

Montesquieu on the History and Geography of Political Liberty

Author: Rebecca Clark

Persistent link: <http://hdl.handle.net/2345/bc-ir:103616>

This work is posted on [eScholarship@BC](#),
Boston College University Libraries.

Boston College Electronic Thesis or Dissertation, 2012

Copyright is held by the author, with all rights reserved, unless otherwise noted.

Boston College
Graduate School of Arts & Sciences
Department of Political Science

MONTESQUIEU ON THE HISTORY AND GEOGRAPHY OF POLITICAL LIBERTY

A dissertation by
REBECCA RUDMAN CLARK

submitted in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy

December 2012

© Copyright by REBECCA RUDMAN CLARK
2012

Abstract

Montesquieu on the History and Geography of Political Liberty

Rebecca R. Clark

Dissertation Advisor: Christopher Kelly

Montesquieu famously presents climate and terrain as enabling servitude in hot, fertile climes and on the exposed steppes of central Asia. He also traces England's exemplary constitution, with its balanced constitution, independent judiciary, and gentle criminal practices, to the unique conditions of early medieval northern Europe. The English "found" their government "in the forests" of Germany. There, the marginal, variegated terrain favored the dispersion of political power, and a pastoral way of life until well into the Middle Ages. In pursuing a primitive honor unrelated to political liberty as such, the barbaric Franks accidentally established the rudiments of the most "well-tempered" government.

His turn to these causes accidental to human purposes in Parts 3-6 begins with his analysis of the problem of unintended consequences in the history of political reform in Parts 1-2. While the idea of balancing political powers in order to prevent any one individual or group from dominating the rest has ancient roots, he shows that it has taken many centuries to understand just what needs to be balanced, and to learn to balance against one threat without inviting another. Knowledge of the administration of criminal justice has proven the most important to liberty, as well as the most difficult to acquire and put into practice.

Montesquieu's attention to accidental causes sheds light on the contradictions within human nature, and the complex relationship between humans and their physical and conventional environments. He shows how nature provides support for both political liberty *and* for despotism. The wisdom of organizing government with a view to political liberty, as well as the means for doing so, does not follow from human nature in the abstract, but has

required reflection on experiences with the consequences of actual governments. By highlighting the dependence of free politics on conditions outside the legislator's immediate control, he encourages reformers to attend to the non-legal supports of political liberty, the limits of human ingenuity, and the risks of unintended consequences. His attention to forces beyond human control provides the occasion to clarify the character of liberal legislative prudence, the art of leading by "inviting without constraining."

Montesquieu on the History and Geography of Political Liberty

Table of Contents

Introduction.....	1
Section 1: Liberty of the constitution and unintended consequences	20
Chapter 1: An introduction to political liberty through despotism	22
Chapter 2: Locke, Montesquieu, and the early history of political balancing	35
Chapter 3: Why the ancients did not understand monarchy	53
Chapter 4: The characteristically democratic misunderstanding of liberty as independence and people power	64
Chapter 5: The historical abuses of criminal justice native to republics	70
Chapter 6: The abuse of criminal justice under imperial and inquisitorial monarchies ...	100
Section 2: Gothic government and the history of French laws	124
Chapter 7: Modern England.....	124
Chapter 8: Montesquieu's approach to historical analysis	134
Chapter 9: Gothic government.....	150
Chapter 10: The development of the Frankish monarchy.....	172
Chapter 11: The age of judicial combat.....	189
Chapter 12: Saint Louis' juridical statesmanship	211
Chapter 13: Reflections on the intellectual and political context of Montesquieu's analysis of Gothic and Frankish government.....	233
Section 3: The Geography of Liberty and Despotism.....	249
Chapter 14: Introduction to Montesquieu's analysis of climate and terrain	255
Chapter 15: Physical and moral causes.....	285
Chapter 16: North and South, Hot and Cold.....	306
Chapter 17: Montesquieu's case against slavery and the "natural reason" for it.....	334
Chapter 18: The terrains of liberty and servitude	359
Chapter 19: Legislating to counter the vices of climate	405
Chapter 20: Evaluating Montesquieu's science of environmental influence.....	425
Conclusion	437
Bibliography	454

Acknowledgements

Thanks to all of my teachers, beginning with my family, Madelon, Scott, and Joshua Clark, for their unfaltering support in all ways. Thanks to my teachers at Boston College, Bowdoin College, and Wyoming High School, as much for challenging as for encouraging me. Thanks especially to my advisor Christopher Kelly and committee members Robert Faulkner, Nasser Behnegar, and Susan Shell for carefully reading these excessively long sections, offering such thoughtful comments and advice, and pushing me to address the implications of, and counterarguments to, my analysis. Thanks to Brenna Strauss and Chaim Katz for providing invaluable feedback on drafts since the very beginning, and for supporting my morals throughout the process.

If a man strikes many coins from one mold, they all resemble one another, but the Supreme King of Kings...fashioned every man in the stamp of the first man, and yet not one of them resembles his fellow.

Babylonian Talmud, Mishnah Sanhedrin 4:5

Introduction

My dissertation examines Montesquieu's contributions to liberalism through a unique angle: his account of the influence of physical, environmental conditions, as well as historical contingencies on the course of political history. In *The Spirit of the Laws*, Montesquieu depicts individuals and communities as profoundly shaped by climate and terrain—their physical environment¹—as well as by laws, mores, manners, religion, their way of life, economic conditions, and their conventional environment.

Among the “various things” to which the laws of any people must relate, he lists “the *physical aspect* of the country” (*physique du pays*) second only to the nature and principle of the given government. The physical aspect, he explains, includes “the climate, be it freezing (*glacé*), torrid (*brûlant*), or temperate (*tempéré*)...[and] the properties of the terrain, its location and extent” (1.3.9, emphasis in original). In sum, these factors amount to what we would call the physical environment or geography of a place. After the *physique du pays*, Montesquieu cites “the way of life of the peoples, be they plowmen, hunters, or herdsmen...the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores, and their manners” as additional key variables to which *l'esprit de lois* should relate (1.3.9).

In particular, he emphasizes the role of these environmental conditions, broadly speaking, in shaping the prospects for political liberty, both for better and for worse. He famously presents hot climate and fertile terrain as posing major constraints on the

¹ Montesquieu considers the importance of territorial size as it relates to the various forms of government in Book 8, and to foreign policy in Books 9-10. Climate and terrain also figure in Books 20-21 on commerce, in Book 22 on population, and in passing throughout the entire text (for example 28.2.545). Edition cited, unless otherwise noted, is Montesquieu, *The Spirit of the Laws*, trans. Anne Cohler, Basia Miller, and Harold Stone (Cambridge, UK: Cambridge University Press, 1989). I will note the book number followed by the chapter and then page numbers within the text.

geographic scope for liberty in Part 3. He also traces his exemplary models of political liberty to particular times and places. Gothic government, the prototype of the modern English and medieval Frankish government, came from the cool forests of Germany in the early Middle Ages. Modern commerce was born in the marginal terrains and marginalized communities of Western Europe during the rise of absolute monarchy in the later Middle Ages and early modern period.

Physical conditions and historical contingences represent “accidental causes.” These conditions are causes accidental to human intentions and plans, regardless of whether they are accidental in a cosmic sense.² Yet Montesquieu emphasizes that they are not simply arbitrary, but intelligible to a significant extent. They can be explained in terms of more or less regular “laws.” As Montesquieu notes in the Preface, his aim in *The Spirit of the Laws* is to explain the logic of human diversity: “I began by examining men, and I believed that, amidst the infinite diversity of laws and mores, they were not led by their fancies alone” (Preface, xlv). The physical and conventional environments powerfully influence human psychology and political tendencies. They combine to give rise to an *esprit général* particular to each nation, which itself constrains the options available to legislators (19.4.310, 19.15.310).

In addition to emphasizing the role of accidental causes in the development of good and bad political forms, in his exploration of different conceptions of political liberty in Part 2, Montesquieu frequently notes how numerous attempts to pursue decent legislative ends,

² Exploring environmental and historical conditions in a very similar way as Montesquieu, Rousseau and Tocqueville describe these as “accidental or providential causes.” See Rousseau, *Essay on the Origin of Languages*, trans. and ed. John Scott, in *The Collected Writings of Rousseau*, ed. Roger Masters and Christopher Kelly, vol. 7 (Hanover, NH: University Press of New England, 1998), IX, 311; Tocqueville, *Democracy in America*, trans. and ed., Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago, 2002), I.2.9, 265-74.

including liberty itself, have often backfired, generating negative unintended consequences for liberty. For example, he explains how certain attempts to reform the Roman republic in order to protect liberty hastened its demise. Caught up in a “frenzy of liberty,” the plebeians’ sought to protect themselves from biased judges by taking judicial powers away from their political rivals, the patricians. In doing so, however, they gave inordinate power to the knights, which upset the constitutional balance (11.18.182).

Montesquieu’s emphasis on accidental causes and unintended consequences in the history of both liberty and servitude raises questions about what leeway, if any, aspiring reformers might have to promote greater liberty. I began, then, with the overarching question, why does Montesquieu emphasize the way factors beyond human control shape political outcomes and constrain legislative possibilities in a work that is manifestly concerned with expanding the scope of political liberty? If peoples are so powerfully influenced by their physical and conventional environments, then what are the scope and the means for improving the prospects for liberty throughout the world? Relatedly, I am interested in what insights would-be reformers can derive from his emphasis on the numerous constraints on legislative will.

Closely related to the long-standing controversy over the work’s alleged determinism is that of its “relativism.”³ Since he attributes the emergence of political liberty to a particular time and place, on what basis does he promote it as a universal standard, what standards beyond that of according with the physical and social environment can there be for guiding political prudence, if it is even possible to exercise such prudence? How is it that political

³ I provide a background on these scholarly debates in Chapters 8 and 14.

liberty speaks to the peoples inhabiting the naturally slavish South and the despotic hinterland of Asia as well?

Overview of historical challenges in interpreting liberty and accidental causes

Since its first publication in 1748, *The Spirit of the Laws* has struck readers as contrasting dramatically with earlier works of model political philosophy because of his emphasis on the diversity of actual peoples, laws, mores, manners, religions, and economies, and moreover, the importance of fitting governments to particular peoples. Montesquieu goes so far as to suggest peoples should all have different laws. “Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another” (1.3.8; see also Preface, xliv, 14.1.231, 19.5.310). Montesquieu’s attention to fitting laws to particular peoples and places is exemplified by his analyses of environmental conditions and historical contingencies.

This focus on the sub-legal underpinnings of politics and the extent to which humans are acted upon by their environment has caused numerous 18th and 19th century commentators to either praise him as a pioneer of the modern social sciences or to blame him for his role in this movement, as the case may be. Montesquieu often analyzes political and social phenomena from a position of detachment, focusing on explaining why they are the way they are rather than whether they are good or right. Auguste Comte praised Montesquieu for pioneering a scientific concept of “law” in the study of politics. That is, he conceived of a law as a necessary relationship obtaining among factors in any society, as an explanation for how societies actually behave, rather than how one thinks they should. Durkheim presents both Montesquieu together with Rousseau as models of a properly scientific acceptance of

diverse conditions and possibilities. This acceptance is closely related to their recognition of the important role of “external circumstances” such as climate, he argues.⁴

Political theorists such as Raymond Aron, Pierre Manent, and Thomas Pangle also trace the “scientific approach” to human affairs back to Montesquieu and/or Rousseau, and define it in similar terms.⁵ According to Manent, the sociological viewpoint pioneered by Montesquieu and best articulated by Durkheim sought to “subject the diversity of cases to the unity of law, to an ever more unitary and general law.”⁶ They deem as definitively modern Montesquieu’s turn to existing laws, and his at least partial disregard for the laws “as they should be.”⁷ Also like Durkheim, they note his reliance upon the relative standard of the fittingness of laws to a given time and place.⁸

When he does evaluate laws and practices, Montesquieu finds himself able to praise such diverse states as the Roman republic, modern England, and the Frankish monarchy. While identifying weakness and strengths in both monarchies and republics, he does not declare either to be fundamentally superior to the other. Instead he indicates that both forms can potentially provide for moderate government, the home of political liberty. “It is not a drawback when the state passes from moderate government to moderate government, as from republic to monarchy or from monarchy to republic, but rather when it falls and collapses from moderate government into despotism” (8.8.118).

⁴ Auguste Comte, “Plan of the Scientific Operations Necessary for Reorganizing Society,” reprinted in *Auguste Comte and Positivism: The Essential Writings*, trans. and ed. Gertrude Lenzer (Chicago: University of Chicago Press, 1975), 49; Emile Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology*, trans. Ralph Mannheim (Ann Arbor, MI: University of Michigan Press, 1965), 15-18, 40-44.

⁵ Raymond Aron, “Montesquieu,” in *Main Currents in Sociological Thought I*, trans. Richard Howard and Helen Weaver (Garden City, NY: Doubleday & Co., Inc., 1968), 13-71; Pierre Manent, *The City of Man*, trans. Marc LePain (Princeton, NJ: Princeton University Press, 1998).

⁶ Manent, *The City of Man*, 58; also Aron, “Montesquieu,” 14.

⁷ Aron, “Montesquieu,” 48; Manent, *The City of Man*, 64-65.

⁸ Manent, *The City of Man*, 46-49.

For a liberal political philosopher, Montesquieu also spends a great deal of time analyzing the internal dynamics of despotism and slavery. He devotes at least as much attention to the practices of despotism and servitude as to those supportive of political liberty. From his initial discussion of despotism in Part 1, Montesquieu calls attention to its prevalence throughout history and across the globe, dwelling on those forces interacting with human nature and particular circumstances that make possible the conditions that he detests: despotism and slavery are not absurdities, resulting from the arbitrary whims of individuals, but institutions with their own internal logic. What's more, in his discussion of the relationship between environmental conditions and the persistence of servitude, he famously suggests that despotism, polygamy, and slavery might be necessary, if lamentable, in some places (8.19.126, 15.7-8.251-52; 16.8.269, 17.6.283-84).

Nature, as I will emphasize, does indeed figure as a point of reference in Montesquieu's evaluations, but he departs from the characteristic modern philosophic mode of deriving a political theory from an account of human nature and the nature of civil society. Hobbes, Locke, and others abstracted from the diversity of actual peoples and places to distill universal theories of human nature and origins, the nature of civil society, and of the principles of government that should logically follow. The bulk of Montesquieu's analysis in *The Spirit of the Laws* is concerned with classifying and evaluating actual, historical political examples. He generally avoids theoretical claims that abstract from the particular places and peoples, and does not tend to rely on quintessentially modern claims of natural rights in promoting political liberty and critiquing despotism and slavery.

Montesquieu also departed from the natural law tradition in focusing on the study of positive laws. While natural law jurists such as Grotius, Pufendorf, and Barbeyrac sought to

explain the logic of universal ethics, and even allowed that universal laws of justice would have to be adapted to particular circumstances, they did not see any rhyme or reason to diversity of actual positive laws.⁹ The places where Montesquieu does proceed as a natural law thinker in Book 1 (“on laws in general”), the first four chapters of Book 10 (defining the right of conquest), and the first half of Book 15 (critiquing slavery), are striking precisely because they depart from the more common approach in the book as a whole. In comparison with earlier works of modern political philosophy as well as natural law jurisprudence, *The Spirit of the Laws* reads like an anti-treatise.

Yet in the midst of his efforts to found a science of positive laws, in which he explains that even slavery and despotism have their logic, Montesquieu denounces despotism and slavery as plainly and emphatically as any political theorist or natural law jurist. He goes even *further* than they do in refuting all conventional claims to a right of slavery, including via conquest (10.1-4.138-42, 15.2.247-48).¹⁰ While agnostic on the classical question of who should rule, as well as the early modern question of the basis for the legitimacy of government, he is emphatic in his negative standards. Montesquieu repeatedly condemns despotism and slavery. He does on the basis of both moral and utilitarian considerations, as well as in the name of internal contradictions between these practices and particular forms of government.

⁹ There were of course disagreements among modern natural law jurists, including whether natural law depends upon being divinely authorized and whether and in what sense it depended upon consent. On the complicated relationship between Montesquieu and thinkers like Grotius, Pufendorf, Barbeyrac, and Clarke, see C.P. Courtney, “Montesquieu and Natural Law,” in *Montesquieu’s Science of Politics: Essays on “The Spirit of the Laws,”* ed. David Carrithers, Michael Mosher, and Paul Rahe (Lanham, MD: Rowman and Littlefield, Inc., 2001), 41-67; Mark Waddicor, *Montesquieu and the Philosophy of Natural Law* (The Hague: Martinus Nijhoff, 1970); George Klosko, “Montesquieu’s Science of Politics: Absolute Values and Ethical Relativism in *L’Esprit des Lois*,” *Studies on Voltaire and the Eighteenth Century* 189 (1980): 153-77. I have largely followed Courtney in my analysis.

¹⁰ Courtney, “Montesquieu and Natural Law,” 59.

Despotism is a “monstrous government” (3.9.28; see also 5.14.63) and a source of “appalling ills to human nature” (2.4.18; see also 4.3.35, 5.15.64, 6.9.83, 8.8.118, 8.21.127). In the middle of his analysis of the powerful impact of climate in shaping human diversity, Montesquieu attacks ancient and modern forms of slavery, in the name of humans’ natural equality (15.7.252, 17.5.283; see also 8.3.114), as well as the nature of human relations (15.2.248), the virtue of both master and slave (15.1.246), and the widely observed right of nations (15.2.247). Throughout the work, and particularly in his discussion of criminal punishments and the right of nations, Montesquieu also condemns acts of arbitrary violence (10.3.149), physical cruelty (6.9.83), and violations of natural modesty (12.14.200-01, 15.12.255, 16.12.272-73). He speaks of the regular use of physical cruelty to enforce the laws as “atrocious” (6.13.86-88). In discussing the use of torture, or “the question,” to extract information in criminal cases, he will not bring himself to explain how it accords with the nature and principle of despotic government: “I hear the voice of nature crying out against me” (6.17.93). He praises the role of Christianity in significantly reducing slavery in Europe (15.5.250, 15.7.252), as well as in the development of gentler right of nations, wherein “victory leaves to the vanquished these great things: life, liberty, laws, goods, and always religion, when one does not blind oneself” (24.3.461-62; see also 10.3.139).

Montesquieu follows the natural law jurists in criticizing Hobbes’ moral positivism, and reaffirming the view that justice transcends the existence of positive laws.¹¹ He also

¹¹ “Particular intelligent beings can have laws that they have made, but they also have some that they have not made. Before there were intelligent beings, they were possible; therefore they had possible relations and consequently possible laws. Before laws were made, there were possible relations of justice. To say that there is nothing just or unjust but what positive laws ordain or to prohibit is to say that before a circle was drawn all its radii were not equal” (1.1.4).

emphatically rejects the Spinozist notion of a “blind fatality” running the world (1.1.3).¹² In addition, as often noted, Montesquieu praises and criticizes many legislators over the course of *The Spirit of the Laws*, and largely for their success or failure in promoting political liberty. Thus, while the subject of Montesquieu’s study, the diversity of laws and mores, is more like that of a skeptic of universal moral standards such as Montaigne, his outspoken evaluations make clear that the book is concerned not only with explaining the sources of human diversity, but also with promoting the cause of political liberty in the world.

Nature, environmental influences, and legislative prudence

Montesquieu’s emphasis on the accidental causes of political liberty suggests much about his understanding of human nature and legislative prudence. His attention to these causes accidental to human plans and purposes, I will show, does not represent a turn towards either physical determinism or historicism. Montesquieu does not “replace Nature

¹² Montesquieu’s opposition to secular determinism can be found at least as early as the *Traité de devoirs* from 1725. *Œuvres Complètes*, ed. Roger Callois, vol. II (Paris: Gallimard, 1949), 109. This edition of Montesquieu’s complete writings, the most widely available, will be cited in the footnotes as “OC” followed by the volume and page numbers. See also *Pensées* #615, “A great genius has promised me that I will die like a bug. He seeks to flatter me with the idea that I am only a modification of matter. He employs a geometric order and reasoning said to be very strong, and that I find very obscure, to elevate my soul to the dignity of my body. Instead of the immense space that my mind embraces, he has given me my own material and a space of four or five feet in the Universe...This same philosopher is willing, on my behalf, to destroy in me my freedom. All the deeds of my life are like the action of *eau royale*, which dissolves gold, like that of a magnet, which sometimes attracts and sometimes repels iron, or like that of heat, which softens or hardens mud. He removes the motive for all my actions, and relieves me of all morality. He honors me to the point of wanting me to commit very great crimes without being considered villainous, without anyone having the right to find fault with me. I have much for which to thank this philosopher” (OC I, 1137, translation my own).

with History,” as some commentators have suggested.¹³ Instead, his analysis sheds light on the contradictions within human nature, and the complex relationship between humans and their physical and conventional environments. He affirms with the natural rights’ theorists that government which protects political liberty accords with human nature. However, he shows how nature provides support for both political liberty *and* for despotism. For Montesquieu, the problem is not that human nature says very little about how we should organize our lives, but that it says too much. That is, nature says many different, often contradictory things about how to behave and how to relate to our family, our fellows, and our rulers. Nature is not a monolithic standard. The *effects* of despotism and slavery contradict human nature, but servitude also finds support in human nature as well as the nature of some physical environments. His depiction of the diversity of human social and political forms thus conveys important teachings about what human nature is really like.

¹³ Whether Montesquieu regarded nature as a standard or sought to move beyond such thinking has been a major subject of debate among his commentators. Reading Montesquieu through the lens of his German successors, Manent and Pangle suggest that he anticipates the shift in the standard of judgment from “Nature to History.” Pangle, *Montesquieu’s Philosophy of Liberalism*, 9; Manent, *The City of Man*, 11-49. If Montesquieu does not simply turn away from nature entirely, Pangle suggests that he reaffirms an essentially Machiavellian or Hobbesian view of human nature, reduced to the more or less sophisticated pursuit of satisfying “the bodily passions.” That he is subtler in undercutting higher longings only means he is more subversive. *Montesquieu’s Philosophy of Liberalism*, 162-64. Courtney is among those who argue that nature remains a prescriptive standard for Montesquieu. Whereas the former oppose history to nature, Courtney argues that recognition of “the dimension of time and the concept of development” is precisely what defines Montesquieu’s understanding of nature as such. “Montesquieu and Natural Law,” 51, 62. See also Aron, “Montesquieu,” 52-55; Paul Carrese “Montesquieu’s Complex Natural Right and Modern Liberalism: The Roots of American Moderation,” *Polity* 36, no. 2 (Jan 2004), 227-50. Durkheim and Condorcet maintain, in turn, that Montesquieu affirms no standard of political right at all, or at least not one systematically ordering his whole project *A Commentary and Review of Montesquieu’s “Spirit of Laws”*: *To which are annexed, Observations on the Thirty First Book by the late M. Condorcet; and Two Letters of Helvetius, on the Merits of the same Work*, Antoine Louis Claude, Comte Destutt de Tracy, trans. Thomas Jefferson (Philadelphia: William Duane, 1811), 160, <http://oll.libertyfund.org/title/960>. Harvey Mansfield and Sharon Krause emphasize that nature points in multiple, often conflicting directions in Montesquieu’s account, thus proving problematic as a political guide. Harvey Mansfield, *Taming the Prince* (New York, NY: The Free Press, 1989), 230-232; Krause, “Despotism in the *Spirit of the Laws*,” in *Montesquieu’s Science of Politics*, 231-272. My argument is closest to those of Courtney, Mansfield, and Krause, though integrating a more comprehensive analysis of his discussion of both human and non-human nature.

Montesquieu's emphasis on the power of environmental influences demonstrates a great deal about his understanding of human nature. It complements his view of the malleability of human passions. That humans can be shaped so profoundly by both our physical and conventional environments is based on the "flexibility" of human nature (Preface, xlv).¹⁴ Nonetheless, human nature remains an important part of the story even in Part 3 of *The Spirit of the Laws*. His critique of slavery, I argue in Chapter 15, ultimately rests on his rare but vital theoretical claim that humans are equal by nature (15.7.252; see also 15.1.246, 15.2.248, 17.5.283). Similarly, his condemnation of despotism seems to depend upon the view that individual lives have an inherent value and integrity, and that it is fundamentally wrong to subject individuals to arbitrary violence, physical cruelty, as well as to violations of what he calls "natural modesty." While Montesquieu firmly upholds these basic moral precepts, he considers a great variety of societies and governments to potentially be compatible with them.

While he considers political liberty to accord well with human nature, he suggests that the wisdom of organizing government with a view to political liberty, as well as the means for doing so, does not simply follow from an examination of human nature, abstracted from the circumstances in which individuals and families have forged political communities. Given the difficulty of deriving a theory of government from human nature or the nature of civil society as such, Montesquieu takes a largely practical rather than theoretical approach. He shows how our understanding of political liberty—what it really is as well as what it requires—has depended upon experience of diverse political arrangements and reflection on those experiences. Montesquieu bases his case for liberty, and against servitude, on an

¹⁴ Pangle, *Montesquieu's Philosophy of Liberalism*, 175.

analysis of historical examples of actual institutions and practices. He focuses on the way that many laws and practices inadvertently undermine their own ostensible ends, as well as the principles of their government. Montesquieu also does not hesitate to lean on utilitarian considerations in order to promote the cause of political liberty. He suggests that certain economic and religious developments have made, and can make, despotism and slavery less useful than perhaps they used to be, to the despots and masters themselves (10.3.139, 15.8.252-53, 20.20.389-90, 24.3.461-62).

The relative importance to political outcomes of prudence or virtue on the one hand and chance on the other, and the dynamic between them, is at the heart of this project. Montesquieu's rhetorical elevation of the role of accidents in shaping peoples and their governments serves not to denigrate the importance of legislative prudence, but to clarify its genius—what kind of knowledge a good legislator needs, and about how desirable changes can and should be promoted.

In my analysis of the historical contingencies and physical accidents that dominate Parts 3-6 of *The Spirit of the Laws*, I explain how his emphasis on these accidental causes serves precisely the goal of furthering the cause of political liberty. He suggests that it is only by confronting the difficulties of establishing and sustaining free government that can one hope to avoid the common pitfalls to political reform. By highlighting the dependence of free politics on factors beyond a legislator's immediate control, he encourages would-be reformers to attend to the non-legal supports of political liberty, the limits of human ingenuity, and the risks of unintended consequences.

Moreover, his discussion of environmental and historical constraints facing legislative reformers provides the occasion to highlight models of political prudence. In the books on

climate and terrain, he shows how material and honorific incentives certain Chinese emperors provided to stimulate agricultural activity. In the middle of his account of the vicissitudes of French medieval legal history, he praises the French king Saint Louis' subtle but influential juridical reforms. With these legislative models, Montesquieu illustrates crucial aspects of his teaching about what moderate statesmanship consists in. Liberty of the citizen, one of two perspectives on political liberty, depends upon rulers engaging popular will to make any necessary changes in mores and manners, rather than relying on instruments of force.

Overview of dissertation structure

To answer my overarching questions, I take up three broad themes in the dissertation. In Section 1 (Chapters 1-6), I clarify Montesquieu's understanding of political liberty and what it requires, and show how he presents it through an analysis of the problem of unintended consequences in the history of political liberty and despotism in Parts 1 and 2. In Section 2 (Chapter 7-13), I explain the origins, development, and importance for political liberty of Gothic government and feudal monarchy, to which both the modern English and medieval Frankish governments (and later the American constitution) are heirs. His discussion of Gothic customs, mores, and institutions spans all six parts of *The Spirit of the Laws*, figuring most prominently in Books 11, 17, 18, 28, and 30. In Section 3 (Chapters 14-20), I explain Montesquieu's account of the geography of despotism and liberty in Part 3. I draw out the significance of his additional typologies of characteristically northern and southern political psychologies, and the hunting, herding, farming, and commercial ways of life, or modes of subsistence.

It is important to clarify just what Montesquieu means by political liberty and servitude in order to make sense of his geographic-historical models—positive as well as negative—later in the book. His account of despotism in Parts 1 and 2, both as a political phenomenon and as a negative political standard, begins to explain how political forms that contradict human nature in their effects can be so prevalent in history. In addition, his emphasis in Part 2 on the importance to liberty of political decentralization, limited kingship, independent judging, and sound criminal practices (as well as political economy in Book 13) helps explain his subsequent focus on commerce, criminal justice, and feudal government.

Montesquieu conveys his understanding of political liberty—and his commitment to it—first through his analysis of the opposite extreme of despotism. While moderate government, the home of political liberty, may best accord with human nature and human happiness, he emphasizes that such government is all too rare. Moreover, he begins to explain in Part 1 why it *makes sense* that despotism is so pervasive and persistent. After characterizing despotism as miserable in most every respect, however, he reflects on the unfortunate prevalence of this form of government.

After all we have just said, it seems that human nature would rise up incessantly against despotic government. But, despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government. This is easy to understand. In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce. By contrast, a despotic government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that (5.14.63).

While suggesting that the persistence of despotism is “easy to understand,”

Montesquieu arguably devotes the rest of the work to fully explaining this paradox of despotism. For one, as I discuss in the first chapter, he shows that human nature provides

support for both political liberty *and* for despotism. I draw out Montesquieu's suggestions about the obstacles to establishing political liberty that human nature itself entails, even as the latter finds itself most at home under a government with such liberty. One major obstacle, which Montesquieu identifies in his unpublished *Essay on Causes that Can Affect Minds and Spirits*, and is illustrated by the history of liberty he depicts in *The Spirit of the Laws*, is that our ability to imagine political possibilities is limited by what we have experienced, either directly or vicariously. "The principle faculty of the soul is to compare."¹⁵ We are unable to anticipate the full consequences of our actions. Moreover, we have a tendency to choose a political or moral course in reaction to what we perceived as erroneous or misguided. Man "must guide himself, and yet he is a limited being" (1.1.5).

To explain Montesquieu's understanding of political liberty, I show how Montesquieu extends the Lockean concern for rule of law, as opposed to rule by the discretion of man. I utilize this comparison to explain Montesquieu's particular approach to advancing political liberty. For both, liberalism is the effort to check the arbitrary exercise of political power through the dispersion and counter-balancing of that power. In the name of these same basic principles of political liberty, however, Montesquieu amends and supplements Locke's political theory. He emphasizes that popular institutions can pose as much of a threat to rule of law as monarchic ones. Montesquieu's analysis of the abuses of political liberty characteristic of both republics and of governments of one alone points to the realm of judging as the "final frontier" for establishing rule of law.

¹⁵ Montesquieu, *Essai sur les causes qui peuvent affecter les esprits et les mentalités*, in Callois, ed., *OC* II, 48. As there is not a complete, widely used translation of the *Essai sur les causes*, I cite the Callois edition of Montesquieu's *Œuvres Complètes*, vol. II. Hereafter, the *Essai sur les causes* will be cited in the body of the text as "EC" followed by the page number from the Pléiade edition. Translations of the *Essai sur les causes* and *Pensées* are my own unless otherwise noted.

Montesquieu's editions and additions to Locke highlight a perennial difficulty for liberal reform and for political reform in general: the effects of laws and practices quite often transcend the intentions and expectations of their human authors. Like Machiavelli, Montesquieu, is concerned with what the former called the "effectual truth" of political acts. The very solutions that Locke proposes contain their own potential pitfalls to rule of law; the popular institutions that serve to check a prince's abuses of power themselves can threaten political liberty.

While he is best known for his principles of constitutional balancing, Montesquieu emphasizes that the placement of judicial powers and the criminal laws are more important than the distribution of legislative and executive powers—the institutional question that occupied Locke. Knowledge about how to administer criminal justice is "the one thing in the world that is most important for men to know" (6.2.74). Notably, this knowledge, was "not perfected all at once. In the very places one most sought liberty, one did not always find it" (12.2.188).

After showing how many efforts to promote political liberty in classical-style republics and other governments have gone awry, Montesquieu describes the English government as the "one government that has political liberty for its direct purpose" (11.5.156). Yet the English did not deliberately set out to found political liberty. "The English have taken their idea of political government from the Germans. This fine system of government was found in the forests" (11.6.166). "Gothic government" was the most "well-tempered" (*bien tempéré*) in the world to date (11.8.167). What is perhaps even more surprising than the implied snub of the Greeks and Romans is Montesquieu's explanation of how this model of political liberty first developed: the prototype of both the modern English

and medieval French constitutions emerged in large part through a fortuitous concatenation of physical and historical circumstances in the wake of the Germanic barbarians' conquest of the western Roman Empire. Gothic government was not developed by the Greeks or Romans, nor for that matter, consciously conceived by anyone at all. "It is remarkable that the corruption of the government of a conquering people should have formed the best kind of government men have been able to devise" (11.6.187).

While Gothic government has its origins in a particular locale, geography enters most dramatically as an obstacle to the establishment of political liberty. He famously contends that lush climates and fertile terrains have enabled despotism and slavery to persist in most parts of the world, despite their contradicting human nature. A formidable natural support for slavery and despotism is the non-human natural environment. The naturally easiest places to live have proven most challenging for the establishment of political liberty. Montesquieu depicts the problem contemporary analysts call the "resource curse;" where one can reap wealth from a piece of land without having to engage the ingenuity of the inhabitants, it is easier for one or a small handful of rulers to dominate the country as despots. Montesquieu also emphasizes the way infertile but flat terrain in Asia has facilitated despotism.

He identifies a pattern of despotic government, civil servitude, and the strict confinement of women in fertile climates. In the hot, southern climates, slavish dispositions abound, passions run wild, and no one wants to work. On the infertile but flat, exposed steppes of Asia, barbarous hordes have lived by a code of conquer or be conquered, leaving servitude in their wake wherever they wander. Montesquieu does not exactly show confidence in the possibility for overcoming tropical and Asian servitude, but he does

express the hope that it can be overcome, and points to positive examples that liberal reformers might imitate.

I clarify the different ways that Montesquieu sees certain physical environments as facilitating the persistence of despotism and slavery, despite their numerous drawbacks. Montesquieu famously argues that certain environmental conditions present major obstacles to the establishment of civil and political liberty. Environmental considerations enter first and foremost as accidental causes that facilitate the persistence of despotism. In addition to the constraints he attributes to hot climate, Montesquieu depicts the problem contemporary analysts call the “resource curse;” when one can reap wealth from a piece of land without having to engage the ingenuity of the inhabitants, it is easier for one or a small handful of rulers to dominate the country as despots. Montesquieu also emphasizes the way infertile but flat terrain in Asia has facilitated despotism.

All of these sections are necessary to explain the significance of accidental causes for Montesquieu’s teachings about political liberty. Montesquieu conveys what are arguably his most important lessons about human nature as it relates to liberal political reform through his critique of the unintended consequences of various attempts at political reform. It is in light of recognizing the frequent disconnect between legislative purposes and effects—both for good and for ill—that Montesquieu turns to an examination of physical conditions and historical contingencies. These must be taken into account in order to understand why political outcomes vary as they do across time and space.

In addition, in order to speak comprehensively about the status of nature in *The Spirit of the Laws*, we have to examine his depiction of both human and non-human nature, and of the way humans are influenced by both our physical and conventional environments. His

attention to climate and terrain, as I explain in Chapter 14, has been a source of fascination among Montesquieu's readers since the book was first published. In addition, various commentators have examined his history of Rome, of commerce, and, to a lesser extent, that of medieval France.¹⁶ However, commentators have not examined physical and historical accidents together and connected them with his depiction of liberty in Parts 1 and 2. Physical accidents and historical contingencies in practice cannot be separated in Montesquieu's account, I will show. For one, the two major historical improvements for political liberty on which he focuses—Gothic government and modern commerce—are rooted in inextricable combinations of physical accidents and historical contingencies. In addition, the power of climate and terrain depends in large part on the broader social, economic, and political context.

¹⁶ I review this literature in Chapters 8 and 13.

Section 1: Liberty of the constitution and unintended consequences

It is sometimes good for laws not to appear to go so directly toward the end they propose (5.5.46).

Introduction

To understand why Montesquieu will give so much attention to physical accidents and historical contingencies in Part 3 of *The Spirit of the Laws*, and why he forwards the particular geographic-historical archetypes of political liberty and despotism that he does, it's necessary to clarify just what he means by liberty and servitude. Montesquieu begins to communicate his understanding of liberty and servitude in Parts 1 and 2, and indicates there why his account of liberty and its opposite requires him to turn to the physical accidents and historical contingencies that dominate Parts 3-6.

In Chapter 1, I will begin by explaining Montesquieu's introduction to political liberty through his account of despotism in Part 1 of *The Spirit of the Laws*. Here he points to the important role of accidental causes in explaining both the persistence of despotism, and the difficulty of establishing and expanding political liberty. I will draw out his suggestions about the obstacles to establishing political liberty that human nature itself entails, even as the latter finds itself most at home under a government with such liberty.

Next, in Chapter 2, I will present the "prequel" of sorts to Montesquieu's historical analysis of the development of, and obstacles to, the establishment of political liberty in Locke's *Second Treatise*. Both depict the problem of unintended consequences in the history of efforts to protect political liberty; efforts to protect political liberty from one threat often

inadvertently invite a new threat. I will explain how Montesquieu effectively picks up where Locke left off in tracing this history, and in elaborating its lessons about the architecture for a government with rule of law—what both Locke and Montesquieu understand political liberty to mean. Montesquieu amends Locke’s institutional proposals with respect to the judiciary and the popular legislative element, but in the name of upholding the same basic principle as Locke: that of thwarting the arbitrary exercise of power. Montesquieu’s attention to the way that accidents and contingencies can redirect legislative purposes helps explain the modifications that he makes to Locke’s constitutional schema.

To understand why Montesquieu turns to an historical analysis of “Gothic government,” the archetype for political liberty in both England and the continental monarchies, we need to clarify what deficiencies he saw in those governments that others have touted as exemplary models of political liberty. Montesquieu analyzes the historical abuses of rule of law in classical kingships and republics, as well as modern monarchies and the city-state of Venice. The focal point for all of these abuses is the realm of judging broadly speaking. Thus, in Chapter 3, I explain Montesquieu critique of ancient kingship as misunderstanding monarchy properly speaking. In Chapters 4 and 5, I examine the abuses of rule of law Montesquieu associated with republics. Chapter 4 considers the tendency for democracies in particular to mistake independence, or natural liberty, for political liberty.

In Chapter 5, I explain Montesquieu’s concern for overzealous criminal accusations and punishment in republics—practices which, as he puts it, make “political right force civil right.” I draw out his explanation for why “even virtue needs limits.” I begin by explaining the overlap between the two aspects of Montesquieu’s definition of liberty, clarifying the importance of criminal justice in Montesquieu’s account of moderate government. I then

draw from his account the reasons why knowledge of its administration has eluded human understanding for so long. Like the key features of a moderate constitution, the criminal procedures that he shows are so important to liberty of the citizen “were not perfected all at once” (12.2.188).

In Chapter 6, I explain his critique of laws collapsing religious and moral government into civil government. In these chapters, I will show that he does not stake his case on religious skepticism, a critique of traditional mores, or classical virtue in their own right. Montesquieu, in fact, repeatedly affirms the importance of religion and decent mores to any moderate political order, and particularly to republics. Rather, his case against administering religious, moral, and political government as one hinges on two practical difficulties, which reflect the particular conditions in which modern nations find themselves.

For one, he contends that the singular education to virtue on which the classical republics depended is no longer possible in the modern world of large nation-states, and of the Christian religion (4.4.35). Secondly, and the focus of my examination, is his argument that attempts to enforce patriotism, piety, and morality through the criminal laws, whatever their intentions, generally have despotic and counterproductive effects. They lead to arbitrary prosecution and punishment of individuals. Moreover, these attempts have a way of undermining their own ends, in addition to endangering political liberty. In the circumstances in which most modern legislators find themselves, attempts to legally compel obedience to political virtue, religious precepts and moral standards tend to undermine more than bolster these goods.

Chapter 1: An introduction to political liberty through despotism

Montesquieu's turn to accidental causes begins with his introduction in Part 1 of an unfortunate paradox about political liberty: while the condition of political liberty accords well with human nature, the kind of government required to support that liberty—moderate government—is extremely rare.¹ Despotism, on the other hand, leads to great affronts to human nature, and yet most peoples live under something much closer to despotism than to moderate government. How can this be the case? Though Montesquieu claims in Book 5 that this quandary is “easy to understand,” it could be said to take him the rest of the work to fully explain. Montesquieu's account of the accidental causes of both liberty and servitude, I would argue, constitutes the long answer to this question.

To begin understanding this paradox, we first must clarify what Montesquieu means by despotic government as distinguished from other forms—from monarchic and republican government in his initial typology, and from moderate government, its normative and structural opposite. In Part 1, Montesquieu defines each type of government—despotism, monarchy, and republicanism—in terms of its distinct “nature” and “principle.” Knowing the nature and principle, one can derive the kinds of laws that would characterize a given state, or at least those that should characterize it in its purest form. The laws and the education to those laws in turn reinforce the nature and principle of government. These categories of government are analytic rather than purely empirical types. Actual governments may resemble the analytic types, but almost always represent an imperfect version of the form to which they are closest. Montesquieu's initial typology nonetheless allows him to explain the basic ways in which governments function internally, and will be important to keep in mind

¹ Paul Rahe notes ancient precedents for this preoccupation with the absence of liberty in the world in Aeschylus, Herodotus, Hippocrates, Cicero, and others. *Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate, Terrain, Technology, Uneasiness of Mind, The Spirit of Political Vigilance, and The Foundations of the Modern Republic* (New Haven, CT: Yale University Press, 2009), 150 n2.

when considering his account of the threats to liberty characteristic of monarchies and republics as well.

Who governs, and on what immediate foundation, constitutes the “nature” of a given form of government. The nature of each government is defined in structural terms, without reference to the particular character of the rulers. In a republic, for example, a part of the people (aristocracy) or the populace in its entirety (democracy) is sovereign. In both monarchy and despotism, “one alone governs.” Yet these latter two forms of government are fundamentally different, in that a monarch rules according to and within the bounds of “fixed and established laws,” while a despot’s commands follow directly from his own personal “will and his caprices,” limited only by his desires and imagination. Despotism in its pure form is arbitrary government, based solely on the private discretion of the despot. In most actual despotisms, mores and religion provide some non-arbitrary force, which even the despot must at least give the appearance of respecting. The basis upon which the populace rules in a republic is left unstated, suggesting that popular rule may or may not be grounded in fixed laws. Either way, what is definitive of this form of government is that many people participate in rule, and they are themselves subject to the authority they wield (2.1.10).

The “principle” of each form of government is its “spring,” the particular passion that makes it tick. It is a window into the distinctive political psychology of different forms of government. The principle is what explains why the citizens or subjects obey the laws, and therefore how the given form of government perpetuates itself.² In republics, citizens have internalized the laws and defend them with a fierce devotion. Political virtue consists in this

² Montesquieu clarifies in his 1757 forward that these principle or various “modifications of the soul” each may be found under any government, but that they function as the spring of government only in particular cases. Virtue, for example, could be present in a monarchy, but sustaining this government does not depend upon it in the way that it does in a republic (xli).

“love of the laws and the homeland,” without regard for one’s private interests and attachments, and indeed often at their expense. As Montesquieu clarifies in his 1757 Author’s Forward, this love of the laws and homeland in democracies is synonymous with the love of equality (xli). “This love [requires] a continuous preference of the public interest over one’s own” (4.5.36).³ Political virtue defined from another point of view, then, is “renunciation of oneself, which is always a very painful thing” (4.5.35).

In a monarchy, in contrast, the subjects’ willingness to defend the laws, the king, and the country does not involve wholesale subordination of their personal interests and attachments, but actually draws strength from the latter. The subjects, and particularly the nobles, are driven not by virtue, but by honor, which is in one sense the opposite of virtue. Whereas republican virtue insists on the equality of all citizens, honor insists on the inequality of ranks. “The nature of honor is to demand preferences and distinctions” (3.7.27). Honor is “the prejudice of each person and each condition,” insofar as each believes he is entitled to certain treatment in accord with his status, and more specifically, his unequal status with regard to others (3.6.26). The nobles’ sense of their superiority makes them, on the one hand, willing to undertake great physical risks on behalf of king and country as well as personal honor, and on the other, resistant to royal aggrandizement of power that would

³ “This love,” he continues “produces all the individual virtues; they are only that preference” (4.5.36). Some commentators criticize that Montesquieu’s account strips classical virtue of its dignity as a reasoned choice of the good, and as an end in itself. Manent, *The City of Man*, 15-34; Rahe, *Montesquieu and the Logic of Liberty*, 71; Mansfield, *Taming the Prince*, 222-229; Pangle, *Montesquieu’s Philosophy of Liberalism*, 53-66. Like the spring of any type of government, virtue, this preference for the common, is a passion. It may be a less base than fear or the love of honor, but it is still a passion, as opposed to the result of a thoughtful choice: “it is a feeling and not a result of knowledge; the lowest man in the state, like the first, can have this feeling” (5.2.42). Nonetheless, according to Montesquieu, the Greek “political men” also understood virtue to be a political instrument, in addition to whatever else it was. They “recognized no other force to sustain [their republics] than virtue” (3.3.22; 4.6.36). Montesquieu does not suggest he is making some novel discovery in highlighting the instrumental value of virtue—nor, for that matter, the painful subordination of natural attachments that it requires.

usurp their customary rights. The fixed character of the laws in monarchy, then, is inextricable from the existence of the nobility and other privileged orders (2.4.18).⁴

Under despotic governments—or at least the despotic type Montesquieu sketches in Part 1—subjects obey the laws, or rather the despot’s decrees, simply because they fear the “prince’s ever-raised arm” (2.3.22). Hinging on the principle of fear, despotism reduces both the ruler and the ruled to the level of beasts. As the subject of despotism, “man is a creature that obeys a creature that wants...Men’s portion, like beasts’, is instinct, obedience, and chastisement” (3.10.29; see also 5.14.59).⁵ The subjects of despotism, like citizens of republics, are all equal to one another. Yet in despotism, it is because they are worth nothing, while in republics, it is because “they are everything” (6.2.75). Despotism does not depend upon—and certainly does not inspire—subjects to willingly subordinate their natural feelings to some public good; it simply compels subjects to suppress such feelings when it suits the despot (3.10.29). Despotism forces subjects to do all manner of terrible things, and merely to serve the whims of the despot. Public interest *per se* does not exist, for the whole country is the private possession of the despot.

In Part 1, Montesquieu also introduces moderate government. A category transcending his initial typology, moderate government represents the analytic as well as the normative opposite of despotic government (3.9.28, 5.14.63, 5.15.65, 7.17.111, 8.8.118).⁶ As

⁴ The implications for liberty of the republican and monarchic principles will be elaborated in Chapter 5 of this chapter, and those of the monarchic principle in Chapter 6.

⁵ While fear is a more prominent motive for obedience in despotism, it remains an important motive for obeying the laws in any government. In contrasting religious government from civil government, Montesquieu explains, “The principal force of religion comes from its being believed; the force of human laws come from their being feared” (26.2.495). See Rebecca Kingston, *Montesquieu and the Parlement of Bordeaux* (Geneva, Switzerland: Librairie Droz, 1996), 227.

⁶ See also *Considerations on the Causes of the Greatness of the Romans and Their Decline*, trans. David Lowenthal, (Indianapolis, IN: Hackett Publishing, 1999), IX.94. I make occasional reference to the

despotic government exists wherever “authority cannot be counter-balanced,” moderate government is found where the major political authority is limited in its exercise of power by a rival seat of power (5.16.66; 11.4.155-156). Moderate government depends not on who rules *per se*, but the division, combination, and tempering social and political powers. In any given moderate government, some body or class could be said to rule, and some passion or passions associated with individuals’ attachment to the laws. As a category, however, it is not necessarily linked to any particular nature or principle. Both monarchies and republics potentially can be governed moderately. “It is not a drawback when the state passes from moderate government to moderate government, as from republic to monarchy or from monarchy to republic, but rather when it falls and collapses from moderate government into despotism” (8.8.118; also 3.9.28, 5.14.63, 5.15.65). In other words, political power can be dispersed and counter-balanced on the basis of either equality or inequality—and on the basis of different measures of equality or inequality.

Montesquieu advocates moderate government because it is the only kind that can support political liberty, and because it is “gentle.” Montesquieu does not clarify the features of moderate government until Part 2. While both monarchies and republics have the potential to be moderate, neither are necessarily so. Moreover, “democracy and aristocracy are not free states by their nature” (11.4.155). By having a check on the one major political power, i.e. at least one counter-balance, a government can be moderate, but lack political liberty. Political liberty requires a more elaborate system of “checks and balances.”

Considerations, cited in the text hereafter as “CC” where especially relevant, but do not take into account in a comprehensive manner works other than *The Spirit of the Laws*.

Political liberty is found only in moderate governments. But it is not always in moderate states. It is present only when power is not abused... So that one cannot abuse power, power must check power by the arrangement of things. A constitution can be such that no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do (11.4.155-156). Montesquieu elaborates on what balancing requires in Books 11 and 12. This structural counter-balancing corresponds to the “liberty of the constitution” that Montesquieu defines in Book 11.

The “gentleness” (*douceur*) that “reigns in moderate government” (6.9.83) corresponds to the other aspect of liberty he will outline in Part 2, the “liberty of the citizen” of Book 12.⁷ In *The Spirit of the Laws*, gentleness is most often used to describe the kinds of penalties that Montesquieu recommends, though a people’s mores also may be characterized by *douceur* as opposed to *rudesse* (4.18.41). A government that is gentle does not subject its citizens to arbitrary violence. When it does punish duly verified crimes, a moderate government administers relatively gentle penalties. As becomes clear in Book 12, these are almost always non-corporal, with some significant exceptions.

A government is also gentle to the extent that it refrains from forcibly trying to uphold or change popular mores, manners, or religion, that is, to change them through the threat of violence. A gentle approach would be to encourage more salutary practices indirectly or through persuasive means, not through the laws themselves. For example, a gentle means of promoting particular mores or religious practices would be to provide social and economic incentives for the desired practices—to publicly honor those who exemplify the moral standard or religious devotion and to publicly disapprove those who flaunt it.

⁷ As it characterizes a government, gentleness is contrasted with harshness or hardness (*dureté*; 6.9.83, 6.13.86, 7.17.111), as well as with government that is cruel (*cruel*; 6.9.83, 6.13.84, 6.15.89, 15.16.258, 24.3.461), severe (*sévère*; 6.15.89, 14.15.245) or violent (6.9.83).

Montesquieu recommends that legislators or would be-reformers encourage needed changes by presenting people with appealing examples of better customs or practices (14.5.236, 14.8.238, 19.14.315-316, 28.38.590-91).

The two distinctive qualities of moderate government, political liberty and gentleness, have their counterparts in the arbitrary and violent exercise of power that distinguishes despotism. While both monarchies and republics each have particular advantages and disadvantages vis a vis liberty⁸, he denounces despotism as an awful way of governing in almost any sense. The rule of one alone without a fixed law, guided only by the caprices of the one who rules, despotism (political servitude) is a “monstrous government” (3.9.28; see also 5.14.63), a source of “appalling ills to human nature” (2.4.18; see also 6.9.83) and “insults heaped upon it” (8.8.118; see also 8.21.127), and detrimental to human happiness (4.3.35, 5.15.64). This form of government is arguably destructive even of those who would most seem to benefit from it (5.14.59-60). It is corrupt by its very nature (8.10.119).⁹

Still, after characterizing despotism as miserable in most every respect, however, Montesquieu reflects on the unfortunate prevalence of this form of government.

After all we have just said, it seems that human nature would rise up incessantly against despotic government. But, despite men’s love of liberty, despite their hatred of violence, most peoples are subjected to this type of government. This is easy to understand. In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce. By contrast, a

⁸ For example, in republican government, citizens internalize the laws, loving them deeply as their own. This gives them a fierce devotion to defending the laws and the homeland that is without comparison in any other form of government (3.6.37, 4.4.35). Monarchy, on the other hand, is more stable and regular than despotic government, and more expeditious in deciding urgent matters of state than republican government (5.10-11.56-57, 3.5.25).

⁹ Despotism is inherently corrupt in that the principle of fear on which it depends to compel obedience to the laws wears itself down over time, requiring more and more effort to terrorize subjects with diminishing returns in obedience. By itself, then, fear is an unsustainable principle on which to govern.

despotic government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that (5.14.63).

In the passage above, Montesquieu indicates that the relationship between liberty and nature is more complicated than his denunciations of despotism might suggest.¹⁰ While despotism has very unnatural *effects*, the idea of despotic government is more natural, in the sense of being more obvious, intuitive, and straightforward, than that of moderate government. Despotism is not wholly without support in our nature. Human nature is such that it also provides support for outcomes that upset human nature. Despotism constitutes a kind of political default, following immediately from the lowest common denominator of political conditions and human passions. As Montesquieu puts it, “everyone is good enough for that” (5.14.63). Human nature may be truncated under despotism, but the passion of fear that makes it tick is all too familiar.

To *be* a despot or master clearly has a natural appeal. Indeed, many have theorized that human nature can be explained almost entirely in terms of a desire to dominate other things and beings. Montesquieu also affirms a universal tendency to want to impose one’s will; the “soul takes such delight in dominating other soul,” he remarks in his account of medieval orders’ aggrandizement of their privileges (28.41.595). As Montesquieu portrays it, however, this quality is not necessarily connected to any particular rapacity or wicked intention. Instead, it is an ordinary vice to which those who mean well are also susceptible. As Sharon Krause has highlighted, Montesquieu defines despotic government itself less by

¹⁰ In Book 15, Montesquieu will forcefully criticize civil servitude, or slavery, as contradicting human nature (15.1-5.246-250).

the character of the individual or individuals at its helm than by its structure: that of the unchecked, unmediated exercise of a ruler's will.¹¹

We should keep in mind that the archetypal image of despotism Montesquieu provides in Book 5 is of seizing one's ends with a special directness: "When the savages of Louisiana want fruit, they cut down the tree and gather the fruit. There you have despotic government" (5.14.59). Insisting on the most direct path to one's end can be despotic even when one's intentions are decent.¹² Even decent persons, those sincerely devoted to noble ends, can crush others, and become blind to their own limitations, in their zeal. Indeed, throughout the book, Montesquieu is especially wary of those who zealously mean well. Terrible abuses of liberty can be perpetrated via too-direct attempts to defend the genuine public goods of patriotism, piety, and morality—even liberty itself (11.18.187). Throughout *The Spirit of the Laws*, Montesquieu warns of the despotic risks in fanatically embracing *worthy* legislative ends (see especially 12.6.166, 29.1.602).

In contrast, Montesquieu suggests it is quite understandable that the idea and means of establishing moderate government have taken so long to emerge, and remain difficult to imitate even once learned, despite the advantages of moderate government. It is hardly evident that the constitutional arrangements and policies Montesquieu recommends—

¹¹ Krause, "Despotism in *The Spirit of the Laws*," 256; Mansfield, *Taming the Prince*, 227. Finding one's self without limits on any side nonetheless makes for very poor character. Despots are characteristically "lazy, ignorant, and voluptuous" (2.5.20; see also 5.14.59-60). Particularly nasty individuals surely pose a problem as political rulers, but as a general rule, it is the contours of the "office" of despot that are to blame for the wicked effects of his reign.

¹² Consider the contrast Tocqueville draws between the violent political associations of nascent democratic societies (in his case 19th century European countries such as France) and the political associations characteristic of relatively more experienced democracies in the United States and England. "What still brings us to see in freedom of association only the right to make war on those who govern is our inexperience as regards freedom. The first idea that presents itself to the mind of a party, as to that of a man when strength comes to him, is the idea of violence: the idea of persuasion arrives only later; it is born of experience." *Democracy in America*, I.II.4, 185.

wherein political power is divided, used against itself, and made to work indirectly—would work, much less be beneficial. While it is hard to imagine today, when the basic principles of constitutional government have become so widely accepted, if one did not see the practical results of 18th century English political arrangements (or those of the United States constitution for that matter) they would seem ridiculous on paper. What a convoluted, chaotic, inefficient way to run a country! Reversing the paradox of despotic government, then, moderate government is more natural in its *effects*, but runs counter to our natural instincts about how political power should be exercised and what it should take as its ends.

Still, while it is a rare and chancy kind of government to establish initially, moderate government, once found or founded, is actually more durable than despotism. Fraught with so many internal consistencies, a despotic government can be maintained only as long as it manages to hold back its enemies by sheer force. The office of the despot, at least, is perennially vulnerable to usurpation by another (5.14.60). Montesquieu will emphasize in Book 12 that a government's reliance on force and fear to obtain obedience, though it may work in the short-term, cannot be sustained for long. By constantly playing upon the spring of fear and ratcheting up punishments for all forms of defiance, despotism eventually wears out its tools of deterrence. In actuality, then, despotic governments persist because they rarely exist in the pure form described in Part I. To the extent that a despotic government is stable, it is usually because other factors in addition to force and fear help bolster it.

Other governments are destroyed because particular accidents violate their principle; this one is destroyed by its internal vice if accidental causes do not prevent its principle from becoming corrupt. Therefore, it can maintain itself only when circumstances, which arise from the climate, the religion and the situation or the genius of the people, force it to follow some order and to suffer some rule. These things force its nature without changing; its ferocity remains; it is, for a while, tractable (8.10.119; see also 2.4.19, 3.10.29-30, 5.14.61).

While accidental causes are most important in the initial establishment of moderate government, they impinge on despotism with regard to its capacity to persist despite such obvious drawbacks. The way that climate, or non-human nature, can “enable” despotism represents the most dramatic natural support for despotism. Montesquieu’s attention to climatic influences on servitude of various orders is the focus of Part 3 of *Spirit of the Laws*, and Chapter 4 of this dissertation.¹³ Religion, even as it restrains the worst tendencies in despotism (2.4.18-19, 3.10.30, 5.14.61), may help despotism persist in some cases if subjects fear that disobeying the despot will expose them to divine punishment, and/or if they believe that he is the legitimate defender of the faith (5.14.61).¹⁴

In attributing a critical role to chance in the establishment of moderate government, Montesquieu suggests that it would be extremely difficult to institute moderate government even if a legislator did consider such political arrangements. Fortuitous circumstances are necessary to bring such an idea to fruition. In the passage from Book 5, Chapter 14 cited above, Montesquieu alludes to two scenarios by which moderate government comes about. In the first, chance leads the way: an extremely rare concatenation of circumstances might happen to give rise to balanced political arrangements. In the second, a prudent legislator founds government with the intention of making it moderate. Even in this latter scenario, however, the prudent legislator depends upon favorable circumstances in order to be

¹³ In Books 14-17, he argues that heat and cold directly affect human character in many politically relevant ways. In Book 18 and in his discussion of the ancient Germanic tribes, Montesquieu discusses more indirect ways that climate and terrain have influenced the prospects for liberty through the various means of subsistence, settlement patterns, familial arrangements, and customs to which diverse conditions have given rise.

¹⁴ The dynamic between religion and despotism, one of the dominant themes of *The Persian Letters*, is very complex and merits an examination far beyond the bounds of this dissertation. Two aspects of this dynamic bear on my subject. The first are his theories about the relationship between climate and religion. The second is his emphasis on the unintended—and counterproductive—consequences of attempts to promote religion directly through the political and civil laws. I will address these aspects in Chapters 5, 6, and 16.

“allowed” to do its work. Finding moderate government is extraordinarily rare, and founding it requires both fortuitous conditions and legislative prudence.¹⁵

¹⁵ While England was not founded *per se*, the United States were. John Adams expressed his understanding of the fortuitous situation in which revolutionary American found itself in a 1776 letter to Richard Henry Lee, now known as his *Thoughts on Government*. “You and I, my dear Friend, have been sent into life, at a time when the greatest law-givers of antiquity would have wished to have lived. How few of the human race have ever enjoyed an opportunity of making an election of government more than of air, soil, or climate, for themselves or their children. When! Before the present epoch, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?” *Papers of John Adams*. Vol 1. Ed Robert Taylor, Mary-Jo Cline, and Gregg Lint (Cambridge: Belknap Press of Harvard University Press, 1977), 93.

Chapter 2: Locke, Montesquieu, and the early history of political balancing

The practical character of Montesquieu's case for liberalism differentiates his approach to liberalism from that of many early moderns, including John Locke.¹⁶

Nonetheless, in Locke's work, we can see the early part of the same history of liberty and servitude that Montesquieu takes up in *Spirit of the Laws*, wherein well-intended political reforms inadvertently open the way to despotism. A number of authors, Harvey Mansfield most notably, have explained how Montesquieu's institutional checks and balances build upon and enhance those described by Locke, particularly in the realm of judging.

I aim to illuminate another way in which Montesquieu elaborates on the same basic logic of liberty we find in Locke's *Second Treatise*: both philosophers show that our knowledge of liberal institutional design has been acquired in large part through reflection on different experiences with actual governments. That is, this knowledge is not simply derived from a theoretical reflection on human nature in the abstract. In particular, these experiences have revealed unintended—and counterproductive—consequences for liberty of institutional changes initiated to *protect* liberty. Both of them show that threats to political liberty come from many angles—for example, from one's government as well as one's external enemies—and that addressing a threat to liberty from one angle can result in people inadvertently backing into a threat from a different angle. By turning to Locke and examining how Montesquieu built upon him, I also hope to illustrate how Montesquieu understood the task of a legislative reformer via his own practice of it.

In reviewing Locke's history of the refinement of the science of political liberty, I will briefly show that, notwithstanding his reputation for emphasizing the uniformities of

¹⁶ The political theorist whom Montesquieu criticizes by name for his overly theoretical approach is James Harrington, the author of the *Commonwealth of Oceana*.

human nature and the demands of political life, Locke also perceived different historical circumstances as requiring different legislative priorities. While his elaboration of political universals certainly merits the emphasis it has received, it is worth noting his largely unappreciated regard for the particular demands made and lessons conveyed by particular times and places.¹⁷ Locke's exploration of the competing demands of political liberty prefigures the challenge Montesquieu will take up: that of trying to remedy the threats to political liberty that immediately present themselves without inviting new and unanticipated threats to that liberty.

To begin the comparison with Locke, I will sketch briefly Montesquieu's definition of political liberty. In depicting political liberty as rule of law¹⁸ as distinguished from rule of man, Montesquieu contrasts it with two distinct conditions: despotism as well as the state of natural liberty, or what he calls independence. Montesquieu introduces political liberty and moderate government, the home of political liberty, in the course of analyzing despotism in Part 1. Moderate government represents both the normative and analytic opposite of despotism (3.9.28, 5.14.63, 8.18.118). Despotism in its "ideal" form is arbitrary rule, guided and limited only by the caprices of the ruler (2.1.10). In a condition of political servitude, individuals are regularly subject to arbitrary violence. In moderate government, on the other hand, the exercise of political power is limited through the counter-balancing of powerful

¹⁷ Ruth Grant discusses Locke's approval of these early tribal kingships and explains how it can be squared with his normative theory of legitimate government. She notes the importance of the experience of the imperfections of these primitive governments to the development of more liberal government. Ruth Grant, "Locke's Political Anthropology and Lockean Individualism," *Journal of Politics* 50, no. 1 (1988), 42-63. Mansfield identifies in Locke's account an "historical progression from the executive power of every man in the state of nature, to the federative power of the monarch-general in primitive society, to the more civilized modern legislature, while the three powers of Locke's constitution appear as three stages in its development." *Taming the Prince*, 200.

¹⁸ Montesquieu does not use the term "rule of law" itself, but this is a modern turn of phrase that captures his and Locke's understanding of political liberty accurately and succinctly.

bodies, such that no one individual, family, class, or other body has the opportunity to exercise total discretion over the laws (5.14.63, 11.4.155-156). As a consequence “gentleness reins in moderate government” (11.4.155).

In his most direct and extensive account of political liberty in Books 11 and 12, Montesquieu emphasizes that political liberty has another counterpart besides despotism in natural liberty, or independence, which is freedom conceived as “doing what one wants” (11.2-3.155). This notion of freedom, includes, but is not limited to, the concept of license. More broadly, it means doing what is right in one’s own eyes. A people or an individual who is independent does not answer to any human authority (19.27.332, 20.7.343, 24.2.460).

As I will discuss in Section 2, the Germanic nations of late antiquity and early medieval times represent Montesquieu’s model of this primitive freedom, for better and for worse. Montesquieu praises their “spirit of independence” in resisting imperial Rome, and then centralization and civil uniformity. While independence is not synonymous with political liberty, it nonetheless made a crucial contribution to the initial establishment of moderate government in Europe. He also suggests that a modern variation of this spirit found in English party politics and political expression is crucial to maintaining liberty in constitutional monarchy or commercial republic. Here, however, Montesquieu emphasizes the dangers of conflating independence and liberty properly speaking.¹⁹ Montesquieu warns,

Political liberty in no way consists in doing what one wants. In a state, that is, in a society where there are laws, liberty can consist only in having the power to do what one should want to do and in no way being constrained to do what one should not want to do.

¹⁹ Moreover, as I will discuss in Chapter 8, Montesquieu is keen to identify the mechanisms by which some aspects of Germanic independence were supplanted by political liberty, and how it can be supplanted where it still exists (5.11.58, 24.5.463, 28.2.535, 28.17.552, 30.19.649).

One must put oneself in the mind of what independence is and what liberty is. Liberty is the right to do everything that the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power (11.3.155).

Montesquieu implies here that, where there is no human sovereign to enforce laws in a non-arbitrary manner, liberty *does* involve being able to do what seems right in one's own eyes—to interpret natural and/or divine laws for one's self. Under a government of laws, however, liberty is something quite different. Political laws are defined precisely as those which override man's "natural independence," affording him liberty, properly speaking, in its place (26.15.510).²⁰ Montesquieu criticizes the tendency to conflate liberty (that is, political liberty) and independence, a tendency that he attributes to democratic peoples especially.

In stark contrast to this view of liberty as independence, Montesquieu foregrounds the formative role of positive laws in establishing political liberty. The two aspects of political liberty he delineates, liberty of the constitution and liberty of the citizen, are each "formed" by the laws. Liberty of the constitution is formed by the "fundamental laws:" those dispersing and counter-balancing powers in the basic institutions of the government. Liberty of the citizen is formed by the laws that citizens directly confront in the course of their daily lives, and which are most likely to bring them into contact with the government: the criminal laws and tax laws.²¹

In addition to the criminal and tax laws, liberty of the citizen is also influenced by "mores, manners, and received examples" (12.1.187). There are two senses in which this

²⁰ Civil laws, on the other hand, substitute legally protected "property" for "the natural community of goods" (26.15.510).

²¹ In order to limit the already broad scope of my dissertation I will pass over Book 13 on the tax laws. My neglect of this book should not be taken as a statement of its relative unimportance to *The Spirit of the Laws*. A comprehensive account of Montesquieu's understanding of the accidental causes of political liberty would have to take Book 13 into account as well. In it Montesquieu shows that in tax policy, at least as much as any other policy type, legislators often undermine their own ends. In states characterized by liberty, there is a particular tendency for legislators to create perverse incentives with their tax policies (13.15.223).

influence works. First, the mores, manners, and received examples of a particular nation might support moderate government and gentle laws, as Montesquieu suggests that they do in England in Book 19, or they might completely oppose such government, as they do in Montesquieu's Japan (14.15.244). Another way that mores and manners play into liberty of the citizen is in the way that a government might try to uphold the existing standards or to change them. As I will show in Chapter 6, Montesquieu argues that a gentle means of regulating moral standards (as well as religious laws) is through the use of social incentives and disincentives and the promotion of positive examples by leading figures.

From a late modern or contemporary perspective, it may be somewhat jarring to hear a founder of liberalism emphasize the centrality of law to liberty. As Montesquieu contrasted modern political philosophers in Book 3 with their classical counterparts, “[whereas before] one was free under the laws, [now] one wants to be free against them” (3.3.23). In emphasizing that political liberty is “formed” by the laws, however, Montesquieu reiterates a key principle of earlier moderns. The importance of laws to liberty is fundamental to both Hobbes’ and Locke’s contributions to liberalism. Montesquieu takes up Locke’s principle of diminishing, as much as possible, not the exercise of power as such, but arbitrary power, through constitutional and procedural means for upholding the rule of law. His definition of political liberty sounds much like that of John Locke in his *Second Treatise on Government*: “freedom of men under government, is, to have a standing Rule to live by, common to every one of that Society...A Liberty to follow my own Will in all things, where the Rule prescribes not” (*Second Treatise of Government*, hereafter STG, IV.22.284).²²

²² John Locke, *Second Treatise of Government*, ed. Peter Laslett (Cambridge, UK: Cambridge University Press, 1988). See also VII.87-89.324-325.

For Locke, liberty unconstrained by law does not exist even in the state of nature, for natural liberty is itself implicitly governed by the laws of nature. “Freedom of Nature is to be under no other restraint but the Law of Nature” (IV.23.284, also II.4.261). Under no circumstances, then, is liberty a matter of living “as one pleases,” without restriction. The liberty of each person (or each nation as the case may be) in the state of nature is to interpret and enforce the laws of nature. As the story famously goes, individuals living in the state of nature diversely interpret and implement the laws of nature. We are prone to be unreflective in our understanding of such laws, partial in judging our own cases, indifferent to others’ cases, and regardless, unable to enforce our judgments alone.

The hazards of this condition plagued even the ancient Israelites, living under divine laws and the “charismatic,” irregular leadership of prophets and champions (*gibborim*; literally, “mighty ones”), but without a central government or king. Locke taps the political history of the period of *Judges* and *Samuel* as exemplifying the state of nature. While they had an extensive, commonly-avowed, and even divinely-given legal code, individuals and tribes within the Hebrew confederation nonetheless continued to interpret and enforce it according to their own discretion before the establishment of the kingship—and to sometimes catastrophic effects.²³

Thus, governance by only the laws of nature or even by divine laws alone leaves extremely vulnerable “Lives, Liberties, and Estates,” summed up as “property” by Locke (STG, IX.123-126). The state of nature, “however free, is full of fears and continual

²³ In the book of *Judges*, crimes and efforts to right those crimes are frequently punctuated by the observation, “in those days there was no king in Israel. Everyone did as he pleased.” Judg. 21:25; 18.1, 19:1 (Jewish Publication Society). See especially the civil war and near-annihilation of the tribe of Benjamin at the end of *Judges* (Judg. 19:1-21:25), which Rousseau reworks into his *Levite of Ephraim*, a tale, as he puts it, “of unprecedented infamy and of still more terrible punishments,” in *The Essay on the Origin of Languages*, 352.

dangers.” Natural laws notwithstanding, there is a *de facto* sense of lawlessness to life outside of political society. The “Law of Nature” may oblige everyone to avoid infringing upon others’ life, liberty, and goods unless they themselves have transgressed the law, or unless preserving the rest of mankind conflicts with self-preservation (STG, II.6.271). The reality, however, is that life in the state of nature is fraught with such infringements, real and perceived. The effectual truth, *a la Machiavelli*, of rule by natural laws alone—or even popularly-acknowledged divine laws, as the chronicles of *Judges* shows—is rule by man, which is to say, arbitrary rule, the great bane of the state of nature for both Locke and Montesquieu.²⁴

Therefore, without positive laws to fix the precise content of a community’s laws, no one can be free.

Law, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest...the *end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other Man’s Humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and the whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own (STG, VI.57.305-306, emphasis in original).

Political liberty’s opposite, then, is not restraint itself, but arbitrary restraint. Power *per se* is not what threatens political liberty, but unchecked power. Political liberty is, as Locke puts it, “to not be subject to the inconstant uncertain, unknown, Arbitrary Will of another Man”

(STG, IV.22.284).

²⁴ In their plea to Samuel to appoint a king for them, the ancient Israelites invoked concerns about both domestic tyranny and foreign conquest. They complained that Samuel’s sons, the heirs to his prophetic leadership, had already proven themselves to be less upright than their father. They also invoked the desire to “be like all the other nations” by having a central leader “to go out at our head and fight our battles.” 1 Sam. 8.4-22.

Arbitrariness in the laws, the irregularities that compromise the character of laws as laws, come in various forms in Locke's account: uncertainty about the precise definition of the laws and whose definition is authoritative, and inconsistency in to whom and how the laws apply—namely impunity for some and not for others. The first is regularized (i.e. its arbitrariness is eliminated or minimized) through the establishment of a common judge. The second is addressed through the separation of legislative and executive powers.

First and foremost, it is the lack of a “known Authority” that makes the “governance” of natural laws alone effectively arbitrary (STG, VII.90.326). Inherent in the very concept of law, Locke argues, is that it be clear *what the law is*, and that violations of the law be subject to rectification. A commonly-avowed judge is necessary to fix the laws and promulgate them, and to provide a means of appeal in the face of legal grievances. The promulgation of law by a common judge clarifies and regularizes that for which individuals will be held accountable, eliminating, or at least reducing, the arbitrariness that enters into interpretation of natural laws outside civil society. A commonly-accepted “umpire” of perceived violations of the laws eliminates, or at least reduces, the arbitrariness that enters into enforcement of natural laws outside civil society (STG, VII.89.325).

It is not enough, however, that a common judge exists to adjudicate grievances among fellow subjects. Locke rejects a Hobbesian monarch, an absolute ruler, as a sufficient guarantor of political liberty. Absolute monarchies may well succeed in providing a means of appeal for grievances suffered at the hands of fellow subjects. Yet there are other threats to political liberty than one's fellows. An absolute monarch's subjects have no power of appeal against injury by their ruler. “For he being suppos'd to have all, both Legislative and Executive Power in himself alone, there is no Judge to be found, no Appeal lies open to any

one, who may fairly, and indifferently, and with Authority decide, and from whose decision relief and redress may be expected of any Injury or Inconveniency, that may be suffered from the Prince or by his Order” (STG, VII.91.326). As he famously puts it, men did not agree to establish a sovereign to protect them against “*Pole-Cats* or *Foxes*” (i.e. their fellows) in order to leave themselves liable to “[being] devoured by *Lions*” (their rulers, STG, VII.93.328). Locke argues, in effect, that the logical implication of Hobbes’ project is that everyone in a commonwealth, including the ruler himself, must be subject to the laws, or else the state of nature has not yet been transcended. Locke goes so far as to argue (to Hume’s famous aggravation) that absolute monarchy is “no Form of Civil Government at all,” because its subjects are still in the state of nature in relation to the sovereign (STG, VII.90.326).

The integrity of the laws as laws depends upon subjects having the “power of appeal” in the face of grievances against the king. Locke criticizes absolute monarchy on Hobbesian terms (even if he’s not directly responding to Hobbes), thus filling out the logic of the *Leviathan*: when the ruler is himself not subject to the laws, and individuals have no power of appeal in the face of injury at the ruler’s hands, subjects are still in the state of nature in relation to the ruler.²⁵ Civil society, properly speaking, does not exist where anyone in the community, even the ruler himself, is exempt from the laws (STG, VII.94.329).

While Locke is best known for his call for limiting the powers of monarchs, it should be noted that he portrays the rise of the “government of one alone” as a sensible response to the greatest challenge to political liberty facing early political communities: foreign invasion and attack (STG, VIII.107.339). In the course of his critique of both traditional paternal

²⁵ For Locke’s implicit critique of Hobbes and, especially and most directly, Filmer in the *Second Treatise* I am relying upon Peter Laslett’s editor’s notes. See especially Notes to VII.77.318-VIII.131.353 as well as the introduction, 67-78.

authority and absolute monarchy, Locke speculates that early political communities opted for the “rule of one alone” to address external threats. The establishment of a chief or strong man at the head of a people *did* help mitigate this problem. Yet in addressing one threat to liberty, they inadvertently backed themselves into a different threat to political liberty: the abuse of executive power. Locke himself suggests that it is primarily “experience” that has “instructed [men] in Forms of Government” (STG, VIII.107.338).

Tracing the emergence of the first “kings,” Locke reaffirms the Hobbesian idea that political liberty begins with the establishment of a strong man to head a people. Locke, however, points to the external threats—i.e. war—as the spur for a loose association of families to appoint a sovereign at their head, whereas Hobbes had emphasized threats from one’s fellows as the impulse for founding civil society. For example, many of the ancient Israelite leaders after Moses and before Saul led almost exclusively in their capacity as military commanders. It was “as if the only *business of a King* had been to lead out their Armies, and fight in their Defence” (STG, VIII.110.341, emphasis in original).

Based on a benign experience of a general’s rule at the head of their army (and that of the father’s rule in the family)

It was no wonder, that they should pitch upon, and naturally run into that Form of Government [i.e. the rule of one man], which from their Infancy they had been all accustomed to; and which, by experience they had found both easie and safe. To which, if we add, that *Monarchy* being simple, and most obvious to Men, whom neither experience had instructed in Forms of Government nor the Ambition or Insolence of Empire had taught to beware of the Absolute Power, which Monarchy, in Succession was apt to lay claim to, and bring up on them, it was not at all strange, that they should not much trouble themselves to think of Methods of restraining any Exorbitances of those, to whom they had given the Authority over them, and of ballancing the Power of Government, by placing several parts of it in several hands. They had neither felt the Oppression of Tyrannical Dominion, nor did the Fashion of the Age, nor their Possession, or way of living (which afforded little matter for Covetousness or Ambition) give them any reason to apprehend or provide against it:

and therefore 'tis no wonder they put themselves into such a *Frame of Government*, as was not only as I said, most obvious and simple, but also best suited to their present State and Condition; which stood more in need of defence against foreign Invasions and Injuries, than of multiplicity of Laws” STG, VIII.107.338-9).

Given the needs government initially served, it was at first “almost all Prerogative”

(STG, XIV.162.376). Yet the kings whom peoples empowered and entrusted to protect them brought in their wake some negative unintended consequences—a succession of princes who took advantage of the prerogative they inherited for their own personal gain, at the expense of their subjects. While this potential, and even likelihood, for power to be abused is taken now as a matter of common wisdom, Locke, for all his criticism of absolute monarchy, does not reproach these early societies for neglecting to prepare for this possibility. He goes so far as to suggest that putting rule in the hands of one man was *necessary* for nascent commonwealths, for “unless they had done so, young Societies could not have subsisted: without such nursing Fathers tender and carefull of the publick weale, all Governments would have sunk under the Weakness and Infirmities of their Infancy; and the Prince and the People had soon perished together” (STG, VIII.110.342). Yet even if it was impossible to do without a strong, unbounded ruler at first, in different circumstances, the old solution became the new problem.

When Ambition and Luxury, in future Ages would retain and increase the Power, without doing the Business, for which it was given, and aided by Flattery, taught Princes to have distinct and separate Interests from their People, Men found it necessary to examine more carefully *the Original* and Rights of *Government*; and to find out ways to *restrain the Exorbitances*, and *prevent the Abuses* of that Power... (VIII.111.343, emphasis in original).

Threats to liberty, they learned, could come from different directions, and what once struck them as the most pressing threat eventually may give way to new threats in different circumstances. Yet the basic goal of preserving themselves from arbitrary domination was more or less constant, even if it manifested itself in different practical political concerns. That

these early societies had not prepared themselves for the possibility that their chiefs could menace as well as protect does not imply that they meant to endow such chiefs with incontestable power. “They never dream’d of Monarchy being Jure Divino” (STG, VIII.112.343).

The phenomenon of the absolute ruler, which arose as an unintended consequence of a sensible solution to the problem of foreign attacks or domestic anarchy, made possible new threats to liberty. For even where there is ostensibly a standing law, any other inconsistency in when, to whom, and in what ways the laws are applied introduces arbitrariness, thus compromising the integrity of the laws as laws. When the same persons execute the laws as have written them, there is a tendency for them to hold themselves and their coterie above the law. To remedy this threat to liberty from above, societies and their reformers have long pursued some means of “balancing” governmental powers. Locke calls for “balancing the Power of Government by placing several parts of it in different hands” (STG, VII.107.338). Specifically, Locke calls for the establishment of a legislative body, authorized by the consent of the majority, to hold everyone, including—and perhaps especially—the king, accountable to the laws.

Analyzing the history of England, Locke traces the first semi-independent (from the king) legislative activity to the efforts of the nobles to diminish executive prerogative. The elaboration of standing laws was linked with the differentiation between legislative and executive powers, and the entrenchment of the rights of the nobles. Locke associates the separation of legislative and executive powers with “moderate Monarchies and well-framed Governments,” a category that will become almost synonymous with political liberty in Montesquieu’s discussion (STG, XIV.159.374).

Consent to the laws, or at least the law-makers, is thus the great guarantor of liberty for Locke. The establishment of a popular legislative assembly would seem to fulfill the logical requirements of rule of law—that “*No Man in Civil Society...be exempted from the Laws of it.*” Putting the legislative capacity on a popular foundation provides the incentive to apply the same laws in the same way to everyone, including the rulers themselves.

The People...could never...*think themselves in Civil Society*, till the Legislature was placed in collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject, equally the other meanest Men, to those Laws, which he himself, as part of the Legislative had established: nor could any on, by his own Authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to License his own, or the Miscarriages of any of his Dependants. Locke suggests that law is not really law if it is not based upon the consent of society, which is to say, the consent of the majority (STG, VIII.95.331-99.333; XI.134.356).

Locke describes government as a whole as a common, impartial judge—that is, with respect to disputes among individuals (XIV.168.379). It is the “want of a common Judge with Authority” that constitutes the state of nature (STG, III.19.281). Such a judge would “determine all the Controversies, and redress the Injuries, that may happen to any Member of the Commonwealth.” Locke envisions this judge as “the Legislative, or Magistrates appointed by it” (STG, VII.89.325). Grounding the legislative power in consent provides a balance against monarchical abuses, but Locke acknowledges that there remains a problem with regard to judging controversies between the legislative and executive, and between the legislative and the people or a part of them. He poses the question of “*Who shall be Judge whether the Prince or Legislative act contrary to their Trust?*” (STG, XIV.168.379, emphasis in original). Earlier in the work, Locke had suggested that there can be no judge on earth, only an “Appeal to Heaven,” when Executive Prerogative is wrongly used. He did allude to

rebellion as a possible appeal on earth if and when the abuse becomes sufficiently egregious to warrant it (STG, XIV.168.380).

Later, however, he concludes, “*The People shall be Judge* whether his Trustee or Deputy acts well, and according to Trust reposed in him” (STG, XIX.240.426-7). When there is concern that the executive or legislative has abused its power, “*the injured party must judge for himself*” (STG, XIX.242.427, emphasis in original). Since Locke would ground the executive’s authority in the consent of the legislative assembly, and the latter in the consent of the majority of the people, the idea is that the deputors should judge the deputies. Nonetheless, he allows that this is not a fully satisfactory solution to the problem he has outlined. Beyond this proposed remedy, everyone retains the right to appeal to Heaven, the ultimate “Judge of the Right” (STG, XIX.341.427).

The matter of adjudicating intra-governmental disputes is the proper place to turn back to Montesquieu, for it is here that his refinements to Lockean liberalism come into relief. Whereas Locke thought that the legislative power could safely take up judging, Montesquieu deems this combination more dangerous to liberty than even the consolidation of executive and legislative powers (11.6.157). While Locke treated popular consent as a guarantee for political liberty, Montesquieu warns republican institutions and principles contain their own dangers to rule of law. In effect, Montesquieu confronts the risks inherent in Locke’s solutions to what confronted him as the most salient threat to political liberty: the king’s exploitation of his power.

Montesquieu emphasizes the problem of arbitrary domination in the realm of judging, or more precisely, where judging overlaps with execution in inquisitorial and policing

institutions. These institutions correspond to what we might call today the criminal justice system. He warns that arbitrary criminal justice practices can ruin the prospects for liberty in an otherwise well-constructed government. In his emphasis on the opportunity for private discretion to dominate judicial interpretation even under a government of laws, Montesquieu suggests that the power of judging, broadly speaking, may be the most difficult to civilize. It is worth recalling Locke's suggestion that what makes the state of nature so unbearable is less the violation of the unwritten laws of nature—although that is bad enough—than the private punishment of those violations, both real and perceived (STG, II.IX.125-126). Above all, it is the need to contain the destructive consequences of private vengeance that makes government necessary to political liberty.²⁶

Montesquieu conveys the problem of arbitrary judging via an analysis of historical abuses of rule of law. He highlights a pattern in both republican and non-republican governments of ill-fated liberal reforms (to speak anachronistically). As with the corruption of early kingship that Locke described, these abuses also began as attempts to tackle a threat to rule of law from one direction, and inadvertently helped generate a threat from another direction.

Chronologically, Montesquieu's critique begins with ancient kingships. While Locke treats ancient and medieval/modern kingships as more or less the same type of government, Montesquieu emphasizes the crucial difference of the landed nobility and the independence of judging in medieval monarchy. Whatever the particular configuration of powers in the

²⁶ Perhaps nowhere is this made more vivid than in Rousseau's reworking of the story from the book of *Judges* of *The Levite of Ephraim*. Anne Cohler concludes that Montesquieu's frequent examples of "endless punishment for wrongs done suggest that one purpose of government is to put an end to such punishment and to justice understood as an exact exchange of goods and punishments." *Montesquieu's Comparative Politics*, 41.

ancient kingships, the king always retained the powers of judging. For this reason, the ancient kingships could never achieve a sustainable constitutional balance.

The potential for abuse of unchecked power, however, is no less under a government of many than under a government of one alone. In some ways, the dangers are more pronounced because they are less suspected; power can become rather concentrated before raising eyebrows. Montesquieu goes so far as to say that “democracy and aristocracy are not free states by their nature” (11.4.155). At the beginning of Book 11, Montesquieu criticizes the tendency in democracies to confuse the power of the people with the liberty of the people, a problem associated with the constant battling between factions in the ancient republics (11.2-3.155). He illustrates this problem later in Book 11 through his analysis of factional battles in ancient republics, and particularly in Rome. In these disputes, the popular and aristocratic parties—as if they were warring nations or individuals in the state of nature—each sought to protect themselves from abuse by their rivals by trying to seize the greater power. They proceeded as though political liberty was the same things as “independence,” or natural liberty (11.2.155). Notably, the powers over criminal justice were at the locus of their power grabs. He depicts a “frenzy of liberty,” whereby the plebeians insisted on stripping the patricians of all of their privileges (11.16.176). Undertaken in order to promote political liberty, these efforts served instead to diminish it for everyone.

Montesquieu explains why the concern for unchecked power implicates republics in his classic expression of liberal suspicion of power: “political liberty is found only in moderate governments...[and] only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it: he continues until he finds limits.

Who would think it! Even virtue has need of limits (11.4.155).”²⁷ Though he is by no means unconcerned with the kingly prerogative gone awry that vexed Locke, the culprit that Montesquieu emphasizes is virtue, the passion that makes republics tick. Virtue in the political sense, a zeal for defending the public good, is the foundation of republican liberty, the guarantor of its laws. Yet at the same time, if left unchecked, it too can lead to arbitrary violence. In the classical-style republics, for example, the same people served as both judge and accuser, exacerbating their tendency to be overzealous in prosecuting and punishing suspected high crimes.

Finally, after showing how so many legislative purposes have gone awry, Montesquieu famously presents the English system—if it can be called a system—as a model of political liberty.²⁸ The key institutional features of this government that Montesquieu identifies are judges independent of both the king and the people, intermediate bodies exemplified by a landed nobility, a national representative assembly, and extensive formalities for criminal judgments.

The reason that such institutions haven’t been fully appreciated, he suggests, is not necessarily that all political thinkers before him were less clever, or less perceptive than he was. Montesquieu does have some choice insults for a few of his contemporaries (e.g. Abbé Dubos in Book 30), but his critique does not turn on culpable errors by his predecessors. The ancients, at least, did not know of the political forms Montesquieu praises, because they

²⁷ This theory does not rule out the possibility of a restrained, virtuous leader, but in fact may be strengthened by the systemic upshots of such a leader (3.5.25). As Locke put it, “the Reigns of good Princes have been always most dangerous to the Liberties of their People.” The bold actions taken by “good princes” become precedents for successors who may not have the same care and public spirit (STG, II.XIV.166).

²⁸ Montesquieu in fact begins explaining the English system in the midst of critiquing other constitutions and political practices. In order to clarify what I see as the logic of his argument, to some degree I am artificially separating his treatment of these different constitutions and laws.

never had before their eyes the example of that constitution. The ancients did not have the benefit of witnessing the crucial “ballasts” in action. England is introduced as the “one nation in the world whose constitution has political liberty for its direct purpose” (11.5.156). Yet if the constitution has this purpose, it is not because the country was consciously founded as such.²⁹ “This fine system was found in the forests” (11.6.166). As I will discuss in Section 2, this government developed in the wake of the barbarians’ conquest of the Romans in Western Europe in order to serve the needs of primitive, herding peoples, to satisfy their code of honor, and to maintain their customs over a greatly expanded territory. Subsequently the nobles and then the commoners may have embraced liberty as their objective, but the political forms that protect that liberty arose for quite different reasons. His contemporaries, viewing these institutions through the distorting lenses of ideological preconceptions, have not recognized their significance for liberty even when they saw them (11.6.166). Even the English perennially risk destroying this constitutional balance in the name of liberty itself.³⁰

Before examining Montesquieu’s models of political liberty—medieval constitutional monarchy and its English descendant—we must first show why he found the conventional models lacking. His critique of ancient kingship, classical republics, and the modern aristocratic-republic of Venice further illuminates just what political liberty is, and what it requires.

²⁹ Mansfield, *Taming the Prince*, 233.

³⁰ On Montesquieu’s concerns about weaknesses of the English political order, see Rahe, *Montesquieu and the Logic of Liberty*, 239-41.

Chapter 3: Why the ancients did not understand monarchy

Chronologically, Montesquieu's critique of unbalanced constitutions and illiberal judicial practices begins with the ancient Greek kingships. The classical-style republics were established to replace fundamentally flawed, unsustainable kingships. Whereas Locke treats the ancient and modern kingships as more or less synonymous, Montesquieu contends that the ancient ones were constitutionally distinct from modern monarchy. To explain this difference, he introduces an additional analytical framework to his account of different governments. While each government has a different nature and principle, there are certain functions common across all kinds of government. Montesquieu carries over Locke's categories of the legislative and executive powers with regard to "civil right," and what Locke called the "federative" power, that is, executive power with regard to foreign affairs, or "the right of nations."³¹ Yet he immediately splits off the second power, "executive power over the things depending on civil right," from the head of state functions, shifting this power of punishing crimes and judging among subjects into a new category of the "power of judging" (11.6.156-7).³²

Montesquieu warns first about the dangers of putting the executive and legislative functions in the same hands. If they are combined, "there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically" (11.6.157). Yet for most European monarchies to qualify as "moderate" in Montesquieu's view, it is enough that the kings leave the judging of crimes and disputes among individuals,

³¹ See Pangle, *Montesquieu's Philosophy of Liberalism*, 118-138, for an account of this schema's relation to precedents in Aristotle's *Politics* and Polybius' *Histories*. See also Locke, STG.XII.364-366.

³² Mansfield notes that Bolingbroke before Montesquieu presented judging as a function properly separated from the executive and legislative functions. Yet he concludes that Bolingbroke's three-fold scheme nonetheless contributed little to Montesquieu's own account. *Taming the Prince*, 214.

even if they retain both the executive and legislative powers. In the ancient kingships, unlike the medieval and modern, the king held the power of judging in addition to that of executing. In Montesquieu's analysis, therefore, ancient governments really could be reduced to the two categories of republics and despotisms. Persia and Lacedaemonia, which Aristotle identified as monarchies, or at least as having monarchic offices, Montesquieu deems a despotic state and a republic, respectively—the former lacking a fixed law, and the latter with such a diminished scope of kingly power that the kings could hardly be said to rule.³³

Montesquieu charges Aristotle with misunderstanding the defining characteristic of government under the rule of one alone: “He does not distinguish among them by the form of the constitution but by accidental things, like the virtues or the vices of the prince, or by extrinsic things, like the usurpation of the tyranny or succession to it” (11.11.169).³⁴ In this way, Montesquieu turns on its head the classical understanding of what constitutes an accidental cause: the character of the ruler is the matter of chance, and the “equipment” with which he works the factor admitting of rational explanation.

Aristotle, it should be noted, did differentiate among kingships on the basis of whether they were governed by laws or according only to the king's will, as well as by the scope of the king's power (3.14-16.1285a-1287b35). In particular he indicated that a key distinction concerns the king's role in criminal punishment at home—i.e. whether he has the power of life and death over citizens at home as well as in military campaigns abroad (3.14.1285a5-15). Nonetheless, Aristotle's account in Book 3 overall gives primacy to those

³³ The contrast Montesquieu is drawing with Aristotle may be more dramatic rhetorically than it is in its actual detail. Aristotle, for example, puts Sparta at one pole on the spectrum of kingships, such that it is barely distinguishable from republics given the limited scope of its kingship. He notes that democracies and aristocracies may also empower a permanent generalship, which is more or less all that the Spartan kings were (3.16.1287a2-7). Elsewhere, Aristotle calls Sparta a mixed regime (4.9.1249b20-ff).

³⁴ He cites Book 3, Chapter 14 of Aristotle's *Politics* (line numbers per Cohler et al., 1285b2-19).

considerations Montesquieu seeks to diminish: the question of who merits rule, and relatedly, the virtue or vice of particular rulers as a reflection of the regime as a whole.

There is one of Aristotle's five categories of kingship that Montesquieu says could have presented the idea of a kingship with independent judging (i.e. monarchy properly speaking): those founded by men who "won the kingdom for themselves" through serving as a people's benefactor in some way. These Greek kings began as "those who had invented the arts, waged war for the people, assembled men who were scattered here and there or given them lands... They were kings, priests, and judges." Like Aristotle, he identifies these as the kings of "heroic times." These kingships, however, distributed power in a manner very different from the European monarchies. They gave the people the legislative power and the king the executive and judicial. By holding both the executive and the judicial powers, the king could very easily make himself hateful. Yet through legislating, the people had more than enough power to retaliate. In these governments, the "powers were badly distributed. These monarchies could not continue to exist; for, as soon as the people could legislate, they could reduce royalty to nothing at the least caprice, as they did everywhere" (11.11.169).

The problem for liberty of the constitution, then, was not that the king was an absolute ruler, but that, at the same time, he "had too much power and he did not have enough" (11.11.169). Lacking a triangulating third, the two powers in these ancient kingships kept pushing against each another until one had effectively subjugated the other. The advantage was with the people, because the legislative power is the most formidable of

the three over the long-run. As soon as they legislated, the people “could reduce royalty to nothing at the least caprice, as they did everywhere” (11.11.169).³⁵

The Roman case was slightly better, because the senate formed something like a third power mediating between the people and the king. The Roman kingship was like that among the Greeks of heroic times in that it “fell from its general vice,” but “in itself and its particular nature it was very good” (11.12.170). Under the first five kings, a magistrate elected by the senate chose the king, who then had to be approved by the senate as a whole, the people, and the auspices. This gave the senate a kind of leeway or independence from the king, because the king also depended upon them for his power. With these checks in place, “the constitution was monarchical, aristocratic, and popular, and such was the harmony of power that there was neither jealousy nor dispute in the first reigns” (11.12.170).

Montesquieu does not highlight particular flaws with the early Roman kingship, but his account fits with the general formula of the ancient kings having “too much power and not enough.” The Roman king also retained both the executive power and civil and criminal judgments. He could invite the senate and/or the people to participate in these matters if he deemed it appropriate. The king’s office was powerful enough that Servius Tullius was able to bypass the senate entirely in order to establish himself as king after the death of his predecessor. From the Roman king’s perspective, and that of many rulers in a similar position, the temptation is to ally with the people to suppress the senators or other eminent

³⁵ In Aristotle’s account of the kings of heroic times, he also indicates that these benefactor-kings eventually were compelled to cede most of their powers, until they retained only symbolic religious functions at home, at least at home: “In ancient times they ruled continuously, dealing with city matters, rural matters, and matters beyond the borders. Later, however, some of these things were relinquished by the kings, some were taken away by the mob, and in most cities the kings were left only with the sacrifices. Wherever there was a kingship worth speaking of, they only held the leadership in military matters beyond the borders.” *Politics*, 1285b11-19.

bodies, who represent the most obvious rivals to power. Thus, Tullius sought to empower the people at the expense of the senate. Yet in doing so, he had to divest his office of some judicial powers, thus weakening royal power as well senatorial (11.12.171).

His successor, Tarquin, rejected both the senate and the people as a political base for royal power, and instead claimed hereditary right to the kingship. Usurping authority on all sides, Tarquin's "power increased, but what was odious about this power became still more odious." Powerful enough to make himself hateful, he was not powerful enough to suppress the hatred he inspired, and so become a full-fledged despot; "the people remembered at a certain moment that they were the legislator, and Tarquin was no longer" (11.12.171).

Montesquieu's analysis of ancient kingships inspires some general commentary on the importance of judicial arrangements. "The masterwork of legislation is to know where properly to place the power of judging" (11.11.169). So long as the instruments for adjudicating disputes continue to serve as weapons of private or partisan attack and reprisal, rule of law in a definitive sense remains elusive. By holding the administration of criminal justice so close to him, the king could not resist collapsing civil right into political right—that is, treating his political rivals as public criminals. The people did the same in turn through their legislative powers. Montesquieu laments,

It had not yet been discovered that the prince's true function was to establish judges and not to judge. The opposite policy rendered unbearable the government of one alone. All these kings were driven out. The Greeks did not imagine the true distribution of the three powers in the government of one alone, they imagined it only in the government of many (11.11.169-170).³⁶

³⁶ The kings of heroic times in Aristotle's account were raised for limited purposes, but he says their responsibilities typically included judging (3.14.1285b10).

The power to judge disputes among the people was the last power the ancient kings would think of farming out, and a perennial locus of conflict between democratic factions.³⁷

As “the ancients...did not know of the distribution of the three powers in the government of one alone, [they] could not achieve a correct idea of monarchy” (11.9.168). The distribution of which he speaks is of the three governmental functions, as well as of power among the classes and privileged orders of society, and among territorial jurisdictions. The key constitutional features securing these distributions were the intermediate body of the nobility and confederation via a national, representative assembly. Along with judges independent of both the king and the people, “The ancients did not at all know the government founded on a body of nobility, and even less the government founded on a legislative body formed of the representatives of a nation” (11.8.167).

While the Roman senate was a vestige of the old constitution that persisted somewhat uncomfortably under the new constitution, the medieval lords, bishops, and other titled bodies practically defined the monarchic constitution. Unlike their closest ancient counterparts, the medieval nobles held the power of judging over their vassals, as I will elaborate in Chapter 9, and subsequently their territorial fiefs. These judicial powers were dispersed widely among the multitude of lordships and ecclesiastical orders, each of which had a degree of practical independence from of one another and from the king or superior lord whom they served. The nobility thus played a crucial role in balancing local and regional power against central power, as well as balancing governmental functions.

³⁷ Montesquieu mentions other ill-fated attempts at balancing the government of one alone, such as the Molossians’ “reform” of establishing two kings: “this weakened the state more than the command: one wanted rivals, and one had enemies” (11.10.168).

Montesquieu refers to monarchy as an analytic type as well as to actual European monarchies.³⁸ Monarchy properly understood is characterized as much by the nobility as by the one who rules. “Intermediate, subordinate, and dependent powers constitute the nature of monarchical government... The most natural intermediate, subordinate power is that of the nobility. In a way, nobility is of the essence of monarchy” (2.4.17). The Roman senate, in contrast, was a vestige of the old constitution that persisted under the new constitution. The nobility all but defines monarchy because most of the king’s power is mediated through it, and because it checks the arbitrary will of the king through its efforts to defend its privileges. Thus, the nobility serves as the primary safeguard for the fundamental law that distinguishes monarchy from despotism.

The balance of powers between the king and the nobles is formally entrenched in the laws, for which the national assembly of the lords and clerics serves as a caretaker. The prototype for the European parliaments of Montesquieu’s day, these national assemblies formed a “depository of laws” (*corps politiques*), formalizing them, preserving their memory, and recalling them as precedents (2.4.19).

The characteristic passion of the nobles, their love of honor, is the spring that makes monarchy tick. Honor is what makes the nobles fight for the king, as well as what makes them resist encroachments on their privileges. The nobility’s “demand [for] preferences and

³⁸ His account of monarchy as a type of government also has both descriptive and prescriptive aspects. He seems to urge actual monarchs to conform more to the model of monarchy. Moreover, as I will discuss in Chapter 8, Montesquieu is keen to identify the mechanisms by which some aspects of Germanic independence were supplanted by political liberty, and how it can be supplanted where it still exists (5.11.58, 24.5.463, 28.2.535, 28.17.552, 30.19.649). Monarchy and the other forms of government are ideal types from which Montesquieu derives *a priori* conclusions about the principle and laws that accord with it. At the same time, his understanding of monarchy of plainly informed by an exquisite familiarity with actual monarchies (see especially his account of education in monarchies; 4.2.31-34). The closer they hew to this model, the more they will reinforce this particular form of government, and the more liberty they will protect for their subjects.

distinctions” is a “false honor,” but it is a politically useful one. “The prejudice of each person and each condition, honor takes the place of political virtue...and represents it everywhere. It can inspire the finest actions; joined with the force of the laws, it can lead to the goal of government as does virtue itself” (3.6.26). Honor motivates nobles to risk their lives to serve their king and country, and to perform fairly impressive acts of courage and gallantry (3.6-8.26-28, 11.7.166-167, 28.19-22.558-562). In a monarchic nation, “one can oblige men to do all the difficult actions and which require force, with no reward other than the renown of these actions...” (3.7.27).

Honor also sets limits to what their king can demand of them; the internal code of honor prescribes what a man must do as well as what he must not do (4.2.31-34). The nobles’ jealousy of their prerogatives spurred them to limit the king’s powers in ways that benefited everyone (2.4.18-19, 11.18.182-183).

In theory, all power in a monarchy originates in and flows back to the king or queen (2.4.17-18). Yet in practice, a monarch takes a hands-off role. Most importantly, he leaves the powers of judging disputes among his subjects. While reflecting on the independence of judging in monarchy, Montesquieu suggests that the ancient kings’ problem was that they were too close to the people in status and power to feel that they could relinquish this function and remain in power.³⁹ In effect, the principle of inequality in monarchy is taken to a much greater extreme than in ancient kingship or in aristocracy. Strangely enough, Montesquieu indicates that this has resulted in greater political liberty than many of those

³⁹ Montesquieu also notes the difference between aristocrats and monarchs in this regard. See for example his observation about the greater difficulty aristocrats have for tolerating political satire. “Aristocracy is the government that most proscribes satirical works. Magistrates there are little sovereigns who are not big enough to scorn insults. If in monarchy some barb is thrown against the monarch, he is so high that the barb does not reach him. An aristocratic lord is pierced through and through. Thus, the *decemvirs*, who formed an aristocracy, punished satirical writings with death” (12.13.200).

constitutions ostensibly based on the equality of all, or that attempt to integrate the principles of both equality and inequality. Unlike the ancient kings, a monarch is so far above everyone else that he can afford to give away this power of criminal judgment and punishment (6.5.78; 12.27.210).

Indeed, it would be beneath a king to be jealous of this power, Montesquieu exhorts. It is a despot who rules through the fear he stirs in his subjects; kings and queens rule primarily through the love and awe in which their subjects hold them.⁴⁰ The power of punishing is petty in comparison to the real power a king commands over his subjects, which is to obtain their willing submission (6.5.78-79, 6.21.95).

The fact that the king does not judge his subjects in their disputes before the law contributes to their love for him. Montesquieu warns that, if monarchs were to judge, “the constitution would be destroyed and the intermediate bodies reduced to nothing; one would see all the formalities of judgment cease; fear would invade all spirits...there would be no more trust, honor, love, security, or monarchy” (6.5.78). When a monarch insists on judging, the power that he effectively secures for himself is to be the object of constant hounding by courtiers seeking to influence his judgment with bribes and favors (6.5.79-80). Moreover, he

⁴⁰ Alexis de Tocqueville notes that the full-throated paternalism of the feudal order was in many ways preferable to the form French monarchy in particular had taken by the 18th century. Formerly, vassals owed great service to their lords—as did the nobles their king—but they at least had the compensation that their superior was obliged to provide for their material needs, education and security. *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday, 1983), 30. As Tocqueville describes the better days of the old regime in France, “The King’s subjects felt towards him both the natural love of children for their father and the awe properly due to God alone. Their compliance with his orders, even the most arbitrary, was a matter far less of compulsion than of affection, so that even when the royal yoke pressed on them most heavily, they felt they still could call their souls their own.” *Ibid.*, 119.

loses what Montesquieu deems the “finest attribute of his sovereignty, which is that of pardoning” (6.5.78).⁴¹

The principle of honor also contributed to the multiplication of formalities in medieval legal proceedings. Individuals must be judged by bodies whom they can consider fit to judge them, which gives way to different levels of courts of one’s peers. Disputes about goods must be adjudicated by particular tribunals and bodies of precedent, distinctions, depending on the nature of the good and the parties to the dispute (6.1.72-73). A judicial system that turns on the point of a honor calls for complex criminal laws adjudicated by manifold tribunals with diverse jurisdictions, and working from particular bodies of precedent. In short, he contends that a common law rather than civil law system agrees better with monarchic government, whereas a simple, uniform law code suits despotic government. Of great importance to the liberty of the citizen, monarchic government also calls for elaborate formalities of “due process” for the accused.

In a monarchy, the administering of a justice⁴² that hands down decisions not only about life and goods, but also about honor, requires scrupulous inquiries. The fastidiousness of the judge grows as more issues are deposited with him and as he pronounces upon greater interests. In the laws of these states, therefore, one must not be astonished to find so many rules, restrictions, and extensions that multiply particular cases and seem to make an art of reasoning itself (6.1.72).

In explaining the constitutional arrangements and judicial practices that accord with monarchy in Part 1, Montesquieu depicts this government as an internally coherent political order, a systematic working out of the principle of inequality in honor. Yet the internal logic of this government is manifest only in retrospect, and after a period of transformation. As

⁴¹ “It would be senseless for him both to make and unmake his own judgments; he would not want to contradict himself. Beyond the confusion into which this would throw all ideas, one would not know if a man had been acquitted or pardoned” (6.5.78).

⁴² Cohler et al. note that *justice* in the French connotes “both the abstract notion and the institution that judges” 2.4.28

becomes clear in Part 2, in its origins, monarchy, much more than either republicanism or despotism, owes its form to accidental causes. In Books 11, 18, 19, 28, 30, and 31, Montesquieu explains how the key features of both the English and French versions of monarchy have their roots in the peculiar institutions and customs of the early medieval Germanic nations.

Before turning to Montesquieu's account of the key features and origins of monarchy in Section 3, however, we need to clarify why his analysis of the more prominent ancient models of political liberty—the republics—also struck Montesquieu as fatally flawed. The Roman republic in particular unquestionably represents a peak for Montesquieu, the best republican system of counter-balanced powers and legal formalities that he had found in his extensive historical studies (6.3-4.76-77, 6.11.84, 6.15.88-89). Indeed, many modern political theorists before and since Montesquieu have been content to stop at Rome in their quest for a model of political liberty. In no other place did legislators seek to establish political liberty more assiduously than in Rome. Yet as enamored as he was of the Roman example, Montesquieu effectively sides with the barbarians against the Romans on the decisive question of the source of European political liberty. He shows how the attempts to promote constitutional balance in Rome and other republics were the very basis of their losing that liberty.

Chapter 4: The characteristically democratic misunderstanding of liberty as independence and people power

The republics that replaced these ancient kingships had many advantages over their predecessors, yet they had their own characteristic problems. The first abuse of liberty native to republics, and characteristic of democracies in particular, stems from their tendency to conflate political liberty with natural liberty, or independence. This undermines liberty of the constitution by encouraging people to perceive all governmental authority and laws as oppressive, and all bodies standing between them and the direct exercise of popular sovereignty as undemocratic. This misconstruction of political liberty often has taken the form of stripping intermediate bodies like the Roman senate and European nobilities of their powers.

The ancient Greek and Roman democracies serve as prime examples of this particular misconstruction of political liberty. In Books 8 and 11, Montesquieu discusses how many Greek cities and the Roman republic succumbed to the illusion of political liberty as the “power of the people” (11.16.176).⁴³ While Montesquieu praises many of the initial changes that augmented the plebeians’ power and diminished that of patricians,⁴⁴ he traces the Roman republic’s fatal institutional mistake to a “frenzy of liberty” among the plebeians (11.6.176).

Notably, the locus of friction between the factions in the Roman republic was the dispensation of justice. The Romans’ constitutional liberty was disrupted dramatically first

⁴³ Montesquieu’s comprehensive study of what contributed to Rome’s fall—embracing external difficulties as well as internal—is in his *Considerations*, which I will reference occasionally but not take into account in a comprehensive manner.

⁴⁴ After the expulsion of the Tarquin kings in ancient Rome, it was important, and in some sense, inevitable, that the plebeians augment their powers at the expense of the patricians; the patrician families, who had elected the king, became “superfluous” to the constitution once the latter was gone (11.13-14.172-174). “The situation required that Rome be a democracy, but nevertheless it was not one. The power of the principal men had yet to be tempered, and the laws had yet to be inclined towards democracy” (11.13.173).

by the establishment of the body of the *decemvirs* to fix judgments. The plebeians and patricians both agreed to cede their powers to the *decemvirs* in order to avoid what seemed even worse—to be subject to judgment by their political rivals. What they created instead, however, was a constitution where, “Ten men alone in the republic had all the legislative power, all the executive power, all the power of judgment” (11.15.175). “Astonished by the power it had given away,” the Romans soon were moved to tear down the tyrannical institution to which they had consented in their mutual spite, but the problem that had given rise to the *decemvirs* in the first place—the mutual aversion to being judged by one’s political enemies—remained.

The Law of the Twelve Tables established an “admirable conciliation” between the senate and the plebeians on the all-important question of who could judge whom for what crimes. Each had a part in judging, varying depending upon the nature of the crime and of the potential penalty, and both had to participate in the decision to put a citizen to death for crime (11.18.179-181). Their powers were well balanced, Montesquieu explains.

In Rome, as the people had the greater part of the legislative power, part of the executive power, and part of the power of judging, they were a great power that had to be counter-balanced by another. The senate certainly had part of the executive power; it had some branch of the legislative power, but this was not enough to counter-balance the people. It had to have part of the power of judging, and it had a part when judges were chosen from among the senators.

Yet a minor judicial change irreparably upset what was only a superficial equilibrium.

Not content to equalize the legislative powers of the patricians with their own, the plebeians insisted on lowering them even further, such that the senate was in some cases subject to the people’s legislative and judicial power without participating in it at all. The Gracchi established that the judges for private crimes would be drawn not from the senate, but from the body of the knights. The shift represented

such a considerable change that the tribune boasted of having by a single rogation cut the sinews of the senatorial order... When the Gracchi deprived the senators of the power of judging, the senate could no longer stand up to the people. Therefore, they ran counter to the liberty of the constitution in order to favor the liberty of the citizen, but the former was lost along with the latter” (11.18.182).

The plebeians were so jealous of their political rights, and so keen on retaliating against the patricians for the abuses suffered at their hands, that they insisted on eliminating all vestiges of the patricians’ powers (11.14.173). In sticking it to the patricians, they may have won a partisan victory, but Montesquieu explains that they inadvertently made themselves vulnerable to domination from another source, for the senate was an intermediate body that, perhaps counter-intuitively, served as a bulwark of constitutional liberty (11.18.182-183). The knights previously formed a “middle order uniting the people and the senate,” but giving them judicial powers allowed them to dominate both. “When judgments were transferred to the tax-collectors, virtue, police, laws, magistracy, and magistrates were no longer.” A particularly dubious class in Montesquieu’s assessment, the knights already served as the tax-collectors when they were given judicial powers (11.18.183).

Montesquieu’s critique of the “frenzy of liberty” highlights the often-counterintuitive character of constitutional balancing: institutions or policies that we experience as offenses to our liberty may also represent important protections to our liberty in another sense. The idea that Roman liberty was to be found in the “power of the people,” in the plebeians’ gaining power at the expense of their political rivals, undermined liberty of the constitution. In recommending the benefits to constitutional liberty of an intermediate body like the nobility, Montesquieu also points to a disconnect between the practical political effects of the nobility and its own internal logic or self-conception. Throughout this discussion of the Romans’ “frenzy of liberty,” as well as the English propensity to legislative aggrandizement,

Montesquieu speaks on behalf of aristocratic privilege not in the name of the justness of their principle of rule (in fact he makes clear that it is not) but for the safeguard against despotism that privileged bodies often have provided.⁴⁵ Only these types of bodies have the clout to effectively counter-balance other privileged or otherwise powerful bodies, and especially to counter-balance those holding the highest office or offices.⁴⁶

Similarly, in his discussions of modern English politics, Montesquieu suggests that those who were intent on weakening the nobility, the “middle order” would have done well to recognize that the nobles also served as a bulwark against threats from other directions.⁴⁷ “In order to favor liberty, the English have removed all the intermediate powers that formed their monarchy. They are quite right to preserve that liberty; if they were to lose it, they would be one of the most enslaved peoples on earth” (2.4.19). This is especially the case given that the English have shown themselves to possess little or no political virtue (3.3.22). Montesquieu mocks Cromwell’s attempt to found a Puritan republic on the acquisitive, factious, sectarian English nation of the 17th century. Lacking the republican virtue needed

⁴⁵ The privileges of an hereditary nobility are “odious in themselves” (11.6.161). Similarly, while Montesquieu is no more a fan of entrenched clerical privilege than other modern political philosophers, he emphasizes that they play an important role in tempering monarchies veering towards despotism (2.4.18-19, 5.14.61).

⁴⁶ Subsequent students of Montesquieu, such as Tocqueville and the American founders, who have been more inclined to democratic government—or at least resigned to its inevitability since the 19th century—have explored ways that democratized intermediate powers continue to make an important contribution to upholding liberty in republican governments. Possible bodies include lawyers, media professionals, commercial bodies, political parties, and other associations whose importance Tocqueville identified in *Democracy in America*. These are bodies that, relative to an hereditary nobility at least, are open to talent. Yet their concerns about perceived threats to their rights or privileges carry more weight than those of average citizens. On Tocqueville’s assessment of intermediate bodies in their democratic form in the U.S., William George, “Montesquieu and de Tocqueville and Corporative Individualism,” *The American Political Science Review* 16, no. 1 (1922): 10-21.

⁴⁷ Rahe notes both the explicit and implied parallels between Rome and England on the risks of a “frenzy of liberty.” *Montesquieu’s Logic of Liberty*, 132-137. In addition to this point of similarity, Rome and England apparently also share a propensity to suicide—England because of the climate (and, one is tempted to add, the food), and Rome because of their education, codes of honor, and the more brutal right of nations practiced in ancient times (14.12-13.241-242 and CC, XII.117).

to sustain a polity without monarchic leadership, they soon found their experiment in a commonwealth untenable (3.3.22).

The character of the citizenry and their particular laws, then, must be considered together in order to assess whether or not the country is free; one must consider the “spirit of the laws,” a principle of Montesquieu’s political science that will become even clearer in the next section on the criminal laws.⁴⁸ The less reliable the citizens’ virtue, the more important it becomes to have a well-structured constitution. That is, the less they are driven by a single-minded devotion to the common good, the more the laws need to provide for the correction of their own abuses. The liberty of the English, he suggests, resides more in the architecture of their government and procedural formalities in their justice system than in the establishment of the House of Commons in and of itself.

As with Montesquieu’s critique of ancient kingships, the case of the Roman (and English) “frenzy of liberty” points to the importance to constitutional balance of intermediate bodies, independent of both the highest offices and the people. The Roman Senate, however, was an intermediate body born of the transition from a kingship to a republic. Whereas the feudal nobility all but defines monarchy, the Roman senate was a vestige of the old constitution that would always sit uncomfortably in the new constitution—until it was eventually razed. There was a “noble rivalry” between the patricians and the plebeians, but

⁴⁸ A caveat to Montesquieu’s critique of the judicial reform under the Gracchi provides another example of this principle. As adamant as he is about the disastrous implications of this change, Montesquieu clarifies in Book 8 that the error of a poorly-placed judiciary was felt only when the Romans reached a certain level of corruption. Even the senate’s judicial powers did not become hateful until then: “So long as Rome preserved its principles, judgments could be in the hands of the senators without suffering abuse; but when it had been corrupted, regardless of the body to which judgments were transferred, whether to senators, knights, or public treasurers, or to two of these bodies, to all three together, or to any other body at all, the result was always bad” (8.12.121). Taken by itself, neither the fateful judicial shift under the Gracchi or the decline of republican virtue across the spectrum determined the abuse of liberty, but rather the changing dynamic between the Romans’ institutions and the character of the citizenry.

this friction was salutary for political liberty only as long as it endured as a viable contest (11.13.173).

The state of liberty of the citizen in the Roman republic was even more precarious than that of liberty of the constitution. He notes, however, that this judicial change under the Gracchi was meant to promote liberty of the citizen (11.6.182). To understand why the plebeians may have thought they were promoting liberty of the citizen, and why they succeeded only in undermining it along with liberty of the constitution, we need to examine the way that these two aspects of liberty overlap in the administration of criminal justice.

Chapter 5: The historical abuses of criminal justice native to republics

To shed light on the importance of criminal justice practices and the abuses characteristic of republics, Montesquieu elaborates two different aspects of political liberty: that in relation to the constitution, and that in relation to the citizen (11.1.154). Liberty of the constitution involves the distribution and regulation of powers to which Montesquieu refers in the passage cited from Book 5, while liberty of the citizen follows primarily from the laws that individuals are most likely to confront in their daily lives—in particular, criminal and tax laws.⁴⁹

It is helpful to consider liberty of the constitution and of the citizen as two different points of view from which to evaluate the political liberty in a country. Liberty of the constitution is gauged from a bird's eye view, an analysis of the structure as a whole, and in its context. From this perspective we can see that the potential threats to rule of law come from many directions. By contrast, liberty of the citizen “consists in security or in one's opinion of one's security” (12.1.187). Liberty in this sense takes its bearings from individuals' everyday experience of their government. Threats, or perceived threats, to a citizen's security primarily come from the prospects of being subject to arbitrary investigation, prosecution, and punishment by judges or the police, and/or large-scale confiscation of personal property. This perspective provides a crucial source of knowledge about the actual effects of laws, notwithstanding their intentions. The perspective of liberty

⁴⁹ In order to limit the already broad scope of my dissertation, I will pass over Book 13 on the tax laws. My neglect of this book should not be taken as a statement of its relative unimportance to *The Spirit of the Laws*. A comprehensive account of Montesquieu's understanding of the accidental causes of political liberty would have to take Book 13 into account as well. In it, Montesquieu shows that in tax policy, at least as much as any other policy type, legislators often undermine their own ends. In states characterized by liberty, there is a particular tendency for legislators to create perverse incentives with their tax policies (13.15.223). The accidental causes of the development of liberal political economy will figure prominently in Section 3 of this dissertation.

of the constitution similarly corrects for the limitations of the “citizen’s eye” view, which is, to put it simply, our natural tendency to be reactionary in evaluating our government. This tendency to focus single-mindedly on the threat to political liberty that strikes us most immediately in turn invites threats from different directions. Political liberty for Montesquieu is not simply synonymous with a sense of security, then. Montesquieu is keenly attuned to the limitations entailed in what he calls the “the principle faculty of the soul [which] is to compare” (EC, 48).⁵⁰

The placement of judicial powers is of central importance from the perspective of both liberty of the constitution and liberty of the citizen. The two perspectives on liberty, however, establish different principles for guiding the placement of judicial powers. A balanced constitution requires judicial independence—that is, judges who are independent of both the highest offices and the popular assembly. Liberty of the citizen, on the other hand, says that both parties should consent to those who will judge them, or at least not strongly suspect that they wish to do them harm.

A crucial threat to the liberty of the citizen is the prospect of being judged by a person or body whom one perceives is “inclined to do him violence” (11.6.159). The independence of the judges, then, is measured subjectively. With the English jury system in mind, Montesquieu calls for judges to be drawn randomly from the population at large to form temporary tribunals. In this way, they at least will lack the time to form interests or a reputation as a body. What’s more, Montesquieu urges that, “in important accusations, the criminal in cooperation with the law must choose the judges, or at least he must be able to

⁵⁰ In Montesquieu’s praise of Saint Louis’ jurisprudential reforms, which I discuss in Chapter 12, he suggests how this faculty of comparison also presents opportunities for advancing political liberty; if people have the opportunity to experience a custom or practice with dramatic advantages over their existing custom or practice, they are quite capable of choosing the one more in conformity with political liberty.

challenge so many of them that those who remain are considered to be of his choice” (11.6.158; see also 11.6.163, 11.18.179, 12.2.188). By accommodating the demands of both liberty of the constitution and liberty of the citizen, Montesquieu shows how to tame “the most dangerous branch” and make it practically invisible. “In this fashion the power of judging, so terrible among men, being attached neither to a certain state nor to a certain profession, becomes, so to speak, invisible and null. Judges are not continually in view; one fears the magistracy, not the magistrates” (11.6.158).⁵¹

Taking into account both of these perspectives on the placement of judging helps us understand why, in the case of the Roman plebeians’ “frenzy of liberty” (discussed in Chapter 1), Montesquieu explains that the judicial changes were guided by a concern, if a confused one, to promote liberty of the citizen—as well as why they succeeded only in undermining it. “They ran counter to the liberty of the constitution in order to favor the liberty of the citizen, but the latter was lost along with the former” (11.18.182). The apparent goal of this change vis-à-vis liberty was that the people would no longer be judged by a body (the senate) that they considered to be biased against them. After a long history of factional strife, this perception may well have been accurate. Still, whether or not the judge is in fact neutral with regard to one’s case is somewhat beside the point; the sticking point is the perception of his fairness by the accused. Thus, Montesquieu praises the requirement in the

⁵¹ As a number of commentators have noted, Montesquieu does not discuss the possibility of judicial review, which may seem to open an additional path by which judicial power could be fearsome. However, in his account of the interpretive methods proper to republican government as opposed to monarchy, he explains why broad judicial discretion is especially problematic in the republican systems (6.3-4.76-77). Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003), 11-104. Gary McDowell, *The Language of Law and the Foundations of American Constitutionalism* (Cambridge, UK: Cambridge University Press, 2010), 221. David Carrithers, “Introduction: An Appreciation of *The Spirit of the Laws*,” in *Montesquieu’s Science of Politics*, 25.

Law of the Twelve Tables for both parties to consent to the selection of the judge for their dispute (11.18.179).

Yet just as the rich or noble are likely to judge the poor or common based on their (poor) opinion of their character, Montesquieu contends, “important men are always subject to envy” (11.6.163). Average persons therefore may evaluate their alleged offenses through the lens of this resentment. Thus, in a state with a nobility, such as England, Montesquieu argues that nobles should be judged by nobles for the same reasons that commoners should be judged by commoners—in order to be judged by their peers (11.6.158-159). In fact, Montesquieu is particularly vexed by the prospect of ordinary persons judging the eminent: “if they were judged by the people, they could be endangered and would not enjoy the privilege of the last citizen of a free state, of being judged by his peers” (11.6.163). Montesquieu’s argument suggests that this problem is not exclusive to aristocratic societies, because “there are *always* some people who are distinguished by birth, wealth, or honors” (11.6.160, emphasis added).

While it may be tempting to write off this suggestion as mere aristocratic prejudice, it is nonetheless consistent with his general concern to thwart arbitrary considerations from intruding on criminal judgments, and helps shed light on this problem.⁵² Montesquieu’s overarching concern with regard to liberty of the citizen in criminal judgments is that criminal accusations and convictions too often depend not on the observed conduct of the accused, “but rather on the idea one has of his character”—what he or people of his faction,

⁵² Moreover, as we will see in Chapter 3, the insistence of medieval nobles’ that they not be judged by their social inferiors gave rise to the institution of “trial by a jury of one’s peers,” which today we know as one of the most democratic features of American government. The extreme inequality of the feudal monarchic order, with its fastidious attention to individual honor, was conducive to the multiplication of judicial formalities that have proven very useful to liberty in republican government as well (6.2.75).

class, race, or religion are like (12.5.192). This applies as well to those resented for their power or status (12.5.192). From the standpoint of judging violations of the criminal laws, even justified resentment of “elites” is an arbitrary consideration. Legally empowering popular resentment of the rich and influential is incompatible with rule of law, just as the spirit of extreme inequality is. The accused may well be a scoundrel, but this does not yet determine his guilt for the criminal act in question.

This is a judicial principle that of course is much easier to accept in theory than to apply in practice, because it requires us to bracket considerations of natural and/or divine right from those of civil right. The difficulty of extricating opinions about others’ character from our legal judgment of their behavior is part of what makes it so difficult to subject administration of criminal justice to the rule of law.

This difficulty may explain why Montesquieu suggests that sound criminal laws and procedures are even more critical to liberty than the balancing of formidable powers against one another, the constitutional principle for which he is better known. Even when discussing liberty of the constitution in Book 11, Montesquieu emphasizes that criminal justice practices make more of a difference in citizens’ personal experience of liberty than any other political institutions (11.6.158-159, 163-164, 11.11.169, 11.16-18.176-183). He asserts its importance in unusually bold terms in Book 6: how to administer criminal justice is “the one thing in the world that is most important for men to know” (6.2.74). In Book 12, he reaffirms the centrality to liberty of criminal justice:

The knowledge already acquired in some countries and which *will* be acquired in others, concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything in the world. Liberty can be founded only on the practice of this knowledge and in a state that had the best possible laws in regard to it,

a man against whom proceedings had been brought and who was to be hung the next day would be freer than is a pasha in Turkey (12.2.188, emphasis added).⁵³

The rules of criminal judgments involve not only the placement of judicial powers, but also the schema for classifying offenses, the procedures for initiating and investigating criminal suits, and the standards for determining guilt and punishment. The “knowledge” to which Montesquieu refers is of the particular purpose of criminal justice, as opposed to justice in a natural, divine, or moral sense, as well as legal methods for realizing that goal. The upshot of Montesquieu’s analysis of different criminal practices is to direct his reader to preservation of rule of law as the immediate goal of criminal justice. The justice system must interpret and enforce the criminal code so as to minimize disruption to the ordinary operation of the laws posed not only by violations of the law, but also by prosecution and punishment of those violations. He emphasizes the dangers to political liberty posed by false accusations of crimes and arbitrary prosecution and punishment. Accordingly, a proximate goal of criminal justice as Montesquieu understands it is to safeguard innocence.

In addition to procedures for classifying and identifying crimes and trying accused criminals, Montesquieu is greatly concerned to apply his science of political liberty to the penal code, a “final frontier” of sorts for rule of law: “It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness

⁵³ This is a slight but significant modification of Cohler et al’s translation, per Christopher Kelly. The original French reads: “Les connaissances qu l’on a acquises dans quelques pays, et que l’on acquerra dans d’autres sur les règles les plus sûres que l’on puisse teni dans les jugements criminals, intéressent le genre humain plus qu’aucune chose qu’il y ait au monde.” Cohler et al translate the first part, “The knowledge already acquired in some countries and which is *yet to be* acquired in others” (188, emphasis added).

ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does not do violence to man" (12.4.189; see also 6.16.91).⁵⁴

It is through the penal code established by a state that the inherent distinctions among the different orders of law introduced in Book 1—among the natural, political, and divine, and between mores and laws—should manifest themselves most clearly. Montesquieu seeks to drive a wedge between the *administration* of political and civil laws, on the one hand, and religious laws and moral standards on the other. While interrelated, complementary, and in some cases intersecting, these distinct orders of law provide for their own particular means of reinforcement outside the criminal code, through the use, for example, of social rewards and penalties (12.4.189-190).

Montesquieu emphasizes that punishments which may well be just from a divine or natural point of view are not necessarily politically prudent (26.5.604). As political policy and legal precedent, the "law of retaliation," the penal code of the natural order, invites abuses. Applying to civil tribunals the logic of penance, which is based on a superhuman capacity to see into man's heart, undermines justice in both a civil and divine sense. "Human justice, which sees only acts, has only one pact with man, that of innocence; divine justice, which sees thoughts, has two pacts, that of innocence and that of repentance" (26.12.505). Even many violations of political laws, Montesquieu counsels, are more properly treated as "breaches of police" (*lesión de police*), violation of public order, than crimes *per se* (12.4.191, 12.13.200, 20.14.357, 26.24.517). That is, they are matters that a magistrate

⁵⁴ The most in-depth account Montesquieu's theory of criminal justice is Rebecca Kingston's *Montesquieu and the Parlement of Bourdeaux*. She argues that Montesquieu's theory of criminal justice must be understood in light of his work as a magistrate, where he was involved with criminal justice in particular. See especially 97-130 and 219-272. See also David Carrithers, "Montesquieu and the Liberal Philosophy of Jurisprudence," in *Montesquieu's Science of Politics*, 291-334.

“corrects” rather than punishes. In all but the most grave crimes against security (high treason, murder, and even attempted murder for Montesquieu), he counsels against the use of corporal punishments (*supplices*), as opposed to penalties (*peines*).⁵⁵

To clarify the distinct logic of human, divine, and natural laws, and of laws and mores, Montesquieu proposes a division of crimes into four classes. Each class consists of violations of a particular order of law, and is distinguished according to what specifically it offends. The first class covers those offenses that “run counter to religion; those of the second, to mores; those of the third, to tranquility; those of the fourth, to the security of the citizens. The penalties inflicted should derive from the nature of each of these kinds” (12.4.189). Only one class actually calls for enforcement through the criminal laws—that is, with imprisonment, death, or large-scale confiscation of property. Offenses against religion or mores that also attack tranquility or security are shifted to these latter categories, while the first two are reserved for those that offend religion or mores, but not tranquility or security. By crimes against religion, then, Montesquieu clarifies that he means “simple sacrilege.”

As important as these criminal rules may be, and as much as he insists that they are drawn “from the nature of things,” Montesquieu emphasizes that “the surest rules one can observe in criminal judgments” were not learned in one moment. These penal reforms are exactly the kind of knowledge that has “not been perfected all at once” (12.2.188). While he

⁵⁵ The *Encyclopédie* defines *supplice* as a “*peine corporelle*, more or less painful, more or less atrocious.” As Montesquieu opposed putting criminals “to the question,” he seems to have in mind the death penalty by “ordinary” means. “Supplice,” *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers*, etc., ed. Denis Diderot and Jean le Rond D'Alembert (University of Chicago: ARTFL Encyclopédie Project, Spring 2011), ed. Robert Morrissey, 15:637. <http://encyclopedia.uchicago.edu/> We should note that the Encyclopedist Jaucourt, the author of the entry on *supplice*, plainly took Montesquieu’s discussion of criminal justice as his primary source in defining related terms—sometimes lifting passages verbatim from *L’Esprit de Lois*. This is a circular definition to some extent, then. Still, Jaucourt’s definition of *supplice* is at least partly a paraphrase, and sheds light on what Montesquieu’s contemporaries understood by the terms he used.

forcefully criticizes the criminal practices that collapse religious and/or moral government into civil government, Montesquieu nonetheless suggests that it is understandable that legislators have often thought to administer the laws of religion, as well as the law-like usages of mores and manners, through the criminal laws. The idea that legal punishments should satisfy the demands of moral and/or cosmic justice has a clear appeal. Indeed, this is exactly why Montesquieu emphasizes the importance of placing formal obstacles in the way of human efforts to avenge the divinity or to enact the natural law of retaliation.

After all, if an individual does something to upset rules of behavior and the values on which a society is built, doesn't it make sense to confront the offense as expeditiously as possible? Even in the United States, reared on Montesquieuian principles of criminal justice, it nonetheless remains tempting, on witnessing morally reprehensible behavior, to reflexively declare, "there ought to be a law against that!" Moreover, if a rule of conduct really is important to maintaining a community, then shouldn't a society affirm its importance by enshrining its prohibition in the political laws, thereby entrusting its enforcement to those with the most formidable power? And finally, if violations of a particular law multiply, is it not plausible that increasing the penalty for such violations might curb them?

In addition to the natural appeal of enforcing moral standards and religious laws by the most direct means possible, there are two particular challenges to understanding the proper rules of criminal justice. For one, "in the very places one most sought liberty, one did not always find it" (12.2.188). The places where one would expect to find it are republics, which profess liberty as a fundamental principle of their constitution. Those states commonly called free are those where "every man [is] considered to have a free soul," and therefore popular sovereignty deemed the appropriate basis of government (11.6.159,

11.6.162). These states enshrine liberty in the laws with an especial directness. In tension with republics' self-presentation, however, Montesquieu singles out "democracy and aristocracy" as those which "are not free states by their nature" (11.4.155). Some of them in fact may have liberty of the citizen as well as the liberty of the constitution, but this is not a necessary consequence of popular sovereignty.

Treating offenses against religion and mores as public crimes has a particular logic in republics. When the citizens rule themselves, the integrity of their personal and domestic morals bear a greater significance on the integrity of the constitution (4.6.38, 5.7.49-51, 7.1-2.96-98, 7.8-10.102-104, 8.1-11.96-106, 23.7.431; CC, VIII.85-86). "In republics private crimes are more public, that is, they run counter to the constitution of the state more than against individuals" (3.5.25).⁵⁶ When clearly and carefully defined, laws governing public continence, consumption, and vice may have a place in small republics, which depend upon cultivating a virtuous citizenry and are more likely to actually have one (4.7.38, 4.6.38, 8.1-11.96-106, 19.16.317-318, 19.21.321-322, 23.7.431). Republican Rome, for example, promoted mores through the institution of the censorate, premised on the recognition that the laws are threatened not only by outright criminal actions, but also by moral corruption—although less directly by the latter.⁵⁷ As I will discuss below, however, in almost all cases, Montesquieu advocates the use of social incentives and disincentives to regulate behavior

⁵⁶ Montesquieu distinguishes public from private crimes in Book 3: "Though all crimes are by nature public, truly public crimes are nevertheless distinguished from private crimes, so called because they offend an individual more than the whole society" (3.5.25).

⁵⁷ "There must be censors in a republic where the principle of government is virtue. It is not only crimes that destroy virtue, but also negligence, mistakes, a certain slackness in the love of the homeland, dangerous examples, the seeds of corruption, that which does not run counter to the laws but eludes them, that which does not destroy them but weakens them: all these should be corrected by censors" (5.19.71). Even the censorate did not administer criminal penalties, but rather official governmental stamps of dishonor, the brands of *ignominia* and *infamia*.

that is of importance to the political order in the long-run, but does not directly impinge on its security.

It is particularly liberty of the citizen that Montesquieu sees endangered in republics. When the people, or some section of them, rule themselves, the citizens are implicitly both judge and accuser, judger and judged.⁵⁸ Republics typically have exacerbated this underlying vulnerability by encouraging public criminal accusations, and allowing the people to judge public crimes with few restrictions on inquiry into, and prosecution and punishment of, this class of crimes. Given these institutional arrangements, it has been all too easy for their zeal for defending the public good to run amok. Montesquieu criticizes the tendency in classical-style republics to collapse considerations of civil right into those of political right; individuals and factions consistently used the instruments of criminal justice to punish their political rivals as enemies of the republic as a whole. These republics did violence to the legally innocent in the name of defending the common good and, of equal concern for Montesquieu, punished the guilty with excessive harshness.

A second reason that good criminal practices have proved elusive is that legislators under all types of government often attempt to enforce religious laws and morals standards directly through the criminal code. One could say that they collapse rule of law in a religious or moral sense with that of rule of law in the civil sense. Laws enforcing religion and morality through the criminal code often have popular support even under non-republican governments. Montesquieu admits that conflating religious, moral, and political government into one has a compelling logic. As he himself affirms the importance of religion and good

⁵⁸ The conception of democratic citizens as both “judger and judged,” comes from Marvin Meyer, *The Jacksonian Persuasion: Politics and Belief* (Stanford, CA: Stanford University Press, 1957), 121.

mores for any people, it is not surprising that many have thought to promote these goods in as forceful a manner as possible. Addressing violations of mores and religion through the criminal laws makes particular sense where the religious and political communities overlap, as they did, for example, in the ancient republics, in the early American colonies, and in ancient Hebrew and modern Islamic countries. As Montesquieu observes in Book 4, the distinction between the political and religious community that is more familiar in Christian countries is something of an historical anomaly—though even in Christian countries, of course, legislators have thought to enforce religious laws through the criminal code (4.4.35).⁵⁹

Whatever their intentions, however, these efforts to encourage piety and morality through the threat of criminal punishment—imprisonment, large scale seizure of property, corporal punishment, and most significantly, death—almost always lead to despotism. That is, they invite arbitrary violence against individuals. Furthermore, Montesquieu shows how they undermine the integrity of religion and morality themselves. In short, administering religion, mores, and civil government as one most often has lead to undermining rule of law in every sense.

Montesquieu's critique of historical abuses of political liberty in Book 11 begins with the Venetian republic. Venice and its peculiar institutions provide a helpful starting point for a number of reasons. First, they exemplify how placement of judicial powers with respect to liberty of the constitution is linked inextricably with that of the citizen's opinion of his security (11.6.157-159, 11.6.163-164, 11.11.169, 11.12.171, 11.18.179-183). Second, the

⁵⁹ This disjunction between the religious and political "homeland" characteristic of the Christian world bears immense significance for Montesquieu's argument about the prospects for republican virtue in the modern context—and an even greater significance for Rousseau, who expanded extensively on this point in Book 1 of *Emile*, after Montesquieu gave it only a short paragraph in *The Spirit of the Laws*.

discussion of Venice highlights the particular threats to liberty of the citizen that are characteristic of republics, and particularly of aristocratic republics.⁶⁰ Finally, this example shows us that Montesquieu's critique of the Venetian state inquisitors is not a condemnation of classical virtue as a principle of government or of republican political forms *per se*. We can see through this example what Montesquieu means by calling his subject the "spirit of the laws," and not the laws in and of themselves: the object of his critique is the corrupt dynamic between unrestrained inquisitorial institutions and the actual character of the citizenry that is likely to exist in most states. The error with institutions giving free rein to virtue (religious and moral as well as political) is that they assume a level of integrity and prudence among the citizens that rarely exists in actuality. They therefore serve to empower personal and partisan grievances at least as much virtue. I will show that this is even *more* the case when such institutions are adopted by non-republican governments.

An aristocracy of the first families of the city, the medieval Venetian republic, serves as an example of the *worst* structural condition for liberty: when the legislative, executive, and judicial powers are in the same hands. In this case, by "the same hands," Montesquieu means those from the same class of persons rather than those of a single individual or body.⁶¹ Regardless of how many offices across which the various powers are distributed, if the "same body of principal men, either of nobles, or of the people, exercised these three powers," then "all would be lost" (11.6.157). Venice empowered rival magistrates and tribunals, but

⁶⁰ David Carrithers, "Not So Virtuous Republics: Montesquieu, Venice, and the Theory of Aristocratic Republicanism," *Journal of the History of Ideas* 62, no. 2 (1991), 245-268.

⁶¹ "Classes" might differ not only on an economic basis, but also in profession, religion, background. Consider contemporary attempts to balance "confessional groups" in Lebanon, Iraq, and Nigeria.

peopled them with “magistrates taken from the same body; this makes them nearly a single power” (11.6.158).

In neglecting to balance classes of persons, Montesquieu argues that the “Italian republics” secured liberty *less* than the European monarchies. He does allow that “the pure hereditary aristocracy of the Italian republics is not precisely like the despotism of Asia,” on account of their numbers inevitably diluting the force of their political power (11.6.158). Yet Venice merits comparison with the “atrocious despotism” of the Turkish sultanate, for “all power is one; and, although there is none of the external pomp that reveals a despotic prince, it is felt at every moment” (11.6.158).⁶²

What does it matter that all magistracies were drawn from the nobles? How can oppression be so keenly felt while remaining so invisible? The power of judging public crimes, “so terrible among men,” is at the heart of the Venetian republic’s despotic aspect as Montesquieu depicts it (11.6.158). The real seat of terror in Venice was the “lion’s maw,” an ominously adorned slot, where citizens were encouraged to submit anonymous accusations of treachery to the state inquisitors (11.6.157, 159).⁶³ The merely superficial distribution of powers in Venice required the republic to check potential abuses through the threat of criminal accusation. Montesquieu dubs the Venetian state inquisitors and its lion’s maw a

⁶² In the *Considerations*, he mocks Venice’s pretensions to good governance, comparing its (non) distribution of powers to that of one of the lowest points in the Roman republic: “The republics of Italy, which boast of the perpetuity of their government, ought only to boast of the perpetuity of their abuses. . . . They have no more liberty than Rome had in the time of the decemvirs” (CC, VIII.87).

⁶³ *Le tronc* in the French and *bocca di leone* in the original Italian, a lion’s maw might serve a variety of purposes. They were installed throughout Venice and other medieval Italian republics. One still intact in the Doge’s Palace in Venice invited “Secret denunciations against anyone who will conceal favors and services or will collude to hide the true revenue from them” (Trans. Berthold Werner). The state inquisitors were a subset of magistrates from the Council of Ten, charged with investigating allegations of conspiracy against the government. Others on the Council would address allegations about tax evasion, bribery, and even public health and sanitation concerns, as one *bocca*--installed in an era of plague outbreaks--and still intact in the church of Santa Maria della Visitazione indicates.

“tyrannical magistracy,” along with the Spartan ephorate (11.6.158). “In Venice, a stone mouth is open for every informer; you might say it is the mouth of tyranny” (5.8.54). He criticizes that the state inquisitors on the receiving end of this “maw” were “subject to no formalities” (5.9.54). The lion’s maw simultaneously undermined both liberty of the constitution and liberty of the citizen by giving enormous, unchecked power to a small handful of men, and terrorizing citizens with the prospect of arbitrary prosecution.

The special terror associated with being sought out by a “state inquisitor” or coming before a judge therefore is related to the fact that it is only in the realm of judging that the government acts on individuals as individuals. The power of judging in question here overlaps to some extent with that of executing the laws. This power is that of execution “over things depending upon civil right” (11.6.156). The state inquisitors, like modern-day police officers, were quasi-judicial, quasi-executive magistrates, who investigated potential crimes, detained suspects, and began the process of legal prosecution against them on behalf of the state as a whole.

Liberty of the citizen is “that tranquility of spirit which comes from the opinion each one has of his security...In order for him to have this liberty the government must be such that one citizen cannot fear another citizen” (11.6.157). In the most obvious sense, addressing the fear of one’s fellows is something every common despot is capable of doing. As Locke notes, he has a vested interest in “[keeping] those Animals from hurting or destroying [those] who labor and drudge only for his Pleasure and Advantage” (II.VII.93). Indeed, the warning—plausible if exaggerated—that only his fearsome authority can keep religious, ethnic, and/or sectarian hostilities at bay has helped prolong, and continues to prolong, the rule of many a despot and his dynasty.

Yet it is not enough to prevent open acts of aggression to establish political liberty as Montesquieu understands it. Under a government with clear laws and popular accountability, citizens may not live in constant fear of open violence against themselves and their family, but nonetheless dread the prospect of being falsely accused of committing a crime. In fact, from the citizen's point of view, it may be as terrifying in a sense to be *accused* of a crime as to be subject to the crime itself. The security that constitutes liberty of the citizen, he contends, "is never more attacked than by public or private accusations" (12.2.188; see also 12.5.192).

By executing the laws that it has also made, the Italian aristocrats "can plunder the state by using its general wills." In the exercise of judicial power—and particularly in judging crimes against the state—"it can destroy each citizen by using its particular wills" (11.6.157).⁶⁴ The psychological effect of oppressive legislation and execution, however, is less terrible than that of judicial oppression. Whereas the force of legislative and executive powers may be harsh, the citizen at least has the consolation that everyone is subject to their harshness. Without extensive procedural safeguards for the accused, individuals suspected of crimes are effectively in the state of nature vis-à-vis their judges. They do not enjoy rule of law at the very moment when it seems to matter most to their own liberty. Reflecting on the abuse of laws against high treason in imperial Rome, Montesquieu explains this phenomenon of using the laws themselves as a political weapon. "No tyranny is crueller than the one practiced in the shadow of the laws and under color of justice—when, so to speak, one

⁶⁴ For an account of the difference Montesquieu makes between forces and wills in *The Spirit of the Laws*, and in comparison with other modern philosophers, see Mansfield, *Taming the Prince*, 220. See also 1.3.8.

proceeds to drown the unfortunate on the very plank by which they had saved themselves” (CC, XIV.129-30).

Rather than compassion for the guilty, Montesquieu emphasizes the threat to rule of law posed by systemic problems with false accusation: “When the innocence of the citizens is not secure, neither is liberty” (12.2.188). To be falsely prosecuted for committing a crime is to be subject to sheer force waged under the pretext of right. From the citizen’s perspective, this may be more terrifying and dispiriting than force waged without that pretext. For one, the police that might otherwise be called in for protection are already engaged against him. What’s more, when a citizen is accused of a public crime, the threat to his liberty comes from the direction of his fellows and his government in the same instance. Even if the accused is officially exonerated, the stain on his reputation and that of his family nonetheless remains.

Still, from Book 11 alone, it is not clear why Montesquieu would be so concerned with republican abuses of judging, for monarchies and despotisms surely can abuse judging as well (6.5-6.77-80, 11.6.158, 12.5-16.192-201). “Reflections on this subject crowd upon me,” he relates in his discussion of judicial abuses in monarchies in Book 6. This story of executive capture of the judiciary has played out in countless cases—from the English star-chamber to the administrative courts of Louis XIV, to the contemporary courtrooms of Putin’s Russia and Mubarak-era Egypt. Yet it is no mystery how or why rule of one alone—with or without a fundamental law—might result in the one aggrandizing his or her power in a dubious appeal to state security or religious piety. All that is needed for a strong executive to clear the path to despotism is to manipulate the criminal justice system in order to mark his political rivals as enemies of the state. In a moment of chaos, he can institute an “emergency

law” to serve him indefinitely—as, for example, had been officially in place for decades until just recently in Syria, Egypt, and Algeria.⁶⁵ Still, when autocrats strong-arm the police and courts to do their dirty work, the figleaf of law is more readily recognized as such. The slide towards despotism in a government dominated by one is plainer to the eye, even if it is no less difficult to counteract for being easier to identify.

In a country or institution ostensibly based on republican principles, however, the abuse of power in general, and of judging perhaps especially, takes subtler forms. It is invisible because it comes in the form of popularly supported legal proceedings, not coercive efforts to make magistrates bend to the will of the powers that be. Criminal accusations and prosecutions can serve as an effective means for concealing personal resentments, partisan grievances, and even the most hateful prejudice in the trappings of righteousness. They provide the last refuge for private vengeance. They are all the more effective because they allow the accusers and the judges to conceal their hatred even from themselves. The sincere belief that we are defending the public good reassures us that we are merely enforcing the laws in a non-arbitrary manner. Confronting characteristically republican judicial abuses thus forces us to question our own best intentions.

To fully understand why judging should have the greatest potential to be terrifying and oppressive in republics—why Montesquieu specifically warns us that virtue needs limits—we have to connect his discussion of judging, criminal laws, and penalties with that of the nature and principle of republics in Part 1. Sustaining republican government requires a single-minded devotion among the citizens to protecting the laws and the homeland. While a monarchic head is expected to be above the laws that he executes, all the magistrates in a

⁶⁵ These laws allow for the executive to arrest and detain anyone for any length of time for basically any reason.

republic, and the body from which they are drawn, are themselves subject to the laws they make, execute, or interpret (2.2.10, 3.5.24). Only they have the power to make sure that none of the magistrates abuse their positions, or that any citizen otherwise subverts the common good. In a republic, “government is entrusted to each citizen” (4.5.36).

The principle of virtue derives from the nature of republican government. Virtue is the great reservoir of strength for upholding a republican constitution. Their profound “love of the laws and the homeland” makes republican citizens willing to make great sacrifices to defend their country and system of government (4.5.35). “When that virtue was in full force, things were done in those governments that we no longer see and that astonish our small souls” (3.4.35). Virtue made the classical citizen capable of heroism we can “know only by hearsay” (2.5.25; see also CC, IV.45-46).⁶⁶

As the fundamental laws treat fellow citizens as part of a kind of covenant with each other for the sake of the common good, they are expected to be their brothers’ keepers. Republican virtue thus goes hand in hand with a particular fervor among the citizens for policing themselves and their fellows for signs of subversion. “In Rome citizens were permitted to accuse one another. This was established in the spirit of the republic, where each citizen should have boundless zeal for the public good, where it is assumed that each citizen has the rights of the homeland in his hands” (6.8.81).

Yet it is precisely because every citizen in a republic is full of public spirit that they can pose a particular threat to liberty of the citizen (4.5.36). This characteristic of republican governments is the source of both their dangers and their profound strengths. The danger

⁶⁶ The citizens’ passionate attachment to their laws and customs “led [Sparta] to greatness and glory, with such an infallibility in its institutions that nothing was gained by winning battles against it, until its police was taken away” (4.6.37). In reference to the Romans, Montesquieu declares virtue “the most durable empire in the world” (19.25.324).

comes from the conjunction of three facts. First, the fundamental constitution of the government makes every citizen an interested party in accusations against state security and the republic's fundamental moral values (6.5.77-78, 11.6.163). Second, the institutions of the ancient republics, as well as Venice, did not account for the dangers of the people serving as "judge and accuser at the same time" (11.6.164). Instead of establishing formal obstacles in the process of adjudicating criminal accusations and restraints on punishing even the guilty, they inflamed the spirits of vigilance and of vengeance. The third crucial fact that Montesquieu illuminates is that, even in the exemplary republics, the zeal for upholding the common good in practice is almost never unadulterated and perfectly on point. These conditions combine to allow, as he puts it, the political interest to force the civil interest. This error involves conflating the laws of property with those of political punishment and reward (6.5.77).

While Montesquieu explains in Book 1 that he will not distinguish between these two types of law, he sometimes uses "civil" and "political" to denote distinct orders of law or right, as well as distinct forms of both liberty and servitude. Political laws replace a state of "natural independence" with one of liberty, and civil laws "the natural community of goods" with property (26.15.510). For the political and civil law to be governed as one would mean that all property would be treated as political spoil. For Montesquieu as for Locke, property includes one's own person, as well as one's possessions (5.3-9.43-56, 15.2.247, 26.15.510).⁶⁷

Thus, the civil laws in Montesquieu's usage also include criminal laws, as these influence the extent to which a citizen is able to "defend his goods and his life against every other citizen" (26.1.494). Moreover, with respect to the criminal laws, the government acts

⁶⁷ Locke, *Second Treatise on Government*, II.V.

on individuals *as individuals*, not merely as members of the body of the governed.⁶⁸ The powers of the civil laws to unite “individual wills” and of the political laws to unite “individual forces” coincide in the administration of criminal justice, making it especially tempting—and especially dangerous to liberty—to collapse entirely the civil and political orders (1.7.8).⁶⁹

Regarding the interest of the people in accusations of high treason, Montesquieu praises the Florentine practice of having accusations of high treason judged by a small group of elites, rather than by a popular body, as was the practice in Rome. He takes this position in explicit opposition to Machiavelli, who warned that the interests of the few and the powerful

⁶⁸ Civil laws concern “the relation that all citizens have with one another,” and political laws “the relation between those who govern and those who are governed” (1.3.7, 26.1.494).

⁶⁹ A major point Montesquieu emphasizes in distinguishing between civil and political right in Book 26 is that government seizure of private property by eminent domain must be compensated. To seize property for public use without compensating the property owner would also amount to the “political interest forcing the civil interest” (26.15-17.510-513).

corrupt such tribunals.⁷⁰ To Machiavelli, Montesquieu responds, “I would gladly adopt this great man’s maxim; but as in these cases of treason, *political interest forces civil interest so to speak* (for it is always a drawback if the people themselves judge their offenses), the laws must provide, as much as they can, for the security of individuals in order to remedy this drawback” (6.5.77-78, emphasis added).⁷¹ Raising a similar situation in Book 11, Montesquieu emphasizes that a tribunal drawn from the people cannot judge accusations of

⁷⁰ In his *Discourses on Livy*, Machiavelli had described the state inquisitors of Venice in practically the same terms. Not surprisingly, however, he viewed them as great assets to the Venetian government, providing frightening examples of the punishment in store for those who would usurp authority or betray the republic to its enemies. “For fear of being accused citizens do not attempt things against the state; and when attempting them, they are crushed instantly and without respect” (I.7.23). That they effectively deterred these threats had everything to do with their being terrifying. Machiavelli, *Discourses on Livy*, I.7-8.23-28, I.49.101. See also III.1-3.209-215. Some historians of the Venetian republic point out that these state inquisitors and their lion’s maw were subject to more restraints than conventionally thought. For example, accusations made without at least two credible witnesses provided were dismissed. See for example, Reuben Parsons, *Some Lies and Errors of History* (Notre Dame, Indiana: The Ave Maria, 1893). Yet others note that the state inquisitors made little effort to disabuse others of the perception that their powers were unrestrained, which reinforces Machiavelli’s view that reputation for harshness enhances deterrence. Perhaps the maximum benefits to both liberty and deterrence would be derived from an executive policing that observes extensive formalities, but without boasting of this fact, such that people cannot be sure it isn’t in fact unrestrained and ferocious. A second reason Machiavelli promotes public criminal accusations accords more with the spirit of Montesquieu’s teachings about criminal justice than his own. Because different factions and sects will always bear resentments against others, Machiavelli advises that it is better to provide an official, regulated mechanism to serve as “an outlet...by which to vent, in some mode against some citizen, those humors that grow up in cities; and when these humors do not have an outlet by which they may be vented ordinarily, they have recourse to extraordinary modes that bring a whole republic to ruin” (*Discourses*, I.7.24). Referring to the popular trial of Coriolanus in Rome, Machiavelli reasons that the people would have “killed him in a tumult” in the streets if they had not had recourse to a tribunal. From Machiavelli’s perspective, it is even worth sacrificing some innocent citizens in exemplary trials in order to “vent the malignant humors that arise in men” (*Discourses*, I.7.25). “For if a citizen is crushed ordinarily, there follows little or no disorder in the republic, even though he has been done a wrong. For the execution is done without private forces and without foreign forces, which are the ones that ruin a free way of life; but it is done with public forces and orders, which have their particular limits and do not lead beyond to something that may ruin the republic” (*Discourses*, I.7.24).

⁷¹ In his brief discussion of this phenomenon, Mansfield identifies the critical conceptual error of these unrestrained inquisitorial institutions: by not separating “judge from prosecutor...they did not distinguish political right from civil right.” While the civil and political orders of law are in some cases the same, the distance between the two is greatest when it comes to the administration of criminal justice. Mansfield, *Taming the Prince*, 277.

high crimes.⁷² Wherever people rule themselves, they are interested parties in any threats against the state security (11.6.163). It only makes sense for them to err on the side of harshness and minimization of risks. Without discounting Machiavelli's concerns about the "few judging the few," Montesquieu emphasizes that the alternative is also problematic. Even when judging is subject to formalities, which Montesquieu says actually accords more with the nature of republics, all the various magistracies serving as checks are drawn from the same body, and so subject to the same basic interests and passions (6.2-3.74-76).⁷³

Montesquieu does not conclude that this basic structural feature of republics is necessarily fatal to liberty, only that laws and legislators in republics must try to counteract this drawback.⁷⁴ Unfortunately, many republics have exacerbated rather than mitigated the tendency for criminal accusations to run amok by establishing inquisitorial institutions with few formal restraints.⁷⁵

Still, Montesquieu suggests that these laws would not necessarily threaten the liberty of the citizen if virtue worked seamlessly in enforcing criminal justice—if citizens sought to

⁷² Montesquieu cites Machiavelli's *Discourses*, I.7, but his statement that "few are corrupted by few" actually comes at I.49.101, although I.7 also mentions the Venetian magistracy in question. Anne Cohler says that Montesquieu agrees with Machiavelli that the "few are corrupted by the few." *Montesquieu's Comparative Politics*, 107. His statements on this subject both in Book 6 and in Book 11 quite clearly indicate that he is more concerned by the prospects of popular judging of high treasons than aristocratic judging, though the latter still is not ideal from the standpoint of liberty of the citizen.

⁷³ Note, for example, the cooperation of all three branches of the U.S. government, including the Supreme Court of the judicial branch, in the internment of Japanese during World War II.

⁷⁴ He praises a number of Roman policies that did just that: "the Roman legislators did two things: they permitted accused men to exile themselves before the judgment and they wanted the goods of condemned men to be made sacred so that the people could not confiscate them" (6.5.78).

⁷⁵ The Spartan counterpart to the Venetian state inquisitors was the ephorate. These magistracies operated in secret, apparently had low standards of evidence and conviction, and were not held to account for their actions at any point. Like the Spartan ephorate, the Roman censors were noteworthy for the free rein they were given in a state that generally utilized extensive formalities. In Rome, he explains, "the censors would not be examined about the things they have done during their censorship; they must be trusted, never daunted. The Romans were remarkable; all the magistrates except the censors could be required to explain their conduct" (5.8.54).

punish only those who genuinely threatened the fundamental security of the political order. Such purity of intention and clarity of perception, however, cannot be counted upon even in a relatively healthy republic. For political virtue to be perfect, it is not even enough to have a single-minded devotion towards the public good over one's own. The citizens must also share a uniform understanding of what the public good is and what it requires.

This is closer to being possible in a small political community on the order of the classical city-states. A small territory and population makes it possible for citizens to more accurately discern the public good, and provides a clearer view of one's fellows. There, "the public good is better felt, and better known, [and] lies nearer to each citizen; abuses are less extensive there and consequently less protected" (8.16.124).⁷⁶ In small republics, one could "raise a whole people like a family," and "all citizens [could] pay a singular attention to each other" (4.7.38).

Even where a thoroughgoing cultivation of love of the homeland (*patria*) is tenable⁷⁷, Montesquieu notes that republics still have depended upon powerful, punitive deterrents against subverting the common good (6.9.82, 12.1.202). Even virtuous citizens will struggle to disentangle partisan disdain and sympathy from their criminal judgments. Love of the homeland manifests itself precisely in their passionate opinions about who or what is good or bad for it. As discussed above, criminal prosecutions in the ancient republics were constantly corrupted by factional disputes and hatreds.

⁷⁶ See Mansfield, *Taming the Prince*, 131-135, 216 235-236, 242-243.

⁷⁷ In Books 4 and 8, Montesquieu explains that the rigorous, singular education required to sustain republican institutions is only possible under certain conditions—namely, in a relatively small population and territory. In Chapter 4, I address his argument about the environmental conditions required for a thoroughgoing republican education.

The abuse of unrestrained inquisitorial and policing institutions, then, stems from the fact that they assume a level of integrity and prudence among citizens that rarely exists in practice, and which the very need for them to exist would seem to belie. Consequently, institutions that encourage citizens to accuse their fellows of high crimes, and expedite the investigation, prosecution, and punishment of these crimes, invite abuse.⁷⁸ They embolden the most reckless citizens, and exacerbate the inclinations of even decent citizens to pursue partisan grievances and personal resentments in the name of protecting the public good (6.8.81, 7.10-11.105-106, 12.18.203). As Mansfield describes it, “in practice, zeal for the public good leads to the situation Locke describes as the state of nature where each man is an executive, though in this case for the public good, and not in self-defense...Citizens could accuse one another, and sycophants prospered under the encouragement to virtuous men to be zealous for the public good.”⁷⁹

As Montesquieu explains in Book 6, however, the elaboration of formalities in criminal judgments in fact *does* accord with the nature of republics. Both republics and monarchies logically entail the establishment of extensive formal protections for individual citizens’ lives, liberty, and property. They do so on the basis of contrary principles of equality and inequality. While Montesquieu’s account of the need for formalities under monarchy is much longer, he concludes, “One can see that there must be at least as many formalities in republics as in monarchies. In both governments, formalities increase in

⁷⁸ Besides these unchecked inquisitorial institutions, Montesquieu identifies other ways that criminal judgments might expedite the process of converting criminal accusations into punishments, thus risking the punishment of innocent persons. He criticizes laws that encourage public accusations of high treason by punishing a citizen who does not report a conspiracy to commit high treason to which he becomes privy (6.8.82, 12.17.202); laws that permit one who witnesses his fellow committing, or conspiring to commit, high treason to take the law into his own hands (12.17.202); and laws that convict on minimal standards of evidence (12.2-3.188-189).

⁷⁹ Mansfield, *Taming the Prince*, 227.

proportion to the importance given to the honor, fortune, life, and liberty of the citizen” (6.2.75). As each citizen is equal to every other in a republic, it is especially difficult to justify judicial discretion in interpreting and applying the laws, which provides further support for rule of law in republics. For whom is the magistrate to presume to know better than anyone else what is the proper solution to a given dispute?

Thus, “the more the government approaches a republic, the more the manner of judging becomes fixed...In republican government, it is in the nature of the constitution for judges to follow the letter of the law. No law can be interpreted to the detriment of citizen when it is a question of his goods, his honor, or his life” (6.3.76). Republican jurors, as the equals of those whom they judge, should only pronounce on the question of guilt, and then apply the precise text of the law accordingly. Discretion in interpreting the laws is more properly the province of monarchs and monarchic judges (6.3-4.76-77).

Montesquieu suggests that Sparta, the early Roman republic, and Venice deviated from the natural tendency of republics because of their aristocratic elements.⁸⁰ It is not coincidental that all of Montesquieu’s examples of “violent springs” such as the ephorate come from aristocratic republics, for these are an already-corrupt type of republic. Virtue in the most robust sense is the spring of democratic republics, while aristocracies rely on a less demanding version, the spring of moderation. The great inequality in aristocracies makes it improbable for robust virtue to develop (5.8.51-52). As the nobles are the ruling class in an aristocracy, they need to rein in their own private interests and passions for similar reasons that the whole citizenry must check theirs in democratic republics. The nobles must be

⁸⁰ “It was a vice of the Lacedaemonian republic that the ephors judged arbitrarily without laws to guide them. In Rome, the first consuls judges like the ephors; the drawbacks of this were felt, and precise laws were made” (6.3.76).

moderate enough not to take advantage of their privileges to abuse the commoners, and moderate enough to be satisfied with being equals among their fellow nobles. Moderation works in part on the pride they take in their superiority with respect to the commoners. That is, aristocrats' commitment to the laws is always tied up to some extent with their personal and familial honor and ambition.

For this very reason, however, restraining them requires harsher reinforcement than in democratic republics. Montesquieu reflects, "It is as easy for this body [of the nobility] to repress the others as it is difficult for it to repress itself. Such is the nature of this constitution that it seems to put under the power of the laws the same people it exempts from them" (3.4.24). Montesquieu contends that aristocracies are inherently more corrupt than democracies, because their constitutions entrench contrary principles—both equality and inequality.⁸¹ This corruption usually is realized when aristocracy becomes exclusively hereditary (the basis of the Venetian aristocracy from its inception). The nobles then have difficulty being moderate even with regard to one another, much less in their rule of the common people (8.5.115-116).

The laws, therefore, "must seek to reestablish the equality necessarily taken away by the constitution of the state" (5.8.51). This brings us back to the lion's maw. In an aristocracy, "the laws should always humble the arrogance of domination. There must be, for a time or forever, a magistrate to make the nobles tremble, like the ephors in

⁸¹ However, this constitutional contradiction also means that aristocracies have in themselves a "certain strength" that democracies lack, because they do not require a rigorous cultivation of virtuous on the popular level. As with the intermediate bodies in monarchies, moreover, the aristocrats' defense of their privileges and interests serves as a bulwark against any one person or body becoming dominant over the others (3.4.24). Nonetheless, Montesquieu contends that aristocratic government is least corrupt when the ruling class is more equal than unequal to the people in wealth, birth, manners, and interests (3.4.24, 5.8.51-52). In the case of aristocracy, it seems that there is one side on which to err.

Lacedaemonia and the state inquisitors in Venice” (5.8.54). The Venetian republic, “in order to maintain itself...needs means as violent as in the government of the Turks; witness the state inquisitors and the lion’s maw into which an informer can at any moment, throw his note of accusation” (11.6.157). These “tyrannical magistracies,” then, were established in an attempt to *curb* the threat of tyranny from overambitious aristocrats.⁸²

In sum, the means of addressing the threat to political liberty posed by ambitious aristocrats in turn invited abuses of liberty of the citizen from opportunistic criminal accusers. The very need for such harsh instruments in Venice affirmed that the nobles lacked the virtue that is necessary to responsibly use them. The threat to liberty came from virtue, but more precisely, from establishing policies that depended upon a virtue that was not in fact present. It was thus the great mismatch between the character of the citizenry and the unrestrained nature of the inquisitorial institutions that generated such abuses of liberty. Venice relied extensively on fear as its principle, the characteristic spring of despotism, while persisting in the illusion that it was relying upon virtue.

Montesquieu’s suggestion for improving upon these too-powerful instruments of executive policing points to the perennial political dilemma implicit in his critique of the lion’s maw. In comparing the Venetian inquisitors with the Roman institution of the dictatorship, Montesquieu clarifies that the danger to liberty of the citizen posed by the state inquisitors in Venice could not easily be eliminated without undermining the basic function for which it was established—to protect from threats to liberty posed by genuine conspiracies

⁸² The Council of Ten, from which the state inquisitors were drawn, was initially instituted in 1310 to investigate and punish a particular conspiracy to usurp the government. Its mandate was renewed continuously, and the Council was eventually made permanent, as it proved to “fill a now-obvious gap in state security” William Wurthmann, “The Council of Ten and the Scuole Grandi in early Renaissance Venice,” *Studi veneziani*, no. 18 (1989), 17. That the Council was dreaded more by the nobles than the commoners affirms its purpose of “guarding the guardians.” David Carrithers, “Not So Virtuous Republics,” 257.

against the state. While the dictatorship defended the aristocracy against the people, who “act from impetuosity and not design,” the state inquisitors defended the nobles as a ruling body against the nobles as individuals and an interested class. For this, “a hidden magistracy is needed because the crimes it punishes, always deep-seated, are formed in secrecy and silence. The inquisition of this magistracy has to be general because its aim is not to check known evils but to curb unknown ones” (2.3.16).

The balancing act that today we would say is between liberty and security was for Montesquieu one between two different threats to liberty, or rule of law. He proposes a compromise between these competing concerns that suggests the origins for our own constitutional requirement for executive detention to depend upon legislative approval:

If the legislative power leaves to the executive power the right to imprison citizens who can post bail for their conduct, there is no longer any liberty, unless the citizens are arrested in order to respond without delay to an accusation of a crime the law has rendered capital; in this case they are really free because they are subject only to the power of the law.

If the legislative power believed itself endangered by some secret conspiracy against the state or by some correspondence with its enemies on the outside, it could, for a brief and limited time, permit the executive power to arrest suspected citizens who would lose their liberty for a time only so that it would be preserved forever.

And this is the only means consistent with reason of replacing the tyrannical magistracy of the *ephors* and the *state inquisitors* of Venice, who are also despotic (11.6.159, emphasis in original).

Montesquieu even expressed support for measures that his American devotees could not abide: the use of what the English (and common-law influenced countries like the U.S.) call *bills of attainder*, as well as their Athenian and Roman precedents. These bills were intended to thwart efforts by one accused of high treason to prevent witnesses from testifying against him in court. “There are, in the states where one sets the most store by liberty, laws that violate it for a single person in order to keep it for all.” Explaining the procedural formalities the Romans observed before taking such a measure, he remarks, “the usage of the

freest peoples that ever lived on earth makes me believe that there are cases where a veil has to be drawn, for a moment, over liberty as one hides the statues of the gods” (12.19.204).

Thus, while Montesquieu did as much as any modern political philosopher to elevate civil liberty as a “co-equal branch” of political liberty, he did not treat “liberty of the citizen” as a trump card, but one value to be balanced against others in the imprecise art of statesmanship. Montesquieu suggests that even a moderate government will have to introduce considerations of international right (the right of nations) into proceedings against individuals within a state who conspire against it as against a foreign enemy. This will be as risky as it is necessary. Montesquieu’s proposed solution is to formalize procedures by which to suspend or modify procedures that obtain in ordinary cases of civil law.⁸³ While these procedures cannot fully substitute for the perfect virtue that inevitably is lacking in actual republican judges, they at least can engage the imperfect virtue of many different judges with disparate institutional and partisan interests.

⁸³ This difficulty clearly is brimming with relevance for contemporary constitutional controversies over the detention of suspected terrorists. See for example *Hamdi v. Rumsfeld* (2004), *Boumediene v. Bush*. (2008).

Chapter 6: The abuse of criminal justice under imperial and inquisitorial monarchies

While Montesquieu dwells on the unappreciated dangers of institutions empowering virtue in republics, the most flagrant abuses he depicts in fact come from governments that make use of such institutions when they cease to have, or otherwise lack conspicuously, the popular virtue on which these laws and institutions rely. In these examples, we can see more clearly how the precise cause of the abuse of inquisitorial institutions—religious and moral as well as political—is the discrepancy between the virtue that these institutions assume and the actual character of the citizenry. Examples from the Roman Empire and medieval Christian monarchies tending towards despotism figure prominently (6.8.81-82, 12.5-6.193-194; see also countries whose official names include or included the title “Socialist Republic” or “Arab Republic.”) The former retained some republican institutions after the constitution definitively changed. The latter tapped the religious zeal of a kind of “republic of believers” embedded within non-republican governments.

Montesquieu notes how imperial Rome retained pretenses to being a republic for a long time after this ceased to be the case. Their institutions for public accusations of treason assumed a certain public spirit and honesty on the part of individual citizens that was no longer present, and so they served primarily to reward opportunists. About Rome, he continues:

The maxims of the republic were followed under the emperors, and one saw a dreadful kind of man, a band of informers, immediately appear. Whoever had many vices and many talents, a common soul and an ambitious spirit would seek out a criminal whose condemnation might please the prince; this was the way to advance to honors and to fortune (6.8.81).

In his earlier work on the Romans, Montesquieu had also noted the abuse of the republican era laws against *lèse-majesté* under Tiberius and subsequent rulers,

Tiberius seized upon this law and applied it, not to the cases for which it had been made, but to anything that could serve his hatred or suspicion. Not only did actions falls within the scope of this law, but words, signs, and even thoughts... And since a tyrant never lacks instruments for his tyranny, Tiberius always found judges ready to condemn as many people as he might suspect. In the days of the republic, the senate, which as a body did not judge the cases of individuals, was informed by a delegation of the people of the crimes imputed to allies. In the same way Tiberius referred to it the judgment of everything he called a crime of lese-majesty against himself. This body fell into a state of unspeakable baseness. The senators actually sought servitude, and under the patronage of Sejanus, the most illustrious among them practiced the trade of informer (CC, XIV.129-30). When those without any political virtue make use of republican instruments of public accusation and control the reins of republican institutions, these instruments will be made to serve antithetical principles under the most disingenuous of guises (12.18.203-204).⁸⁴

As will be discussed below, Montesquieu associates the overly zealous punishment of *genuine* acts of high treason with republics. Nonetheless, he finds the tendency to arbitrary accusation and prosecution of high treason more pronounced in non-republican governments. Montesquieu criticizes efforts to make the category of high treason function as a kind of catch-all. This often occurs when laws against high treason are vaguely worded, a greater tendency in monarchies and despotisms than republics.⁸⁵ Deeming it high treason to “disrespect the prince” opens the door to infinite opportunity for arbitrary punishment. The exact character of the offense cannot be defined in advance such that persons can predict adequately what will be treated as a breach of the laws. Such laws can be exploited easily to

⁸⁴ For a contemporary example in the context of international governance, see the UN Human Rights Council and its predecessor, the UN Commission on Human Rights, which was disbanded in 2006 after being co-opted by member states for purposes antithetical to the Commission’s establishment. As then UN Secretary-General Kofi Annan described the process of corruption, “States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others” United Nations, Report of the Secretary General 2005, cited in Martin Edwards, Kevin Scott, Susan Allen, and Kate Irvin, “Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission,” *Political Research Quarterly* 61, No. 3 (Sep., 2008): 392.

⁸⁵ Montesquieu singles out republics for excessively punishing genuine acts of high treason (12.18.202-203), but it is under governments of one alone that the category of high treason tends to be overloaded. All of his examples in Book 12, Chapters 7-11 come from despotic governments or monarchies tending towards despotism.

target one resented for other reasons, or simply to give vent to a despot's fits of anger. "The laws of China decide that whoever lacks respect for the emperor should be punished by death. As they do not define what lack of respect is, anything can furnish a pretext for taking the life of whomever one wants and for exterminating whatever family one wants" (12.7.194). Clarity on the laws of high treason is so important to liberty of the citizen that he insists, "Vagueness in the crime of high treason is enough to make government degenerate into despotism" (12.7.194).

In addition to inviting arbitrary arrest, Montesquieu contends that overloading the category of high treason with lesser offenses actually may serve to weaken deterrence against genuine betrayals of the state. Citing a Roman law that punished counterfeiting as high treason, he challenges, "does that not confuse ideas about things? Does not giving the name of high treason to another crime diminish the crime of high treason?" (12.8.196). Laws that treat everything touching the king as sacred can undermine his own security. "A law of England, passed under Henry VIII, declared that all those who predicted the king's death were guilty of high treason. This law was very vague. Despotism is so terrible that it even turns against those who exercise it. In the last illness of this king, the doctors never dared to say that he was in danger, and no doubt they acted accordingly" (12.10.197).

As laws encouraging accusations of high political crimes often have invited abuse, so do those encouraging accusations of “high crimes” against religion and morality.⁸⁶ Perhaps nothing has thwarted the development of the “surest rules” of criminal justice more than prosecution and punishment of these offenses (12.2.188). In Book 12, he identifies three particular offenses in the latter two categories whose criminalization is bound to lead to the abuse of innocent persons, or at least to the arbitrary prosecution of some offenders and not others. Like vaguely worded laws against high treason, laws criminalizing sacrilege, magic, heresy, and the “crime against nature” invite arbitrary interpretation by leaving an immense amount of discretion to accusers, witnesses, and judges about what constitutes an offense and/or evidence proving it. They have a similar effect of emboldening rash tempers, and inviting vested interests to determine prosecutorial priorities. Laws criminalizing hidden sacrilege, for example, provide the same incentives to all would-be accusers, regardless of their actual piety. This “destroys the liberty of citizens by arming against them the zeal of both timid and brash consciences” (12.4.190).

Laws encouraging criminal accusations of immorality or impiety also result in more arbitrary violence in distinctly non-republican contexts. For example, the domestic tribunals established under the Roman republic to examine alleged debauchery among women generated perverse incentives when they were retained under the empire.

⁸⁶ Montesquieu speaks of crimes against mores (*mœurs*), not against ethics. *Mœurs* in the French are customs or conventional values (19.16.317). I have elided the conceptual distinction between morality in the sense of *mœurs* and that in the ethical sense in this discussion because, from the perspective of those to whom the *mœurs* belong, the two are quite closely related. “Loose morals” and “bad character” are taken as signs of ethical irresponsibility. Montesquieu defines mores and manners as “usages that laws have not established, or that they have not been able, or have not wanted, to establish... The difference between laws and mores is that, while laws regulate the actions of the citizen, mores regulate the action of the man. The difference between mores and manners is that the first are more concerned with internal, and the latter external, conduct.

This tribunal maintained mores in the republic. But these same mores maintained this tribunal. Its task was to judge not only the violation of laws but also the violation of mores. Now, *in order to judge the violation of mores, one must have mores...* Just as the domestic tribunal presupposed mores, public accusation also presupposed them; and this made both of them collapse along with the mores and come to an end with the republic... The establishment of the monarchy and the change in mores also brought public accusations to an end. One could fear that a dishonest man, stung by a woman's sneers, indignant at her refusals, *outraged even by her virtue*, might form the design of ruining her (7.10-11.105-106, emphasis added).

The Inquisition and various blood libels prosecuted against the Jews in the Middle Ages fanned popular religious intolerance on the pretext of defending of Christianity, but with a much clearer commitment to bolstering despotic authority than to actually promoting piety. The Inquisition, "would have given way to its contradictions, if those who wanted to establish it had not taken advantage of those very contradictions" (26.11.504; see also 12.4.190, 25.13.490-491).

Where certain beliefs or non-beliefs are considered criminal, one also finds religious hatreds emboldening all manner of criminal accusations. There is no crime too terrible or too preposterous for the heretic to be capable of committing. "Under the reign of Philip the Tall, the Jews were run out of France, having been accused of allowing lepers to pollute the wells. This absurd accusation certainly should cast doubt on all accusations founded on public hatred" (12.5.193).

Along with what he calls "the crime against nature," Montesquieu warns

One must be very circumspect in the pursuit of magic and of heresy. Accusation of these two crimes can offend liberty in the extreme and can be the source of infinite tyrannies if the legislator does not know how to limit it. For, as *it does not bear directly on the actions of a citizen, but rather on the idea one has of his character*, the accusation becomes dangerous in proportion to the people's ignorance, and from that time, a citizen is always in danger because the best conduct in the world, the purest morality, and the practice of all one's duties do not guarantee one from being suspected of these crimes (12.5.192, emphasis added).⁸⁷

Identification and prosecution of these crimes depends entirely on speculative "evidence," where there is nothing falsifiable by which the accused might dispute the charges against him. Accusations of using magic have so little connection to demonstrable evidence, Montesquieu notes, that one would have "to be a magician in order to vindicate oneself of the accusation of magic" (12.5.193).

While observable in principle, homosexuality is concealed in any society that criminalizes it. Thus, its punishment often depends upon testimony from informers within the household. These persons may be subject to manipulation and otherwise unreliable, making this criminal law especially open to abuse as a weapon against persons resented for other reasons. While affirming the moral judgment underlying laws against homosexuality, Montesquieu insists that such judgments wreak havoc if enshrined in the criminal code: "What I shall say will leave it all of its stigma and will bear only on the tyranny that can take an unfair advantage of even the horror in which it should be held" (12.6.193). He cites the Roman historian Procopius' observation of its prosecution under Justinian: "the deposition of a witness, sometimes a child, sometimes a slave, sufficed, especially against the rich and those who were of the faction of the Greens" (12.6.193).

⁸⁷ Of what are the people ignorant? Perhaps Montesquieu has in mind his idea that magic "can be proved does not exist" (12.6.193).

In sum, Montesquieu warns that, when legislators try to promote religious and moral standards by directly imposing them, the standards themselves often suffer. His critique of these laws (except those against magic), seeks to uphold the basic moral or religious standard underlying them, while condemning the use of criminal laws to promote that standard. Laws criminalizing offenses against religious and mores—like those treating all crimes as high treason—not only invite arbitrary violence, but also serve to empower vice, ignorance, and recklessness. They put in the position of being the defenders of religion and morality the least admirable subjects or citizens.

Montesquieu reminds would-be inquisitors that attempts to politically avenge heresy amount to arrogations of superhuman powers. These institutions collapse all distinctions between human and divine judgment.⁸⁸ Seeking to rule human tribunals “by the maxims of the tribunals that regard the next life,” these institutions assume unto human judges a divine capacity to see into the hearts of fellow men, and even judge whether or not they have atoned for their sins (26.11.504). They deign to empower the “weakness, ignorance and caprice of human nature” with the rights of avenging an infinite being (12.4.190). One could say that, by insisting on punishing crimes that do not admit of human verification, these moral and religious inquisitors seem to doubt the divine power to punish hidden crimes.

⁸⁸ The distinction between these two orders of law—and their overlap and complementarity—is a very complex matter. Montesquieu emphasizes the distinction between the divine and human orders of law more than any other. These laws “differ as to their origin, as to their object, and as to their nature... Human laws enact about the good; religion, about the best... The principal force of religion comes from its being believed; the force of human laws come from their being feared” (26.2.495). At the same time, in Montesquieu’s view, divine and political laws share a common domain; religion is not merely relegated to the private sphere, but has clear political implications (either good or bad depending on the particular doctrine/practice). Moreover, religious and political laws inevitably intersect with civil laws with regard to marriage (26.13.505-506), and with the political laws with regard to the establishment of capital punishment for murder (12.4.191). In the case of marriage laws and punishment for the gravest crimes, the different orders of law might contribute different considerations, but they must complement one another and not stand in contradiction. See Rebecca Kingston, “Montesquieu on Religion and the Question of Toleration,” in *Montesquieu’s Science of Politics*, 375-408.

Moreover, by applying to criminal tribunals the logic of penance, based as it is on the superhuman ability to see into the heart of man, merely human judges not only risk punishing arbitrarily, but also rewarding the faithless. The practice of exonerating one who confesses to a religious crime and condemning to death another who denies it rewards those more willing to lie.

This is drawn from monastic ideas in which the one who denies appears to be unrepentant and damned and the one who confesses seems to be repentant and saved. But such a distinction cannot be the concern of human tribunals; human justice, which sees only acts, has only one pact with men, that of innocence; divine justice, which sees thoughts, has two pacts, that of innocence and that of repentance (26.12.505).⁸⁹

In Book 28, Montesquieu criticizes another manifestation of this phenomenon: the use of the “negative proof” in medieval monarchy, what is often called compurgation. Among the early Christianized Germanic tribes, some tribunals allowed an accused criminal to exonerate himself simply by swearing and/or having witnesses swear that he did not commit the crime. This created perverse incentives. On the one hand, it had the effect of absolving the irreverent and dishonest, and on the other, it punished those who, while they may well have committed a crime, at least had the decency not to swear falsely that they did not (28.12-18.548-557). A usage among the Lombards similarly allowed an individual to claim an inheritance if he swore on the Gospels that his title was legitimate. The unfortunate result was that “perjurers were sure to acquire” (28.18.554). With these examples, Montesquieu suggests how conflating divine and human laws can undermine rule of law in both senses.

⁸⁹ See Moses’ clarification about enforcement of the Israelites’ divine covenant: “Concealed acts concern God alone; but with overt acts, it is for us and our children ever to apply all the provisions of this Teaching” Deut. 29:28.

Punishments

The despotic and counterproductive effects of laws criminalizing offenses against mores and religion stem not only from their arbitrary prosecution, but also from their harsh punishment.⁹⁰ Montesquieu counters the tendency to conflate the natural and/or divine order of law with the civil order of law in the punishment of crimes. He does so not by reasoning about the justice of various punishments or the theoretical foundation for a government's right to punish its citizens, but by driving a wedge between justice in a transcendent sense and in a civil sense. Punishments that may *be* just in a natural and/or divine sense do not necessarily make for prudent policy.

The “law of retaliation” can be likened to the ordinary means of administering criminal justice in a condition of natural liberty, wherein the party wronged, or his relatives, take personal vengeance for a perceived violation of the natural and/or divine law. As Montesquieu put it in Book 1, “there are relations of fairness (*équité*) prior to the positive law that establishes them...so that, one intelligent being that who has done harm to another intelligent being deserve the same harm in return” (1.1.3).⁹¹ Even for citizens enjoying a robust rule of law, *public* vengeance retains a strong instinctual appeal, particularly for the

⁹⁰ The three particularly hazardous criminal accusations he discusses—magic, heresy, and the crime against nature—all shared the dubious distinction of bringing “the penalty of burning” (*peine de brûler*, 12.6.193).

⁹¹ In linking the “law of retaliation” to this natural “relation of fairness” prior to positive law, I am following Anne Cohler’s interpretation in *Montesquieu’s Comparative Politics*, 34-40. See also a fragment on penal law from the *Pensées*, where Montesquieu explicitly describes retaliation as the punitive power of the state of nature. “Revenge is the only means that Nature has given us to stop the evil inclinations of others. This is the only coercive power that we have in the state of nature: everyone had a magistracy he exercised through revenge.” *OC II*, 1471.

most heinous crimes.⁹² As we will see in Montesquieu's discussion of early Germanic criminal usages, a fundamental task for perfecting moderate government in his view has been finding ways to rein in the law of retaliation—though not to suppress it entirely. The tendency for criminal punishment to exacerbate public vengeance is a particular problem in republics on the classical order. The tendency to invite arbitrary considerations of private vengeance, however, is more characteristic of despotic government and monarchies tending towards despotism.

The penalty distinctive of the divine order, Montesquieu suggests, is that of repentance or atonement (12.4.190-191, 26.12.505). Retribution—repaying both evil and good in kind—clearly represents a divine standard of justice in the biblical tradition as well, and one whose execution is a responsibility man shares with God in the case of the willful murder of another human being (at least according to Jews, Muslims, and Protestants).⁹³ As suggested above, Montesquieu's discussion of criminal justice reminds one that taking the standards of divine justice into human hands is a very precarious activity—a part of the knowledge of moderate criminal rules that is by no means foreign to the biblical tradition, but

⁹² In a direct criticism of Montesquieu's elevation of "gentleness," Rousseau will tout the importance to political liberty of supporting this seed of natural right (in his "Last Reply" to the *First Discourse*). As I suggest here, however, Montesquieu would preserve this natural and/or divine standard of justice for duly adjudicated crimes against security. The difference between the two on the relationship between political liberty and criminal justice, I will show, is more one of rhetorical emphasis.

⁹³ "For your own life-blood I will require a reckoning: I will require it of every beast; of man, too, will I require a reckoning for human life, of every man for that of his fellow man. Whoever sheds the blood of man/By man shall his blood be shed/For in His image/Did God make man" Gen. 9:5. In the Jewish understanding, this is a Noachide law—given to all of mankind, not only to Israel. The Mosaic laws, those given at Sinai exclusively to the people of Israel, affirm death as the just punishment for a murderer, and clarify the distinction between willful and involuntary murder, the latter of which does not merit the death penalty, but nonetheless requires the provision for the cities of refuge. Exod. 21:12-13, Numb. 39:9-34, Deut. 19:1-21, Josh. 20:1-9. Montesquieu praises this provision, which provided a safe haven for the involuntary man slaughterer from his victim's family, for simultaneously protecting those innocent of true murder from an excessive punishment and showing regard for the natural desires of the victim's family for vengeance. "Those who murdered involuntarily were innocent, but they had to be removed from the sight of the relatives of the deceased; therefore, Moses established an asylum from them. The greatest criminals did not merit any asylum. They had none" (25.3.482).

nonetheless often forgotten or overlooked. Even laws punishing religious crimes that are in principle verifiable, and even those that also constitute crimes against security, can easily be abused to punish arbitrarily. Thus, Montesquieu counsels great caution in criminal punishment of religious offenses.

In addition, Montesquieu calls for cultivating the use of sublegal penalties for offenses against mores, religion, and “breaches of police,” as well as a relative increase in reliance on pecuniary rather than corporal penalties. Montesquieu argues that legislators in moderate governments can and *should* support piety, modesty, marital fidelity, and other moral virtues, but indirectly. To do justice to Montesquieu’s vision of liberal criminal jurisprudence, one must consider his argument that social incentives and disincentives ultimately are more effective, as well as gentler, means of promoting religious laws and standards of public conduct.

While monarchic and despotic abuses of the accusation of high treason certainly abound (12.7-10.194-197), Montesquieu devotes a chapter to discussing “how dangerous it is in republics to punish excessively the crime of high treason.” In this example, the concern is not wrongful conviction, but excessive punishment of those actually guilty of high treason.

What Montesquieu means by harsh punishments is more limited than what reformers of the criminal justice today tend to mean. For example, he clearly supports the use of capital punishment for those duly convicted of the gravest assaults on security: high treason, murder, and even attempted murder (12.4.191). The practices he identifies as particularly problematic are those that extend violence or exile to other family members and that otherwise seek to keep alive the grievance against a particular person or group that laws have duly punished

(6.12.85-86, 12.18.202-203).⁹⁴ “The Greeks,” for example, “put no limits to the vengeance they wreaked on tyrants or on those they suspected of being tyrants. They put children to death, sometimes five of the closest relatives. They drove out an infinite number of families. Their republics were shaken by this; exile and the return of the exiled were always periods marking a change in the constitution” (11.18.203).

When a republic has destroyed those who want to upset it, one must hasten to put an end to vengeance, penalties, and even rewards.

One cannot inflict great punishments, and consequently, make great changes, without putting a great power into the hands of a few citizens. It is better, then, in this case, to pardon many than to punish many, to exile few than to exile many, to leave men their goods than to multiply confiscations. *On the pretext of avenging the republic, one would establish the tyranny of the avengers.* It is not a question of destroying the one who dominates but of destroying domination. One must return as quickly as possible to the ordinary pace of government where the laws protect all and are armed against no one (12.18.202; emphasis added).

Montesquieu suggests that punishment can be so forceful that it upsets the very balance of the constitution, turning a community of fellow citizens into one of permanently warring nations, and attacking the basis of all citizens’ security.

He warns that laws providing for expeditious capital punishment of a given crime risk attracting frivolous claims. Legislators establish a most perverse incentive when they introduce the possibility of the death of one’s rival (or rival nation in the international context) as a relatively easy—and legal—remedy. Montesquieu highlights this danger through his example of the Amphictyonic oath and the Deuteronomic provision for punishing the enticer to idolatry.

Montesquieu raises the example of an oath taken by members of the Amphictyonic (or Delphic) League of Greek towns as a key example of “laws that run counter to the aims

⁹⁴ A suitable analogy to the moderation of punishments that Montesquieu had in mind might be the post-Civil War reconciliation with the former Confederates that Lincoln initiated, as contrasted with the plans of some of the more radical Republicans.

of the legislator” (29.4-5.603-603). He criticizes the penal provision of the oath for undermining the very intent of the treaty itself. The oath called for members to swear that:

“I will never destroy a town of the Amphictyons and that I will not divert its running water; if any people dare do such a thing, I shall declare war on them, and I shall destroy their towns.” The last article of this law, which seems to confirm the first, is in reality contrary to it. The Amphictyonic league wants the Greek towns never to be destroyed, and this law opens the door to the destruction of these towns. In order for the Greeks to establish a good right of nations, they had to become accustomed to thinking it an atrocious thing to destroy a Greek town; therefore, they should not destroy even destroyers. *The law of the Amphictyons was just, but it was imprudent.* This is proved by the very abuse of it that occurred. Did not Philip give himself the power to destroy towns on the pretext that they had violated the laws of the Greeks? The Amphictyons could have inflicted other penalties: ordering, for example, that a certain number of magistrates in the town of the destroyers or of leaders of the violating army would be punished by death; that the destroyers would cease for a time to enjoy the privileges of Greeks; that they would pay a fine until the town was reestablished. Above all, the law should have addressed the reparation of the damage (29.5.604, emphasis added).

The penal provision in this case has the effect of exacerbating the spirit of vengeance in the very act of trying to curb such vengeance. He recommends limiting retribution to the leaders of this destruction, and prioritizing the penalty “drawn from the nature of the thing,” which is for the criminals to have to reconstruct the town itself.

In criticizing laws that require citizens to reveal secret conspiracies on penalty of death, Montesquieu refers to the injunction in Deuteronomy that an Israelite must be the first to confront his or her relative’s covert conspiracy to betray God.

“If thy brother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine soul, entice thee secretly saying: ‘Let us go to other gods,’ thou shalt stone him; thine hand shall be first upon him, and afterwards the hand of all the people.” This law of Deuteronomy cannot be a civil law among most of the peoples that we know because it would open the door to all crimes (12.17.202; Deut.13:7-10). As the conspiracy of the *mesit*, or enticer, was to commit simultaneously both high

treason and heresy, this passage—if taken as law in itself—would conflate natural, political, and divine right all at once: the natural right to personally avenge a crime against one’s own,

the political right to punish one who gravely threatens the nation's survival, and the divine right to avenge a crime against God. This law would seem to empower each citizen with the right of retaliation for this doubly-high crime, collapsing entirely the process from accusation to punishment, with the witness himself to execute judgment. Montesquieu's circumspect warning is that the direct application of the purpose of this law can be realized only for a people of nearly superhuman virtue, and in all other cases is an invitation to lawlessness.

Such a law has a particular logic in a republic, where "the rights of the homeland" are in each citizen's hands, and moreover, where the religious and political communities are one. Yet Montesquieu contends that this "liberal" use of capital punishment for all manner of transgressions is more characteristic of despotic governments more than classical-style republics or moderate monarchies. Montesquieu suggests that republican governments do not hastily unite political right into natural right in this way, because the honor equally accorded to each individual encourages formal protections against taking the life of a fellow citizen. It is "despotic states, which prefer simple laws, [that] make much use of the *law of retaliation*; moderate states sometimes accept it. But the difference is that the former have exercised it strictly, while the others almost always temper it" (6.19.93, emphasis in original; see also 29.15.612). Indeed, rabbinic interpretation of this and other Mosaic laws on capital crimes, which called for extensive investigation of capital crimes, high standards of evidence for conviction, and even more formidable barriers to actually carrying out execution, suggests

that the risks to which Montesquieu alludes were keenly felt by the immediate inheritors of this law code.⁹⁵

Montesquieu warns that efforts to avenge “simple sacrilege,” i.e. crimes against God but not against man, by their nature have no limit. “If men’s laws are to avenge an infinite being,” there can be no possible limit on the punishment. With offenses that “wound the divinity, where there is no public action, there is no criminal matter; it is all between man and god who knows the measure and time of his vengeance” (12.4.190).

When an offense such as fraud is punished with “extravagant penalties” (i.e. painful corporal penalties), the law “removes all proportion in penalties. Men whom one could not consider wicked are punished like scoundrels, which is the thing in the world most contrary to the spirit of moderate government” (13.8.218).

Yet even in countries where there is no pretense of the government respecting innocent life, Montesquieu argues that excessive reliance on capital punishment can be

⁹⁵ Given the emphasis on formal investigations before criminal, and especially capital, cases in all other biblical references to capital punishment, it is unlikely that the ancient Israelites ever applied these words literally—i.e. that no formal procedures needed to be observed between hearing the enticement and enacting the punishment. The requirements for convicting a suspected *mesit* in fact were less demanding than for other capital crimes, but in a different sense: while obtaining testimony through entrapment was ordinarily inadmissible in classical Jewish law, the *mesit* could be tricked into repeating his invitation in front of hidden witnesses. While the Mosaic law typically tapped the witness to fulfill the role of public executioner, the Talmudic sages and subsequent rabbinical authorities explain this as a means of emphasizing to the witness the gravity of false testimony, particularly in capital crimes: to testify before a tribunal that one saw this individual kill another is effectively to kill him. In general, while upholding the divine standard of capital punishment as the just penalty for willful murder, the rabbis placed very high barriers before the enactment of capital punishment, precisely on the view that such a grave punishment is easily abused in the hand of humans. These barriers included the unanimous agreement of twenty-three members of a regularly-constituted rabbinic court and extensive invitations to appeal. See the often quoted m. *Makkot* 1:10, “A Sanhedrin that executes once in seven years is called murderous. Rabbi Eliezer ben Azariah says: once in seventy years. Rabbi Tarfon and Rabbi Akiva say: ‘Had we been members of a sanhedrin, no person would ever be put to death.’” Babylonian Talmud, Schottenstein ed., *Ketubot* 30a; *Sanhedrin* 1, 4, 7, 37a-b, 67a, series ed. Hersch Goldwurm and Nosson Scherman, vols. 29, 47-49 (Brooklyn, NY: ArtScroll Mesorah Publications, 1990-2007). See also Maimonides 11th century codification of Jewish law in the *Mishneh Torah: Sefer HaMitzvoth*, trans. Rabbi Eliyahu Touger, vol. 29 (Brooklyn, NY: Moznaim, 1986-2007), Neg. Comm. 290.

counterproductive: “extravagant penalties can corrupt despotism itself” (6.13.86). By seizing on the simplest and most direct mechanisms for pursuing their goals, despotic legislators—in the long-run at least—actually undermine the very principles they ostensibly mean to support. The harsh punishment of every crime, and the constant ratcheting up of punishments in the face of violations, can have a counterproductive effect on deterrence—particularly of the worst crimes.⁹⁶ When used too frequently, harsh penalties cease to have their effect, because they erode the despot’s crucial “natural resource”—his subjects’ fear of his wrath.

A violent government wants to correct...instantly; and instead of considering that the old laws should be executed, one established a cruel penalty that checks the ill then and there. But the spring of the government wears down; the imagination becomes inured to this heavier penalty as it had to the lesser, and as fear of the lesser penalty diminishes, one is soon forced to establish the heavier in every case (6.12.84; see also 6.13.86).

Requiring an extremely harsh punishment for a particular crime may also have the counterproductive effect of encouraging citizens not to report criminal acts or magistrates to refrain from prosecuting them. Montesquieu criticizes a proposal by a Roman tribune to punish with death the kind of political intrigue in which a great many citizens were likely to engage. This proposal was thwarted by the senate who realized that a harsh penalty “would certainly terrify men’s spirits but...as a result, no one could be found to accuse or condemn; whereas, with moderate penalties, there would be both judges and accuser (6.14.88).⁹⁷

⁹⁶ Kingston, *The Parlement of Bordeaux*, 228.

⁹⁷ Consider the recent Iranian case of Ameneh Bahrami, a young woman who was partially blinded and severely disfigured when a spurned suitor threw acid in her face. On the basis of 7th century Islamic jurisprudence, an Iranian court decided that the woman could choose either to punish him in kind with blinding by acid, or to pardon him. After initially electing to administer retaliation in kind, at the last second, she decided to forego her right to blind him. This case provides a prime example of at least two of Montesquieu’s points about the use of *supplices*. First, it exemplifies a punishment that one could understand to be at the same time both just and imprudent. Second, while the man who committed this terrible crime underwent the ordeal of the trial and the period of anticipating his own mutilation—right up until the final moments—he ultimately did not have to pay any pecuniary penalty or be imprisoned. In the final instance, Bahrami opted for impunity rather than a *supplice*.

Montesquieu reasons that any penal code should be designed such that it deters the worst offenses. “It is essential for penalties to be harmonious among themselves, because it is essential that the greater crime be avoided rather than the lesser one, the one that attacks society rather than the one that runs less counter to it” (6.16.91). By punishing so many offenses with death, despotic legislators generate a perverse incentive to commit the most severe crimes, which presumably conflicts with the interests of even the most inveterate despots. Montesquieu mocks a law in “Muscovy” that punished both robbery and murder with death, which led to an increase in the incidence of robbers killing their victims, for “dead men, they say, tell no tales.” On the other hand, “in England, robbers do not murder because, unlike murderers, they can expect to be transported to the colonies” if convicted (6.16.92).

The upshot of Montesquieu’s critique of harsh penal codes is to elevate the role of pecuniary penalties, as suggested in the example of the Amphictyonic oath as well as social penalties that fall outside the direct purview of the government altogether (6.18-19.93-94). Montesquieu commends Frankish judicial practices for their use of pecuniary rather than corporal penalties. The particular forms of this pecuniary penal code represent the “spirit of monarchy” (6.10.83) and the early Germanic laws (28.1.534). These practices, whose peculiar emergence I will discuss in Chapter 9, had the effect of prioritizing protection of the accused from private vengeance (30.20.651). This judicial principle offers a crucial correction to the natural tendency to err in the opposite direction—and one that is deeply rooted in the European traditions that are the primary object of political reforms.

Yet Montesquieu does not call for a wholesale replacement of corporal penalties with pecuniary ones. He acknowledges the potential for pecuniary penalties to critically

contradict justice in a natural and/or divine sense. If the legal penalties for the most heinous crimes leave a political community profoundly unsatisfied, then a gentle penalty itself might exacerbate individuals' desire to take justice into their own hands. Montesquieu is not wholly opposed to the criminal laws exacting some degree of public vengeance. In fact he favors giving vent to public vengeance in crimes against security: high treason, murder, and even attempted murder. In the case of murder, Montesquieu makes clear that capital punishment in these cases serves a retributive function, among others. In somewhat mysterious language, he also suggests that it plays a role of individual and communal expiation.

With regard to crimes that attack security, as opposed to those that attack tranquility, mores, or respect for the divine, Montesquieu prescribes the use of punishments properly speaking—i.e. *supplices* versus simple *peines*, or penalties. *Supplices* constitute

A kind of retaliation (*talion*), which causes the society to refuse to give security to a citizen who has deprived or has wanted to deprive another of it. This penalty is derived from the nature of the thing and is drawn from reason and *from the sources of good and evil*. A citizen deserves death when he has violated security so far as to take or to attempt to take a life. *The death penalty is the remedy, as it were, for a sick society (la société malade)*” (12.4.191, emphasis added).
 Montesquieu suggests that murder is an act for which an individual must not only pay, but also atone, and which calls for the communal expiation as well.

Reflecting on the argument that pecuniary penalties favor rich criminals, Montesquieu concludes, “A good legislator takes a middle way; he does not always order pecuniary penalties; he does not always inflict corporal penalties” (6.18.93; also 12.4.191).

Subcriminal penalties

Montesquieu is unusually straightforward about changes he wishes to encourage with regard to penalties.

Men must not be led to extremes; one should manage the means that nature gives us to guide them. If one examines the cause of every instance of laxity, one will see that it is unpunished crimes and not moderated penalties.

Let us follow nature, which has given men shame for their scourge, and let the greatest part of the penalty be the infamy of suffering it.

If there are countries in which shame is not an effect of punishment, it is a result of tyranny, which has inflicted the same penalties on scoundrels as on good people.

And, if you see in other countries in which men are restrained only by cruel punishments, reckon again that this arises largely from the violence of the government, which has employed these punishments for slight transgressions (6.12.85).

While Montesquieu would proscribe violence against the person or property of those who violate religious laws or openly flaunt the mores on which a particular nation is built, he permits—even promotes—their public regulation by other means. Both morality and religion, he emphasizes, provide their own means of regulation outside the criminal laws—through means other than physical compulsion. The proper way to support morality is through the promotion of salutary examples and the use of social incentives and disincentives (19.12.27.210). In this way, government can support good mores both less tyrannically and in the long-run, more effectively.⁹⁸

The penalties for simple sacrilege, deriving “from the nature of thing” include “expulsion from the temples; deprivation of the society of the faithful for a time or forever; shunning the presence of the sacrilegious; execration, detestation, and exorcism” (12.4.190). Crimes against mores consist in physical and especially sexual indulgences that flout what a given society considers appropriate or seemly. Mores are a matter of police (*police*), which in

⁹⁸ See Kingston, *The Parlement of Bordeaux*, 228-232.

Montesquieu's usage means the day-to-day ordering of public life (12.4.190). The third class of crimes, those that "run counter to the citizens' tranquility" (*la tranquillité*) also constitute breaches of police, which are of different order than violations of the criminal laws (12.14.200, 20.14.357, 26.24.517).⁹⁹ Offenses against the public tranquility might include small-scale acts of vandalism.¹⁰⁰ Violations of mores "are founded less on wickedness than on forgetting or despising oneself." Those of tranquility stem from "men's troubled spirits" (12.4.190-191). A magistrate "corrects" rather than "punishes" such offenses (26.24.517). The (relatively) gentle penalties deriving from the nature of moral offenses include public "naming and shaming" of offenders, social exclusion, and deprivation of the honors and esteem ordinarily accorded to respectable behavior, and fining or expelling the offender from a particular society (12.4.190). The penalties that derive from the nature of offenses against tranquility include "prison, exile, corrections, and other penalties that restore men's troubled spirits and return them to the established order" (12.4.191).¹⁰¹

Montesquieu contends that human nature provides its own means of correction to "crimes against mores" in the form of our susceptibility to shame (*la honte*) and other non-legal constraints, at least in all but the most corrupt cases at least (6.9.82, 6.11-13.84-89,

⁹⁹ See also 4.6.37, 5.11.58, 5.15.65, 6.11.84, 6.13.87, 7.9.105, 11.11.170, 11.14.173, 11.11.183, 12.6.194, 12.14.200, 14.11.241, 14.14.244, 15.12.255, 16.11.272, 16.31.307, 20.14.357, 20.15.347, 21.1.354, and 26.24.517.

¹⁰⁰ Montesquieu does not mention what acts might constitute violations of public tranquility. I have suggested vandalism as the type of act he has in mind based on his reference to the responsibilities of the Roman Aediles, whom Montesquieu says were charged with maintaining the *police* in Rome (11.14.173). According to Cicero, their responsibilities included the upkeep of sewers, aqueducts, streets, and other matters of public health and public works; supervision of sumptuary laws and mores, weights and measures, and emergency grain supplies; and finally, organization of public games and festivals. *De Legibus*, in *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Law*, trans. Francis Barham, vol. 2 (London: Edmund Spettigue, 1841-42). <http://oll.libertyfund.org/title/545>

¹⁰¹ I have translated the first penalty in this list, *la prison*, as prison rather than Cohler et al's "deprivation."

6.20-21.94-95, 12.4.190, 16.12.272).¹⁰² Shame (*la honte*) is an especially potent tool for penalizing misconduct by gentler means. It is the natural penalty for moral misconduct in two senses: it is the penalty that accords with the nature of moral offenses, and the penalty that makes use of the means for self-correction built into the human constitution.¹⁰³ Given Montesquieu's repeated calls for the use of moral suasion to support religious laws and moral standards, it should be clear that what he rejects about laws criminalizing religious and moral offenses is not the basic principles underlying such laws, but rather the view that physical coercion is the proper means for protecting and advancing them.

In general, moderate governments tend to have greater resources for generating the penalties best fit offenses against mores and tranquility. For this reason, Montesquieu explains that moderate governments in fact have been able to obtain compliance with the laws through the use of gentle penalties. Moderate countries tend to have milder penalties than despotisms.

In moderate states, love of the homeland, shame, and fear of blame are motives that serve as restraints and so can check many crimes. The greatest penalty for a bad action will be to be convicted of it...In these states a good legislator will insist less on punishing crimes than on preventing them; he will apply himself more to giving mores than to inflicting punishments (6.9.82; see also 6.11-12.84-86, 6.20.94). In criticizing the promiscuous use of the death penalty in Japan for almost every offense, including lying to a magistrate, Montesquieu suggests that even governments without a moderate constitution can be governed more gently.

¹⁰² Montesquieu's attention to the power of shame complements his account of that of its corollary, honor, in making monarchy tick. See, for example, his fascinating analysis of the point of honor in feudal society (28.20-21.559-561).

¹⁰³ See also 16.12.272: "It is the nature of intelligent beings to feel their imperfections; therefore, nature has given us modesty, that is, shame for our imperfections." Although Montesquieu's discussion of "natural modesty" here refers to that of women, this particular sentence makes a broader statement about human nature.

A wise legislator would have sought to lead men's spirits back by a just tempering of penalties and rewards; by maxims of philosophy, morality, and religion, matched to this character; by the just application of the rules of honor; by using shame as a punishment, and by the enjoyment of a constant happiness and a sweet tranquility (6.13.87).

The demands of justice in natural or divine sense are not irrelevant criminal justice in Montesquieu's view, but revenge and atonement, respectively, must be distinguished from the particular end of civil punishment—the maintenance of rule of law. To the extent that they serve its particular end, Montesquieu does factor them into criminal punishments.

Still, the momentum of his penological account is behind limiting private and public vengeance. In all cases, it is important that criminal practices not *exacerbate* such vengeance. In addition to preventing the genuine settlement of disputes, punishments that feed the natural human desire for vengeance may pose another problem for rule of law. As Anne Cohler notes, Montesquieu is concerned with the effect that administering harsh punishments has not only on those at the receiving end, but also on those authorizing it. "Punishment ...accustoms the spirit of those responsible for the punishment to despotism. The ruler becomes accustomed to treating others as if they responded only to violence."¹⁰⁴ Moreover, even if a *supplice* may be just in a particular case, its use may set a precedent for its use in a more arbitrary fashion, particularly in a country tending towards despotism.

One might conclude from Montesquieu's proposed penal reforms that his aim is simply to undermine revealed religion and Christianity in particular. Indeed, many commentators have.¹⁰⁵ Certainly, one could arrive at Montesquieu's principles of criminal

¹⁰⁴ Cohler, *Montesquieu's Comparative Politics*, 40. Montesquieu writes, "A legislator who wants to correct an ill often thinks only of that correction; his eye is on that objects and not on its defects. Once the ill has been corrected, only the harshness of the legislator is seen; but a vice produced by the harshness remains in the state: spirits are corrupted; they have become accustomed to despotism" (6.12.85)

¹⁰⁵ Pangle, *Montesquieu's Philosophy of Liberalism*, and *The Theological Basis of Liberal Modernity in Montesquieu's "Spirit of the Laws"* (Chicago, IL: University of Chicago Press, 2010). Robert Bartlett, "On

jurisprudence from a position of religious skepticism and/or through a critique of the premises of traditional morality. I have tried to show, however, that Montesquieu lays down a different path to a liberal system of criminal justice. His definitive reason for excluding government of religion and mores from the direct purview of civil administration is that countless examples of combining them show that they almost always generate despotic effects. That is, they lead governments to commit arbitrary violence against individuals. What's more, he offers many examples to show that efforts to promote religion and morality directly through the political laws undermine religion and morality themselves. While his reforms are not directed primarily towards upholding religion and traditional morality, he does present them as compatible with the latter—and not implausibly so.¹⁰⁶

In his account of a liberal system of criminal justice, Montesquieu shows that the science of a good legislator requires an understanding of something besides religious and moral principles, though it certainly requires these as well. His analysis of criminal justice reaffirms his lessons about the establishment of constitutional balance: political science requires an attention to the logic of unintended consequences—both the inadvertent generation of perverse incentives, and the happy accidents that characterize Montesquieu's account of the development of liberal institutions and criminal procedures. The apparently “strongest” attempts to support morality and religion often inadvertently generate perverse

the Politics of Faith and Reason: The Project of Enlightenment in Pierre Bayle and Montesquieu,” *The Journal of Politics* 63, no. 1 (2001), 1-28.

¹⁰⁶ It might be more accurate to say that Montesquieu is advocating theological reforms, even as he insists that he writes as a political man and not as a theologian (25.9.487). The question becomes, then, whether his interpretation of Christianity and the biblical tradition more broadly is a plausible one. These are questions far outside the bounds of this dissertation. In my analysis here, my aim is only to sketch Montesquieu's practical critique of political enforcement of religion and morality. In doing so, however, I hope to show that there are a number of obstacles to reading Montesquieu as a radically anti-religious thinker. To insist on this reading, one must at least address the merits of Montesquieu's practical case against collapsing the administration of religious and political government.

incentives, while gentler, indirect means may do so both less tyrannically and more effectively. Like his critique of laws that seek liberty too directly, Montesquieu's critique of the criminalization of offenses against religion and mores clarifies that the science of politics cannot be reduced to that of ethics, philosophy, or religion. Informed by the latter, it nonetheless must take into account the way that legislative purposes play out in practice, and in different conditions.

Section 2: Gothic government and the history of French laws

It remarkable that the corruption of the government of a conquering people should have formed the best kind of government men have been able to devise (11.6.187).

Chapter 7: Modern England

Having seen the shortcomings Montesquieu identified in classical-style republics, ancient kingships, and the modern European monarchies tending towards despotism, we can understand why he would have been open to another political model. Montesquieu's travels throughout Europe in 1728-1731 provided him with the opportunity to observe first-hand many of the modern contenders for the most admirable political systems: such as modern Christian monarchies, the small, Italian, aristocratic republics like Venice, and the commercial republics of the Low Countries. His trip also included an extended stay in England, which few Frenchmen before Montesquieu had thought to consider as a model. Montesquieu returned with the unusual notion that the French might have something to learn from their coarse, barbarous neighbors on the other side of La Manche.¹

Without overlooking its social vices and political weaknesses, Montesquieu praises England as the "one nation in the world whose constitution has political liberty for its direct purpose" (11.5.156). Montesquieu takes the English system as a model, if not *the* model, of constitutional and civil liberty.² He finds in this government a distribution of powers among the monarchy, nobility, and commons, a judiciary independent of both the highest offices and

¹ In the years just before Montesquieu arrived in England, Voltaire had also sojourned there, and he returned to France with his own praises for freedom of speech, religion, and commerce in England, discussed in *Lettres Philosophiques* (1734). See Paul Rahe for a discussion of the newfound French interest in England in the wake of their country's military defeats at the hands of the British and the Treaty of Utrecht in 1713. *Montesquieu and the Logic of Liberty*, 6-26.

² On the limits to which England serves Montesquieu as model, see Rahe, *Montesquieu and the Logic of Liberty*, 97-98. Cohler, *Montesquieu's Comparative Politics*, 7.

popular passions, a relatively gentle criminal code, and laws effectively protecting the freedom of trade and navigation. These institutions and policies serve to thwart the aggrandizement of power by any one body or class and to protect individuals from arbitrary prosecution, punishment, and property seizure. In short, the English constitution provides the foil for the overzealous popular judging characteristic of republics, the tyrannical and yet impotent ancient kingships, and the inquisitorial and absolutist monarchies of early modern Europe.

In Book 11, he describes and explains the dynamics of England's institutional arrangements, or at least an idealized version thereof. As many have noted, Montesquieu adopts a strange mode in his chapter "on the constitution of England," wherein he doesn't refer to England by name, but instead describes a model inspired by English institutions.³ He recommends a monarchical executive and bicameral legislature comprised of one house of hereditary nobles and one house of popularly elected, local representatives. Judging should be handled for the most part by temporary tribunals of persons drawn from the common lot of citizens in the case of accusations against commoners, and from the nobles in accusations against nobles.

Montesquieu recommends these arrangements in terms very familiar to students of American government, notwithstanding the lack of hereditary or other titled classes in our system. This government has provisions against threats to liberty coming from many different angles—foreign aggressors, individual tyrants, domineering elites, mob rule, cruel judges, and even waning concern for preserving the government among the citizenry. The

³ See for example Pangle, *Montesquieu's Philosophy of Liberalism*, 114; Shklar, *Montesquieu* (Oxford: Oxford University Press, 1987), 85-86; Cohler, *Montesquieu's Comparative Politics*, 104. Rahe, *Montesquieu and the Logic of Liberty*, 96-97.

single executive allows the government to respond swiftly to urgent challenges, and threats from abroad in particular. His independence from the nobles and popular representatives prevents aggrandizement of power in an all-powerful assembly. The people's representatives take a primary role in the raising of public funds, which is the most important kind of legislation, and the matter that the nobles have the most interest in corrupting. The nobles' desire to defend their prerogatives tempers the popular body's enterprises, and the popular body's desire to preserve their liberty in turn serves as a check on the nobles (11.6.159-161).

Popular election of parochial representatives makes the most of the strengths of average citizens—their ability to identify the more capable among their fellows—while avoiding the drawbacks of their entering directly into the activity of deliberating and legislating (2.2.12, 11.6.160). The government as a whole takes advantage of the particular interests that both the nobles and common people have in participating in government, and it plays upon the nobles' stake in the stability of the constitution to engage them in tempering any friction between the king and the popular assembly. This government avoids the prospect of any one body or individual dominating the rest largely by the different bodies constantly being able to say “no” to the others. This means that when it does act, the government must act together, or at least all parts must acquiesce to the action. “The form of these three powers should be rest or inaction. But as they are constrained to move by the necessary motion of things, they will be forced to move in concert” (11.6.164).⁴ The popular house of the legislature is sufficiently powerful that one can say the people more or less have the upper hand. Nonetheless, power is exercised via institutional arrangements inherited from

⁴ For a fuller explanation of the idea of this government, see Mansfield, *Taming the Prince*, 233-41, Pangle, *Montesquieu's Philosophy of Liberalism*, 114-38; Cohler, *Montesquieu's Comparative Politics*, 104-14; Rahe, *Montesquieu's Logic of Liberty*, 40-45, 49-59, 96-117, 136-43.

feudal monarchy that have proven adaptable to more republican purposes. In England, in sum, “the republic hides under the form of a monarchy” (5.19.70).

The wise placement of judicial powers in this government makes them practically “invisible and null” (11.6.158). Most crimes are judged by temporary tribunals drawn from the people at large. In this way, “judges are not continually in view; one fears the magistracy and not the magistrates” (11.6.162). The judging of accused nobles falls to a temporary tribunal drawn from the body of the nobles, so that they too can be judged by their peers, which Montesquieu calls “the privilege of the last citizen of a free state” (11.6.163). Montesquieu will suggest that the English practice of judgment by one’s peers owes its unique forms to the jurisprudence of trial by combat (28.27.572).

Judging in England, however, combines monarchic forms with republican means of limiting private discretion in judging, and particularly in criminal judging. In his discussion of judging in monarchies versus republics in Book 6, Montesquieu identifies England as an example of the republican model, wherein juries decide only questions of guilt in criminal cases. A judge determines the penalty, which is precisely defined by the law and simply applied by the judge (6.3.76). The judges are “only the mouthpiece that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor” (11.6.163). As this leads to judges erring on the side of a strict justice, Montesquieu approves of a limited role for the upper legislative house “to moderate the law in favor of the law itself by pronouncing less rigorously than the law” (11.6.163). That the legislative assembly of the nobles would have authority over clemency rather than the king also marks the distinction of the English judicial system from a purely monarchic one (6.21.94).

Montesquieu praises the independence of judging from both the king and the popular legislative assembly. In the difficult case of judging suspected treason or other high political crimes in republics—that which gave rise to Venice’s lion’s maw—Montesquieu recommends the practice of the lower house of the popular assembly bringing the accusation before the upper house of the nobles.⁵ The particular interests and passions of each class, therefore, neutralize one another. This practice constitutes the great “advantage of this government over most of the ancient republics, where there was the abuse that the people were judge and accuser at the same time” (11.6.164).

In the English system as depicted by Montesquieu, the private discretion that wreaked havoc in the ancient republics is actually given free rein to err. As Montesquieu explains in his famous discussion of English partisanship at the end of Book 19, it is a hallmark of the freest societies for citizens to see practically the whole world through the lens of party. Historians “in extremely free states...betray the truth because of their very liberty for, as it always produces divisions each one becomes as much the slave of the prejudices of his faction as he would be of a despot” (19.27.333). Yet non-criminal accusations, or even criminal accusations disarmed of their legal power, actually can contribute to liberty in modern republics if they are channeled into the party politics of constitutional government. Montesquieu would appear to agree with Machiavelli that the resultant outpouring of partisan recriminations and private resentments—the “venting of malignant humors”—represents both a source and sign of a vibrant constitution on the English order. “As all the passions are free there, hatred, envy, jealousy, and the ardor for enriching and distinguishing oneself

⁵ Montesquieu discusses Venice and its notorious judicial practices, a subject of Chapter 5 of this dissertation, at 2.3.16, 5.8.54 and 11.6.157-158,

would appear to their full extent, and if this were otherwise, the state would be like a man who, laid low by disease, has no passions because he has no strength” (19.27.325).

Citizens in constitutional republics are *constantly* accusing their political adversaries of betraying the country’s fundamental principles, of threatening the country’s safety and liberty, and otherwise exemplifying hypocrisy, foolishness, tyranny, demagoguery, and/or outright criminality. Yet regardless of the accuracy or even the earnestness of these accusations, Montesquieu suggests that they won’t undercut the constitutional order so long as the government’s instruments of investigation and judgment cannot easily become the possession of one faction. In a country like England, where each of the major political powers has its adherents, “the hatred between the two parties would endure because it would always be powerless (19.27.326). The “spirit of one faction [is] repressed...by the spirit of another” (2.3.22).

Montesquieu also attributes importance to the mutability of partisan commitments in this political system. Attached to their independence as much as to their factions, citizens readily will shift allegiance from a party that becomes too dominant. “As these parties are made up of free men, if one party gained too much, the effect of liberty would be to lower it while the citizens would come and raise the other party like hands rescuing the body.” Yet it is not “free-thinking” *per se* that fuels this behavior, but a healthy dose of philosophic superficiality: “As each individual, always independent, would largely follow his own caprices and fantasies, he would often change parties; he would abandon one and leave all his friends in order to bind himself to another in which he would find all his enemies” (19.27.326).

The English way of upholding political liberty clearly comes with its tradeoffs. In his discussion of their “spirit, mores, and manners,” in Book 19, English liberty goes hand in hand with a factious, calculating, surly, and restive national character (19.27.325-33). Montesquieu concludes his account of their petty factionalism with the observation that this mentality could lead men to “forget both the laws of friendship and those of hatred” (19.27.326). These individuals would relate to one another as “confederates more than fellow citizens” (19.27.332). The jealousy of their liberty that serves to nip potential tyranny in the bud also makes them “uneasy about their situation and...believe themselves in danger even at their safest moments” (19.27.326).⁶ In directly seeking its object, the English constitution generates what Montesquieu calls an “extreme political liberty,” which can undermine happiness (11.6.166).

Montesquieu concludes his discussion by cautioning that his account of the English model should not be read as a call for other European nations to copy England’s institutions:

I do not claim hereby to disparage other governments, or to say that this extreme political liberty should humble those who have only a moderate one. How could I say that, I who believe that the excess even of reason is not always desirable and that men almost always accommodate themselves better to middles than to extremities? (11.6.166).

While one might conclude that Montesquieu offers this disclaimer in order to thwart criticism from the monarchic regime under which he lived, his depiction of English mores in Book 19 affirms that their liberty comes with some burdens. Their laws establish liberty, but it is not clear how much they actually “enjoy” it.⁷ Moreover, the work as a whole testifies to the dangers of promoting immoderately even—and perhaps especially—genuine goods. That

⁶ See Rahe on the *inquiétude* characteristic of the English in *The Spirit of the Laws. Montesquieu and the Logic of Liberty*, 99-102.

⁷ In his conclusion to Book 11, Chapter 6, Montesquieu clarifies the character of his analysis: “It is not for me to examine whether at present the English enjoy (*jouissent*) this liberty or not. It suffices for me to say that it is established by their laws, and I seek no further” (11.6.166).

Montesquieu would caution against the single-minded pursuit of political liberty fits squarely into his overall teaching about political moderation (29.1.602).

While Montesquieu focuses on laws and institutions supportive of political liberty in *The Spirit of the Laws*, he nonetheless makes clear in his comparison of the English and French constitutions that political liberty, or at least the direct pursuit of it, is not simply synonymous with happiness. England is the “one nation in the world whose constitution has political liberty for its direct purpose” (11.5.156). The continental monarchies, in contrast, “do not have liberty for their direct purpose as does the one we have just mentioned.” Instead, “they aim only for the glory of the citizens, the state, and the prince. But this glory results in a spirit of liberty that can, in these states, produce equally great things and can perhaps contribute as much to happiness as liberty itself” (11.7.166). The continental monarchies only “approximate” constitutional liberty through the maintenance of independent judging (11.7.166-167). In the 18th century, they were more vulnerable to both royal absolutism and “overmighty” lordship.⁸

Nonetheless, the subjects seem to enjoy more what liberty they do have. In his brief homage to the distinctive “general spirit” of the French nation, Montesquieu paints a decidedly more pleasant, even more dignified, picture than he does of the English. They possess a “sociable humor, an openness of heart; a joy in life, a taste, an ease in communicating its thoughts; which was lively, pleasant, playful, sometimes imprudent, often indiscreet; and which had with all that, courage, generosity, frankness and a certain point of honor” (19.5.310). The distinctive monarchic spring of honor, in the particular form of a

⁸ Comparing the constitutional balance in England and France in the 18th century, Nannerl Keohane concludes that the French had the advantage of more secure laws of succession than England. On the other hand, the king’s authority and the subjects right and obligations were more secure in England. *Philosophy and the State in France* (Princeton, NJ: Princeton University Press, 1980), 27.

domesticated, courtly gallantry, still holds sway in the French monarchy in the ways I discussed in Chapter 3 (2.4.18).⁹

The liberty afforded by the French constitution is an “accidental by-product” of the pursuit of glory, as Paul Rahe puts it, and that by the English constitution one of those rare examples to which Montesquieu alluded in Book 5 of political liberty that “prudence” was “allowed to produce” (5.14.63).¹⁰ Liberty is something they have “known how to take advantage of” (20.7.343). Nonetheless, even if modern Englishmen have embraced liberty as the object of their constitution, Montesquieu indicates that the basic form of their government initially emerged by accident. After explaining the dynamics among the institutions in his model of English liberty, Montesquieu casually remarks, “The English have taken their idea of political government from the Germans. This fine system was found in the forests” (11.6.166).

The primitive judicial customs and political arrangements constituting “Gothic government” in fact *found* the English when the Angles, Saxons, Jutes, and other Germanic tribes crossed the channel in the wake of the western Roman Empire’s fall in the fifth century CE, and proceeded to expel or subjugate the Celtic-speaking Britons—at least in the southern part and central part of the island—and assimilate them into an Anglo-Saxon, national

⁹ Montesquieu dates the end of the English monarchy properly speaking to the end of Charles I’s reign in the English Civil Wars (8.9.118).

¹⁰ Rahe, *Montesquieu’s Logic of Liberty*, 94-95.

monarchy.¹¹ The key constitutional features of a limited monarchy, tribal confederation, national representative assembly, and independent judging have their roots in the institutions adopted by the Germanic tribes upon conquering parts of the former Roman Empire.

The early monarchy from which both England and France derived would seem to represent the prime example of a rare “masterpiece of legislation,” arising through a highly unusual concatenation of accidental causes (5.14.63). While they have taken different paths in the intervening centuries, both the continental (French and German in particular) monarchies and the English government, Montesquieu emphasizes, are heirs to Gothic government (6.10.83, 6.18.93, 30.18.644). He introduces Gothic government in Book 11 and traces the early history of the Frankish (i.e. French) constitution and civil law in the last two hundred pages of *The Spirit of the Laws*.

¹¹ According to Bede’s *Ecclesiastical History* and subsequent English chronicles, the Anglo-Saxon-Jutish conquest began in the mid-5th century CE with the arrival in Kent of an expedition led by Hengist and Horsa, the “founding brothers,” who were apparently invited by the British king Vortigern to help fend off the Picts. In his comprehensive analysis of the “Gothic revival” in 17th and 18th century English political, literary, and artistic thought, Samuel Kliger explains how historians came to attach the name of the Goths, a Germanic tribe that actually was not among those who colonized England, to the early medieval English monarchy. Jordanes coined the concept of “Gothic government” in his 6th century *Getica*, which drew on an earlier 6th history of the Goths by the Roman, Cassiodorus, which is no longer in existence. *The Goths in England: A Study in Seventeenth and Eighteenth Century Thought*, (New York: Octagon Books, 1972), 25-26, 112-113.

Chapter 8: Montesquieu's approach to historical analysis

Montesquieu's account of Gothic government and the Frankish monarchy in Part 6 represents his most extended foray into historical analysis. Nonetheless, commentators seeking to articulate Montesquieu's approach to historical writing, or his "philosophy of history," tend to focus on his *Considerations on the Causes of the Greatness and Decline of the Romans* (1734), as well as earlier unpublished works: the unfinished and mostly lost *Traité des devoirs*, the associated *De la politique* (1725), and *Réflexions sur le caractère de quelques princes et sur quelques événements de leur vie* (1731-33).¹² In these works, Montesquieu speaks more plainly to universal principles of historical development, and the question of the relative role of chance and discernible causes is central. Especially given its 19th century career, this term connotes a more systematic theory than Montesquieu generally saw fit to advance. *The Spirit of the Laws* and a number of earlier works, however, clearly represent attempts to execute an analytically rigorous form of historical investigation. Paul Rahe identifies Montesquieu as "arguably the first to attempt to identify the motor driving [historical evolution]."¹³

In this effort, Montesquieu certainly was not alone. His analysis was contemporaneous with those of Voltaire and Vico, and served as a significant inspiration for

¹² Commentary on the historical theories implicit in these works include Shackleton, *Montesquieu: A Critical Biography*, 157-70. Berlin, "Montesquieu," 15-52. David Carrithers, "Montesquieu's Philosophy of History," 61-80. Stark draws on both the earlier works to explain Montesquieu's view of historical causation as well as the history of commerce and civilizational types in *The Spirit of the Laws* Books 18-22. *Montesquieu's Sociology of Knowledge*, 16-18, 75, 87-98. On the history of these manuscripts, see Shackleton, 68-76.

¹³ Rahe, *Montesquieu and the Logic of Liberty*, 148.

both Gibbon and Hume later in the 18th century.¹⁴ As a number of observers of 18th century intellectual history have suggested, it was much clearer what the *philosophes* and others *opposed* in early modern history-writing than what exactly they meant by “philosophic history.”¹⁵ The kinds of history that Enlightenment philosophers sought to supplant can be organized into roughly three categories. First, there was the “Cleopatra’s nose” approach, according to which major historical developments were attributed to idiosyncratic personal qualities and encounters.¹⁶ Fénélon, Voltaire, Condillac, Gibbon, Hume, and others criticized mere historical chronicles, which discerned no logic to the rise and fall of civilizations, nations, and individuals beyond that of “radical historical contingency.”¹⁷

A second type of history that many Enlightenment thinkers argued against was that focused on the activity of political, military, and religious leaders. While we may naturally gravitate towards the stories of “great men,” Hume, for example, argued that more ordinary,

¹⁴ The term “philosophy of history” itself originates from Voltaire’s piece by the same title, which eventually became the introduction to his *Essai sur les mœurs et l’esprit des nations et sur les principaux faits de l’histoire depuis Charlemagne jusqu’à Louis XIII*, first published in 1756. Voltaire discussed history and historiography in *Nouvelles considérations sur l’histoire* (1744) in addition to the *Essai sur les mœurs*. Vico’s *Scienza Nuova* (1725) has been vaunted by 20th century thinkers such as Isaiah Berlin as an underappreciated originator of philosophical history. See for example “The March of History,” in *Political Ideas in the Romantic Age*, Ed. Henry Hardy (Princeton, NJ: Princeton University Press, 2006), 208-259. While Shackleton and Berlin insist that Montesquieu was not familiar with Vico’s work, Paul Rahe concludes that that he was, based on a note to himself in his Italian travelogue about buying a copy in Naples of the “nuova Scienza” by “Joan-Batista Vico” (“Voyage de Gratz a la Haye,” OC I, 575). Shackleton, *Montesquieu: A Critical Biography*, 114-16. Berlin, “Montesquieu,” 134, 139. Rahe, *Montesquieu’s Logic of Liberty*, 147n3. Gibbon explicitly took inspiration from Montesquieu in *Essai sur l’étude de la littérature* (1761) and *The History of the Decline and Fall of the Roman Empire* (1776-89). Cited in Carrithers, “Montesquieu’s Philosophy of History,” *Journal of the History of Ideas* 48, no. 1(1986), 64-65. For Montesquieu’s influence on Hume, see James Moore, “Montesquieu and the Scottish Enlightenment,” in *Montesquieu and His Legacy*, ed. Rebecca Kingston (Albany, NY: State University of New York, 2008).

¹⁵ Paul Cheney, *Revolutionary Commerce: Globalization and the French Monarchy*, (Cambridge, MA: Harvard University Press, 2010), 88-95. Johnson Wright “Historical Writing in the Enlightenment World,” in *The Enlightenment World*, ed. Martin Fitzpatrick, Peter Jones, Christa Knellwolf, and Iain McCalman (New York: Routledge, 2004), 207-216. Carrithers, “Montesquieu’s Philosophy of History,” 61-63.

¹⁶ In his *Pensées* 162, Blaise Pascal famously suggested, “Cleopatra’s nose: if had it been shorter, the whole face of the earth would be different.” Translation my own. (Brunschvig, 1897 ed), 47, <http://www.pascalpense.org>

¹⁷ Cheney, *Revolutionary Commerce*, 90. Carrithers, “Montesquieu’s Philosophy of History,” 62-63.

socially-dispersed behavior generally played a much greater role than these conspicuous individuals. At the very least, we should not expect to find reliable causes through reference to the actions and characteristics of individuals. If we want to make any sense of history, then we should look to broadly present passions, such as material interests, and to the realms in which they predominate, such as commerce. Hume follows Montesquieu in considering personal quirks and the virtues of great men to be “accidental things” in a key sense (11.9.168).

To say that any event is derived from chance, cuts short all further inquiry concerning it, and leaves the writers in the same state of ignorance with the rest of mankind. But when the event is supposed to proceed from certain and stable causes, he may then display his ingenuity in assigning these causes; and as a man of any subtilty can never be at a loss in this particular, he has thereby an opportunity of swelling his volumes, and discovering his profound knowledge in observing what escapes the vulgar and ignorant.

The distinguishing between chance and causes must depend upon every particular man’s sagacity in considering every particular incident. But if I were to assign any general rule to help us in applying this distinction, it would be the following: *What depends upon a few persons is, in a great measure, to be ascribed to chance, or secret and unknown causes: what arises from a great number, may often be accounted for by determinate and known causes.*”¹⁸

The problem with both the “Cleopatra’s nose” and “great men” approaches, then, is that they leave fortune as the apparent arbiter of history. The opposition between chance, or accident, and discernible causes ran through many of the philosophic histories of the 18th century. As Hume put it, “nothing requires greater nicety, in our inquiries concerning human affairs, than to distinguish exactly what is owing to *chance*, and what proceeds from *causes*.”¹⁹ In light of growing successes in discerning the causal mechanisms governing the natural world, it seemed unnecessary to settle for such an impotent approach to historical

¹⁸ David Hume, “Of the Rise of the Rise of the Arts and Sciences,” in *David Hume: Selected Essays* (Oxford, UK: Oxford University Press, 1998), ed. Stephen Copley and Andrew Edgar, emphasis in original, 56-57.

¹⁹ David Hume, “Of the Rise of the Rise of the Arts and Sciences,” emphasis in original, 56.

inquiry. Enlightenment historians thus sought to uncover “underlying social structures” shaping historical trends and began to pay more attention to the role of “humble classes.”²⁰

The third category to which Enlightenment historiography stood in contrast were the early modern ecclesiastical or “providentialist”²¹ histories, exemplified by Bossuet’s *Discours sur l’histoire universelle* (1681) and *Histoire des Variations de Églises Protestantes* (1688). As Paul Cheney notes, these ecclesiastic histories had in common with the philosophic ones the ambition to explain history via definitive causality rather than chance, and on a global scale. The philosophic historians, however, sought to examine both ancient and modern history without taking scriptural and clerical authority for granted.²² Either because they doubted the very possibility of divine providence or were wary of claims to know its course in political history, they focused on sociological, economic, and physical causes rather than final ones. Still, as some have argued, much of Enlightenment historiography amounts to a secularization of histories like that of Bossuet, sharing the formal qualities of a faith in future progress and a confidence in the intelligibility of history.²³

Montesquieu also transcended these conventional types of political history, clearly sharing the view that it is both possible and desirable to explain major social, economic, and political developments in terms of regular, worldly causes, or at least to a greater extent than

²⁰ Cheney, *Revolutionary Commerce*, 90. See also Johnson Wright on the turn from state, law, and legislator-centered to “sociological” history. “Historical Writing in the Enlightenment World,” 208.

²¹ This is Shackleton’s term. *Montesquieu: A Critical Biography*, 163. Shackleton contends that the main problem in early modern historiography was “the relationship between secular and ecclesiastical history,” and that Bodin was the first major writer to attempt a “laicization of history” (Ibid., 159).

²² Cheney, *Revolutionary Commerce*, 90. Carrithers, “Montesquieu’s Philosophy of History,” 79. Shackleton, *Montesquieu: A Critical Biography*, 159-161.

²³ Voltaire’s *Essai sur les mœurs*, while critical of providentialist history, also evinced a substantial debt to Bossuet’s universal approach, beginning with the obvious fact that it picked up where Bossuet’s history left off, at the reign of Charlemagne. See Pierre Force, “Voltaire and the Necessity of Modern History,” *Modern Intellectual History* 6, no. 3 (2009), 477-78. doi: <http://dx.doi.org/10.1017/S147924430999014X>

often thought. In what is likely his most famous statement on the subject, in the *Considerations*, Montesquieu rejects the idea that fortune is the arbiter of human affairs, and poses two related, though not analogous, distinctions between causes—general and particular causes, and moral and physical causes. After explaining how Rome’s republican character led to their great conquests, and their conquests to the eventual corruption of their republican character, Montesquieu explains

It is not chance that rules the world. Ask the Romans, who had a continuous sequence of successes when they were guided by a certain plan, and an uninterrupted sequence of reverses when they followed another. There are general causes, moral and physical, which act in every monarchy, elevating it, maintaining it, or hurling it to the ground. All accidents are controlled by these causes. And if the chance of one battle—that is, a particular cause—has brought a state to ruin, some general cause made it necessary for that state to perish from a single battle. In a word, the main trend draws with it all particular accidents (CC, XVIII, 169).²⁴

Accidents in this passage, what he calls particular causes, are simply chance

occurrences, which could just have easily turned out differently. That a particular general in power at a particular time and place happened to have particular virtues is itself an accident in this sense.

While Montesquieu sees many such accidents leaving their mark on the Roman story²⁵, he contends that the Romans’ republican constitutional structure and military virtue, the resulting expansion of their country, and the dynamic between the constitution and size of the country, are the general causes explaining the transformation of the republic into an empire.²⁶ The eventual corruption of the republic stemmed less from the particular acts of

²⁴ Shackleton suggests that Montesquieu largely paraphrases this statement from a work by a friend of Vico, Paolo Mattia Doria’s *La vita civile* (1729).

²⁵ See for example his praise of the “particular causes” of Pyrrhus (IV.44), Caesar (XI, 106), and Trajan (XV, 141) and the “four great men” Claudius, Aurelius, Tacitus, and Probus, running against the general trends, “who by a great stroke of luck succeeded each other [and] reestablished an empire that was about to perish” (XVI.164).

²⁶ *Considerations*, IX.94-95.

any citizens or generals than from these general causes. “If Caesar and Pompey had thought like Cato, others would have thought like Caesar and Pompey; and the republic, destined to perish, would have been dragged to the precipice by another hand” (XI.108). The ambition of Caesar and Pompey may have occasioned the transformation, but the cause in a truer sense lay outside them, and outside human control as such.²⁷

In *De La Politique* (1722), he similarly suggests that the failures of Charles I of England and Louis XV of France derived more from the general disposition of the people in those times—a “common character” that is the prototype for the *esprit général* Montesquieu analyzes in masterpiece—than from their individual behavior.²⁸ Explaining the decay of Roman military discipline and virtue in the *Considerations*, he abstracts from the role of particular individuals: “The mistakes of statesmen are not always voluntary. Often they are the necessary consequences of the situation in which they find themselves” (XVIII, 168).²⁹

Montesquieu’s discussion of general causes in these early works raises the question of whether individuals’ and peoples’ fates are wholly determined by social or structural forces outside their control. To put it another way, do general causes have *necessary* effects?³⁰ Emphasizing either necessary causes *or* chance in political history in turn puts into question the possibility for statesmanship and political reform.

²⁷ Shackleton finds the distinction between occasions and causes in Malebranche, Vico and Doria (168-69). *Montesquieu : A Critical Biography*, 167-68. In Chapter XI of the *Considerations*, Montesquieu says human ambition in general rather than that of Caesar and Pompey *per se* should be blamed (107-8).

²⁸ *De La Politique*, OC I, 112-119. The dating of the work is according to Stark, *Montesquieu’s Sociology of Knowledge*, 16, who considers this Montesquieu’s most determinist-leaning work, and which he chalks up to a “youthful error” (16-18) On the provenance of this unfinished work, preserved in the *Pensées*, see Carrithers, “Montesquieu’s Philosophy of History,” 72-73. See also Shackleton, *Montesquieu : A Critical Biography*, 166.

²⁹ The question of *which* general cause—the republican constitution itself or the size of the country (i.e. a moral or a physical cause)—was the primary causal force in Roman history is one I will address in Chapter 15.

³⁰ Carrithers, “Montesquieu’s Philosophy of History,” 63.

Evidently more inclined to sweeping philosophic statements in his earlier writings, Montesquieu at times affirms historical necessities to the success—or lack of success—of particular rulers, and to the decline of Rome. “Since the republic had necessarily to perish,” he explains in the *Considerations*, “it was only a question of how, and by whom, it was to be overthrown” (XI, 102). It was a necessity given the implications of the nature and principle of the Roman constitution: as a martial, non-commercial republic (and with short electoral cycles for the consulate),³¹ Rome had to constantly be engaged in war, and was quite successful in doing so. At the same time, its republican character also meant it was dependent upon maintaining a small, close-knit society that could be educated to a singular devotion to the fatherland. Expanding in accord with the first implication of its constitution, Rome simultaneously undermined its ability to maintain its political character (CC, XI, 92-95)

Yet beginning with his early works in the 1720s, Montesquieu also explicitly rejects what could be considered a fourth counterpoint to “philosophic history,” at least in his version of it. If ascribing too much causal responsibility to eminent individuals and personal characteristics ceded history to chance, and the clerics ascribed unmediated, transparent causality to God, Montesquieu set himself against another polar extreme—the secular determinism of a “blind fatality” ruling the world.³² Moreover, as we will see in analyzing his history of Gothic government as well as the geography of liberty and despotism, the general causes Montesquieu elaborates in *The Spirit of the Laws* are not necessary causes.³³

³¹ *Réflexions sur les Habitants de Rome*, OC I, 910-912. In Chapter 4, I will discuss at greater length this characteristically republican dilemma of territorial size and the tradeoffs between external and internal strength.

³² Montesquieu rejects this outlook, which he attributes to Spinoza, in the very first chapter of *The Spirit of the Laws* (1.1.3). His opposition to this outlook can be found at least as early as the *Traité de devoirs* from 1725 (OC I, 109). See also *Pensées* #615, in OC I, 1137 (translated in Introduction, 12n).

³³ Berlin, “Montesquieu,” 150-51. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 17, 76.

For one, the general causes that make up the *esprit général* of a nation are so numerous, and so dynamically interrelated that it is almost impossible for any one to simply determine outcomes. Moreover, analyzing influences on the *esprit général* becomes the occasion for Montesquieu to highlight the scope for and character of political prudence.

Notwithstanding his bold generalizations in these earlier works, then, what emerges above all from them is neither a confirmed determinism— nor any systematic “philosophy of history”— but rather a fascination with the interplay between chance, or particular causes, and general causes, in political history. Indeed, Montesquieu seems to have been able to make a strong case for both chance and causes.³⁴

In the work that represents the culmination of his mature reflections on politics and history, Montesquieu generally refrains from asserting universal principles of historical development. Nonetheless, in *The Spirit of the Laws*, as well as the *Essay on Causes* that he wrote while crafting his masterpiece, Montesquieu explores in a more comprehensive fashion the different kinds of general causes—the dynamic between physical and moral causes— shaping the *esprit général* of a nation. He affirms in the Preface his view of the basic intelligibility of political differences across time and space,

³⁴ As Carrithers emphasizes, in *De la politique*, Montesquieu was as inclined to broad affirmations of unforeseeable historical contingencies as to those of the force of general causes. “Most effects come about through such singular channels, or depend on causes so imperceptible and so remote, that we can hardly predict them” (OC I, 112). He cites, for example, the Byzantine emperor Heraclius’ losses at the hands of Mohammed’s army which, far from being anticipated as a potential threat, did not even exist when he first took the throne in 610 CE. What’s more, in the fragmentary *Réflexions sur le caractère de quelques princes et sur quelques événements de leur vie* (1731-33), originally part of an intended work, *Les Princes*, Montesquieu focuses on the impact of the particular character of rulers. Montesquieu makes the case that personal virtues or vices were decisive in the reigns of many of the very same kings whose cases he explained in terms of general causes in *De la politique*. For example, he earlier explained Charles I of England’s failure to preserve the crown as the consequence of Henry VIII’s decision a century prior to liberate royal power from the papacy. This unleashed a passion for liberty that inevitably would turn on royalty itself at some point. Later, however, Montesquieu cited Charles I’s own personal and political vices—as well as Cromwell’s sheer genius—for the fall of English crown in 1649. *De la politique*, OC I, 112-13. *Réflexions sur le caractère de quelques princes et sur quelques événements de leur vie*, OC I, 519-531. Carrithers, “Montesquieu’s Philosophy of History,” 72-77.

I began by examining men, and I believed that, amidst the infinite diversity of laws and mores, they were not led by their fancies alone.

I have set down the principles, and I have seen particular cases conform to them as if by themselves, the histories of all nations being but their consequences, and each particular law connecting with another law or dependent upon a more general one (Preface, xliii).

Yet in taking his subject as “the spirit of the laws,” Montesquieu shows that the logic of this diversity across time and space cannot be understood in simple, general terms. *The Spirit of the Laws* emphasizes the multiplicity of general causes, including laws and legislative purposes themselves, and the need to examine them together in order to make fruitful comparisons among different political orders. The spirit of the laws, “the various relations that laws may have with various things,” includes “the nature and the principle of the government that is established or that one wants to establish... physical aspect of the country...the way of life of the peoples...the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores, and their manners” (1.3.8-9, 19.4.310). He groups these “various things” into physical and moral causes, a dichotomy that will be especially important to understanding his analysis of the influence of climate and terrain in Part 3.³⁵

In *The Spirit of the Laws*, Montesquieu revisits his analysis of the Roman republic’s rise, imperial transformation, and subsequent decline in Books 11 and 27.³⁶ In addition, he explains major changes over time in ancient and modern commerce (Books 20-22), and in

³⁵ The distinction and interaction between these two categories will be the subject of Chapter 15.

³⁶ I discuss Montesquieu’s critique of the “frenzy of liberty” that undermined both constitutional and civil liberty in the Roman republic in Chapter 1 of the dissertation.

medieval French mores, religion, and civil and political laws (Books 28, 30-31).³⁷

Montesquieu's history of the Franks will be the focus of Chapters 9-12, and I will broach his history of commerce to some extent in Chapter 18, as the accidental causes of geography and history converge in the account of commerce.

Commentators attempting to articulate his approach to historical writing usually neglect both his history of commerce and of the Frankish monarchy in their analyses of his "philosophy of history."³⁸ The neglect of his history of commerce is especially surprising, as Montesquieu identifies the kind of global patterns, transcending individuals and even particular nations, which are typically thought to constitute "philosophic" history.

In Part 6, on the other hand, Montesquieu focuses on a particular history, and the causes contributing to the *esprit général* of a particular nation. Montesquieu's analysis of Gothic government and the history of French laws underscores the singular origins of England, his model of political liberty, and France, which, in addition to being the country of the greatest personal concern to Montesquieu, is also his most detailed historical example of a moderate monarchy (in its medieval incarnation). Many commentators have focused on the

³⁷ Montesquieu also discusses changes over time in global population size and distribution (Book 23) and in the right of nations (Books 10 and 24), both of which he relates to the establishment of Christianity. The rise and fall of different religious and philosophic movements itself forms a history of great interest to Montesquieu. I will briefly address the relationship between his account of physical and historical accidents and divine causality in the Conclusion.

³⁸ Paul Rahe, who looks for Montesquieu's approach to historical analysis in Parts 3 and 4 of *The Spirit of the Laws*, rightly notes that Carrithers' overlooks his account of the development of commerce, broadly speaking, in Part 4. *Montesquieu and the Logic of Liberty*, 147-149. Paul Cheney focuses on Montesquieu's much neglected history of commerce in *Revolutionary Commerce*, 52-110. So far as I can tell, none of these investigations of Montesquieu's approach to historical writing integrates an analysis of the subject of this chapter, the history of Gothic government and the Frankish monarchy in Part 6 of *The Spirit of the Laws*. Conversely, analyses of Part 6 by Cox, Kingston, and Huillung do not connect his approach to history here with that to commerce and Rome. Iris Cox, *Montesquieu and the History of French Laws* (Oxford: The Voltaire Foundation, 1983) and "Montesquieu and the History of Laws," in *Montesquieu's Science of Politics*, 409-429; Rebecca Kingston, *Montesquieu and the Parlement of Bordeaux* (Geneva, Switzerland: Libraire Droz, 1996); Mark Hulliung, *Montesquieu and the Old Regime* (Berkeley, CA: University of California Press, 1976).

intellectual context of this analysis: the debates about whether the French monarchy was more Germanic or Roman, whether the legitimate seat of authority was the nobility or the crown, and what all of this meant for the course of 18th century France. While I will remark on the historical context at the end of the chapter, my interest in his analysis of Gothic and Frankish government is to explain how it fits into the broader picture of his account of and argument for moderate government, its dependence upon accidental causes, and I will clarify what Montesquieu means by “Gothic government,” how it unintentionally supported political liberty, and the upshots of this analysis for liberal political leadership.

That Montesquieu’s most extensive foray into historical writing explores the development of a particular nation itself tells us something about his approach to the study of historical causality. His focus on medieval France allows him to present a comprehensive picture of the general spirit of a particular nation, which is the necessary preparation for any would-be political reformer. Thus, writing a particular history better serves practical political science than philosophizing about the nature of political history in general. Relatedly, while *The Spirit of the Laws* certainly is concerned with the theoretical question of the relative role of chance and causes, the primary tension, or at least the one of primary interest in my analysis, is the more practical one between accidents and prudence.

What Montesquieu calls “accidents” in Book 5 of *The Spirit of the Laws*, and which I refer to as “accidental causes” in this dissertation are akin to the “general causes” identified in the *Considerations*. While accidental to human plans and purposes, these are not simply arbitrary factors. Originating beyond conscious human control, they are nonetheless intelligible. Nor, however, are accidental causes in this sense strict necessities or determinative factors. For one, they interact with other accidental causes, multiplying

possible outcomes. Moreover, they interact with human will, plans, and purposes. Not least among the factors contributing to the *esprit général* are the different orders of laws themselves, the relations among them, their origins, and even the “purpose of the legislator” (1.3.9).³⁹ In other words, this spirit reflects both accidental causes and human intentions. Political prudence in turn consists partly in understanding the general causes participating in a particular community’s political situation. By understanding the factors both constraining and facilitating political movement, a legislator can clarify just what leeway he has.

While Montesquieu makes quite clear the shortcomings of Gothic government with regard to liberty, in it he finds the remedies, or at least inspiration for possible remedies, to the abuses of liberty he identifies in classical-style republics, ancient kingships, and despotic-leaning monarchies (i.e. modern France). Gothic government and its heirs also conflated different orders of law, as I will show, but their errors helpfully complement or neutralize the errors of these other governments.

Montesquieu’s account of Gothic government provides the counterpart to his analysis of the negative unintended consequences of many attempts at political reform. While so many well-intended legislative plans and purposes have gone awry, the institutions and practices that have proved crucial to promoting rule of law in a large country were first established for reasons unrelated to that goal. Without intending to establish constitutional government or civil liberty *per se*, the fiercely independent Franks forged a government with well-distributed powers, confederation, intermediate bodies, and a national, representative

³⁹ Montesquieu summarizes the *esprit général* in Book 19, “Many things govern men: climate, religion, the laws, the maxims of government, examples of past things, mores, and manners: a general spirit is formed as a result” (19.4.310). Earlier versions of this definition are collected in *Mes Pensées* in *OC*, I, 1458 and 1156 and discussed by Shackleton, “The Evolution of Montesquieu’s Theory of Climate,” *Revue Internationale de Philosophie* 33-34 (1955), no. 3-4, 320-329, and Stark, *Montesquieu’s Sociology of Knowledge*, 87.

assembly, and an independent judiciary with a relatively gentle criminal justice system. The structure of feudal monarchy arose through a highly unusual concatenation of accidental causes. The balance of power within the government of one alone emerged in the wake of the barbarians' defeat of the Romans in Western Europe in the 5th century. The rudiments of a "liberal" government emerged on account of the early Germanic nations' attempts to adapt their herding lifestyle, tribal government, and judicial customs first to the great external threat of the Roman empire, and then to ruling over a much expanded territory and diverse peoples in the wake of conquering the western Roman empire. The wearing down of the original constitution itself marked the realization of the Gothic model.

In sum, Montesquieu provides us with a most surprising account of the origins of constitutional arrangements and legal practices we now consider most civilized. These unique circumstances provided the occasion for the Franks to forge the rudiments of "liberal" government. The prototype for the political and civil arrangements we now consider most civilized initially emerged from the practices of barbaric peoples. That is, the Franks made their livelihood not through farming or commerce, but by herding, hunting, and pillaging booty from their defeated enemies. As I will discuss in Section 3, the independence afforded by their means of livelihood itself is rooted in the particular climate and terrain of northern Europe, which helped shape the way that the Franks organized themselves as their empire grew. The Franks also were barbaric in the pejorative sense—harsh, violent, and vengeful.

Through highlighting the contingent character of much of French civil and political development, demonstrates his uniquely comprehensive approach to political science. For one, Montesquieu demonstrates what it means, and why it is important, to analyze societies in terms of the "spirit of the laws," the relations among different orders of law, and among

the laws and factors he outlines in Book 1, Chapter 3. Book 18, which I will discuss in Chapter 18, specifically concerns the relation of the ancient Germanic laws to terrain, mores, and means of livelihood, while Books 28, 30, and 31 deal with the relation between these laws (in their Frankish version) and their origins and purposes.⁴⁰ Montesquieu shows how the laws of royal succession, military conquest, criminal justice, property, and other orders have mutually influenced each other over time, with the logic of different orders dominating at different junctures. Some of the key developments he traces in the history of the Frankish civil and political laws include the consequences for royal power of the changing basis for the possession of fiefs and freeholds, and the dynamic relationship between local judicial practices and the state of royal power.

Second, he contextualizes foreign practices within a broader framework of universal standards. In discussing medieval usage of trials by combat and ordeal to settle disputes, Montesquieu insists that these practices were not simply arbitrary. Without ever losing confidence in either his right or his ability to evaluate such practices, Montesquieu explains how these usages accorded with the mores, religious beliefs, and means of livelihood of the warrior, proto-Christian aristocracy that established them. He insists that we must consider them in light of the web of laws, mores, and circumstances of which they were a part, and that such analysis is necessary precisely in order to evaluate them properly.

Third, he clarifies the scope and character of political prudence even as he emphasizes the limits on our ability to shape political outcomes. In emphasizing the role of historical contingencies in the medieval Frankish monarchy, Montesquieu does not denigrate

⁴⁰ Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the rise of judicial activism* (Chicago: University of Chicago Press, 2003), 84.

the importance of political prudence, but rather clarifies its genius. His analysis in Part 6 becomes the occasion for Montesquieu to define, as well as to demonstrate, prudential leadership. For one, Montesquieu's analysis must show not only how it is that the system of government and the policies of Gothic government happened to emerge, but why learning about them can help us improve our understanding of what makes for good laws and institutions. Moreover, his discussion of the influence of causes accidental to human plans and persons also becomes the occasion for him to identify individuals who helped improve the French constitution and the administration of criminal justice. In the heart of his account of the contingent emergence of liberal French jurisprudence, Montesquieu elevates King Louis IX, later beatified as Saint Louis, as a model political reformer. Saint Louis' leadership, he suggests, consisted less in the actual changes he himself instituted, than in the way his actions roused others to change their practices for themselves. This king exemplifies the art of "inviting without commanding," which Montesquieu praises as the "supreme skill" (28.38.591; 31.5.679). Of course, Montesquieu himself also comes to light as an example of this approach to political leadership, in ways that I will discuss in the concluding chapter.

Finally, Montesquieu's analysis in Part 6, and particularly that of Gothic and Frankish criminal practices, helps illuminate his limited but unmistakable affirmation of historical progress in the realm of political liberty, which is overlooked by focusing on his more conspicuously philosophic historical writing.⁴¹ In Book 12, Montesquieu had made a striking

⁴¹ Berlin rightly emphasizes that Montesquieu did not share the full-throated optimism of contemporaries such as Helvétius and Condorcet and others regarding the prospects for reason's success in the political realm. "Montesquieu," in *Against the Current: Essays in the History of Ideas*, Ed. Henry Hardy, 136. Following Gilbert Chinard, Carrithers goes so far as to affirm Montesquieu a "historical pessimist." Gilbert Chinard, "Montesquieu's Historical Pessimism," in *Studies in the History of Culture: The Discipline of the Humanities* (Menasha, WI, 1942), 161-72. Cited in Carrithers, "Montesquieu's Philosophy of History," 79. Agreeing with their overall assessment of Montesquieu as the "sober version" of the Enlightenment, I would add that

assertion about the prospects for liberalizing the administration of criminal justice: “The knowledge already acquired in some countries and which *will* be acquired in others, concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything in the world” (emphasis added, 12.2.188).

In explaining Saint Louis’ subtle but influential judicial reforms in Book 28, Montesquieu also offers an uncharacteristically bold statement of faith that more and more peoples will adopt criminal practices protective of liberty. Influenced by the experience of more humane, less arbitrary criminal procedures in the king’s court, the Frankish lords willingly gave up their traditional legal customs. “Reason,” Montesquieu contends, “has a natural empire; it has even a tyrannical empire; one resists it, but this resistance is its triumph; yet a little time and one is forced to come back to it” (28.38.590). In his account of the history of criminal practices, liberal and despotic, Montesquieu presents his unique understanding of enlightenment; acutely aware of the many ways political reform has gone and can go awry, he nonetheless finds reason for optimism about the future of political liberty. What’s more, he expresses a confidence in humans’ own ability to positively influence the state of that liberty, even if, as we will see, it is often not in the way we intend to do so.

Montesquieu’s view must also be distinguished from one of traditionalism or opposition to reform as such. His analysis of the history of criminal practices, I would suggest, is perhaps the best place to see how he tempered caution with hopefulness and vice versa.

Chapter 9: Gothic government

To understand the context and significance of Montesquieu's historical analysis, as well as to clarify the developments he traces, I have relied on much historical "heavy-lifting" done by others, in particular Iris Cox and Rebecca Kingston. In Cox's comprehensive study of the three historical books (28, 30, and 31), she discusses the extraordinary volume of original and secondary sources on which he relied. These sources include Roman and Greek histories (Tacitus' *Germania* in particular), the capitularies, edicts, customs, and legal codifications recorded in the medieval period; the canon law that developed alongside civil and constitutional law, and Frankish histories. In the latter category, Gregory of Tours' *History of the Franks* and the lives of Charlemagne and Saint Louis, written by Eginhard and Joinville, respectively, figure most prominently.

She concludes that he relied on these works as raw historical data, but not for his interpretation of the key contours of Frankish history and their significance.⁴² As Montesquieu himself put it, "I have tried to give a clear idea of these things which are so confused and obscure in the authors of those times that, in truth, drawing them out of their chaos is to discover them" (28.27.577).

Cox also evaluates the main points in Montesquieu's historical argument in light of 19th and 20th century medieval scholarship, concluding that subsequent research largely

⁴² Cox, *Montesquieu and the History of French Laws*, 46.

corroborates his account, including many points he was the first to forward, with a couple of relatively minor exceptions.⁴³

Rebecca Kingston analyzes the relationship among Montesquieu's discussion of criminal laws in Book 12, his analysis of the history of French criminal justice, and his experiences working as a magistrate in the *parlement* of Bordeaux (1715-1724). I rely in particular on her organization of the juridical history traced in Book 28. To shed light on Montesquieu's argument and his approach to analyzing trials by ordeal and combat, I refer briefly to two very different, contemporary analyses of these phenomena.⁴⁴

While Montesquieu discusses Gothic and Frankish government most extensively in Books 18, 28, 30, and 31, he signals the importance of ancient Germanic laws to both his understanding of political liberty and the case of France in particular throughout the book. He cites "our fathers the Germans," as an example of a people with relatively gentle criminal practices (6.18.93, 14.14.243, 24.17.471) and with the mores, manners, and laws that accord with a barbaric livelihood—that is, with herding and pillaging (10.3.140, 17.5.283).⁴⁵ This

⁴³ The works she consults are Émile Chénon, *Historie générale du droit français* (Paris 1926-1929); Henri Regnault, *Manuel d'histoire du droit français* (Paris, 1940); Ferdinand Lot, *Naissance de la France* (Paris 1970) ; F.L. Ganshof, *Qu'est-ce que la féodalité?* (Brussels 1968) ; Marc Bloch, *La Société féodale*, 2 vols. (Paris 1939-1940); and Jean Brethe de La Gressaye's critical edition of *De l'esprit des lois* (Paris 1961). In addition to quibbling with the precise timing of certain changes, subsequent historians have questioned two points that are important to Montesquieu's overall argument of Gothic government and the history of the Frankish monarchy. The first is whether individuals under the Merovingians and Carolingians could choose the civil code by which they wanted to be governed. While numerous French historians have challenged this point, many Italians maintain the same position as Montesquieu. The second is whether the distribution of land by the king always went with the delegation of the right of justice, or whether this right was delegated separately. Ganshof and Regnault conclude that the fief and the justice sometimes went together, but not as a general rule. Either way, the king devolved the right of justice, which is the key point for Montesquieu's account of feudal monarchy. Cox, *Montesquieu and the History of French Laws*, 21, 30-31, 153-157.

⁴⁴ Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986) and Peter Leeson, "Ordeals," *Journal of Law and Economics* (forthcoming) and "Trial by battle," *Journal of Legal Analysis* 3, no. 1 (2011), 341-375.

⁴⁵ Montesquieu refers to "our fathers the Germans" at 6.18.93, 10.3.140, and 14.14.243 and explicitly directs the reader to his extended discussion of Germanic civil laws in Book 28 on three occasions (10.3.141, 17.5.282, 21.18.387). Carrese, *The Cloaking of Power*, 88.

former aspect of their politics he explains in detail in Books 28 and 30, and the latter in Book 18 (18.22-31.296-307), the subject of Chapter 18 of this dissertation.

Montesquieu first introduces Gothic government in Book 11 after his account of the English constitution.⁴⁶

Here is how the plan for the monarchies that we know was formed. The Germanic nations who conquered the Roman Empire were very free, as is known. On the subject one has only to see Tacitus on the *Mores of the Germans*. The conquerors spread out across the country; they lived in the countryside, rarely in the towns. When they were in Germany, the whole nation could be assembled. When they dispersed during the conquest, they could no longer assemble. Nevertheless, the nation had to deliberate on its business as it had done before the conquest; it did so by representatives. Here is the origin of Gothic government among us. It was at first a mixture of aristocracy and monarchy. Its drawback was that the common people were slaves; it was a good government that had within itself the capacity to become better. Giving letters of emancipation because the custom, and soon the civil liberty of the people, the prerogatives of the nobility and of the clergy, and the power of the kings, were in such concert that there has never been, I believe, a government on earth as well-tempered as that of each part of Europe during the time that this government continued to exist; and it remarkable that the corruption of the government of a conquering people should have formed the best kind of government men have been able to devise (11.6.187).

This government was “a mixture of aristocracy and monarchy” in that the kingship was limited and elective; it was, as Cohler describes it, an “aristocracy of warriors, one of whom was the king.”⁴⁷ As Tacitus describes their political practices in the 1st century CE, when they were fighting the Romans, a chief would rule on the basis of his eminence in

⁴⁶ Montesquieu focuses on the development of the French monarchy, though he makes brief references to turning points in the English monarchy (2.4.18, 3.3.22, 8.9.118) and to developments in the monarchy in Hungary (8.9.119), Germany and Italy (9.9.137). See Tocqueville’s account of the similar political, social, and economic arrangements “from the Polish frontier to the Irish Sea” in the Middle Ages. *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Anchor Books, 1983), I.4.15.

⁴⁷ Cohler, *Montesquieu’s Comparative Politics*, 102. “Their kings they choose for their noble birth, their army commanders for their valour. Even the kings do not have absolute or unrestricted power, and their commanders lead by example rather than by issuing orders, gaining respect if they are energetic, if they stand out, if they are at the front of the line.” Tacitus, *Germania*, trans. Anthony Birley (Oxford: Oxford University Press, 1999), 41.

martial virtues, and in close counsel with a relatively democratic public assembly.⁴⁸ The distinctive political institution of Gothic government, the national, representative assembly, was based on the Germanic tribal assemblies, which governed in conjunction with the elective king.⁴⁹ In the wake of their common military conquest, tribes united under a king to forge representation of a diverse, dispersed empire. The representatives from different armies, tribes, and towns—and soon clerics—would assemble from the different corners of the expanding territory to discuss national affairs and consult with the king. The national business was primarily war and the division of the spoils thereof. These assemblies represented the nation at the same time that they served the king.

Montesquieu is especially interested in the government of the Franks, a tribe that started on the northern banks of the Rhine River in what is now the Netherlands and northwestern Germany, and over a period of a few centuries, managed to conquer most of Western and Central Europe. In the wake of incursions by other Germanic tribes, themselves pushed west by the Huns, the Franks expanded to the south and west in the 5th century under the great Merovingian king Clovis. Their customs and institutions that first developed “in the forests” of Northern Europe had to be modified somewhat in order to serve the demands of ruling over vastly increased territory.

⁴⁸ On the context, reliability, and influence of Tacitus’ account of Germanic practices, see J.B. Rives, introduction to *Tacitus’ Germania*, trans and ed. J.B. Rives, 1-74 (Oxford: Clarendon Press, 1999).

⁴⁹ Tacitus provides a vivid image of these ancient assemblies of primitive warriors. “On minor matters only the chiefs decide, on major questions the whole community. But even cases where the decision lies with the commons are considered in advance by the chiefs...When the assembled crowd is ready, they take their seats, carrying arms. Silence is commanded by the priests, who have on these occasions the right to enforce obedience. Then the king or chiefs are heard, in accordance with each one’s age, nobility, military distinction, or eloquence. The power of persuasion counts for more than the right to give orders. If a proposal displeases them, they shout out their dissent. If they approve, they clash spears. Showing approval with weapons is the most honorable way to express assent.” *Germania*, 43.

At the time of Clovis' death in 511, the Frankish realm extended south all the way to the Pyrenees, encompassing almost all of modern-day France, with the exception of Brittany, the Mediterranean coast, and the Alpine regions. By the early 6th century, the Frankish realm extended south all the way to the Pyrenees, encompassing almost all of modern-day France, with a few exceptions. At the height of its power in the early 9th century CE, the Frankish empire ruled most of western and central Europe, including all of modern-day France, the Netherlands, Belgium, Austria, Czech Republic, Slovenia, and Croatia, and much of modern-day Italy, Germany, and Hungary earning its consummate conqueror, Charlemagne, the title, "Father of Europe" or "Father of a Continent" in historical memory.⁵⁰ The French monarchy's roots stretch from early Frankish dynasties of the Merovingians (428-737) and Carolingians (752-987) through the Capetians (987-1792), with their offshoots of the House of Valois (1328-1589) and the House of Bourbon (1589-1792).

The way that the Franks expanded the territorial scope of their institutions and practices in the wake of their conquests is key to Montesquieu's account of Gothic government. The constitutional balance, as well the rudiments of an independent judiciary and relative liberty of the citizen, resulted accidentally from the interaction of the Franks' primitive political right, their right of nations, and their civil right. Gothic government also conflated different orders of law, but their errors helped to compensate for the errors Montesquieu identifies in republics on the classical order, as well as ancient kingships and

⁵⁰ Pope John Paul II dubbed Charlemagne the "Father of Europe." *Father of a Continent* is the title of a recent study of Charlemagne by the Italian historian Alessandro Barbero. The Franks' territorial expansion is tracked in *The New Penguin Atlas of Medieval History*, Colin McEvedy (New York: Penguin Books, 1992). For a helpful visualization of the Franks' rapid expansion, see the following time-sequence animation http://upload.wikimedia.org/wikipedia/commons/2/23/Franks_expansion.gif by Wikicommons user "YemeniteCamel," based on the maps "Growth of Frankish Power, 481-814" and "Disruption of the Carolingian Empire, 843-888," in *The Historical Atlas*, William Shepherd (New York: Henry Holt and Company, 1923), 53-56. http://www.lib.utexas.edu/maps/historical/history_shepherd_1923.html

those modern monarchies tending towards despotism. This government in turn was the primary raw material from which the feudal monarchy in France developed centuries later. “It is impossible to inquire...into our political right,” Montesquieu explains, if one does not know perfectly the laws and the mores of the German peoples” (30.19.646).

The basis of regional and local authority, including the right of judging, depended in the first place on the Franks’ military arrangements and their mode of conquest. Among the early Germans, there were not standing armies, but instead loose associations of princes who attracted young men to their service through their reputation for bravery. Dubbed “companions” by Tacitus and Caesar, or *leudes*, vassals, antrustions, or the king’s faithful by subsequent historians, these followers took oaths to fight in the battle alongside their prince, competing to outdo one another in valor (30.3-4.626-628, 30.16.640). They were the king’s vassals in the sense that they had sworn to serve him, but they did not hold lands in return. These were people who made their living primarily through herding and pillaging, not farming. “Fiefs were war horses, weapons, and meals” (30.3.621). Citing Tacitus, Montesquieu gives us a vivid picture of their rustic, martial mores: “You could persuade them to work the land and wait out the year far less than you could persuade them to challenge the enemy and be wounded: they will not acquire by sweat what they can obtain by blood” (30.3.621).⁵¹

Not invested in the defense of planted fields or material riches, these warriors had to be mustered and re-mustered for each particular battle, with new oaths and new promises of booty. “The pace of the monarchy was set by springs that had always to be rewound” (30.4.622). That is, the warriors fought voluntarily, and their spoils—properties accorded by

⁵¹ Tacitus, *Germania*, 14.45.

political rather than civil right—were revocable, or at most given for life (30.16.640-641).

The difficult part for a king or general was not to command the army, but to make them assemble in the first place. “In this independent and warlike nation, one had to invite rather than to constrain; one had to give, or offer expectation of, fiefs vacated by the death of their predecessor, to reward constantly, to make preferences feared” (31.5.678).

As they grew and extended their domination across more and more of Europe, the different levels of military leaders and followers within each of these nations multiplied. There were four primary kinds of military units. The *leudes*, or “the king’s faithful,” were those who fought directly for the king. These *leudes* in turn often had other men faithful to the king or themselves fighting under them. The bishops and other ecclesiastic orders had their own vassals, and in the peculiar world of early Germanic Christianity, they led their own troops vassals in battle.⁵² Those who were not vassals in any of these orders, the freemen, would be organized for battle under a count, a local office appointed by the king.

While these primitive “fiefs” were revocable, at least in principle and the lords were compelled to honor their king above all, the relationship among them was both interdependent and hierarchical. The system as a whole was thus rather decentralized, though some kings managed to assert their sovereignty more effectively than others.

Inhering in these offices of military command, Montesquieu emphasizes was the right of justice. He goes to great lengths in Book 30 to explain how, in the “spoils system” of the early Germanic tribes, the booty divided among a prince’s leading warriors included the right and responsibility for presiding over the adjudication of disputes among those fighting under

⁵² “The bishops, accustomed in those times to go to war against the Saracens [Muslims] and the Saxons [pagans], were far from having the monastic spirit” (31.21.702).

him. “It was a fundamental principle of the monarchy that those who were under someone’s military power were also under his civil jurisdiction” (30.18.644). For the dukes, counts, and other lords serving the king, the right of justice, as well as that of making payments to the fisc⁵³, always went with that of fighting for the king and mustering their own followers to fight.

The involvement of numerous judges and character witnesses, called compurgators, is crucial to Montesquieu’s account of Frankish justice.

One will perhaps believe that the government of the Franks was at that time very harsh because the officers had simultaneously military power, civil power, and even fiscal power over the subjects: a thing that I have said in the preceding books is one of the distinctive marks of despotism.

But it must not be thought that the counts judged alone and rendered justice as do the pashas in Turkey... Whoever had the jurisdiction, whether king, count, *grafia*, *centenarius*, lords or ecclesiastics, *they never judged alone*; and this usage, which had its origins in the forests of Germany, continued when the fiefs took a new form (30.18.646, emphasis added).

All types of lords would judge with no fewer than twelve other persons. Those

fighting under the king’s followers would themselves provide testimony about the character and behavior of accused criminals in their lord’s court (30.18.645-646).⁵⁴ To judge suits, they would convene temporary courts comprised of a number of the defendant’s peers. A major reason for them not to judge alone was that the default means for settling disputes was “proof by combat,” or legally-administered duels. They judged with their peers so as to be able to defend—literally—their judgments. For the accusation that a lord had borne false witness or

⁵³ Montesquieu emphasizes that the Franks did not collect taxes (30.12.630-632). The payments to the fisc came tolls collected on rivers and for bringing vehicles to public occasions (30.18.636). “Simple, poor, free, warlike, and pastoral peoples who were without industry and were attached to their lands only by their reed huts follows their leaders in order to get booty and not in order to pay or levy taxes. The art of abusive taxation is always invented afterwards, when men begin to enjoy the felicity of the other arts” (30.12.630).

⁵⁴ See Bartlett, *Trial by Fire and Water*, 26-28, 30-33, 50-51, 135-137. William Forsyth, *History of Trial by Jury*, 2nd ed. (Jersey City, NJ: Frederick D. Linn & Company, 1875). <http://constitution.org/cmt/wf/htj.htm>

false judgment gravely insulted his honor, which necessarily lead to combat to avenge that honor (at least until certain reforms promoted under Saint Louis, which I will discuss below; 30.18.644).

Montesquieu attributes the requirement of English juries rendering judgment on a unanimous basis to the situation of these early jurors, wherein they faced the possibility they would be challenged to a duel if either of the disputants rejected their decision. By deciding cases unanimously, they put parties in the position of having to challenge all of them to fight if they wanted to dispute the decision, which served as a helpful deterrence to complaints of false judgment (28.27.572).

While it may seem strange to think of the right of justice as a form of booty, the Germanic tribes treated almost all crimes as civil disputes, that is, as offenses to individuals rather than against the government, public security, or the nation as a whole. Accordingly, the penalties for most offenses were pecuniary, not corporal (28.36.586). Thus, the right of justice was a lucrative possession. Those who had fought for the king and were given the “right of justice” as a spoil of war constituted a key link between the political and civil order. The counts in particular, who organized the freemen for war and presided over adjudicating their disputes, played a crucial role in the development of a political law as such—that is, a law governing the relationship between the government and the ruled that is distinct from the relationship between a lord and his vassal—i.e. the feudal law.⁵⁵

A second key aspect of the relationship between the Frankish political and civil order, and a key source of political liberty this government afforded, centers on the use of personal

⁵⁵ Kingston and Cohler both provide helpful explanations of the role of the different titled orders in the Frankish monarchy. Kingston, *The Parlement of Bordeaux*, 236-242. Cohler, *Montesquieu's Comparative Politics*, 87-90, 102-103

laws to civilly govern the new peoples and territories they conquered (30.3-22.620-656). In other words, individuals were judged according to the laws of their own people, which remained attached to them wherever they were in the Frankish empire, rather than being judged by the laws of the Franks, those who were sovereign over the territory. This curious situation included the maintenance of different criminal laws among the different peoples living under Frankish domination. “One was so far from even dreaming in those times of putting uniformity into the laws of the conquering peoples that one did not even think of making oneself the legislator of the vanquished people” (28.2.535). What’s more, individuals could choose to adopt as their own a law code other than that of their fathers.

The use of personal laws also contributed to the liberty of the citizen by leaving to the conquered the customs and civil rights that Montesquieu suggests are much more important to their liberty than political right. In keeping with his rejection of the view that self-government defines political liberty, Montesquieu suggests that what most threatens that liberty is not the mere fact of being ruled by a foreign king, but the experience of having one’s customs and civil laws forcibly replaced (28.2.534-535, 28.12.548; see also 10.9-11.145-146, 10.14.149-150).⁵⁶ Cohler explains that the use of personal laws not only helped to maintain diversity and decentralization in the Frankish monarchy, but also served to limit the role of private discretion in applying the civil laws to individuals, such that they were “ruled more by law than by a person.”⁵⁷

⁵⁶ See also the *Considerations* where, in the context of explaining how Rome, unlike Spain, “imposed no general laws” as it conquered, he expresses a similar point: “It is the folly of conquerors to want to give their laws and customs to all peoples. This serves no purpose, for people are capable of obeying under any form of government” (VI.75).

⁵⁷ Cohler, *Montesquieu’s Comparative Politics*, 142.

To clarify the significance of the Franks' reliance on personal laws, Montesquieu contrasts their mode of imperial consolidation with that of the Visigoths and Burgundians, who relied more on impartial, territorial laws. Somewhat counter-intuitively, the Frankish practice of governing largely through personal laws led to more "liberal" results. Promoting uniformity in the civil laws in the territories they controlled meant the Burgundians and Visigoths had to forcibly overhaul the familiar practices of the peoples they conquered. Legal uniformity also facilitated more centralized administration and adjudication of the laws.

The Visigoths, who ruled Gaul before the Franks conquered it, and then most of the Iberian Peninsula from the early 5th to the early 8th centuries CE, serve as the foil to the Franks in *The Spirit of the Laws*, an example of the most unfortunate version of the intermingling of Germanic and Roman laws and peoples. Though initially derived from similar geographic and customary sources as the Frankish monarchy, the Visigothic government in the Iberian Peninsula represents for Montesquieu the prototype for despotic government in Western Europe.⁵⁸ In their constitution, almost all power was in the hands of the bishops and the king.

What's more, in calling for forcible conversion of Jews on penalty of death, their criminal laws exemplified the conflation of the divine and human that Montesquieu criticizes in Book 12. "We owe to the codes of the Visigoths all the maxims, all the principles and all the views of the present-day Inquisitors" (28.1.535; see also. 28.8.542). The Visigoths seem to have retained the worst aspects of "northern" harshness and independence while adopting the worst of the "southern" characteristics (14.14.243-4, 28.1.533-534, 30.1.533-534,

⁵⁸ In late antiquity, the Visigoths lived in forested regions northwest of the Black Sea, eventually engaging in the longest and most continuous migrations of the Germanic tribes. See McEvedy, *The New Penguin Atlas of Medieval History*, 10-34.

30.7.542). While the Franks did not stray too far from their original climate and terrain, the Visigoths came to build their kingdom in modern-day Spain, based in Toledo.⁵⁹ The Visigoths also apparently earned distinction for their political stupidity. Montesquieu hardly can control his disdain for them: “The laws of the Visigoths, those of Reccesuinth, Chindasuinth, and Egiga, are childish, awkward, and inane; they do not attain their end; they are rhetorical and empty of sense, fundamentally frivolous, and gigantic in style” (28.1.534).

If the retention of the use of personal laws by the Franks was favorable to liberty *among* the various Germanic peoples, however, it introduced a “cruel difference” between the Franks and the Romans (28.3.536). As the Germanic laws turned on the question of the honor due to individuals according to their status, one who had injured or killed a barbarian had to pay at least twice as large of a settlement as in the case of a Roman. However, because the Franks allowed individuals to choose the law by which they wanted to be governed, “everyone gave up Roman right in order to live under Salic [i.e. Frankish] law” (28.4.538).⁶⁰ Following the plain incentives to live under Frankish law, the Romans abandoned their own laws in order to enjoy the benefits of living under the Frankish laws. Thus, in the territory controlled by the Franks, Roman right steadily fell out of use, a distinction corresponding to that in modern France between the *pays de droit ecrit* and *pays de droit coutumier*.⁶¹

⁵⁹ I will expand on the significance of these migrations and habitats in the Chapter 16. In other parts of the book, Montesquieu criticizes the despotic economic and criminal justice policies of the modern monarchy of Spain (15.2.248-249, 20.14.346-247, 20.22.393-396, 25.13.490-492).

⁶⁰ The major exception was the clergy, for whom the Franks established privileged settlements regardless of their national legal status (28.4.538). Montesquieu’s view that the Franks, at least in some places and times, allowed individuals to choose their legal status, is one of the primary aspects of history that commentators in the 19th and 20th century contested, although some reaffirmed his position. See Cox, *Montesquieu and the History of French Laws*, 153-156. Shackleton, *Montesquieu: A Critical Biography*, 327-28.

⁶¹ Shackleton, *Montesquieu: A Critical Biography*, 325-328, Cox, *Montesquieu and the History of French Laws*, 156.

Under the Visigoths, Burgundians, and Lombards, however, the use of Roman right alongside the barbarian laws and customs endured. Montesquieu attributes this divergence in their civil practices to their relative positions of power with respect to the Romans. It is not, in other words, that the Franks somehow respected others' liberty more than the Visigoths in leaving the vanquished their civil laws, or that the Visigoths governed their subjects impartially because they were more concerned with "fairness." Rather, the Visigoths' conquests were much less secure than those of the Franks, which required them to come to terms with and appease the Romans and other peoples in the territories where they wished to settle and rule. "The Burgundians and Visigoths, whose provinces were quite vulnerable, sought to reconcile the original inhabitants to them and to give the inhabitants the most impartial civil laws, but the Frankish kings, sure of their power, were not so considerate" (28.1.533-534; see also 28.7.542).

As a result, Roman laws were widely used in those regions conquered by the Visigoths—most notably Spain—while they fell out of use in Frankish empire (28.4.539-540).⁶² In the *Lex Wisigothorum* promulgated by King Chindasuinth in 643 CE (and then revised by Recceswinth in 654 CE), the Visigoths established a uniform civil code in an effort to eliminate all distinctions among the Goths and Romans, and to force them to become a single nation. Under the Lombards, whose laws were also impartial, the use of Roman right expanded such that those who followed the law of the Lombards grew very few. The power of the clergy in the Italian peninsula, as well as the republican sensibilities in the towns, also militated against the adoption of the barbaric laws (28.6.541).

⁶² It is to the differences between the Visigothic and Gothic modes of conquest that Montesquieu traces the much discussed difference in 18th century France between the *pays de droit coutumier* and the *pays de droit écrit*. Cox, *Montesquieu and the History of French Laws*, 156.

As the Franks did not impose their civil laws or customs on those they conquered, the political unification of various peoples under the Frankish monarchy did not entail their civil unification. This contributed to constitutional balance by reaffirming the confederated character of the Frankish monarchy, whose spirit Montesquieu traces to the customary settlement patterns of the ancient Germans.

I find the origin of this in the mores of the Germanic peoples. These nations were divided by marshes, lakes, and forests; one can see in Caesar that they even liked their separation. The fright the Romans gave them made them band together; each man, in this mixture of nations, had to be judged by the usages and customs of his own nation. All these peoples, taken individually, were free and independent: *the homeland was in common and the republic particular; the territory as the same and the nations various*. Therefore, there was a spirit of personal laws among these peoples before they left their homes, and they took it with them in their conquests” (emphasis added, 28.2.535; see also 10.3.141, 28.2-12.534-548).

The decentralized character of the Frankish empire, even under its strongest kings, as well as the multiplicity of jurisdictions at every level contributed a great deal to balancing powers in the constitution. Further contributing to decentralization, the Frankish monarchy assimilated the ancient practice of electing a tribal chief into the medieval monarchy; municipal mayors were elected democratically by the people in their cities and towns, and at the same time served as local administrators of royal power (31.4.677-31.7.681).⁶³

The national assembly was the vehicle for tribal confederation, which was crucial to the constitutional liberty afforded by this government. Monarchy united the tribes first and foremost to forge a common foreign policy. Their union was forged for limited purposes.

⁶³ “A government in which the nation had a king and elected someone who was to exercise royal power seems very extraordinary, but I believe that the Franks, independent of the circumstances in which they found themselves, took their ideas about this from a distant past. They were descended from the Germans, of whom Tacitus says that in their choice of a king they determined according to nobility, and in their choice of leader, according to virtue. These were the Merovingian kings and the mayors of the palace; the first were hereditary and the second were elected” (31.4.677). See also Tocqueville’s account of municipal autonomy, elective mayors, and their decline in France and other monarchies derived from feudal government. *The Old Regime and the French Revolution*, 41-48.

They left to local authorities and customs governance of most matters except for those of external security (28.2.535). The effect was a nation with a great variety of laws across its different regions and among its different peoples, and thus many “layers of authority.”⁶⁴

Gothic criminal justice

The Germanic tribes’ customary juridical practices, including their penal code, played a crucial role in the primitive liberty afforded by Gothic government. The penalties for most offenses were pecuniary rather than corporal because almost all cases, including those of murder, were treated as private disputes rather than as public crimes (30.19.646). There was hardly a political law *per se* among these the early Franks, but only affairs of war, on the one hand, and civil and domestic concerns on the other.⁶⁵ Citing Tacitus, Montesquieu notes that the early Germans had only two capital crimes: “they hung traitors and they drowned cowards; these were the only public crimes.”⁶⁶ The heavy reliance on pecuniary penalties was another “forest custom” that the Visigoths abandoned in their southern conquests (28.1.533-534).

Their reliance on pecuniary penalties, Montesquieu explains, was not a matter of “gentleness,” but instead followed from their martial code of honor. “Our fathers the Germans admitted almost none but pecuniary penalties. These men, who were both warriors

⁶⁴ Ward, “Montesquieu on Federalism and Anglo-Gothic Constitutionalism,” *Publius: The Journal of Federalism* 37, no. 4 (2007), 559.

⁶⁵ Montesquieu defines political laws as those between the rulers and the ruled (1.3.7).

⁶⁶ “Traitors and cowards are hanged on tress. Cowards, those who will not fight, and those who have defiled their bodies, are plunged into a boggy mire, with a wicker hurdle pressed on top of them.” Tacitus, *Germania*, 12.43.

and free, considered that their blood should be spilled only when they were armed” (6.18.83; see also 28.1.533-534).

Montesquieu attributes great significance to the pecuniary settlements utilized by the various Germanic tribes, which existed in a primitive form in Tacitus’ time, but came into their own after the barbarian conquests. Paraphrasing Tacitus, he explains, “Among the Germans, hatred and enmities were inherited from one’s near relations, but these were not eternal. Homicide was expiated by giving a certain quantity of livestock, and the whole family received satisfaction; a very useful thing, says Tacitus, because enmities are more dangerous among a free people” (24.17.471).⁶⁷

Once one has accepted such a payment, Montesquieu emphasizes, it thereby becomes a crime in itself to continue to seek vengeance. In this way, the pecuniary penalties for adjudicating civil disputes brought in their wake a nascent political law. “This crime contained an offense against the public no less than an offense against an individual; it was scorn for the law itself. Legislators did not fail to punish this crime” (30.19.649). The refusal to give or to accept “satisfaction” posed a similar problem.

The medieval codifications of the Salic and Ripuarian Franks, Lombards, Saxons, Alemanni, and Bavarians called for those convicted of killing or injuring another to pay a two-part settlement (usually in livestock) to both the wronged party *and* a public official charged with keeping the peace. These Latin legal codifications date from the 5th to the 9th centuries. Tacitus does refer to a payment made to magistrate of some sort, as well as to the victim or his family. When an individual is found guilty of killing or injuring another, Tacitus writes, he is “fined a certain number of horses or cattle, of which part is paid to the

⁶⁷ Tacitus, *Germania*, 21.48.

king or the state, part to the victim of the crime or his relatives.”⁶⁸ Montesquieu suggests, however, that the payment to the magistrate was not a regular practice during this period, and that the payment to the family was itself only a suggestion rather than an obligation (30.19.646-650).

Under the Germanic confederations, legislators (the king and the national assembly) increased the settlements to the wronged parties, factoring in the honor of the one killed or injured, and made both the giving and receiving of this form of “satisfaction” obligatory. Of crucial importance, the pecuniary settlement required an additional payment, called a *fredum*. This was a “compensation for protection from the right of vengeance” made by the convicted party to the local magistrate (30.20.650). It was the regularization of this dual-payment system that brought the Germanic tribes under some semblance of rule of law. Thus,

Among these violent nations, rendering justice was nothing other than granting to him who had committed an offense one’s protection from the vengeance of him who had received it, and obliging the latter to accept his satisfaction that was his due so that, *among the Germans, unlike all other people, justice was rendered to protect the criminal from the one he had offended* (30.20.651, emphasis added).

Thus, he emphasizes that their judicial practices did not arise because these people were gentle, compassionate, or temperate, but precisely because they were not. They had a marked tendency to resort to violence and vengeance among themselves, and thus a particular need to devise a means for settling private disputes before they intensified into communal wars.⁶⁹

The *fredum* served in effect to make protection of the accused one of the fundamental principles of the criminal justice system—in addition to bringing the guilty to justice. By protecting the criminal and relying on relatively gentle penalties, these judicial usages helped

⁶⁸ *Germania*, 12.44

⁶⁹ Pangle, *Montesquieu’s Philosophy of Liberalism*, 282.

ensure that the justice system would not itself exacerbate private vengeance. These features served to effectively remove private feuds from the condition of natural liberty, or the state of nature (28.1-2.532-535, 28.17-27.552-574, 30.3.621).

Montesquieu makes it quite clear that this government had many flaws from the point of view of liberty—most notably the civil servitude of most of the commoners. Moreover, like Tacitus, he considers most of these tribes—and certainly the Franks—to be barbaric in both an anthropological and pejorative sense.⁷⁰ That is, they were semi-nomadic, herding peoples, and they were also brutally violent. “The Franks,” he explains, “tolerated murderous kings because they were murderous themselves; they were not struck by the injustices and pillaging of their kings because they too plundered and were unjust” (31.2.673).

Thus, unlike many in Britain, France, and the United States—not to mention Germany—who would take up a Gothic or Saxon theory of liberty, Montesquieu does not

⁷⁰ Tacitus’ commentators have long treated *Germania* as serving to critique the decadence of a too-civilized Rome as much as depict the tribes themselves. His account of the ancient Brits in *Agricola* is explicitly such a critique. See for example Rousseau’s allusion to Tacitus in Part 1, pg. 22 of his *Discourse on the Arts and Sciences*, trans. and ed. Victor Gourevitch (Cambridge, UK: Cambridge University Press, 1997), 11. Nonetheless, as the passages I’ve cited suggest, Tacitus’s account of these tribes is not entirely appealing—at least not for those reading it after the ascendance of biblical morality.

need to romanticize Gothic government in order to clarify its advantages.⁷¹ Indeed, he shows that we can make sense of their political and civil arrangements only in light of their ferocity. What is important from Montesquieu's point of view is the basic structure of political and civil power, as well as the judicial forms that emerged from the peculiar mixture of Germanic and Roman laws in the early medieval period. This government had limited monarchy, governing in concert with a national representative assembly, and through multiple levels of intermediate authority. These institutions were not the result of a concerted effort to devolve power from the central government to local institutions, or to distance judging from the king (19.27.326).

"The great invention of Gothic government," as Anne Cohler puts it, "was that rule over the same good or person could be shared, so that no person or group need be sovereign

⁷¹ In his comprehensive study of Gothicism in early modern England, Samuel Kliger explains the political leveraging of early English history by parliamentary leaders to criticize royal pretensions to absolute power. The Goths represented the founders of the public assemblies from which parliament was derived and which the Stuarts were trying to undermine. *The Goths in England: A Study in Seventeenth and Eighteenth Century Thought* (New York: Octagon Books, 1972). Kliger also has shown how the "Gothic thesis" had its own uniquely American career in the 18th, 19th, and early 20th century. It was leveraged as a racially-based explanation for American government by Thomas Jefferson in the 18th century and in the 19th century by such figures as George Perkins Marsh and Ralph Waldo Emerson. "Emerson and the Usable Anglo-Saxon Past," *Journal of the History of Ideas* 16, no. 4 (1955): 476-493. "George Perkins Marsh and the Gothic Tradition in America," *The New England Quarterly* 19, no. 4 (1946): 524-531. James Ceasar and others note that many 18th century Americans, including Jefferson, touted the Gothic foundations of American government. This recourse to "customary history" was meant to undermine feudal monarchy as it stood in the 18th century by unearthing its pre-8th century, Saxon forms, considered more democratic and free. To fix the origins of constitutional monarchy before the Norman invasion was to link the nascent nation to the robust activity associated with the Germans, rather than the speculative inclinations of the Normans. Jefferson affirmed this view in "Summary View of the Rights of British America," where he refers to Anglo-Americans' "Saxon ancestors." Others pitted Saxon constitutionalism against Norman tyranny. Demophilus, "The Genuine Principles of the Ancient Saxons or English Constitution" in Charles Hyneman and Donald Lutz, eds. *American Political Writing during the Founding Era, 1760-1800* (Indianapolis: Liberty Press, 1983), 340-367. According to Ceasar, the Gothic thesis grounds liberty in the customs that happen to have developed in the German forests. He presents the Gothic thesis as the opposite of an argument in the name of nature, whereas in Montesquieu's account, it has everything to do with the nature of the environment of northern western Europe. *Nature and History in American Political Development* (Cambridge, MA: Harvard University Press, 2006), 19-38. For a recent book tracing the use and abuse of Tacitus' account of the ancient Germanic peoples, see Christopher Krebs, *A Most Dangerous Book: Tacitus's Germania from the Roman Empire to the Third Reich* (New York: Norton and Company, 2011).

over any good or man.”⁷² Sovereignty was united in the figure of the king, and yet, in practice, “civil power [was] in the hands of an infinite number of lords” (28.41.594). To summarize the Gothic constitutional order, then, national representative assembly and elective monarchy provided for power sharing among the nobles and the king. Tribal confederation and the integration of multiple sets of tribal laws dispersed power between national, regional, and local jurisdictions. As Lee Ward puts it, “the vertical division of power among several layers of authority” was Montesquieu’s key supplement to the “horizontal separation of powers among the functions of government.”⁷³ The moderation of monarchic constitutions depends upon both principles. All in all, the Gothic constitution represented a better combination of the benefits of national, political unity and local, civil diversity than any that had come before, particularly on this scale.

Montesquieu emphasizes that this government contained its own internal resources by which individuals could improve it, particularly once Christianity and the ecclesiastical orders were added to the equation. For example, if the nobles, clerics, kings, towns’ leaders, or any other element might act to aggrandize its power, as Montesquieu deems inevitable, there were other bodies built into the constitution that could check their power (28.41.495). The genius of Gothic government is that it contained numerous means by which to counter-balance itself—not necessarily automatically, but without would-be reformers having to

⁷² Cohler, *Montesquieu’s Comparative Politics*, 89; also 60, 96.

⁷³ Ward notes that contemporary commentators tend to focus on Montesquieu’s account of the separation of powers in England and overlook his contributions to federalism, in the form of his analysis of Gothic confederation. Montesquieu’s analysis of Gothic constitutionalism in Part 6, Ward argues, provides the key to balancing the drawbacks of the English system: the centralization of legislative power in the national parliament. The English have opened themselves to the risks of legislative tyranny by eliminating local and regional assemblies and tribunals and the privileges of the nobles and clerics. “Montesquieu on Federalism and Anglo-Gothic Constitutionalism,” 557.

radically overhaul the existing arrangements. There are existing elements of the general spirit on which legislators can draw.

Further, the major flaw of civil servitude (serfdom) was not essential to this constitution. Civil emancipation accorded with the Christian beliefs that the Franks and all the other Germanic tribes eventually adopted. As will be discussed below, Montesquieu largely attributes the growth of medieval serfdom (*l'esclavage de la glebe*) to the voluntary, if unfortunate, subjection of freeholds to the laws of vassalage during quarrels among the warring Frankish princes.

Like the republican and royal judicial practices that Montesquieu criticizes in Parts 1 and 2, Gothic criminal justice also conflated different orders of law. That much of the meaningful property was governed by political rather than civil right conflicts with what Montesquieu counsels elsewhere (26.15.510). Moreover, their civil laws treated genuine crimes against public security as merely private disputes. Even though these laws had the effect of addressing the public implications of these disputes, in the classification of crimes Montesquieu lays out Book 12 (discussed in Chapter 2), it remains problematic that murder could be atoned for by a pecuniary penalty (12.4.191).

The way that Gothic government conflated different orders of law, however, helpfully complements or neutralizes the particular errors of the classical republics, kingships, and the modern despotic-leaning monarchies. As discussed in Chapter 2, the tendency in all of these cases has been for “the political interest to force the civil interest,” as he puts it (6.5.77). Even if Gothic government went too far in disconnecting criminal justice from the political interest and purposes, the more common danger throughout political history has been too little distance between the political and civil orders of law. This often has meant that arbitrary

domination and violence find a ready outlet in the administration of criminal justice, and that the judicial system serves to exacerbate private vengeance. Arbitrary violence and private vengeance, of course, are the very problems that formalized laws and courts of adjudication are meant to solve. Moreover, the decentralization of political power and diversity and of complexity of civil law also runs counter to the tendency in both republics and despotism towards the opposite extremes.

Thus, while Gothic criminal justice does not represent a model in itself, it underscores Montesquieu's critique of judicial abuses in republics, despotisms, and despotic-tending monarchies. Moreover, it suggests key historical roots, however crude, for the modern institutions and laws that best support liberty of the citizen.

Chapter 10: The development of the Frankish monarchy

At the beginning of Book 30, Montesquieu summarizes the logic of Gothic government, calling attention to its fortuitous origins.

I would believe there was an imperfection in my work if I did not mention an event which happened once in the world and which will perhaps never happen again, if I did not speak of those laws which were seen to appear in a moment in all of Europe without connection with those known until then, of those laws which did infinite good and ill, which left rights when domain was ceded, which diminished the whole weight of lordship by giving many people various kinds of lordship over the same thing or the same persons, which set various limits to empire that was too extensive, which produced rule with an inclination to anarchy and anarchy with a tendency to order and harmony (30.1.619).

In emphasizing the fortuitous character of the development of these political arrangements, Montesquieu does not denigrate the role of human discernment, or prudence, in political science, but rather clarifies its genius. Montesquieu must explain not only how it is that the system of government and the policies of Gothic government happened to emerge, but why they served the cause of political liberty—a cause that was not what the people involved actually had in mind. Moreover, Montesquieu's discussion of the influence of causes accidental to human plans and purposes also becomes the occasion for him to identify individuals who helped improve the French constitution and/or the administration of criminal justice: the national assembly in the early 7th century Merovingian dynasty, Charlemagne in the late 8th and early 9th centuries, and Louis IX (Saint Louis) in the mid-13th century.

In referring to its fortuitous origins and subsequent improvements in Book 11, Montesquieu introduces us to the major theme of his account of Gothic government in France in Books 28, 30, and 31, which is the way this government changed over time. Gothic government underwent myriad transformations over the medieval period, and across the different parts of northern Europe where it was established. In the last two hundred pages or

so of the *Spirit of Laws*, Montesquieu pinpoints key developments in the Frankish monarchy, where Gothic government came into its own. “The spectacle of the feudal laws is a fine one. An old oak tree stands; from afar the eye sees its leaves; coming closer it sees the trunk, but it does not perceived the roots; to find them the ground must be dug up” (30.1.619).

In Books 30 and 31, he explains the development of the first five hundred years or so of the Frankish political law—that is, the laws concerning kingship, succession, regional and national *parlements*, and the relationship between the king and intermediate orders. Montesquieu tracks the consolidation of a national political order from the primitive Germanic practices under the Merovingians and early Carolingians (early 5th – mid 9th centuries CE). After peaking with the Frankish empire under Charlemagne (768-814), national, political government weakened and power decentralized under the Carolingians and early Capetians, giving way to the domination of feudal laws (late 9th – early 13th centuries CE).

Montesquieu emphasizes the political revolution wrought by the changing basis for possession of fiefs (28.9-11.543-546, 30.5.622-623, 30.16.640-641, 31.26-34.709-722).⁷⁴ Originally distributed as spoil by the king to his generals, fiefs were held in exchange for continued service to the king, which linked the nobles who held them to the monarchy invested them in the national business. Inhering in the possession of fiefs was also the right of judging disputes in their ranks. When possession of fiefs became hereditary, these goods came to be governed by civil rather than political law. The nobles ceased to have an interest in the business of the nation, and the basis for a political law as such fell away. The

⁷⁴ On the seemingly mundane subject of property and inheritance, Tocqueville remarks appropriately, “No great change in human institutes will be made without discovering estate law in the middle of the causes of that change” *Democracy in America*, Mansfield and Winthrop ed., 1.2.10, 334.

transformation of allods or freeholds into feudal properties also weakened the connection between the king and his people.

As important to Montesquieu's story of the Frankish monarchy as the revolution in the fiefs was that in the Franks' civil laws and the judicial practices by which civil disputes were adjudicated. In Book 28, Montesquieu shows how the ancient Germanic judicial usages interacted with the right of conquest practiced by the Franks in order to establish independent judging and relatively gentle penalties. He explains the growth of written, standardized judicial usages during the consolidation Frankish empire, their subsequent decline as the monarchy gave way to full-blown feudal government, and then the rebirth of written law in the wake of the reforms initiated by Louis IX (1226-1270) and his successors. The counterpart to this rise, fall, and rebirth of written judicial practice is Montesquieu's fascinating depiction of the emergence and routinization, and then gradual reform of some of those practices that have helped to earn the medieval period its reputation as the "dark ages": trials by ordeal and combat. The reform of medieval juridical practices in turn led to the gradual restoration of central and royal power on a modified basis.

To simplify matters, we can consider Montesquieu's history in Part 6 in three periods, based on the major changes he identifies in the basis for the possession of fiefs, and in the dominant criminal justice practices. The first period, which I have just discussed, is that of the initial political consolidation of the Frankish empire in the wake of the Merovingians conquests, and those of the first three Carolingian kings—from the 5th through the late 9th century, just after Charlemagne's reign. I will refer to this period as that of the "original Gothic constitution." The period of the Frankish monarchy's weakening under the later Carolingians and the early Capetians, where possession of fiefs became hereditary and trial

by combat the dominant mode for adjudicating disputes, I will call that of “full-blown feudalism.”⁷⁵ This period spans roughly from the late 9th to the early 13th century.

Finally, there is the period of national and royal consolidation that began under Louis IX (1226-1270) and led over the next couple of centuries to the rebirth of a national political order. Following Rebecca Kingston’s analysis, I will refer to this as the beginning of a “national system of criminal justice.”⁷⁶ These periods roughly correspond to the three dynasties or “races” of Frankish rulers, the Merovingians, Carolingians and Capetians. However, as Montesquieu emphasizes, the transfers of power to new ruling houses were more results of the key political and civil developments than their starting points. In each of these three periods, Montesquieu suggests an individual or group as a kind of model of political prudence. Under the original Gothic constitution, the Merovingians’ national assembly helped craft the Edict of Clotaire II, which regularized limits on royal power and criminal justice procedures. Countering the decentralizing trends of the Carolingian monarchy was Charlemagne’s consolidation of national power and balancing of the nobility and clergy. Finally and most importantly is Montesquieu’s praise of Louis IX’s subtle but influential juridical reforms, which helped renew national political and civil law.

The emergence of “full-blown feudalism”

Montesquieu focuses on two major political developments occurring roughly over the period of the latter Merovingians kings through the end of the Carolingians: first, the replacement of a hereditary basis for possession of fiefs rather than one of political reward;

⁷⁵ The noted 20th century French medieval historian, Marc Bloch, credits Montesquieu with popularizing the notion of the “feudal laws” as the defining feature of medieval political order, though Boulainvilliers was the first to speak of them as such (xvii-xviii). *Feudal Society*, trans. L.A. Manyon (Chicago: University of Chicago Press, 1961).

⁷⁶ Kingston, *The Parlement of Bordeaux*, 244.

and second, the voluntary subjection of freeholds to the rules of vassalage. Associated with these two developments were changes in the relative powers of kings, mayors, nobles, clerics, and commoners. Overall, these developments ruined the constitutional balance in the Frankish monarchy. They occurred through the decisions made by countless individual kings, nobles, clerics, and freemen over many centuries, in view of their apparent interests. Periods of royal consolidation and centralization gave way to decentralization and dominance of local, feudal laws. The office of kingship itself practically disappeared twice—first, when royal and administrative power were consolidated by the “mayors of the palace” at the end of the Merovingian dynasty (first half of the 8th century or so), and second, when the holder of the largest, most strategically-placed fief, Hugh Capet, was given the crown.

Both ensuing from and contributing to these political changes were developments in civil practice, and particularly the administration of justice. After the Franks recorded their customary personal laws in Latin, the use of written laws of both Roman and Germanic extraction diminished, and that of unwritten customs—varying almost infinitely by jurisdiction—came to the fore again (28.11.546). This period saw the growth and refinement of trial by combat as the dominant mode of resolving civil disputes. Indeed, the mores and manners associated with trial by combat emerge as the distinguishing feature of this period (28.13-36.548-588).

Transformation of fiefs from political spoil to heritable property

Montesquieu emphasizes throughout Books 28, 30, and 31 that fiefs as well as counties were initially revocable possessions; they were political spoil, awarded by the king to his leading officers in exchange for continued military service (28.9-11.543-546, 30.5.622-

623, 30.16.640-641, 31.26-34.709-722). While fiefs “were neither given nor taken away capriciously and arbitrarily,” they fundamentally linked the nobles to the national business, making them both closely accountable to the king, but also directly involved in governing the fiefs and planning for war (31.1.669). When the Germanic tribes still were largely herding and warring peoples, fiefs took the form of livestock, men, and other movable goods. As they conquered and settled Roman Gaul, and came to rely increasingly on agriculture, fiefs took the form of lands and crops. Gradually nobles came to possess these fiefs on a more permanent basis—first for life, and then in perpetuity for their heirs. This greatly weakened the relation between the king and his leading men (28.41.594-95, 31.9-15.684-94, 31.21-23.701-705).⁷⁷

Montesquieu suggests a couple of factors contributing to this change. For one, when Frankish expansion plateaued at various points under the Merovingians and Carolingians, it became more difficult for kings to find new fiefs to distribute to their loyal followers. Kings often seized ecclesiastical property in order to have new fiefs to distribute. This would be the source of great conflicts among the Frankish nobles, kings, and clerics for much of the medieval period (31.9.684-687, 31.12.690-692).⁷⁸

Secondly, Montesquieu speculates that nobles became attached to their fiefs and counts to their counties, and acquired a sense of entitlement to them. Counts, originally sent on a yearly basis to muster freemen and adjudicate their disputes, would purchase the right to continuing possessing their office. Among the fiefs, “one can readily think that corruption crept in on this point” as it did among the counts (31.1.669).

⁷⁷ Cox, *Montesquieu and the History of French Laws*, 36-41.

⁷⁸ Cohler, *Montesquieu's Comparative Politics*, 61-62.

This process by which fiefs left the realm of political law and entered that of civil law took place over many centuries. For many centuries, there was a mix of hereditary and centrally-distributed fiefs in the Frankish kingdom. Tension over this development, which clearly undermined the king, led to the major political development of the late Merovingian period, the rise of the mayors of the palace as the *de facto* rulers. When Queen Brunhilda, ruling as regent for her son then grandson and great-grandsons, attempted to thwart this trend, the nobles violently opposed her designs. Her rival's son, Clotaire II in Neustria, took advantage of the popular hatred of this policy and plotted to eliminate her. After brutally murdering her, he succeeded in making himself the sole ruler of the Franks. However, he gained his position only by agreeing to give his co-conspirator, Warnachar II, lifelong tenure as mayor of the palace in Burgundy. Thus, the king's attempts to make the Neustrian monarchy dominant over the Frankish kingdom in effect served to weaken royal authority further (28.1.670-671).

To the extent that their kings and national representatives distinguished themselves, it was because they were fully cognizant of both the advantages and disadvantages of their nation's harsh mores. "The wise men of the various barbarian nations thought they themselves should do what was too slow and too dangerous to be expected from a reciprocal agreement of both parties" (30.19.647).

Montesquieu repeatedly refers to "the nation" as the source of key reforms in the Merovingian dynasty (31.2.672-3, 31.3.677). In the context of the Merovingians and Carolingians, the first two Frankish dynasties, this meant the lords and the bishops, "as it was not yet a question of the commons" (28.9.544). During the regencies of Brunhilda and Fredegunde and the feuds between them in the 6th and early 7th centuries, the kings and

queens constantly were making exceptions to the laws on inheritance and royal marriage—of fundamental importance to the political order in a monarchy—and trying their rivals without regard to judicial formalities. The national assembly fortified their civil laws on inheritance, marriage, and the rights of the accused that had been circumvented during these royal feuds through the Edict of Clotaire (aka Edict of Paris).⁷⁹

Before then, the nation had shown signs of impatience and flightiness in the choice or conduct of its masters; one had seen it rule on differences between its masters and impose on them the necessity of peace. But the nation then did what had not been seen before: it looked over its present situation, it examined its laws coolly, it provided for their deficiency, it checked violence, it regulated power (31.2.672). The Edict of Clotaire represented the first “revolution” in the Frankish monarchy, and the most republican one. This act serves as a model of political prudence by a national, representative assembly—what would become the English parliament and the French estates general. Their accomplishment in Montesquieu’s view seems to have been to reflect on what powers their leaders should have and what limits they should face, as well as to protect the nation as a whole against their own worst tendencies. In addition to bolstering rule of law and limitations on royal power, these reforms also confirmed the shift in some powers to the mayors of the palace. “The nation believed that it was safer to put power in the hands of a mayor whom it elected and on whom it could impose conditions than in those of a king, whose power was hereditary” (31.3.677). They were inspired in this change, he suggests, by the memory of their ancient practice of balancing elective generalship against hereditary kingship. Though at times these offices coincided in a single figure, they continued to maintain two differentiated bases for legitimate central rule—prefiguring, it would seem, the

⁷⁹ Brunhilda harbored a terrible vengeance for Fredegunde, her sister’s usurper as Chilperic I’s queen, as well as her probable murderer, and they feuded for decades. See Gregory of Tours, *History of the Franks*, trans. Lewis Thorpe (London: Penguin Book, 1974).

offices of monarch and prime minister in modern England, and other European constitutions with a distinct head of state and head of government (31.4.677).⁸⁰

The mayors of the palace, who administered the royal business in each of the primary Frankish realms of Austrasia, Neustria, and Burgundy, grew in power at the expense of the king (31.1-7.669-680). At first chosen by the king, the mayors eventually were elected by the national assembly, winning favor with them by supporting their claims to ranks and privileges, and by leading them in battle when certain kings shrunk from this duty. As the functions of distributing booty and commanding the armies were still inherently linked, political and military power increasingly became consolidated in the mayors. Remembered by historians as the “lazy kings” (*rois fainéants*), the last of the Merovingians in the late 7th and early 8th centuries were kings in name only. Duke Pepin (Pepin of Heristal) mayor of the palace in Austrasia in the late 7th century, simply kept the king imprisoned in his own palace, trotting him out once a year to show the people (31.6.680). The mayors of the palace did not attempt to return fiefs to a revocable status. “They ruled only by the protection that they granted the nobility in this regard; thus, the great offices continued to be given for life and this usage grew stronger” (31.7.680).

The beginning of the Carolingian dynasty, Montesquieu insists, signified only the official transfer of kingship to the family of Pepin. When his grandson, Pepin the Short (Pepin III), combined the mayoral and royal offices and was crowned king, he only formalized the change that had already taken place: “he acquired nothing by it except royal attire; nothing changed in the nation.” In emphasizing this point, Montesquieu explains that

⁸⁰ See Ferdinand Lot on the Edict of Clotaire as the product of national action. *Naissance de la France* (Paris: Librairie Arthème Fayard, 1948), 205-207. Cited in Cox, *Montesquieu and the History of French Laws*, 34-35.

historians mistake the most visible moment of a historical change as the source of the change itself, and ignore the preceding developments that prepared the way. “I have said this in order to fix the moment of the revolution so that one does not make the mistake of regarding as a revolution that which was only a consequence of the revolution” (31.16.695).

Charlemagne, national unity, and the regularization of property rights

The general trend towards extreme decentralization via the establishment of feudal inheritance was interrupted by the singular reign of Charlemagne (768-814), grandson of Charles Martel (Charles the Hammer), and the most famous of medieval European monarchs. Montesquieu gives Charlemagne the highest political praise he knew, which was that of being “extremely moderate” (31.18.698).

He so tempered the orders of the state that they were counter-balanced and that he remained the master. Everything was united by the force of his genius. He constantly led the nobility from expedition to expedition; he did not leave them time to form designs, and he occupied them entirely with following his. The empire was maintained by the greatness of the leader; the prince was great, the man was greater...He made admirable regulations; he did more, he had them executed. His genius spread over all the parts of the empire. One sees in the laws of this prince a spirit of foresight that includes everything and a certain force that carries everything along. Pretexts for avoiding duties are removed; negligences corrected, abuses reformed or foreseen. He knew how to punish. He knew still better how to pardon. Vast in his plans, simple in executing them, he, more than anyone, had to a high degree the art of doing the greatest things with ease and the difficult ones promptly...This prodigious prince was extremely moderate; his character was gentle, his manners simple; he loved to live among the people of his court (31.18.698). Among the policies for which Montesquieu praises Charlemagne is that of effectively establishing rule of law with regard to the goods of the clergy. As fiefs started to become hereditary, many kings, especially among the early Carolingians, would plunder the wealth of the clergy in order to reward their generals and spur them to continue fighting. The clergy were in a position to acquire goods constantly through bequests from rich and poor alike.

Kings “paid off” their sins with generous donations, and devout persons planned to leave their wealth to the church.

Yet precisely because they were constantly acquiring wealth, the churches were a ripe target. They “were given the whole of the goods of the kingdom several times. But, if the kings, the nobility, and the people found the means of giving them all their goods, they nevertheless found the means of taking them back. Under the Merovingians, piety founded churches, but the military spirit gave them to military men who divided them among their children” (31.10.686-689).

For Charles Martel, the last king in western Christendom able to fend off the Saracens (the Moors), the spirits of piety and battle conspired to enable him to redistribute to his warriors almost all of the Frankish clergy’s wealth. Since he was indispensable to the Pope, he had no need to appease the local bishops. From Charles Martel’s rule as mayor of the palace to the beginning of his grandson Charlemagne’s reign, Montesquieu speculates that the goods of the church changed over almost entirely into the possession of warriors (31.11.687).

Unable to make the nation simply return the goods, Charlemagne established tithes on the biblical model to secure income for the clergy, the maintenance of churches, and charity for the poor. Montesquieu explains that he was able to enforce payment of these tithes, which accord with a republican rather than a monarchic constitution, only through a combination of diverse incentives.⁸¹ First, he used his direct power over his own vassals and judges to oblige them to pay the tithes, thereby setting a powerful example. This did not persuade everyone,

⁸¹ “Among the Jews the payment of tithes was a part of the founding plan of their republic, but here the payment of tithes was a burden independent of those established by the monarchy” (31.12.691).

however. The “common people,” he explains, “are scarcely able to abandon their interests for an example” (31.12.691). In addition, then, an assembly established a capitulary that “gave them a more pressing motive:” it warned that, during the last famine, some crops were devoured by demons who, while devouring them, reproached those who had failed to pay their tithes (31.12.691). Finally, Charlemagne secured the compliance of the nation with the tithes by allowing the people to redeem them, i.e. to buy back the lands they gave in tithes.

Montesquieu emphasizes that securing the church’s income was a *political* reform for Charlemagne. While tithing *per se* was alien to the monarchic constitution, it served a crucial role in helping to balance the intermediate bodies. His efforts were based on an understanding of the important role of the clergy in the Frankish political order as a counter-balance to the nobles, an intermediary between the king and the people, and a link to the resources and influence of the papacy in Rome. “It seemed that he regarded the immense gift he had just given to the churches less as a religious act than as a political dispensation” (31.12.692).

We see in Montesquieu’s homage to Charlemagne how much the “original Gothic constitution” depended on constant warring in order to link the interests of the king and the nobles, and to maintain a united but diverse confederation. What Charlemagne managed to accomplish, moreover, Montesquieu attributes to his own personal qualities.⁸² Charlemagne’s rule was in one sense the opposite of an “accidental cause;” he acted with “a spirit of foresight that includes everything and a certain force that carries everything along” (31.20.699). Nonetheless, his virtue and genius were accidental to the character of the constitution. Indeed, the tempering of intermediate bodies and the national unity he forged

⁸² Cox, *Montesquieu and the History of French Laws*, 37.

went against the general tendencies of the Carolingian dynasty, with the increasing independence of fiefs from political law. In a few decades, his son Louis the Pious and grandsons, Charles the Bald, Lothair I, and Louis the German, managed to squander his achievements, and to solidify the means for undoing the original Frankish political law (31.25.709).

The transformation of freeholds into fiefs

Aside from their inability to control Frankish territory, to counter-balance the clergy and nobles, and to maintain an order to the distribution and possession of goods, Charlemagne's successors promoted legal changes that hastened decentralization and weakened the crown. In the Treaty of Verdun (843) that ended their civil wars, Charlemagne's grandsons included some clauses concerning the regulation of allods and fiefs that "must have changed the whole of the French political state" (31.25.08).

Allods were goods held without terms of service to any lord. The freemen who held these allods were directly under the king, who appointed counts to organize them for war. The counts also judged disputes among the freemen, whereas vassals and under-vassals were judged in their lord's court. While holding property without any strings attached might seem preferable to holding the same property as a vassal, a number of factors made vassalage appealing. Vassals to the king had a certain privileges, Montesquieu emphasizes; their lives were worth more in settlements for injuries or murders and they were punished less severely if they tried to evade judicial orders. As the property and person of vassals were generally more secure, many who were not bound in service therefore changed their allods, or

freeholds, into fiefs.⁸³ Moreover, by giving an allod to the king, who would in turn grant it as a fief, one could often establish that the land would pass on to heirs. In this way, freemen voluntarily subjected the use of their land to feudal obligations, a practice that began under the Carolingians and continued under the Capetians (31.8.682-684, 31.24.706-709).

It was especially during the civil wars among Charlemagne's grandsons, when one without an official protector found himself and his property quite vulnerable, that this practice of converting a freehold into a fief was popular. Moreover, the three brothers' Treaty of Verdun gave freemen even greater "free agency" in selecting a king or lord to whom they could en-fief their allods. Montesquieu affirms the importance often ascribed to the bloody battle of Fontenay, which, by killing so many Frenchmen, prompted the nobles to demand limits on the kings' ability to oblige them to fight in offensive wars (31.26-27.708-711). However, he emphasizes—in capital letters no less—that "THE PRINCIPAL CAUSE FOR THE WEAKENING OF THE CAROLINGIANS" was this change in the governance of freeholds (31.25.707). "Those who were formerly directly under the power of the king, insofar as they were freemen under the count, became imperceptibly vassals of one another" (31.25.708).

By the end of the Carolingians, Montesquieu concludes, all the lands had become fiefs and under-fiefs. When there were neither freeholds nor revocable fiefs, but only fiefs held on a hereditary basis, political law itself faded into irrelevance. "What the king had held without mediation was no longer held except by mediation, and royal power was, so to speak pushed back a degree sometimes, two, and often more" (31.26.710). As fiefs became

⁸³ Montesquieu concludes that freemen were granted the right to petition for a fief after the Treaty of Andelot in 587 and before Charlemagne's reign (31.24.706). Compare this example of voluntary servitude to Montesquieu's discussion in Book 15 of the one circumstance in which slavery could accord with natural right (15.6.251).

heritable goods, regulated by civil right rather than political right, under-vassalage was revolutionized as well. When fiefs were revocable or given for life, vassals of the king might parcel out their fiefs to under-vassals, but upon the death of the overlord, the entire fief would return to the king's control. This loosened the bonds between the king and all the lords of the nation. Once fiefs were hereditary, under-fiefs became so as well. "The inheritance of fiefs and the general establishment of under-fiefs extinguished political government and formed feudal government" (31.32.716).⁸⁴

These changes in the regulation of allods and fiefs greatly weakened the king's political relationship with the nobles and with the freemen, and diminished the import of the national body of representatives as a major legislative and executive body. "Most of the lords who had formerly answered immediately to the crown answered to it only mediately. These counts who had formerly rendered justice in the king's audiences, these counts who led freemen to war, stood between the king and his freemen, and power was pushed back yet another degree" (31.28.712).

Giving freemen the "liberty" to en-fief their holdings not only diminished the power of the monarchy, but also contributed to the rise of civil servitude in a harsh form. Montesquieu contends that there were few serfs under the Merovingians, most of whom were indentured before the Germanic conquests. It was only later under the Capetians that serfdom was extensive. (30.10.626-627). Serfdom expanded when the feuding kings and nobles enslaved the towns they conquered, and when freeholds were voluntarily subjected to the laws of vassalage (31.25.707-709).⁸⁵

⁸⁴ Cox, *Montesquieu and the History of French Laws*, 38.

⁸⁵ Hulliung discusses Montesquieu's account of the development of serfdom in the middle medieval period.

A number of other developments resulted from the replacement of allods by fiefs and the establishment of the heritability of fiefs, including most of those practices for which feudalism earned the odium of modern philosophers: primogeniture, the lords' authority over vassals' marriages and underage heirs,⁸⁶ and the servile homages and "reliefs" paid to lords as a substitute for loss of political control of the fiefs. When fiefs were given on a revocable basis or for life, they could not be divided. Once they were hereditary, however, they could be, at least in principle. However, since possession of a fief still required one to perform military services, the lord pursued his interest in competent and sufficient services by other means, such as by requiring consent for the marriage of vassals' daughters, and insisting upon ceremonial gestures of loyalty, known as "homage and fealty." Furthermore, upon inheriting the under-fief, the vassal would have to pay a "relief" as a sign of the lord's proprietary interest in the land (31.717-722).

Political consequences of the revolution in fiefs

This revolution in the regulation of fiefs eventually had to bring about a change in the nature of the monarchy, for the crown itself came to have little power over the nobles. They had few benefices with which to appeal to the nobles or the clergy, and barely enough wealth to sustain their own domains. "The tree spread its branches too far, and the top dried out" (31.32.716).

Montesquieu and the Old Regime, 68-69. See also Iris Cox, *Montesquieu and the History of French Laws*, 32.

⁸⁶ "As fiefs had become hereditary, the lords, who were to see that service was done for the fief, required that daughters who were to inherit the fief, and...sometimes, males, could not marry without their consent, so that marriage contracts became for the nobles a feudal provision and a civil provision. In such an act, made under the eyes of the lord, provisions were made for the future inheritance with a view to the heirs' being able to serve the fiefs; thus, only nobles were at first at liberty to provide for future inheritances by marriage contract" (31.34.722).

Yet the primary reason for which the Frankish monarchy was initially established—to unite Germanic tribes to fight foreign aggressors—was no less relevant in the 9th and 10th centuries than it was in the 5th and 6th. Thus, when the nobles gained so much power at the expense of the king, the crown could only go to the most powerful noble. As the most powerful landholder, Hugh Capet was the only Frenchman in a position to defend the lands and muster sufficient men in the face of a Norman invasion. He owned the towns of Paris and Orleans, and was able to check the advances of the Normans along the Seine and Loire Rivers. Therefore, in 987, “the crown was united with a great fief” (31.32.717).

The ascendance of the Capetians, Montesquieu insists, represented a much a greater change than that of the Carolingians, because it signified the end of veritable anarchy (31.16.695). Nonetheless, the rise of the House of Capet was, like the crowning of Pepin the Short, the culmination of a transition that began many decades, even centuries, before.⁸⁷ Thenceforth, succession to the crown followed the feudal pattern: “When fiefs became hereditary, the right of the eldest was established in the inheritance of fiefs, and for the same reason in that of the crown, the great fief...A right of primogeniture was established, and the reasoning of the feudal law forced that of the political or civil law” (31.33.708). The monarchy was reborn on the basis of the feudal laws (31.32-34.716-722).

⁸⁷ Cox, *Montesquieu and the History of French Laws*, 42.

Chapter 11: The age of judicial combat

As the changes in the fiefs undermined royal authority, civil practices had to change accordingly. In the wake of their conquests, the various barbarian monarchs recorded their usages in order to preserve them. In the 9th and 10th centuries, however, “the Gothic and Burgundian laws perished even in their own countries from general causes that brought about the disappearance of the personal laws of the barbarian peoples everywhere” (28.5.540).

Among these general causes was the change in the basis for holding fiefs and the multiplication of under-fiefs. The more decentralized the monarchy became, the more diverse and numerous the civil jurisdictions. Both Germanic and Roman written laws began to fall into disuse by the beginning of the Carolingian dynasty, because there was no one to enforce them (28.9.543-544).

Norman invasions, Viking raids, and other battles also “plunged the victorious nations back into the shadows they had left; reading and writing were forgotten” in France and Germany. “Thus, just as in the establishment of the monarchy German usages passed into written laws, some centuries later written laws returned to unwritten usages” (28.11.545-546). To adjudicate civil disputes, lords relied on local customs. These various local, orally-transmitted usages multiplied even further as judicial combat, a source of “continuous accidental situations [introducing] new usages,” took an increasingly important role in the resolution of civil disputes (28.45.600).

Montesquieu’s account of the extension and elaboration of judicial combat, or trial by combat, is the feature of the feudal laws to which he devotes the most attention in Part 6 (28.1.532-28.45.601, 30.18.644-30.22.658). He traces both the growth of trial by combat

under the Carolingians, and its subsequent decline beginning with the reforms initiated by Saint Louis in the early 13th century.⁸⁸

This peculiar practice epitomized the monarchic principle of honor, a Christianized version of the Germanic peoples' primitive codes of martial honor, and the social and political body of the warrior elite that promoted it. Though the precise terms varied greatly by jurisdiction and the particular dispute at hand, trial by combat was the predominant means for settling civil and criminal disputes where concrete evidence and witness testimony were either nonexistent or unreliable. Montesquieu's analysis of judicial combat serves as a key example of his approach to political science, as it shows him contextualizing seemingly bizarre practices, but as part of a broader effort to assess their political and ethical significance.⁸⁹ In order to properly evaluate them, he suggests, combat and ordeals must be examined in their relation to the mores, manners, religious beliefs, and economic livelihood of the medieval Germanic nations. Montesquieu leaves his readers with no doubt that trials by combat and ordeal were quite brutal, and based on illusion. In his chapter "The way of thinking of our fathers," he reflects, "One will be astonished to see that our fathers thus made the honor, fortune, and life of the citizens depend on things that belonged less to the province of reason than to that of chance, that they constantly used proofs that did not prove and that were linked neither to innocence nor to the crime" (28.17.551). Yet these practices were not merely brutal and superstitious. As he often does throughout *The Spirit of the Laws*,

⁸⁸ Rebecca Kingston details these and other development Montesquieu traces in medieval monarchy from the Germanic conquests to 18th century France. She delineates three major periods in the development of French criminal justice based on Montesquieu's historical analysis in Part 6: the Frankish, Carolingian, and that ushered in by Louis IX (Saint Louis). *The Parlement of Bordeaux*, 237-249.

⁸⁹ In his examination of the rationality and validity of medieval judicial ordeals, Robert Bartlett suggests that "trial by ordeal offers a perfect issue for testing different approaches to the study of alien practices and beliefs—beliefs and practices which, in this case, stem from our own European traditions rather than those of distant or exotic places." *Trial by Fire and Water*, 157-158.

Montesquieu shows how laws or customs that would strike modern readers as absurd or simply malicious make *some* sense, and were *less* terrible in their context.⁹⁰

Ordeals, broadly speaking, have ancient roots in many civilizations, but were especially integral to the judicial practices of the early Germanic peoples. Shlomo Eidelberg identifies three categories of ordeals. “Neutral ordeals,” such as the casting of lots, are simply tools for rendering a decision in a matter that otherwise would be decided arbitrarily, and would fester as a dispute. A unilateral ordeal is a procedure used to ascertain guilt or innocence with regard to a criminal accusation. Suspected criminals might undergo a unilateral ordeal, such as cold or hot water test, the hot iron, to “prove” their innocence. In civil cases, parties with competing claims could undertake a bilateral ordeal—i.e. a duel—in order to decide whose claim was “right.”⁹¹

Three major points in his analysis highlight Montesquieu’s approach. First, while speaking plainly to all of its flaws, Montesquieu argues that judicial combat marked an improvement on what it replaced in both public and private disputes. This practice represented a transitional mode by which vengeful, unruly peoples could begin to live under a political law. A major reason for the extension of judicial combat in civil cases, Montesquieu argues, was to compensate for the abuses of the negative proof, the common means by which disputants would “defend” their claims to property, to having a witnessed a

⁹⁰ For Stark, Montesquieu’s analysis of judicial ordeals exemplifies Montesquieu’s preoccupation with the *cas teratologique* in comparative politics. To “find an explanation for men’s strange and apparently irrational behavior” was a “constant preoccupation and scholarly ambition.” *Montesquieu: Pioneer of the Sociology of Knowledge*, 39.

⁹¹ Shlomo Eidelberg, “Trial by Ordeal in Medieval Jewish History: Laws, Customs, and Attitudes,” *Proceedings of the American Academy of Jewish Research* 46/47 (1979), 105-120. Eidelberg examines and then dismisses possible precedents for judicial ordeals in ancient Israel and Jewish law, and then explores why many medieval kings and judges exempted Jews from unilateral ordeals, and from fighting judicial combats except by proxy.

particular crime, or to their innocence in the face of a criminal accusation. Second, he insists that judicial combat, as well as various trials by ordeal were “more unreasonable than tyrannical” (28.17.553). Their practical effects were much less arbitrary than were their principles. Third, he suggests that trial by combat, which was defined almost entirely by customary procedures and lacked substantive law, multiplied formalities in a way that proved beneficial to the administration of criminal justice from the perspective of liberty of the citizen.

Montesquieu depicts both the early Germanic concern for martial honor and its somewhat modified form in the era of full-blown feudalism. Trial by combat served both worldly and otherworldly concerns.⁹² “The German peoples,” he explains, “were no less sensitive than we ourselves to the point of honor; indeed they were more so. Thus the most distant relatives had a lively concern about insults, and all their codes are founded on this” (28.20.560). Affronts to a man’s honor among them consisted of anything that suggested cowardice or ineptitude in the practice of war—either through the man’s own actions or through accusations levied by another (28.21.561). Furthermore, one who served the king or another distinguished man, or was born into a distinguished family, had a certain rank, and could not be treated as lower in rank without offending his honor. Commoners fought on foot using clubs, and with their faces exposed, while nobles fought on horseback, in armor, and with swords. Thus, nothing could offend a gentleman more than to be slapped in the face, no matter how minimal the physical injury, because it signified he was being treated as a commoner (28.20.560).

⁹² Bartlett, *Trial by Fire and Water*, 114-116.

After adopting Christianity, the articles of the barbarians' codes of honor were infused with a concern for what they believed God rewarded. These peoples "found honor by punishing injustice and defending weakness," in addition to doing so by distinguishing themselves for their courage in battle. "Gallantry was born when one imagined extraordinary men who, upon seeing virtue joined to beauty and weakness in the same person, were led to expose themselves to danger for her sake and to please her in all the ordinary actions of life" (28.22.562).

A major premise underlying the trials by combat and by ordeal was that God could and would judge disputes about which there was no evidence but the parties' competing, equally plausible claims, ensuring defeat of the one who had lied and/or committed a crime (28.17.552). Notwithstanding their newfound profession of faith in the one, omnipotent God, they also believed that the wrong side could win a combat if he got his hands on magical herbs (28.22.562).⁹³

Among the ancient Germanic tribes and the early Franks, warring peoples would often resort to the use of single combat as a means to control violence among themselves. "The advantage of the practice of judicial combat was that it could change a general quarrel into an individual quarrel, return strength to the tribunals, and restore to the civil state those who been governed then only by the right of nations" (28.25.566). It was far better to have

⁹³ Thus, a standard part of the process for commencing a trial by combat was the requirement that each side swore he did not have any magical weapons on his person (28.22.562). See Bartlett on the debate over the Christian and/or pagan character of these practices. *Trial by Fire and Water*, 153-156. See Eidelberg on the adaptation of ancient Germanic ordeals to Christianity by clerics as well as their opposition to it. On why Jewish law opposed such ordeals, see discussion of prohibition against divination in Lev. 19:26 and Deut. 18:9-15; Babylonian Talmud, *Chullin* 95b, vol. 63, Schottenstein ed.; Maimonides, *Mishneh Torah*, *Hilchot Avodat Kochavim*, Ch. 11, trans. Trouger, vol. 3, and Eidelberg, 112-120.

two warring groups settle their dispute by appointing individual representatives to fight one another than to subject everyone to violent combat.⁹⁴

In an exquisite depiction of the paradox of independence, the primitive freedom outside the rule of law, Montesquieu explains how trial by combat served as a stepping stone to establishing political liberty properly speaking:

The Germans, who had never been subjugated, enjoyed an extreme independence. Families waged war on one another over murders, robberies, and insults. This custom was modified by putting these wars under regulations; they were waged by order of the magistrate and under his eyes, which was preferable to a general license to do harm to each other... when one nation wanted to begin war with another, they sought to capture someone who could do battle with one of their own and...the success of the war was judged by the outcome of this battle (28.17.552).

The use of single combat to settle conflicts between families or tribes suggested its use for civil disputes. “Peoples who believed that single combat would settle public business could well have thought that it could also rule on disputes between individuals” (28.17.552). In civil disputes during the Carolingians’ reign, Montesquieu argues, a major reason trial by combat became much more widespread was because it compensated for the abuses of another judicial practice: the use of what Montesquieu calls the negative proof, also known as compurgation or the wager of law. The “establishment of negative proofs brought in its train the jurisprudence of combat” (28.18.554; see also 28.13-20.548-560). Trials by ordeal and combat as well as the negative proof were all regarded as *judicia dei*, or divine judgments.⁹⁵ While the clergy strongly opposed trial by combat, “they themselves largely gave rise to it” through their promotion of the use of judicial oaths in lay tribunals (28.18.554). “The

⁹⁴ In Eidelberg’s account, this type of case—similar to the contest between David and Goliath in *I Samuel* 17—is not an ordeal properly speaking, because its purpose was to decide the outcome of a battle by a preferable means, not to determine guilt or the veracity of a claim (109).

⁹⁵ Bartlett discusses different classes of single combat, ranging in legality and purpose. *Trial by Fire and Water*, 113-115. See also Henry Charles Lea, *Superstition and force: essays on the wager of law, the wager of battle, the ordeal, torture*, 3 vols. (1866). Republished as *The Duel and the Oath* (Philadelphia: University of Pennsylvania Press, 1974) and *The Ordeal* (Philadelphia: University of Pennsylvania Press, 1973).

ecclesiastics took pleasure in seeing that in all secular business one had recourse to the churches and altars” (28.18.556).

In negative proof, used among most of the Germanic tribes, though not the Salic Franks, lay tribunals would allow the accused to exonerate himself by swearing on the Gospels that he had not committed the crime in question, and/or by his having relatives and friends swearing to his innocence.⁹⁶ Similarly, a charter indicating inheritance rights could be legally confirmed by a sworn statement. Such laws, he explains, “could be suitable only to a people with a certain simplicity and natural candor. The legislators even had to anticipate their abuse” (28.13.549). The negative proof made it common practice for individuals to give false testimony, cheapened religious oaths, and undermined the stature of ecclesiastical courts. “Perjurers were sure to acquire” (28.18.554). Those nobles who felt that the use of the negative proof cheated them out of an inheritance, or prevented them from gaining satisfaction from one who had wronged them, had to find recourse to another remedy. “The law of combat was a natural consequence of, and remedy for, the law that established negative proofs. When one made a declaration and saw that it was going to be unjustly evaded by an oath, what could a warrior do who saw himself about to be confuted but ask satisfaction for the injury done him and for the perjury itself?” (28.14.549)⁹⁷

The tendency among legislators and jurists, he explains, is to react against the most egregious abuses of justice. “One did not know what to do. The negative proof by an oath had drawbacks and that by combat had them also; one changed as one was more struck by

⁹⁶ Henry Lea disputes Montesquieu’s claim that the Salic Franks did not make use of the negative oath. *The Ordeal*, 334n1, 347n2 and *The Duel and the Oath*, 29n1.

⁹⁷ Bartlett affirms the point that dissatisfaction with the oath encouraged the use of ordeals and the wager of battle, though he does not make as much of this as Montesquieu does. *Trial by Fire and Water*, 50-53, 103-106.

those of the former or by those of the latter” (28.18.556). One can imagine that, among peoples so fixated on personal honor, and used to having the liberty to avenge harms and insults, a legal system that did not facilitate satisfaction honor, and conflicted so profoundly with everyone’s sense of justice, would be disregarded entirely.

Thus, even though Germanic justice favored pecuniary penalties over corporal penalties, the demands of honor introduced violence as a mode of proof (via divine judgment) rather than a punishment. In the primitive tribunals before which disputants would bring their claims, honor was channeled into defense of one’s word. If a person was accused of presenting a false accusation or giving false witness, he fought to defend his honor. If a judge summoned a person to court and he did not show, the judge would challenge him to fight. “All was governed by the point of honor” (28.18.558).

While rejecting the idea that trial by combat and by ordeal proved guilt or innocence by rendering divine judgment, Montesquieu suggests that this practice and the procedures surrounding it actually led to outcomes correlating more with those of an accurate proof than one might have expected. Trial by combat in particular accorded with Germanic mores and with the political principle and the purpose of their government—that is, with honor and war.

Proof by single combat had a certain reason founded in experience. In a nation concerned uniquely with war, cowardice presumes other vices; it proves that one has resisted the education one has been given and that one has not been sensitive to the honor or been led by the principles that have governed other men; it shows that one does not fear their scorn and that one cares not at all for their esteem (28.17.553). If one were unskilled in a single combat, Montesquieu suggests, there was a greater likelihood that he was not law-abiding in general. In a limited sense, then, these “proofs” supported their end, if not by the causal mechanisms through which they claimed to operate.

An additional advantage of trial by combat was that it required very little competence among the presiding judges. One did not even need to be literate to oversee judicial combat. Trial by combat was governed by mores and manners rather than laws properly speaking. This practice was extended during the same period that central political authority eroded, and with it, the use of the codifications of the barbaric laws and literacy itself. In the circumstances of a highly decentralized feudal monarchy, the procedural customs that developed around judicial combat, which the warrior nobility was well-suited to oversee, provided the major source of rule of law (28.19.558).

Montesquieu also maintains that trial by combat was less brutal and irrational than the other proofs of divine judgment that preceded it in civil and criminal disputes: the ordeals such as the trial by boiling water, wherein the hand of the accused was immersed in boiling water and wrapped for a period of a few days (28.16.551).⁹⁸ If the burns had begun to heal, then he was considered as judged innocent by God. If they were not healing, then he was deemed guilty. The various barbarian nations began declaring their preference in 7th and 8th century assemblies for using trial by combat to “adjudicate” contested inheritances and testimonies, and this method eventually supplanted “the proofs by the cross, cold water, and

⁹⁸ Bartlett traces the use of ordeals, by hot iron, boiling water, cold water, and other means, to the Franks in particular. The use of ordeals spread with Christianity across Europe. *Trial by Fire and Water*, 3-9. See also Lea, *The Ordeal*. Unlike Bartlett, Lea finds the use of ordeals to be simply cruel and arbitrary, and their replacement by more intensive human inquiries to mark an unmitigated improvement.

boiling water, which had also been regarded as judgments of god” (28.18.557).⁹⁹ As individuals could take their case literally into their own hands with a judicial combat, this mode of dispute settlement perfectly accorded with the independent spirit of the Franks.

Yet even trial by ordeal, Montesquieu suggests, was not as arbitrary a practice as one might expect, given the mores and the lifestyle of the peoples who used it. In some cases, it was governed by procedures that likely would filter out the innocent before they actually underwent the ordeal. For example, under a particular Thuringian¹⁰⁰ law, a women accused of adultery was to be subjected the ordeal by boiling water, but only if there was no man willing to present himself as her champion. “A woman whom none of her relatives wanted to defend,” Montesquieu reasons, “was, by this alone, already convicted” (28.17.553).

Additionally, Montesquieu speculates that the ordeal itself was both less cruel and less arbitrary in the circumstances. For individuals leading as physically rough and primitive of lifestyles as the medieval Europeans did, ordeals would have been less painful than they would be for softer peoples. Moreover, he suggests that the results of these tests bore some relevance to the question of criminal guilt and innocence. The causal mechanisms to which he attributes this relevance are physical and quite direct.

Who does not see that, among a people practiced in handling arms, their coarse and callous skin would not sufficiently receive the impression of the hot iron or the

⁹⁹ After spreading with Christianity in the early medieval period, Bartlett concludes that the use of ordeals declined primarily because of growing doubt among ecclesiastics that they were biblically sound. Ordeals were nowhere prescribed in the bible, and by undertaking them, clerics were “testing God,” essentially asking that God perform miracles on demand. While many clerics in earlier centuries, such as Agobard, levied this same criticism, church doctrine on the matter did not become unified until the 12th century, and most importantly, the church leadership did not wield then the central position of authority that it did later (132). Unlike trial by combat, which could be administered by any lord, the participation of clergy and the forms of Christian rites and liturgy were fundamental to performing ordeals. Thus, while the Fourth Lateran Council (1215) proscribed both ordeals and judicial combat, it influenced the decline only of the former. *Trial by Fire and Water*, 70-102.

¹⁰⁰ The Thuringians ruled what is now central Germany during the 5th and early 6th centuries before they were conquered by the Franks, who codified their personal laws in the Lex Thuringium.

boiling water to appear there three days later? And, if it appeared, it was a sign that the one undergoing the ordeal was effeminate. And, as for the women, the hands of those who worked could resist the hot iron. The ladies had no lack of champions to defend them, and in a nation where there was no luxury there was scarcely any middle state (28.17.553).

In his comprehensive study of trials by ordeal and combat, Robert Bartlett affirms the basic point in Montesquieu's account: ordeals were not simply irrational, but made a great deal of sense as "proofs" of last resort for people with limited capacity to uncover concrete evidence for many civil and criminal claims. They were "intellectually coherent, not contradicted by the available evidence, and well-suited to attaining [their] avowed ends."¹⁰¹ In contrast to Montesquieu, however, Bartlett concludes that ordeals must have been physically tortuous, and that both ordeals and judicial combat were in themselves arbitrary modes of proof. Still, he suggests that the procedures that replaced ordeals may well have been *more* arbitrary. Judicial inquisitions and the use of torture to obtain confessions introduced a greater role for human discretion than did ordeals.¹⁰²

A contemporary economist, Peter Leeson, recently has argued that trials by ordeal *did* serve the purpose of separating the innocent from the guilty surprisingly well.¹⁰³ He argues via a rational choice model that the prospect of an ordeal effectively sorted the innocent from the guilty. For one who knew he had committed the crime in question, and who believed in the premise of the ordeal, the costs of undergoing the ordeal—which *would* cause permanent physical damage, in addition to generating a steep financial penalty when "failed"—were far

¹⁰¹ Bartlett, *Trial by Fire and Water*, 164.

¹⁰² While judicial inquests and torture (associated with Roman and canon law) were the primary replacements for ordeals, Bartlett finds that trial by battle replaced ordeals in some cases, as well as the old negative oath in others, and trial by jury in England Denmark. Robert Bartlett, *Trial by Fire and Water*, 137-164. There is no indication from the work that Bartlett is familiar with the Montesquieu's discussion of these practices.

¹⁰³ Peter Leeson, "Ordeals," *Journal of Law and Economics* (forthcoming). Available online at <http://www.peterleeson.com/Ordeals.pdf>. See also "Justice, medieval style," *Boston Globe*. January 31, 2010. http://www.boston.com/bostonglobe/ideas/articles/2010/01/31/justice_medieval_style/

greater than those of admitting his guilty and settling. Only the innocent would actually agree to go through with the ordeal, because they expected that God would exonerate them through the test, and accordingly by not allowing them to be severely injured.

As the clerics who administered the test must have understood this calculus at some level, Leeson infers that they manipulated the ordeals for those individuals who undertook them. In sum, he argues that ordeals “worked” because the probands (the accused criminals), spectators, and clerics administering the tests all genuinely believed in the ostensible mechanism by which ordeals “proved” innocence and guilty, that they facilitated judgments of God. As soon as participants began to doubt the basic premise of the ordeals, however, they stopped serving their purpose so well. Spectators might have personal knowledge or discover new evidence contradicting an ordeal’s judgment, or might become suspicious upon observing that the vast majority of those who underwent ordeals were exonerated. Leeson reasons that priests had to “fail” a certain number of individuals whom they thought were innocent in order to protect against the risk of the latter. However, failing these individuals then increased the chances that contradictions would arise between the results of the ordeal and what spectators knew about the case.

Leeson also has argued in defense of the sensibility of trial by battle as used by the English to settle disputed property claims 1066-1179.¹⁰⁴ As disputants in these cases fought with champions whom they hired, and the better champions cost more money, the institution of trial by combat had a tendency to “prove” in favor of the party who valued the land the most, and presumably would make the most use of it. The practice of trial by combat is

¹⁰⁴ Peter Leeson, “Trial by battle,” *Journal of Legal Analysis* 3, no. 1 (2011), 341-375.

particularly exciting for a free market economic historian such as Leeson, because it represented a rare means by which property could change hands in the feudal economic system. Other than through inheritance, individuals could transfer property only by overcoming major obstacles, such as the requirement for the consent of both the lord and the heirs, thereby freezing property in the hands of those who might not be making the most efficient use of it. Trial by battle worked in the sense that it tended to accord the property not to the party whose claim was legitimate according to the feudal law, but who “deserved” to have it from the perspective of free market economics.

To serve its purpose of identifying the party who valued the land the most, Leeson argues, trial by battle did not even have to be carried to fruition. Because the results of combat are so uncertain, even when one has hired a good champion, there was a significant incentive to settle before the combat or at least before it concluded. The important thing was for the parties to see whom each had hired as his champion, and therefore what their chances were of prevailing. As evidence affirming his theory, Leeson cites medieval records indicating that most would-be judicial combats in the time and place of his focus were settled before they were completed.

He also emphasizes that these battles were fought with short clubs, not swords or lances, and that individuals rarely died in the course of them. As evidence that allocating disputed property “efficiently” was an implicit goal of the trial by battle system, he notes that the practice fell into disuse at the same time that consent requirements for alienating property were eliminated, thereby “lowering the transaction cost” of alienating property. If an

individual really wanted to get a piece of property, it became easier to persuade the owner to sell it to him than to challenge his title to the land through a trial by battle.¹⁰⁵

In contending that no modern author before him has suggested that *judicia dei* actually served the purpose of separating the guilty from the innocent, Leeson overlooks Montesquieu, who would seem to serve as an important precedent for his broader project of illuminating what he calls the “law and economics of unusual institutions.”¹⁰⁶ Montesquieu illustrates the basic approach needed for understanding and evaluating foreign practices. A fundamental principle of *The Spirit of the Laws* is that, in order to properly evaluate a law or practice, one has to take into account its full physical and moral context. One must understand the particular problems facing the actors involved, and the incentives at work. By doing so, one sees that many practices that strike us as wholly bizarre make more sense in their context. A comprehensive political science does “not treat laws but the spirit of the laws, and...this spirit consists in the various relations that laws may have with various things.” To understand a law and to evaluate its merits, one must relate it to “the physical aspect of the country...the way of life of the people...the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores, and their manners” (1.3.9).

While Montesquieu’s explanation of *judicia dei* may lack the causal precision of Leeson’s, it nonetheless reflects a broader scientific, moral, and prudential horizon. Leeson’s approach lacks external standards by which to evaluate these practices, which he seems to

¹⁰⁵ Peter Leeson, “Trial by battle,” 369.

¹⁰⁶ Leeson refers briefly to Montesquieu, but only as evidence for the blanket condemnation of and ridicule for trial by combat among modern observers. He notes that Montesquieu called trial by combat a “monstrous” usage “Trial by battle,” 342. Leeson also has penned rationalizations of piracy, soccer hooliganism, and the auctioning off of wives, among other “unusual institutions.” See for example *The Invisible Hook: The Hidden Economics of Pirates* (Princeton, NJ: Princeton University Press, 2009).

embrace rather than treat as a limitation of his approach. His broader thesis is that what we call barbarism usually, if not always, can be explained as a sensible response given the material and ideational incentives facing the actors in question. Accordingly, he suggests that the chief motivating force in the evolution of legal systems are not changing norms, but changing incentives, and particularly economic incentives. “Trial by battle didn’t die because England became less barbaric. It died because England became a lower transaction cost economy.”

The implication is not only that royal political interests and changing religious evaluations of judicial combat were irrelevant, but that our norms are no better than theirs—just responsive to different economic incentives. He suggests that, if people were to believe once more that ordeals actually render divine judgment, then “perhaps they should” adopt this practice again.¹⁰⁷

As far as Leeson’s analytic schema itself goes, the legitimacy of the practice is entirely relative. This could be regarded as a merely a limitation of his framework for understanding ordeals; if one concludes on external bases that ordeals are immoral, irreligious, and/or imprudent, one might derive helpful insights about how to re-tool incentives in order to alter the actors’ decision-making calculus, and incentivize them in a better direction. Instead of regarding the relative orientation of his theory as a limitation of his approach, however, Leeson seems to embrace it as an advantage.

¹⁰⁷ Leeson, “Trial by battle,” 370.

Though Montesquieu certainly was attentive to the great power of economic incentives, he was not a partisan of any particular causal force in the history of laws.¹⁰⁸ Rather, he emphasized the multiplicity of variables, and their interrelated character. The legal customs governing trial by combat were intimately related to the mores, manners, religious beliefs, and economic livelihood of the medieval Germanic nations. In addition to this broader “causal horizon,” Montesquieu’s analysis differs from Leeson’s in that he insists on the brutality of these practices, and emphasizes the risk that they punished arbitrarily—even if they made *more* sense and were *less* cruel than we might suspect. His argument is only that their effects were less inimical to liberty of the citizen than the ideas they embodied.

In the circumstances of the times when proof by combat and proof by hot iron and boiling water were the usages, there was such an agreement between these laws and the mores that the laws less produced injustice than they were unjust, that the effects were more innocent than the causes, that they ran more counter to fairness than they violated rights, that *they were more unreasonable than tyrannical* (28.17.553, emphasis added).

Moreover, to the extent that Montesquieu rationalizes trial by combat, it is as much on account of the indirect effects of the procedures accompanying it as its correspondence with the mores, religious beliefs, lifestyle, and judicial capacities of medieval Europeans. In the era dominated by judicial combat, “jurisprudence was entirely in the proceedings” (28.19.558).

One will perhaps be curious to see the monstrous usage of judicial combat reduced to principles and to find the body of so singular a jurisprudence. Men who are fundamentally reasonable place even their prejudices under rules. Nothing was more contrary to common sense than judicial combat, but once this point was granted, it was executed with a certain prudence (28.23.563).

¹⁰⁸ Perhaps the most dramatic example is his warning to Christian kings that the expansion of Muslim political power has had a good deal to do with the lowness and simplicity of the taxes Muslim rulers have levied (13.16.224).

Combat was an option only when there was not substantive evidence or persuasive testimony to settle the case (28.25.565). There were various opportunities for parties to preclude the turn to combat by making a settlement. The scene for the judicial combat was carefully managed so that the weaponry and defenses of the parties were equivalent and outside parties could not interfere (28.24.564-565). In sum, judges set themselves to governing the terms and execution of combat as fairly as possible, and to ensure that trial by combat was the dispute resolution mechanism of last resort. The administration of judicial combat reflected, and through its performance instilled, many aspects of what could be broadly regarded as sound jurisprudence.

As “the nature of honor is to demand preferences and distinctions,” judging in monarchy tends to involve numerous distinct legal codes, procedures, and jurisdictions (3.7.27). In monarchies, he explains, “one must not be astonished to find so many rules, restrictions, and extensions that multiply particular cases and seem to make an art of reasoning itself” (6.1.72). Moreover, as the Franks’ political laws degenerated into the feudal laws and they adopted an agricultural as opposed to a herding way of life, distinctions, obligations, and privileges further multiplied. As Montesquieu explains in Book 18, “it is the division of lands that principally swells the civil code” (18.13.291). A massive diversity of civil rules followed that of legal jurisdictions and property types.

The differences in rank, origin, and condition that are established in monarchical government often carry with them distinctions in the nature of men’s goods, and the laws regarding the constitution of this state can increase the number of these distinctions. Thus, among ourselves, goods are inherited, acquired, or seized; dotal, paraphernal; paternal and maternal; those of personal estates of several kinds; free, substituted; those of the lineage or not; noble, freely held, or common goods; ground rents, or those given a price in silver. Each sort of goods is subject to particular rules; these must be followed in order to make disposition of the goods, which further removes simplicity (6.1.72-73).

Notwithstanding its faults, then, Germanic jurisprudence involved a meticulous attention to procedural formalities and appropriateness of jurisdiction. It emphasized the distinctions among cases, individuals, and jurisdictions.

This legal diversity and procedural complexity stands in contrast to the uniformity and simplicity in the laws, their execution and adjudication, which Montesquieu associates with despotism throughout *The Spirit of the Laws* (5.14.59, 6.19.93, 6.2.74-75, 29.18.617). Uniformity in the civil laws and customs of a nation is a particularly appealing form of simplicity, seizing even “great spirits” such as Charlemagne, whom Montesquieu otherwise praises a wise, masterful king of France (29.18.617).¹⁰⁹ Those moved by the zeal for uniformity

Find in it a kind of perfection they recognize because it is impossible not to discover it: in the police the same weights, in commerce the same measures, in the state the same laws and the same religion in every part of it. But is this always and without exception appropriate? Is the ill of changing always less than the ill of suffering? And *does not the greatness of genius consist rather in knowing in which cases there must be uniformity and in which difference?* (29.18.617, emphasis added)

Despite their appeal in the abstract, more uniform and simpler laws may needlessly force people to change their familiar practices in order to accord with a single standard. In addition, they make it easier for one or a few people to dominate the political order. Like the presence of intermediate bodies in the constitutional order, diversity among civil codes indirectly helps protect a semblance of local autonomy in a large nation.

Montesquieu’s account of Frankish political and civil laws, then, highlights the role local and regional independence can play in supporting constitutional liberty, and legal and jurisdictional diversity and procedural formalities for liberty of the citizen. As the last line

¹⁰⁹ In including Charlemagne in this criticism, Montesquieu may have in mind his forceful conversion of the pagan Saxons to Christianity in the late 8th century.

cited above indicates, however, the principle to be derived from this critique of uniformity is not that legal diversity and complexity are constitutional values in and of themselves.¹¹⁰ His model of political prudence in Part 6, the 13th century French King Louis IX, helped to rationalize criminal laws and procedures, and thereby to consolidate royal and national power. To make sense of the third period of Frankish history Montesquieu analyzes, as well as his praise of Louis IX, we first must consider his warnings in Book 29 about making an idol of the political features he himself elevates.

Book 29 and the “spirit of moderation”

The placement of Book 29, the most explicitly prescriptive book in *The Spirit of the Laws*, in the middle of his arcane analysis of early France sends an unmistakable message to his reader about the relevance of the historical books to his political philosophy as a whole. Montesquieu begins this book on “the way to compose the laws” with the most straightforward declaration of the prudential principle of *The Spirit of the Laws*, and illustrates it with an example that counters the force of his own argument for Gothic due process.

I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator; the political good, like the moral good, is always found between two limits. Here is an example.

The formalities of justice are necessary to liberty. But, their number could be so great that it would run counter to the end of the very laws establishing them: suits would be interminable; the ownership of goods would remain uncertain; one of the parties would be given the goods of the other without examination, or both would be ruined by the examination.

Citizens would lose their liberty and their security; accusers would no longer have the means to convict nor the accused a means to vindicate themselves (29.1.602).

¹¹⁰ See also his praise of Alexander the Great who, “left to the vanquished peoples not only their mores but also their civil laws and often even the kings and governors he had found there” (10.14.150).

As the beneficiaries of legal protections largely inspired by Montesquieuian concerns, we are in a position to appreciate the problem of erring too far on the side of procedural formalities in the administration of justice. This brief paragraph on the hazards of too much of rule of law, so to speak, evokes many Anglo-American legalistic sagas, illustrated perhaps most vividly by the *Jarndyce vs. Jarndyce* affair in Charles Dickens' *Bleak House*. In this story of an indeterminate will, disputed over the course of generations, Dickens depicts an "interminable" suit, in which many men were "ruined by the examination." Adjudication by combat looks quite sensible and humane by comparison.

We can also understand the challenge of determining a moderate level of judicial formalities between the two extremes; while Montesquieu suggests that both accusers and the accused would see their case harmed by excessive formalities, it is also the case that, in the words of Herbert Kaufman, "one person's 'red tape' is another's cherished procedural safeguard."¹¹¹ To forward the spirit of moderation as a political principle, then, does not easily generate specific policy recommendations.

In all cases, Montesquieu goes on to show in Book 29, acting upon a spirit of moderation—"knowing in which cases there must be uniformity and which difference"—requires a legislator to take the particular context of a law into account. Using examples of other civil procedures and penalties, Montesquieu shows that two laws that appear the same might serve to promote very different outcomes in two different countries (29.6-9.604-07, 29.12-13.609-11). Conversely, two that look quite different might serve similar ends. In order to judge whether or not they support moderate government, one must examine these laws in light of the legislator's policy aims (29.3-5), the purpose of the state as a whole

¹¹¹ Herbert Kaufman, *Red tape, its origins, uses and abuses* (Washington, DC: Brookings Institute, 1977).

(29.13),¹¹² the law's actual effects (29.6), the particular form of government (29.3,8), the material incentives with which they are associated (29.9), and the mores of the people for whom they are made (29.10). In evaluating whether or not a particular criminal penalty is moderate, one must also measure it against the penalties assigned to more and less severe crimes in the same penal code (29.12.609). All of these circumstances, plus the particular language of the laws themselves, must be carefully considered by "those who have a comprehensive enough genius to be able to give laws to their own nation or to another" (29.16.612).

As an example of the need to relate a law to the form of government, Montesquieu clarifies that the same penalty might be harsh in some circumstances and appropriate in others. While condemning the common view that harsh criminal penalties are the be all and end all of effective deterrence (29.2.602), Montesquieu justifies an infamous provision in Solon's laws. In the small republics of ancient Greece, he explains, it made sense to penalize citizens for refusing to take sides in a factious quarrel.¹¹³ In republics, political factions have a greater potential to threaten the security of the state. If the more sensible citizens, seeing the shortcomings of the various parties, respond to factious disputes by keeping neutral and retreating into their private lives, the worst elements will carry the day. In a monarchy, on the other hand, political factions tend to engulf only a small portion of the population. The

¹¹² Punishing manifest robbery more harshly than non-manifest robbery serves Sparta's purposes as a martial regime, but when adopted by Rome and other ancient states, this distinction in the laws was arbitrary. "As civil laws depend on political laws because they are made for one society, it would be well if, when one wants to transfer a civil law from one nation to another, one examines beforehand whether they both have the same institutions and the same political right" (29.13.610).

¹¹³ As discussed in Chapter 6, Montesquieu specifically promotes public condemnation as gentler form of punishment.

inclination to remain indifferent to the outcome supports public security in this case, whereas it undermines it in the other (29.3.603).¹¹⁴

¹¹⁴ See Plutarch, Solon, Ch. 20 and Aristotle, *Constitution of Athens*, trans. Thomas Dymes (London: Seeley and Co., 1891), VIII.5. <http://oll.libertyfund.org/title/580>

Chapter 12: Saint Louis' juridical statesmanship

Louis IX's indirect efforts to rationalize, consolidate, and centralize Frankish law served political liberty because they came on the heels of the era of "full-blown feudalism." Diversity in civil laws and judicial practices, and decentralization of political authority, had gone too far. The "anarchy" towards which rule tended under the feudal laws reached an extreme (30.1.619). What the incapacity of government as such meant was that individuals and families enjoyed neither political nor natural liberty, but instead suffered the domination of local lords over their lives and livelihoods. There was so much diversity in the local customs and judicial practices that, as one of Montesquieu's sources says, "Each lordship had its civil right...and so specific was this right...that in the whole kingdom [no] two lordships were governed in every point by the same law" (28.45.599).¹¹⁵ In effect, then, the judgment of one's case depended entirely upon the jurisdiction under which it fell, making individuals subject to arbitrary power at the hands of local lords. In addition, while trial by combat initially helped to narrow the scope of violent conflicts, its usage sometimes had the effect of multiplying disputes rather than narrowing them when third parties, in the form of witnesses and judges, had their testimony or judgment, respectively, challenged (28.27.568-577).

While he broaches the modern French monarchy only indirectly and in passing in *The Spirit of the Laws*, with his account of Louis IX's juridical reforms, Montesquieu gives us the beginnings of major features of the 18th century French criminal justice. Saint Louis'

¹¹⁵ He cites the 13th century French jurist and writer, Beaumanoir.

juridical reforms of Saint Louis inaugurated the establishment of “national criminal justice.”

116

The beginning of the correction of the shortcomings of trial by combat marks the third period in Montesquieu’s history of Frankish laws, and the one apparently shaped more than any other by the prudence of a particular ruler. Charlemagne stamped his influence on the Frankish kingdom during his reign. Montesquieu dubs him “the most vigilant and attentive prince we have ever had (31.9.684). Yet the constitutional balance he managed to secure did not last much longer than his own reign (31.20-23.699-706).

Louis IX, in contrast, influenced the course of the French monarchy for centuries to come. Ruling France in the early to mid-13th century, Saint Louis is the figure to whom Montesquieu pays the most tribute in all of *The Spirit of the Laws*. This king was best known for leading the Seventh and Eighth Crusades and generally striving to embody the ideal of Christian kingship—and succeeding in doing so, as his canonization would suggest. Interestingly, Montesquieu mentions none of this in his praise of Louis IX in Book 28.¹¹⁷ Nonetheless, he always refers to him as “Saint Louis.”¹¹⁸ He focuses on the subtle but influential reforms this king initiated in between his crusades, which helped restore a national, political order in the wake of a period of extreme decentralization and local tyranny.

Montesquieu’s detailed explanation of Saint Louis’ subtle and skillful political strategy is especially striking given its placement in the midst of a long and detailed account of the vicissitudes of feudal monarchy. Discussing this king’s judicial reforms inspires

¹¹⁶ This is Kingston’s term for the period of Frankish history that begin with Louis IX’s reign. *Montesquieu and the Parlement of Bordeaux*, 244.

¹¹⁷ See for example Jacques Le Goff, *Saint Louis*, trans. Gareth Gollrad (Notre Dame, ID: University of Notre Dame Press, 2009) and William Jordan, *Louis IX and the Challenge of the Crusade* (Princeton, NJ: Princeton University Press, 1979).

¹¹⁸ Carrese, *The Cloaking of Power*, 65.

Montesquieu's most lucid explanation of the nature of political prudence in the entire *Spirit of the Laws*. As Paul Carrese notes, it is difficult not to speculate that Montesquieu is describing his own method via his praise of Saint Louis'.¹¹⁹

Montesquieu begins by clarifying that Saint Louis actually made much less extensive legal changes than people credit him for. The conventional story is that he abolished trial by combat in France. A king in this period, however, in no way would have sufficient power to effect such changes. The king could establish policies only for his own domain, where he governed by feudal rather than political right. For the semi-sovereign baronies that made up most of the kingdom, he could enact ordinances only through the consent of the barons. If the barons did not sign onto a given ordinance, they were free to follow it or reject it as they saw fit for their jurisdiction. The under-vassals were in the same position *vis a vis* their barons (28.29.580). "If one attends to the state of the kingdom at that time, when everyone grew heady with the idea of his own sovereignty and his power, one surely sees that to undertake to change the accepted laws and usages everywhere was something that could not enter the minds of those who governed" (28.37.589).

The fact that historians credit Saint Louis for more than he actually did, however, suggests something about his powerful impact. He gave rise to what in retrospect were revolutionary changes, but through actions that did not strike anyone as revolutionary at the time. Without ever directly legislating his end—that impulse Montesquieu counsels legislators to avoid throughout *The Spirit of the Laws*—Saint Louis's limited reforms influenced the judgment of the lords such that fairly soon, most of them too had discontinued or minimized use of judicial combat (28.38.591, 28.43.598).

¹¹⁹ Carrese, *The Cloaking of Power*, 93.

What exactly did Saint Louis legislate with regard to judicial combat then? The king himself did three things in particular: abolish combat in his own domains, provide for redress rather than appeal in his own domains, and call for expanded grounds for challenges of false judgment in the lords' courts. First, he abolished the use of judicial combat in the courts of his own domains.¹²⁰ He did not, however, call for abolishing combat in his barons' tribunals. For his lords' courts, however, he introduced the possibility of an appeal as we know it: a challenge of false judgment to be settled by right in a higher court.

Montesquieu emphasizes that appeal was in most ways foreign to the jurisprudence of combat (28.27.568-69, 28.29.578, 28.42.596-97, 28.45.600). "The nature of the decision by combat was to terminate the business forever and was not compatible with a new judgment and prosecutions" (28.2.568). Indeed, there is a special finality to a dispute resolution mechanism that ends with the loser being killed. Even in cases where combat did not necessarily lead to death, or when a tribunal had judged without having to resort to combat, the idea of appealing a judgment was problematic. To declare one's lord's judgment false was to say that one's lord's "judgment had been falsely and wickedly rendered," which was a criminal act in itself (28.27.569). Saint Louis himself would reaffirm that it was a felony to challenge one's lord's judgment (28.27.569, 28.29.578).

Instead, one was constrained to challenge the peers who composed the tribunal rather than the lord, "who established and regulated the tribunal; one thus avoided a felony; one insulted only one's peers, to whom one could always give satisfaction for the insult." (28.278.569). In some tribunals at least, one had to challenge each of them who participated

¹²⁰ While Montesquieu dates this reform to 1260, subsequent research places it at 1257. *Montesquieu and the History of French Laws*, 26.

in the disputed decision. Montesquieu suggests that this led to peers pronouncing their judgment unanimously and simultaneously, in order to deter challenges of false judgment.¹²¹ This incentive for pronouncing unanimously, he speculates, is the origin of the custom of requiring unanimity in the pronouncement of jury opinions in England. A preference to avoid combat also led the peers to err on the side of acquitting the accused, absolving the debtor, or favoring the defendant in a dispute over inheritance (28.27.572).

While appeal in general and by right in particular ran against the spirit of medieval jurisprudence, there did exist means by which cases could be removed from a lord's court to that of his overlord—either because the lord himself sought to move the case to a court less vulnerable to challenge or because the accused or plaintiff declared an opinion false without explicitly attacking the integrity of the judges themselves (28.27.572-73).¹²² The latter represented an existing avenue for declaring a judgment false without inviting combat, which was precisely the practice Saint Louis wished to encourage. This distinction, first recorded by Beaumanoir, arose when a lord questioned the judgment rendered by the peers in his own court. He was challenging himself in effect by questioning the peers, and thereby offending his own honor; it would have been ridiculous to insist he deliver battle gages to himself. In this case, then, the peers who were challenged had the liberty to treat the challenge as a personal affront and to judge the matter by battle, or to have the matter judged by right—that

¹²¹ Montesquieu cites Pierre De Fontaines, the Count of Vermandois, who worked as a jurist for Louis IX and wrote about the judicial customs in Vermandois in *Le Conseil*, an important reference for this period along with Beaumanoir.

¹²² If a lord did not have sufficient peers, i.e. those who held under-fiefs in his jurisdiction, to constitute a tribunal, the case had to be brought before an overlord, because a lord could not judge alone. As fiefs were distributed very broadly and thinly in France, as compared to in England, many lords had no peers to judge with them and could not hold courts. All cases in their jurisdiction had to be tried by overlords. Montesquieu speculates that this led to the consolidation of regional power in medieval France, and “the separation of justice from the fief” in practice (28.27.571).

is, by testimony and evidence—in the overlord’s court. This mechanism for waging an appeal in the modern sense had a particular logic in the case mentioned. It introduced the possibility of judging challenges by right rather than by combat, on the basis that one was challenging not the personal integrity of the peers, but the accuracy of the judgment.

In the lordships in his own domains, where he had greater authority to dictate policy, Saint Louis prohibited challenges of false judgments, but permitted unsatisfied parties to seek “redress” (*amendement*) before the same tribunal, or before the king’s court. This was to ask for a favor or mercy from one’s superior rather than to question his judgment. In recommending usages for his barons’ courts, the king took another approach. He allowed for judgments in those courts to be declared false, which would send them to the overlord’s or the king’s court. He maintained all the customary procedures for the declaration of falseness, but called for the suzerain court to judge the case through a judge-led investigation (*enquête*) of witnesses’ testimony, following procedures he specified, instead of combat. “So that the change would be felt less, he removed the thing and let the terms continue to exist.” As a consequence, in whatever court in the kingdom one found himself, there was a mechanism available for challenging a decision “without running the risk of combat” (28.29.579).

Montesquieu explains that Saint Louis had to “manage carefully” his promotion of new judicial proofs in the courts of his barons, who typically “enjoyed the prerogative that business could never be removed from their courts unless one exposed oneself to the dangers of a declaration of falseness” (28.29.579). Moreover, single-combat in general was regarded as a privilege of the nobility, a guarantee of their independence (28.18.555). To take cases from their jurisdiction not only threatened their independence, but also took away potential income from pecuniary penalties. The nobility thus had a strong interest in maintaining the

jurisprudence of combat.¹²³ As impersonal declarations of falseness already were a means by which cases could be moved from a lord's court to that of his overlord, or from the baron's to the king's, Saint Louis took advantage of this mode for expanding the use of the new proof by judicial inquisition.

The barons and under-vassals, of course, were not required to follow even these limited changes. They could choose to follow either the king's laws or the previously existing ones. The king's laws "were accepted only by those who believed it advantageous to accept them" (28.29.580). While some lords insisted on maintaining trial by battle, many did adopt the king's new approach, such that in retrospect it looked as though Saint Louis himself had legislated for the whole kingdom. When Beaumanoir codified practices in the Beauvais and Clermont shortly after Louis IX's reign, he found the king's laws in widespread use (28.38.590-591).

As Saint Louis' reforms were not mandatory, their real impact was through the appealing example they presented for other lords to imitate. The king's laws gave credence to the idea that questioning a judgment was not necessarily a personal affront. To grasp the significance Montesquieu attributes to Saint Louis' indirect leadership, he must be quoted at length.

As Saint Louis saw the abuses of the jurisprudence of his time, he sought to make the peoples disgusted with it... Thus, this prince accomplished his purpose, though his rules for the lords' tribunals were not made as a general law for the kingdom, but as an example that each one could follow and would even have an interest in following. *He took away the worse by making the better felt.* When one saw in his tribunals, and in those of the lords, a more natural, more reasonable way of proceeding, a way more in conformity with morality, religion, public tranquility, and the security of person and goods, it was taken up and the other was abandoned (28.38.590-91, emphasis added).

¹²³ Bartlett, *Trial by Fire and Water*, 124-25.

In this passage, we can see Montesquieu's unique understanding of enlightenment. In emphasizing the moderate legislator's need to account for peoples' attachment to their shared customs, Montesquieu departs from rationalist and individualistic approaches to advancing political liberty. Yet he was far more optimistic about the prospects for salutary political change and enlightenment in Europe than a figure like Edmund Burke.¹²⁴ He forwards a different model of enlightenment, which counts on human reason, but in a more reasonable, a more moderate way. In some cases, a people *should* reform its laws and customs in light of experiencing better alternatives; what's more, he trusts that a people *can* reform itself, or be led to reform. Specifically, he trusts that people as whole will opt for less physically harsh criminal practices. Montesquieu expresses his confidence in the prospects for more moderate criminal practices in two striking instances in *The Spirit of the Laws*. Explaining how the example of Saint Louis' judicial procedures persuaded lords to adopt them, Montesquieu asserts, "Reason has a natural empire; it has even a tyrannical empire; one resists it, but this resistance is its triumph; yet a little time and one is forced to come back to it" (28.38.590).

The "reason" Montesquieu extols in this striking passage would seem to be that based on reflection upon experience of the effects of different policy alternatives. As soon as appeal to higher tribunal on the basis of right became available in the French legal system, it was not difficult for individuals to see that this mode of proof had a greater relation to questions of guilt and innocence than did combat. The existence of appeal by right served to highlight the arbitrariness of judicial combat as a mode of legal proof. Our reasoning, Montesquieu suggests in his unpublished *Essay on Causes that Can Affect Minds and Spirits*, is bound by

¹²⁴ For a brief comparison of Montesquieu's and Burke's understandings of historical political development and its implications for political leadership, see Pangle, *Montesquieu's Philosophy of Liberalism*, 192-93.

the possibilities we are capable of imagining, which depends in great upon on the possibilities we have experienced, either directly or vicariously. “Ideas are related to one another. The principle faculty of the soul is to compare, and that cannot be exercised amidst such a poverty of ideas (*une pareille indigence*)” (EC, 54).

In addition to having a more obvious relation to the question of guilt and innocence, Montesquieu indicates that appeal by right also appeared to participants as “more in conformity with morality, religion, public tranquility, and the security of persons and goods” (28.38.591). As Bartlett notes in his account of the decline of judicial combat, the 12th and 13th centuries saw growing clerical rejection of the religious premises of judicial ordeals, including combat. According to his biographers at least, Saint Louis’ own disdain for this practice stemmed from the view that trial by battle, like other ordeals, represented an irreligious effort to “tempt God.”¹²⁵ While clerical opposition to trial by combat, formalized by the Fourth Lateran Council in 1215, did not directly bring about the end of this practice, it may have had an indirect impact via its influence on Louis IX. That his judicial procedures seemed more reasonable, then, does not necessarily mean that the Franks started to judge their laws by different principles—i.e. they abandoned religious considerations for one’s of reason independent of theology. Rather, the strength of the appeal of the new judicial proof was that reason, religion, and morality coincided in supporting it.

¹²⁵ Robert Bartlett, *Trial by Fire and Water*, 123-24. Bartlett remarks that other monarchies in the 11th-13th centuries also sought to abolish judicial combat, most notably Frederick II, Holy Roman Emperor from 1194-1250. The latter’s motives and methods, however, contrasted dramatically with those of the pious French king. Though Montesquieu does not mention Frederick II, he would seem to represent a foil to Saint Louis, the example of how *not* to abolish trial by combat. Citing numerous and contradictory reasons why the practice should be ended, Frederick II abolished trial by battle in the *Constitutions of Melfi* in what Bartlett describes as an authoritarian manner, and on the basis of an “invocation of highly abstract principles of nature and justice. He retained the duel as an instrument of executive terror, despite his dismissiveness about it as an unnatural and unjust proof.” Ibid., 124. The shared opposition to judicial combat of these two very different kings, however, suggests to Bartlett that monarchs as such had an interest in limiting the practice, as it was a powerful source of nobles’ independence. Ibid., 124-25.

Montesquieu's other bold statement of his confidence in the potential for political progress via a kind of enlightenment comes in Book 12. There he declares both the importance of criminal justice to liberty, and his confidence that knowledge of moderate criminal justice will become much more widespread. "The knowledge already acquired in some countries and which *will be acquired* in others, concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything in the world" (12.2.188, emphasis added).¹²⁶ Some perhaps will choose not to apply this knowledge, but it will not be on account of their ignorance of it.

Montesquieu goes on to speak quite directly to would-be legislators about the character of Saint Louis' political prudence. In a formulation that reappears in two other key passages, Montesquieu instructs, "to invite when one must not constrain, to lead when one must not command, is the supreme skill" (28.38.591). This skill is that of a leader who recognizes that he faces profound limits in his capacity to shape the practices in his nation. The limits in this case arise first from the great dispersion of political power in the kingdom. Even if the king did have the authority to legislate for the whole, however, he faced another obstacle. The nobles with whom the crown shared power prided themselves, rightly or wrongly, as sovereign over their own affairs. The Franks, and especially the nobles among them, were fiercely attached to their independence, embodied in and protected by the customs forming the jurisprudence of combat. Moreover, this was a nation particularly jealous of its independence. The nobles' pride in their independence in relation to the crown could be considered analogous to the popular state of mind in a democracy, where "every man [is]

¹²⁶ See also his statement in the Preface, "it is not a matter of indifference that the people be enlightened. The prejudices of magistrates began as the prejudices of the nation." He defines prejudices as "not what makes one unaware of certain things but what makes one unaware of oneself" (xliv).

considered to have a free soul” and therefore must be represented in the legislative power (11.6.15). Respecting their autonomy would seem to be a strategic necessity for a king who wished to actually accomplish his purposes.

Montesquieu uses this same turn of phrase of inviting rather than constraining in reference to Merovingian kings’ and mayors’ need to ply the nobles with promises of booty in order to engage them in war. “In this independent and warlike nation, one had to invite rather than to constrain; one had to give, or offer expectation of, fiefs vacated by the death of their predecessor, to reward constantly, to make preferences feared” (31.5.679). Like them, Louis IX had to concern himself as much with a strategy for influencing his independent-spirited lords as with his goal itself.

This prince had in view less the thing itself, the best way of judging, than the best way of replacing the former practice of judging. The first object was to evoke a dislike for the old jurisprudence, and the second to form a new one. But once the drawbacks of the new one had appeared, another was soon seen to supplant it. Thus the laws of Saint Louis did not so much change French jurisprudence as they gave new means for changing it; they opened new tribunals, or rather ways to get to them, and when one could easily attain the one that had a general authority, judgments which formerly affected only the usages of a particular lord came to form a universal jurisprudence (28.39.592-93).

Montesquieu’s praise of Saint Louis’ mode of reform also recalls his important discussion of the proper way to change mores and manners. In his efforts to reform medieval judicial practices, Saint Louis represents the approach Montesquieu had recommended in Book 18 of changing mores and manners through appealing examples of new mores and manners rather than through coercive laws. There, he illustrates the significance of his statement in Book 18 that “mores, manners, and received examples can give rise to [liberty

of the citizen]” (12.1.187).¹²⁷ This crucial element of liberty of the citizen and of the “gentleness” he praises in moderate government can be fully understood only through his analysis of the historical examples of Peter the Great and Saint Louis.

If Saint Louis represents the model of how to reform practices tied up with mores and manners, Peter the Great illustrates Montesquieu’s teaching in the negative. Criticizing Peter the Great’s tyrannical beard tax, Montesquieu explains how a people’s perception of their liberty—even if arguably flawed—must nonetheless be taken into account in order to protect political liberty in the full sense. He introduces this example in Book 11 in the context of explaining how contested the definition of liberty is, on account of peoples’ attachment to their particular way of life (11.2-3.154-55). Liberty has meant dramatically different things to different people: self-rule, free elections, personal arms. “No word has received more different significations and has struck minds in so many ways as has liberty” (11.2.154).

For the Russians in the early 18th century, facing the introduction of Peter the Great’s beard tax, liberty was experienced as “the usage of wearing a long beard,” thus the coercive beard tax as a tyrannical institution. The upshot of the diverse ways in which liberty has been defined is that “each has given the name of *liberty* to the government that was consistent with his customs or inclinations” (11.2.155, emphasis in original). Similarly, people tend to associate liberty with their own form of government—at least if they live in an aristocracy, democracy, monarchy, or some hybrid thereof.

¹²⁷ Montesquieu distinguishes most clearly among mores, manners, and laws in Book 19: “Mores and manners are usages that laws have not established, or that they have not been able, or have not wanted to establish. The difference between laws and mores is that, while laws regulate the actions of the citizen, mores regulate the actions of the man. The difference between mores and manners is that the first are more concerned with internal, and the latter external, conduct (19.16.317).

In Book 19, he raises the beard tax again as an example of what he calls tyranny “of opinion, which is felt when those who govern establish things that run counter to a nation’s way of thinking.” Tyranny of opinion is contrasted with “real tyranny, which consists in the violence of the government” (19.3.309). The experience of real tyranny is characteristic of life under despotic government. What makes a government violent, severe, or harsh consists first and foremost in its use of the criminal code to change mores and manners or to enforce domestic right, natural right, or divine right (12.4-6.189-194, 25.12.490, 26.11.504).

Yet government can act tyrannically also by trying to change mores or manners coercively, if not violently, through, for example, heavy taxes or pecuniary penalties. Montesquieu pronounces Peter the Great’s modernizing policy, which “obliged the Muscovites to shorten their beards and clothing” as “tyrannical” (19.14.315). Throughout the book, Montesquieu counsels his reader to bear in mind that people tend to be more strongly attached to their customs—their religion, *mœurs*, and manners—than to anything else, even their form of government. “A people always knows, loves, and defends its mores better than its laws” (10.11.146).¹²⁸ Few things are more threatening to the citizen’s perspective of his liberty than the prospect of coercive changes to his mores, manners, and religion. Moreover, mores and manners constitute a kind of rule of law that society reinforces largely independent of governmental authority, and which in turn help reinforce the laws and form of government themselves. Yet mores and manners hold sway primarily because people

¹²⁸ Montesquieu asserts this in the context of explaining how a conquering nation should behave towards a nation it has conquered. Conquest may be necessary to a state’s self-preservation, but only the basic powers of sovereignty should be assumed. “It is not enough to leave the vanquished nation its laws; it is perhaps more necessary to leave it its mores, because a people always knows, loves, and defends its mores better than its laws” (10.11.146).

willingly embrace them as their own laws, not because the government compels them.

Whereas

Laws [are] the particular and precise institutions of the legislator. . .mores and manners [are] the institutions of the nation in general. From this it follows that when one wants to change the mores and manners, one must not change them by the laws, as this would appear too tyrannical; it would be better to change them by other mores and other manners.

Thus, when a prince wants to make great changes in his nation, he must reform by laws what is established by laws and change by manners what is established by manners, and it is a very bad policy to change by laws what should be changed by manners (19.14.315).

Montesquieu suggests there is something a bit incongruous about perceiving a policy like the beard tax as tyrannical.¹²⁹ Nonetheless, he treats this attachment of a people to its customs, peculiar as they may seem to others, as an inexorable phenomenon of political life, which a moderate legislator must respect, if only for prudential reasons. While he may regard the length of one's beard as, in principle, a matter of indifference to one's liberty, Montesquieu still criticizes Peter the Great as acting tyrannically by trying to change his nation's manners forcibly (19.14.315). The way in which a legislator tries to reform his country can be tyrannical even if the particular changes he is advocating might be favorable to liberty in themselves.

To the extent that particular mores and manners hinder the establishment of political liberty, Montesquieu shows with these examples that there are means by which a prudential reformer can encourage mores and manners more supportive of political liberty. Many modern rationalists and democrats have found Montesquieu too skeptical, too cautious, too deferential to custom for their tastes. Yet he clearly defended both the need for political and

¹²⁹ Much more ridiculous is his example of the Romans' outrage under the rule of Augustus, not so much for the harsh laws he instituted as for his banishment of their beloved dramatic dancer Pylades. Drawing on Cassius Dio's *Historia Romana* account, Montesquieu notes that they "felt tyranny more vividly when a buffoon was driven out than when all their laws were taken from them" (19.3.309).

civil changes, and also recommended the best way to promote such changes when they involve mores and manners.

The prudence of a legislator in promoting such necessary but thorny changes is of the greatest importance to political liberty, and what distinguishes his understanding of political liberty from the more rationalist, abstract conceptions of other early moderns.¹³⁰ Mores and manners in fact can be changed, but they have their own means. He contends that the social modernization Peter the Great sought could have been pursued more gently through the setting of an appealing new example rather than through the laws themselves (19.14.315).¹³¹ What is “tyrannical” is to try to enforce mores, and especially to change them, through laws. Peter treated the “Muscovites” as though they were “beasts,” responding only to force. The people resented being treated as such, and thus resisted the change in itself, as well as for the insult it represented. “In general, peoples are very attached to the customs; taking their customs from them violently makes them unhappy: therefore, one must not change their customs, but engage the peoples to change them themselves” (19.14.316).

What’s more, Montesquieu emphasizes that changing mores through persuasive examples is far more effective than attempting to compel changes through the legal sanctions. Whereas forced changes in customs will always meet with resistance, changes that people have made for themselves will be more profound and enduring.

¹³⁰ Carrese, *The Cloaking of Power*, 93-95.

¹³¹ Though Montesquieu does not mention this, Orthodox Christian religious laws lay behind the Russians’ practice of wearing a beard, and the strength of especially the clerics’ attachment to this custom. On Montesquieu’s recommendations for encouraging people to change religious practices, which is in the same spirit of his critique of the beard tax, see Book 25: “One does not succeed in detaching the soul from religion by filling it with this great object [of fear]...a more certain way to attack religion is by favor, by the comforts of life, by the hope of fortune, not by what reminds one of it, but by what makes one forget it; not by what makes one indignant, but by what leads one to indifference when other passions act on our souls and when those that religion inspires are silent. General rule: in the matter of changing religion, invitations are stronger than penalties” (25.12.489).

The violent means he employed were useless; he would have accomplished his purpose as well by gentleness. He himself saw how easy it was to make changes. The women had been enclosed and in a way enslaved; he called them to court, he had them dress in the German way, and he sent them fabrics. They immediately appreciated a way of life that so flattered their taste, their vanity, and their passions, and they made the men appreciate it (19.14.316).¹³²

As Montesquieu puts it earlier in Book 19, whereas “laws are established, mores are inspired” (19.12.314). In a monarchy, the king himself has considerable influence over the customs of his subjects through the example of his own person and family. “The mores of the prince contribute as much to liberty as do the laws; like the laws, the prince can make beasts of men and men of beasts” (12.27.210).

It may be the case that the content of certain customs undermines political liberty, but the attachment to our customary practices is not in itself a formal obstacle to political liberty. Montesquieu shows with the example of Saint Louis’ reforms that a people’s attachment to their particular way of life may support their liberty in itself. The customs of a “free people are a part of their liberty” just as “the customs of a slave people are a part of their servitude” (19.27.325). The Frankish independence of spirit, motivating them to defend their honor and avenge their grievances, and later inspiring the nobles to jealously guard their privileges and their particular jurisdictions, represents the key example of the way free mores can support political liberty. The very desire not to be ruled by others, while disastrous to rule of law if unopposed by other forces in society, nonetheless can help guard against usurpation. The constant uneasiness (*les inquiétudes*) of the English, their impatience with everything and everyone—even life itself—as well as their habit of freely opining on everything that agitates

¹³² Montesquieu suggests that this gentler approach was especially easy in the Russian case, because the change desired was not radically foreign to the mores of the Muscovites given by the climate. “The mores of that time were foreign to the climate and had been carried there by the mixture of nations and by conquests. Peter found it easier than he had expected give the mores and manners of Europe to a European nation” (19.14.316). I will return to this relationship among mores, laws, and climate in Section 3.

them, similarly helps prevent tyranny from gaining any foothold (14.13.243-245; 19.27.325-333). The English uneasiness has this formal similarity with the Frankish spirit of independence, even though it is tied up with a commercial rather than a martial way of life.

It must be emphasized that trial by combat, ostensibly a matter of civil laws, was intimately tied up with Frankish mores, manners, and religion. Indeed, given the informality and irregularity of civil law as such during this period, mores and manners constituted the jurisprudence of combat. The king thus could expect great resistance to changes in judicial procedures. For a number of reasons, then, Louis IX had to rouse the nobles to change their own practices, to “engage people to change [mores] and manners themselves” (19.14.316).

Before treating Saint Louis as *the* model of political prudence in *The Spirit of the Laws*, we must consider why and how his approach was beneficial in these circumstances, and distinguish those circumstances that are analogous and those that are not. Saint Louis serves as legislative model for three particular, related circumstances: when a would-be reformer faces a highly decentralized structure of political power, where actors who hold power independently must be relied upon in order to implement reform; when trying to shape the laws and actions of free people, that is, people who consider themselves to be independent from and equal to the would-be reformer; and thirdly, when what should be changed by its nature cannot be changed by anyone other than the actors’ themselves—i.e. mores, manners, and beliefs. The particular prudence of Saint Louis was to recognize the relations among laws, mores, manners, and religion, and to identify non-coercive means of changing the latter. Louis IX also understood well the internal resources of existing system to improve itself. He used this limited existing mode of appeal as a wedge to promote appeals by right rather than combat more broadly

In addition to encouraging use of the appeal, Louis IX shaped judicial reform by two other modes: promoting the writing and codification of legal usages around the kingdom, and commissioning translations of Roman law texts. Louis IX had existing usages written down. The codification of these laws would be left to others, but the process of putting greater coherence and regularity into the civil practices could not begin until one had collected and recorded the various existing practices. This led to greater recording and use of written records for the purposes of legal proof (i.e. written contracts, birth records). With a greater availability of written records, at least some charges of false witness and false judgment were avoided (28.44.599).

Saint Louis' initial steps inspired a movement to codify French law and return to the use of written laws, exemplified by figures like de Fontaines and Beaumanoir (28.45.600). However, Montesquieu contends that the *Etablissements de Saint Louis*, the work attributed to him, actually was written by a bailiff (an early judicial professional) writing shortly after his reign.¹³³ The *Etablissements* formed an "amphibious code" of Germanic and Roman laws. "Things were brought together that had never been related and that were often contradictory" (28.38.592). In collecting and organizing the different practices, the disparate Germanic and Roman laws at least were in one place. The incongruities and even contradictions between them suggest the need for further codification.¹³⁴ Having records of all these different usages invited comparisons, as well as reference to precedents (28.45.600-01).

¹³³ See Cox on subsequent evidence uncovered to confirm this point. *Montesquieu and the History of French laws*, 47.

¹³⁴ Montesquieu himself made use of an analogous 18th century project, without which his own project probably would not have been possible. A group of Benedictine monks were collecting medieval legal codes and historical documents into a single series, the *Recueil des historiens*, five volumes of which were published between 1738 and 1748 (the last ten years of Montesquieu's work on *The Spirit of the Laws*).

The work begun in the 13th century was taken up by succeeding generations. In the “great period” of legal codification, under Charles VII and his successors, the French “depositories of the laws” came into their own (2.4.19). A crucial intermediate power that helps fix the laws, the *parlements* were the seats for legal codification. The regional *parlements* became the judges in the last resort on almost all the business of the kingdom. This meant that *parlements* met more frequently and for longer. *Parlement* became a sitting body, and *parlements* were multiplied, elevating the importance of regional bodies the constitutional order as another countervailing balance to local domination (28.39.592-93). They maintained regional diversity among civil laws while reducing local diversity. Civil laws were more regionally uniform, but not necessarily nationally uniform. Through this process of codification, “our customs assumed three characteristics: they were written down, they were more general, and they received the stamp of royal authority” (28.45.601).

Finally, Saint Louis effected his “revolution” by having old books translated—specifically, books of Roman law (28.38.593). “Saint Louis, in order to create distaste for French jurisprudence, had the books of Roman right translated so that men of the law of that time would know them” (28.38.590). This greatly complemented the existing French jurisprudence. While Germanic law was heavy on procedural formalities, it was lacking in substantive clarity. Roman law, on the other hand, more clearly defined crimes and categorized them, and included extensive discussion of grounds of evidence.

Along with the regularization of judicial practices in the *parlements*, this process led to the growth of the study of jurisprudence in general, and the ascendance of *noblesse de robe*, who obtained their office through purchase (28.42-43.596-8, 30.2.663-638). The old warrior nobility, who presided over the jurisprudence of combat lost interest in judicial

administration as it became a more scholarly and less military affair. “Judgments, instead of being a striking action, pleasing to the nobility, and interesting to warriors, had become only a practice that they neither knew nor wanted to know” (28.42.597). The multiplication of interests among the nobility, Montesquieu suggests, strengthened the constitutional balance (20.22.351). In explaining how the *noblesse de robe* naturally lost interest in the new forms of judging, Montesquieu undermines Boulainvilliers’ claim that the *noblesse de robe* “usurped” power from *noblesse d’épée* (28.43.598).

In sum, Saint Louis’ reforms helped to rationalize, professionalize, and centralize jurisprudence, but in a quite indirect manner. This process occurred over a few centuries through and through the participation of numerous kings, nobles, scholars, and legal professionals. “All of this happened gradually and by the force of things” (28.43.548). Just as the transformation of fiefs from political spoil to inherited property forced a change in the basic principles of the monarchy, the increasing coherence of civil laws and criminal jurisprudence eventually led to an overhaul in the political order. “Thus, the laws made by Saint Louis had effects that could never have been expected of a masterpiece of legislation. Sometimes many centuries must pass to prepare for changes; events ripen, and then there are revolutions” (28.39.592).

While Montesquieu warns against uniformity and centralization in other instances, in this case the highly fragmented manner of proceeding represented the greater threat to rule of law. With Saint Louis’ reforms, judging at the local level was made less arbitrary (28.43.597-598). In general, there was greater clarity about and consultation of the laws by which judges should judge.

More than Louis IX's laws or their immediate effects, the object of Montesquieu's praise in this story is his mode of political reform. His own recommended judicial practices in fact were soon eclipsed. "By the force of the *Establishments*, the point was reached where there were general decisions, which had been entirely lacking in the kingdom; when the building was constructed, the scaffolding was left to fall" (28.39.592).

There were indeed some disadvantages with the inquisitorial system King Louis IX's promotion of appeals. Montesquieu notes three potential drawbacks. In particular, fewer judges were involved in the new system of inquiry by a trained jurist.¹³⁵ "Canonical right and the new civil right worked together to abolish the peers" (28.42-43.597-98). In addition, whereas judgment by combat was always public, judicial inquiry into witness testimony and evidence, which was recorded in writing, could be conducted privately (28.34.584-84). Third, the ability to appeal without fear to one's physical safety encouraged frivolous claims, a problem that "had to be checked by the fear of costs," and eventually by the establishment of a party for the public (28.35.586).¹³⁶

Perhaps most significantly, the new judicial procedures Saint Louis promoted would be associated with the use of torture, a practice Montesquieu condemns elsewhere in the book (6.17.92). In the judge-led inquiries Saint Louis favored and under the recovered Roman law (the Justinian code in particular), unless two witnesses would attest to a crime, or a confession would be required to convict. Torture was regularly used to extract confessions if the case was capital and the judge had a strong suspicion of guilt but insufficient witness

¹³⁵ Pangle makes this point in his brief discussion of Book 28, *Montesquieu's Philosophy of Liberalism*, 285-286.

¹³⁶ See Carrese, *Cloaking of Power*, 92.

testimony.¹³⁷ Bartlett notes that the inquisitorial, Roman and canon law-infused juridical system born in the 13th century in fact gave much more discretion to human judges than did the jurisprudence of combat. If, in proof by combat, a man's "innocence" turned on the somewhat arbitrary consideration of his relative martial skills, his plight was not so dependent upon the discretion of other men.¹³⁸

Of course, greater uniformity and central power is by no means a constitutional value in itself for Montesquieu. In his own age, the pendulum had swung to too much centralized and royal power, after the prime of "well-tempered" government in France from the 12-15th centuries.¹³⁹ His account of the long history of power sharing between the king and the nobles contributed to the 18th century critique of absolute monarchy in France.

¹³⁷ Kingston, *Montesquieu and Parlement of Bordeaux*, 107 n28.

¹³⁸ Bartlett, *Trial by Fire and Water*, 139-143, Kingston, *Montesquieu and Parlement of Bordeaux*, 106-110.

¹³⁹ Hulliung, *Montesquieu and the Old Regime*, 64.

Chapter 13: Reflections on the intellectual and political context of Montesquieu's analysis of Gothic and Frankish government

Before leaving this fascinating, if obscure, account of the medieval Franks and their tribal forbearers, it is worth our reflecting on Montesquieu's overall interest in travelling down this particular path. Why was he concerned to trace the vicissitudes of the Frankish monarchy in such meticulous detail? And why should modern readers care about the history of the dark ages anyway? I will conclude by noting some of the 18th century intellectual and political context of for his analysis of Frankish history, and summarizing what seems to be the broader historiographical or philosophic implications.

Numerous commentators have explained the extremely difficulty books of Part 6 with reference to his contemporaries' lively and politically-fraught dispute over the origins and development of the French constitution.¹⁴⁰ From the late 16th through the 18th centuries, Frenchmen debated the relative powers of the king, the old nobility, and *parlements* proper to the French constitution. Crises over royal succession frequently brought these debates to a head.¹⁴¹ The major divide was between partisans of the nobility and those of the king—what historians have dubbed the schools of the *thèse royale* and the *thèse nobiliaire*, represented most prominently by the Abbé Dubos and the Comte de Boulainvilliers, respectively.

These debates over authority and succession turned on the basic question of who was ultimately answerable to whom in the nature of the French constitution. What were the

¹⁴⁰ For discussions of the 16th, 17th, and 18th century debates over the nature and origins of the French constitution—the conflict between the *thèse royale* and the *thèse nobiliaire*—see Elie Carcassonne, *Montesquieu et le problème de la Constitution française au XVIIIe siècle* (Paris: Presses Universitaires de France, 1927); Cox, *Montesquieu and the History of French Laws*, 43-50, 161-165; Cox, "Montesquieu and the History of Laws," in *Montesquieu's Science of Politics*, 410-416; Pangle, *Montesquieu's Philosophy of Liberalism*, 292-297; Mark Hulliung, *Montesquieu and the Old Regime*, 60-63. Michael Mosher, "Monarchy's Paradox: Honor in the Face of Sovereign Power," in *Montesquieu's Science of Politics*, 159-229. Shackleton, *Montesquieu: A Critical Biography*, 324-336. Keohane, *Philosophy and the State in France*, 346-350

¹⁴¹ Cox, "Montesquieu and the History of Laws," 412-413.

proper positions, rights, and responsibilities of each the elements of the political order in the true French constitution? Who had usurped whom in the course of French history, and what side represented the most serious threat to liberty? In the wake of the Fronde, the 17th century movements by various nobles to limit royal power, Boulainvilliers carried on the nobles' case for a fundamental share in rule, and against the doctrine and practice of absolute monarchy. Dubos and the royalists insisted that king's power was not subject to any limits. While the nobilists argued that crown represented the greatest danger to the 18th century French constitution, the royalists saw the nobles as "petty tyrants" who had to be humbled, a problem that only a strong, central power—Voltaire's enlightened despot—could manage.¹⁴²

Notably, each school sought evidence for their respective claims in historical discoveries about the relative powers of each element in the Frankish beginnings of the monarchy. Both sides seemed to agree that the debate over the nobles' and crown's rightful position turned on the character of the initial Frankish conquest of Roman Gaul. Did the Franks simply take over the offices of the Roman empire, with the Frankish king assuming the role of an emperor, or did the Frankish conquest involve overhauling Roman political law entirely?

Boulainvilliers argued in his *Historical Records of the Old Government of France* (1727) that the primary seat of authority in the French constitution was the nobility, descended from those Franks who had originally conquered Gaul. The king originally was a "first among equals," elected to power by fellow nobles. He denied the king's claim to power independent of the nobles' approval. In addition, his account undermined the legitimacy of

¹⁴² Mosher, "Monarchy's Paradox," 165.

both the civil emancipation of serfs and the extension of noble titles and privileges in the centuries since the original conquest.

In his weighty tome, a *Critical History of the Establishment of the French Monarchy in Gaul* (1734), Dubos countered the nobilists' historical claims. He argued that the Frankish kings entered Gaul at the Romans' invitation, divided the territory according to a mutual agreement, and assumed rule by filling the existing offices with their own men. The Frankish kings, in this view, simply served as the new emperors, ruling on the basis of a Roman grant of *imperium*.

Montesquieu was closer to the nobilists' position in the sense that he considered absolute monarchy the greater danger to liberty in modern France. He also goes to great lengths to show that the French constitution—or at least what is *moderate* about it—is rooted more in Germanic than in Roman practices. Accordingly, he affirms that nobility constitute a semi-independent base of power.¹⁴³ In his investigation of the initial Frankish settlement of Gaul, Montesquieu also concludes that the Frankish conquest marked a clean break with the Roman political order. Mocking Dubos' suggestion that the Franks “were the best of friends of the Romans,” Montesquieu emphasizes that the barbarian conquest was indeed barbaric (28.3.537).¹⁴⁴ Unlike the Visigoths whose invasion went deeper into the interior of the Roman Empire, the Franks did not have to negotiate the extent of their empire with the

¹⁴³ Pangle, *Montesquieu's Philosophy of Liberalism*, 292-299.

¹⁴⁴ Mosher emphasizes this point in “Monarchy's Paradox,” 165. Montesquieu explains their barbarity in the pejorative sense in quite vivid terms: “The history of Gregory of Tours and other records show us, on the one hand, a ferocious and barbarous nation; and, on the other, kings who were no less so. These princes were murderous, unjust, and cruel because the whole nation was. If Christianity sometimes seemed to soften them, it was only through the terror that Christianity gives the guilty. The churches defended themselves from them by the miracles and prodigies of their saints. The kings were not sacrilegious because they dreaded the penalties for sacrilege, but, in other areas, they committed, both in anger and in cold blood, all sorts of crimes and injustices because they did not see the hand of the divinity so present in these crimes and these injustices. The Franks, as I have said, tolerated murderous kings because they were murderous themselves; they were not struck by the injustices and pillaging of their kings because they too plundered and were unjust” (31.2.673).

Romans. “They conquered; they took what they wanted, and they made regulations only among themselves” (30.7.624). The upshot is that the Franks were in a position to replace the Roman political laws with their own (30.12-14.630-636, 30.25.663-668).

While closer to the nobilists on the major points in dispute, Montesquieu also finds much to criticize in Boulainvilliers.¹⁴⁵ The latter denigrated the *noblesse de robe*, who gained their status through obtaining judicial or administrative offices, usually by purchase, as merely the instrument of the monarchy in their constant struggle to control the true nobility, the *noblesse d’épée*. Descended from the warrior nobles, he considered the nobles of the sword as constituting a racially pure caste with a unique claim to authority in the original Germanic conquest. He insisted that civil emancipation and the expansion of nobility through purchase represented a corruption of the true Gothic constitution, and of the racial purity of the old warrior aristocracy. In Boulainvilliers’ view, the *noblesse de robe* had usurped the *noblesse d’épée*.

Interested in identifying what has supported political liberty in the French constitution rather than defending one particular claim to rule or “essence” of the French monarchy, Montesquieu contends that these changes marked the perfection of Gothic government (11.8.167, 28.45.600, 30.2.663-668).¹⁴⁶ The medieval shifts in political power—the nobles’ gains at the expense of the crown in the 9th and 10th centuries, the *robe*’s at the expense of the *épée* beginning in the 13th century, and the back and forth between the clergy and nobles,

¹⁴⁵ Pangle, *Montesquieu’s Philosophy of Liberalism*, 293; Cohler, *Montesquieu’s Comparative Politics*, 85. Cox, *Montesquieu and the History of French Laws*, 161-65 and “Montesquieu and the History of Laws,” 412-20; Shackleton, *Montesquieu: A Critical Biography*, 328-332.

¹⁴⁶ Mosher, “Monarchy’s Paradox,” 166.

were not stories of one body usurping others' rightful powers.¹⁴⁷ Rather, they followed changes in civil laws that more or less necessitated shifts in political power. For example, the growing role of the robe in judicial administration happened in large part because the old nobility was not interested in the scholarly, dry study and application of written laws that came to define the occupation of judging in the late medieval period. No one usurped anyone else in this case; "all this happened gradually and by the force of things" (28.45.598).

In sum, Montesquieu reproaches both Dubos and Boulainvilliers for evaluating the historical record through partisan lenses, often twisting the evidence to accord with their predetermined purposes.¹⁴⁸ "The Count of Boulainvilliers and the Abbé Dubos have each made a system, the one seeming to be a conspiracy against the third estate, and the other a conspiracy against the nobility" (30.10.627). Neither the royalists nor the nobilists properly understood the character of the French constitution.¹⁴⁹ Over the centuries, this government went through numerous changes. Power has shifted multiple times, between the crown and the nobles and among the three estates. Among the titled orders of the sword, robe, and clergy themselves, the power dynamics have varied greatly. While there have been better and worse periods for political liberty than others, there is not a specific moment in time that

¹⁴⁷ Cox, *Montesquieu and the History of French Laws*, 31-32.

¹⁴⁸ Montesquieu could not reserve his satirical pen only for use against Dubos. After chastising Dubos' careless distortion of historical records, he quips, "But it is permitted to Father Hardouin only to exercise arbitrary power over the facts" (30.12.631). After establishing a sound reputation as a scholar of numismatics and classical natural history, the Jesuit priest and librarian Hardouin began promoting in the 1690s a rather fantastical theory of classical literature. In the *Prolegomena* and other writings, he insisted that, all works of classical literature and history, including much attributed to Church fathers, were forgeries by an "impious crew" of 13th and 14th century monks—complete with a chain of historic references to those works to strengthen the illusion. He excepted from this account only a few works of Cicero, Pliny, and Horace, as well as the Old and New Testament—the latter of which he claimed was written originally in Latin. See Jean Hardouin, *Prolegomena*, trans. Edwin Johnson, ed. Hermann Detering (Berlin: Books on Demand GmbH, Norderstedt, 2010).

¹⁴⁹ Cox, "Montesquieu and the History of Laws," 412-416. Cohler, *Montesquieu's Comparative Politics*, 85-86. Mosher, "Monarchy's Paradox," 166.

marks the “essential” French constitution. As evidence that he was not simply a partisan of the nobility, Montesquieu shows that in some historical instances, greater royal power and central control improved rule of law.

In comparison to figures like Dubos and Boulainvilliers, Iris Cox explains, Montesquieu’s “immense mental step forward” was to show that, “in the state which is France, the rights and duties of the sovereign and of other institutions and persons within the state, do not have one form or organization which is correct and from which all deviations are unjust and wrong.”¹⁵⁰ Montesquieu’s history also challenges the basic premise on which the nobilists and royalists agreed: that origins determine right.¹⁵¹ Rather, the distinctive feature of the French constitution and monarchy more generally, is the basic feature of power-sharing between the crown and the intermediate bodies of the nobility, *parlements*, ecclesiastics, and towns, and the moderation of government this provides. Cox describes Montesquieu’s view of French history, distinct from the primary existing camps, as a *thèse évolutionnaire*.¹⁵²

The diverse roles played by the legislators whom Montesquieu praises demonstrate how his view of the French constitution and its history transcended the partisan historiography of the 17th and 18th centuries. While Montesquieu agreed with the nobilists on what constituted the primary threat to constitutional balance in 18th century France, he showed in his history of the Frankish monarchy that the crown was not the only possible threat. At many junctures, in fact, the crown has played a crucial royal in counter-balancing

¹⁵⁰ Cox, *Montesquieu and the History of French Laws*, 164.

¹⁵¹ Hulliung, *Montesquieu and the Old Regime*, 62. Another historiographical purpose in Montesquieu’s analysis of feudalism, Hulliung argues, is to wrest medieval history from the legalists, to show the laws in their full “sociological” context.

¹⁵² Cox, “Montesquieu and the History of Laws,” 422.

orders of the nobility, in uniting the nation, and in mediating friction between the other powers. Montesquieu's historical analysis warns against putting too much faith in any one "ballast;" liberty can fall again even after it has risen.¹⁵³

One reason for engaging in this painstaking analysis of dusty Latin legal codes, ecclesiastical chronicles, and royal capitularies, then, was weigh to in on the scholarly merits and contemporary political implications of the competing French histories. Montesquieu laments that he must go to great lengths just to undo the effects of bad scholarship.¹⁵⁴

I beg the reader's pardon for the deadly boredom that so many citations must give him; I would be briefer if I did not still find in front of me the book, *The Establishment of the French Monarchy in Gaul* by Abbé Dubos. Nothing pushes back the progress of knowledge like a bad work by a famous author, because before instructing, one must begin by correcting the mistakes (30.15.639). Setting the record straight was a necessary first step to whatever additional "instructing" he wished to impart. The extreme care with which Montesquieu collects and combs through evidence suggests that, whatever else his goals may have been, he was concerned not least with getting the story right.

Still, his efforts clearly aim at providing more than history for history's sake.¹⁵⁵ Montesquieu's analysis to some extent serves the substantive political purpose of setting the groundwork for any possible reform of French politics in the 18th century by identifying some of the particular internal strengths and weaknesses of the French constitution, as well as the relationship these strengths and weaknesses. As noted at the beginning of this chapter, Montesquieu sees the prototypes of 18th century English and French government in the ancient Gothic constitution. We might like to know how this ancient government gave way to

¹⁵³ Keohane, *Philosophy and the State in France*, 397.

¹⁵⁴ Hulliung, *Montesquieu and the Old Regime*, 63.

¹⁵⁵ Cox, *Montesquieu and the History of French laws*, 37, 171.

modern European monarchies, and particularly to understand how and why they diverged—for example, why the national representative assembly became a much more powerful institution in England than in France,¹⁵⁶ and why England and not France (not yet at least) had “leveled” its social order. Could the French constitution be balanced more securely along the English lines? Might the English find ways to enjoy their liberty a bit more as the French do theirs?

Montesquieu’s accounts of French and English monarchy, however, do not allow us to compare them in a rigorous fashion. In the French case, Montesquieu gives us the medieval history of the monarchy without a comprehensive picture of the early modern period. He traces the first thousand years or so of French civil law and jurisprudence, and only the first five hundred years of the institution of the French monarchy, ending with the rise of house of Capet in the late 10th century.¹⁵⁷ As he puts it in the last paragraph of the work, “I have closed the treatise on fiefs where most authors have begun it” (31.34.722). With regard to England, he provides an 18th century depiction and only a few intriguing references to its Germanic origins. Accounts of the medieval development of English civil and political law, as well as of the early modern French constitution, are quite conspicuous in their absence from *The Spirit of the Laws*. His analysis of medieval Frankish laws only invites an English counterpart, a challenge which one of his many English admirers, William Blackstone, would take up in earnest.¹⁵⁸

¹⁵⁶ Cox notes that Montesquieu doesn’t discuss the Estates General at all. “Montesquieu and the History of Laws,” 418-421, 425.

¹⁵⁷ Cox, “Montesquieu and the History of the Laws,” 409.

¹⁵⁸ In *The Cloaking of Power*, Carrese takes up precisely this subject: the way that Blackstone, Hamilton, and Tocqueville built upon and extended Montesquieu’s insights into different contexts.

Montesquieu does not offer specific recommendations for how France or any other country should proceed in the 18th century. This would seem to be due as much to his concern for promoting moderation in the spirit of reform as to any worries about censorship.¹⁵⁹ There are, however, overall general guiding principles for promoting political liberty, for England as well as France. His attention to the Germanic roots of French laws and the moderation they afforded indirectly suggests the deficiencies of the modern French laws with regard to political liberty.¹⁶⁰ In emphasizing the Germanic origins of both French and English government, Montesquieu suggests the possibility of reviving in France a constitutional balance and moderate criminal practices like those in England.¹⁶¹ Highlighting the particular origins of the French constitution serves to show that the monarchy has within itself the resources for reforming itself.

Having worked as a jurist in the *parlement* of Bordeaux, Montesquieu certainly was aware of the influence of Roman law on modern French government. By emphasizing the Gothic roots of French monarchy, however, he taught that the major source of what is *moderate* about French monarchy—indeed all European monarchies—are its Germanic forms. The revival of Roman right played a role in the much-needed consolidation of royal power in the 13th century, but with the House of Bourbon and modern doctrine of absolute monarchy, the pendulum had swung too far in the direction of royal, central power.

One example from Book 29 gives a hint of Montesquieu's own indirect, cautious approach to promoting reform in the French administration of criminal justice. In a rare

¹⁵⁹ Cox, "History of Laws," 422, and Pangle, *Montesquieu's Philosophy of Liberalism*, 298, come to a similar conclusion.

¹⁶⁰ Keohane, *Philosophy and the State in France*, 402.

¹⁶¹ Pangle, *Montesquieu's Philosophy of Liberalism*, 298.

discussion of modern French criminal law—and a comparison with its modern English counterpart no less—Montesquieu discusses their respective penalties for false witness in Chapter 11. France considers false witness a capital offense, while England does not. “In order to judge which of these two laws is better,” Montesquieu explains, one must consider the constellation of criminal policies of which each law forms a part. Specifically, the punishment for false witness depended upon whether torture was permitted in order to extract confessions.¹⁶² These in turn were related to the inquisitorial versus adversarial court proceedings in France and England, respectively. In the French system, judges lead the process of investigating cases, calling witnesses to testify on behalf of the public as they deemed appropriate. Accused criminals against whom there was a strong presumption guilt could be tortured under French law in order to obtain a confession. In the English system, the adversarial process allows the accused to produce witnesses in their defense, and the law does not permit putting the accused to the question. “The three French laws,” he explains, “form a well-linked, consistent system; the three English laws form one that is no less so... In order to judge which of these laws is more in conformity with reason, they must not be compared one by one; they must be taken all together and compared together” (29.11.608).

In the English system, the courts are less likely to extract a confession from the accused, and so they depend more upon testimony from various witnesses to convict. They cannot afford to frighten witnesses away by the prospect of capital punishment for false witness. Both parties have recourse against false witness by the other side’s witnesses,

¹⁶² In the French system, *la question préparatoire* referred to torture for the purpose of obtaining a confession, and *la question préalable* that in order to get a convicted criminal to name his accomplices. Kingston explains that the use of torture in the French courts began to decline in the 17th century before being abolished completely in 1780. When Montesquieu himself worked in La Tournelle, only 4 cases (0.6%) involved torture. *The Parlement of Bordeaux*, 122.

however, because they too call their own witnesses. “The business is, so to speak, argued out between them.” In the French system, as the accused cannot bring forth his own witnesses, his fate depends entirely on the testimony of those summoned by the public party. The French law does not provide the accused with recourse against false witness. On the other hand, because it has the recourse of torture to extract a confession, “the French law...does not so greatly fear intimidating the witnesses” (29.11.608).

Montesquieu suggests that the punishments attached to false witness in themselves, are not prudent or imprudent, but only so in reference to the context of the legal system. In rationalizing this rather harsh punishment, however, Montesquieu draws our attention to torture as the crux of the problem. While the logic of the penalty for false witness might depend on its legal context, Montesquieu contends that in no case is the law “forced to use the *question* in criminal cases.” Putting the accused “to the question,” he argues in Book 6, is “not necessary by its nature.” He cites the example of England as “well-policed nation” that rejects the use of torture “without meeting drawbacks” (6.17.92).¹⁶³ It is difficult not to think that Montesquieu is suggesting a means by which French criminal justice could be made gentler and no less effective. Citing some provisions from the *Establishments of Saint Louis*, Montesquieu also notes that French jurisprudence formerly made use of an adversarial approach, and so was able to punish false witness with only pecuniary penalties (29.11.608 n15). Thus, while arguing that the English and French laws both “form a well-linked,

¹⁶³ Montesquieu expands on his critique of “the question” in *Pensées* #1954, emphasizing its inhumanity, association with slavery, and use on countless innocents. He clearly, if wryly calls for abolishing this practice in France by highlighting the fact that many judicial practices once supported by the laws are now considered cruel and/or ridiculous. “One cannot (it will be said) reject a practice authorized by so many laws. But by the same reason, it would not have been necessary to abolish the proof by hot iron or by cold water, duels, nor the absurd and infamous congress.” This “congress,” Callois explains, was a legal “requirement to engage in intercourse in front of the court when applying for nullification of a marriage due to impotence. *OC I*, 1475n52.

consistent system” he seems to invite reform of the French laws (29.11.608). He shows how the English system avoids the use of both torture and harsh punishment for false witness by using an adversarial investigative procedure, which also happens to be indigenous to French criminal jurisprudence itself.

Previous English attempts at liberal reform also serve (or should have served) as a cautionary tale for France and other European monarchies. In the English system, the privileges of nobility have been all but eliminated, which is a double-edged sword from standpoint of liberty, Montesquieu warns. Elimination of the nobles’ privileges may have served English liberty in one sense, but Montesquieu warns that, like the Romans’ “frenzy of liberty,” it also made them vulnerable to a new threat: that of popular legislative aggrandizement (2.4.18-19). “In order to favor liberty, the English have removed all the intermediate powers that formed their monarchy. They are quite right to preserve that liberty; if they were to lose it, they would be one of the most enslaved peoples on earth” (2.4.18-19). The warning is that republicanism depends upon a selfless civic spirit, frugality, and simplicity that are totally at odds with a society defined for centuries by monarchy. As with republican judicial instruments that invite public accusations, republican legislative and executive institutions imposed upon a nation that lacks robust political virtue will only encourage despotism.

The removal of intermediate bodies is the “cause for the corruption of almost all monarchies” (8.6.117). And “just as democracies are ruined when the people strip the senate, the magistrates, and the judges of their functions, monarchies are corrupted when one gradually removes the prerogatives of the established bodies or the privileges of the towns. In the first case, one approaches the despotism of all; in the other the despotism of one alone”

(8.6.116). Much of Montesquieu's recommendations for the reciprocal checks and balances among the branches of government is directed towards avoiding legislative tyranny, the greatest threat he foresees to the English system and to modern republics in general (11.19.186). For example, to avoid the natural tendency for the popular legislature to aggrandize power in a republic, the executive needs more checks on the legislature than vice versa (11.6.162-164).

The question is whether the French monarchy in Montesquieu's day could have been infused with more republican principles without eliminating all the vestiges of the monarchic structure of government. With his emphasis on the way French orders have counter-balanced one another over the centuries, Montesquieu suggest that French monarchy has internal resources for improving itself. Moreover, by depicting the risks of "leveling," he seems to warn that a wholesale overhaul of the form of government is not necessary, and in fact could cause more harm than damage. While regarding absolute monarchy as the greater contemporary threat to the French constitution, Montesquieu makes clear that the key to monarchic liberty consists in the balance among multiple seats of powers, not in the activity of any one body in particular. The nobles, clergy, crown, and—in a "leveled" monarchy a la the English, the commons—all could aggrandize power to the detriment of the constitutional balance. The nobles and clergy in fact have done so at various junctures in French history, with kings playing important roles in consolidating national political order to counter-balance extreme fragmentation and local feudal magnates (28.45.600-601).¹⁶⁴ In his critique of the later Carolingian kings' fragmentation of the empire, and his praise of powerful kings like Charlemagne and Charles VII, and the nationalizing juridical reforms Saint Louis,

¹⁶⁴ Mosher, "Monarchy's Paradox," 167.

Montesquieu shows that he was not a partisan of the nobility, notwithstanding his own status.¹⁶⁵ For monarchy to be something more than mere feudalism, the king must be sovereign; while monarchic power is distinguished for being mediated, in some sense, it must still flow from and return to the crown (2.4.17-18).¹⁶⁶

Yet Montesquieu's exhortatory tone in discussing monarchy in general in Parts 1 and 2 indicates the fundamental problem with this form of government: that kings often do exactly the things that Montesquieu counsels them against (6.5-9.77-83, 8.6-7.116-118, 12.22-28.207-211). While he makes a powerful case that "insofar as the monarch's power becomes immense, his security diminishes," there may be no hard check on the ambitions of a king who will not accept Montesquieu's sage advice (8.7.118). Indeed, this seems to be Rousseau's implicit critique of Montesquieu's regard for monarchy in the *Social Contract*.¹⁶⁷ As Michael Mosher puts it, "perhaps...it was only a monarch and not the monarchy that was well-tempered."¹⁶⁸ Iris Cox cites the early 20th century French legal historian, Émile Chénon, on the predicament of French kingship in the wake of the decline of feudal government:

The king was persuaded that he could not infringe the fundamental laws, and in general he did not do so. Most of them were in any case in his interest or at least in the interest of the monarchy. But if he had wanted to violate them, who could have prevented him? The theory of the fundamental laws was in fact only a moral limit on the power of the king: this limit, amply sufficient when a Saint Louis is on the throne, must have appeared less of a safeguard to the subjects of Louis XIV.¹⁶⁹

¹⁶⁵ Hulliung, *Montesquieu and the Old Regime*, 61-63.

¹⁶⁶ Cohler, *Montesquieu's Comparative Politics*, 141.

¹⁶⁷ Rousseau, *The Social Contract*, in *Social Contract, Discourse on the Virtue Most Necessary for a Hero, Political Fragments, and Geneva Manuscript*, trans. Judith Bush, Roger Masters, and Christopher Kelly, in *The Collected Writings of Rousseau*, vol. 4, ed. Roger Masters and Christopher Kelly (Hanover, NH: University Press of New England, 1994), III.6, 176-177.

¹⁶⁸ Mosher, "Monarchy's Paradox," 167.

¹⁶⁹ Émile Chénon, *Histoire générale du droit français* (Paris : Recueil Sirey, 1929), Vol. II, 412. Cited in Cox, "Montesquieu and the History of Laws," 410.

Cohler suggests that Montesquieu's hope would have been for France "to paraphrase his remark about England, to keep the forms of the monarchy while the republic develops"—that is, to democratize rather than eliminate the intermediate institutions between head of state and the body of the people as a whole.¹⁷⁰ This revival of Germanic political liberty would have (had) to take a specifically French form—perhaps more aristocratic than democratic as one commentator suggests.¹⁷¹ One could say that what Montesquieu most feared was precisely what happened.

Finally, there is another way in which Montesquieu's historical analysis implicates general prescriptive principles. He conveys in these books as well as anywhere in the work as a whole what he means by insisting on comparing practices in light of the "spirit of the laws," and what this means about the scope and character of political prudence. One might conclude that Montesquieu emphasizes these interconnections in order to simply discourage attempts at improvement. Indeed, some have interpreted him in this way (i.e. Thomas Jefferson), or been inspired by him to push the bounds of skepticism towards the Enlightenment (i.e. Edmund Burke). Yet Montesquieu's glowing praise of the reforms initiated by Saint Louis, and the placement on "how to compose the laws" right in the middle of the historical books, signals that his project is cautiously progressive.

As Montesquieu states in the Preface, this cautious optimism follows directly from his explanation of the interrelated character of the different orders of law, custom, and practice:

Each nation will find here the reasons for its maxims, and the consequence will naturally be drawn from them that changes can be proposed only by those who are

¹⁷⁰ Cohler, *Montesquieu's Comparative Politics*, 140.

¹⁷¹ Pangle, *Montesquieu's Philosophy of Liberalism*, 298.

born fortunate enough to fathom by a stroke of genius the whole of a state's constitution...In a time of ignorance, one has no doubts even while doing the greatest evils; in an enlightened age, one trembles even while doing the greatest goods. One feels the old abuses and see their correction, but one also see the abuses of the correction itself. One lets an ill remain if one fears something worse; one lets a good remain if one is in doubt about a better. One looks at the parts only in order to judge the whole; one examines all the causes in order to see the results (xliv).

Section 3: The Geography of Liberty and Despotism

Introduction to Section 3

In this section, I will explain the place of Part 3 in *The Spirit of the Laws* and what it contributes to answering the overarching questions of my project. After reviewing common challenges Part 3 has presented to commentators, I will explain the major political implications of Montesquieu's analysis of climate and terrain through the framework of his dichotomies between physical and moral causes (Chapter 15), and between the tendencies of cold and hot, or northern and southern countries (Chapter 16). I will pay particular attention to Books 15 and 18, as the themes of greatest importance to my project figure most prominently in these books: nature's multiple and conflicting implications for political liberty (Chapter 17), the dynamic between physical environmental and conventional or historical variables (Chapter 18), and the lessons to be learned about physical accidents for liberal statesmanship (Chapter 19). I will conclude by briefly evaluating the merits of some aspects of Montesquieu's analysis in Part 3 in light of contemporary research in the social sciences.

I will begin by explaining the two major conceptual dichotomies organizing Montesquieu's analysis in Part 3: his distinction between physical and moral causes, and between characteristically northern and southern political psychology. In Chapter 15, I will explain Montesquieu's distinction between, and depiction of the dynamic interaction among, physical and moral causes. I will trace his long-standing interest in the physiological underpinnings of differences in human thought and behavior, and discuss a prime early example of his analysis of the complex dynamics among physical and moral causes: the republican dilemma of territorial size and the tradeoffs between internal and external

strength, exemplified by the expansion of the Roman republic. In the context of discussing foreign policy, he introduces the size of a country as an almost defining feature of a country's politics. He links small territories to republican government, medium to monarchy, and large to despotism based on the character of the citizenry and the communication of power that different size communities facilitate (8.16-21.123-128). While they can be well-governed internally, small republics often have the problem of vulnerability to conquest by larger, more powerful states. Addressing this problem through cultivating military prowess and a martial ethos, and asserting themselves abroad, small republics (and monarchies that expand as well) then encounter a different problem: that growing in size undermines their ability to maintain liberty *internally*.

His distinction between and discussion of the complex dynamics among physical and moral causes are crucial to understanding his case for the extremely powerful and yet not definitive influence of the physical environmental causes. The moral causes of education, manners, mores, and religion ultimately have at least the potential to prevail over environmental influences, in all but the most extreme cases. Not least among the moral causes are laws and legislators themselves (1.3.9, 14.1.231, 14.6-8.236-240, 15.8.252, 18.6-7.288-289, 19.4-5.310, 19.25-27.324-333, 20.1-2.338-339, 21.20.389, 23.20.440, 24.14-18.468-472, 26.494-518; CC, XVIII.169).

In Chapter 16, I explain the typology of northern and southern, or cold and hot countries, which runs through Part 3 of *The Spirit of the Laws*. The contrast Montesquieu draws between these two political psychological types clarifies the mindsets and the behavior that Montesquieu considers formative of liberty, and conversely those that undermine it. While he emphasizes the vices of hot climate in Part 3, Montesquieu also shows that each

climate has its mixture of characteristics, some positive and some negative. The characteristically southern temperament is not without its virtues, nor the northern its vices. Yet the southern virtues have negative implications for political liberty, whereas the northern vices happen to be favorable to political liberty. Like his account of Gothic honor leading inadvertently to rule of law, his exploration of each of these types highlights the disconnect between psychological characteristics in themselves and outcomes for political liberty.

In Chapter 17, I undertake a close analysis of Book 15 on climate and slavery. Montesquieu's fervent critique of slavery in this book, as well as discussion of a "natural reason" for it in some climates, represents a dramatic climax in the book as a whole, a high point in the tension between the power of environmental influences and our capacity to shape social and political outcomes. Through his critique of conventional rationales for civil slavery, Montesquieu's normative position, as well as its foundations, comes into relief. His distinction between an *explanation* for slavery and *justification* points to the difficulty of nature's status as a straightforward guide. The tension between Montesquieu the social scientist and Montesquieu the political counselor that comes to a head in Book 15 points us to the perennial questions regarding the work's alleged determinism and relativism. Both of these controversies in turn raise the question of what legislators can and should do to promote liberty.

In Chapter 18, I explain the physical and moral ways that Montesquieu sees fertile and otherwise easy terrain as facilitating servitude. I then clarify the environmental roots of "Gothic liberty," highlighting the role of natural topographic boundaries and places of refuge for the early history of political independence in northern Europe, as contrasted with central

Asia. I also discuss the relationship between challenging terrain and liberal political economy more generally.

Montesquieu's analyses of environmental and historical accidents converge in his account of the different modes of livelihood, what Smith would call the "four stages" of political economy: hunting, herding, farming, and commerce. He highlights tradeoffs for liberty among these different stages, and particularly in the transition between one of nomadic herding to one of settling and cultivating the land. I show how Montesquieu's analysis of the tradeoffs between the condition of natural liberty and a civilized order, between a pastoral and agricultural way of life, plays a similar role in his political science as the state of nature concept does for other moderns. Montesquieu suggests that agricultural and industrial innovation, as well as general shift towards reliance on commerce rather than farming, can help diminish the drawbacks of the transition to a civilized order—weakening not only the "empire of climate," but also that of men.

In Chapter 19, I will clarify how Montesquieu's emphasis on physical causes forms a critical part of his teaching on political prudence, underscoring cultural qualities supportive of and detrimental to liberty, as well as ways of encouraging or discouraging these qualities. This section begins with a reflection on the perennial controversy over the work's alleged determinism, which in turn raises that of the scope for—even the very possibility of—exercising political prudence and leadership. Following numerous other commentators, I conclude that a major aim of his discussion of the powerful influence of climate is to educate legislators about how they can mitigate the challenges certain climates present for liberty and social order. He offers numerous examples of how wise legislators have countered the "vices

of climate”¹—namely the indolence of hot climates—with laws providing incentives to industriousness. As he puts in the title to Book 14, Chapter 5, “bad legislators are those who have favored the vices of climate and good ones are those who have opposed them” (14.5.236). However, I go beyond previous commentators in extending the prudential insights of Part 3 to other problems of political psychology for liberty. Montesquieu’s analysis also points to the importance of tempering the excesses of northern spiritedness with the spirit of commerce and of cultivating the spirit of commerce more broadly. Finally, I show how his critique of the mentality of those inhabiting fertile climes suggests the potential need to temper excesses of the spirit of commerce.

I will conclude with some reflections on the contemporary validity and relevance of Montesquieu’s analysis in Part 3. While clarifying the limits of physical environmental causes in his account, we should be careful not to reason away the dramatic character of his conclusions. Montesquieu attributes remarkable power to physical environmental influences in Books 14-17, often making uncomfortably bleak predictions for the prospects for civil, domestic, and political liberty in hot, flat climes. While he often draws the causal arrows too directly between environmental conditions and political outcomes, there is a great deal to the *effects* Montesquieu described. The basic geographic trends in civil, domestic, and political liberty he described unfortunately have resonance even today. Similarly, even if particular details of his theories of environmental influence may be inaccurate, the relationships he identified between environment and political economy in particular have proven rather prescient, a point that I will briefly elaborate in the section conclusion with a couple of

¹ This is a phrase he uses in the title of Book 14, Chapter 5, where he discusses practices and beliefs that exacerbate indolence, and in describing lasciviousness in hot climates (16.10.271).

contemporary examples: the phenomenon of oil-rich countries and the “resource curse,” and Nelson Polsby’s “air-conditioner theory” of southern American political power.

Chapter 14: Introduction to Montesquieu's analysis of climate and terrain

Books 15, 16, and 17 are devoted to discussing the laws of civil slavery (*l'esclavage civil*), domestic slavery (*l'esclavage domestique*), and political servitude (*la servitude politique*), respectively. As Montesquieu draws greater distinctions among these different orders of servitude and liberty in Part 3 than elsewhere in the book, it will be helpful to clarify what he means—particularly in distinguishing between civil and political servitude. In Book 1, Montesquieu says that he will not systematically differentiate between political and civil realms of laws. This imprecision, he explains, has to do with the fact that his subject is not laws in and of themselves, but the “spirit of the laws,” that is, the dynamics among different orders of laws. Moreover, civil and political orders are difficult to fully entangle, as civil laws differ dramatically depending upon the form of government. Thus, Montesquieu treats matters we might distinguish as civil laws—such as criminal justice procedures and taxation under the category of liberty of citizen, which is one of the two aspects of political liberty broadly speaking. The relationships among individuals, the government, and other powerful bodies in society as they regard property and labor are also matters affecting the liberty of the citizen.²

However, in some places, Montesquieu does make a point of distinguishing between the civil and political realms, including civil and political liberty and servitude. For example, in criticizing laws of high treason in republics, he explains that they enable the “political

² These policies also may influence liberty of the constitution if they enable new social classes to emerge and balance against existing powers, as he suggests was the case with the Bank of St. George in Genoa, for example (2.3.15).

interest to force the civil interest” (6.5.77).³ Montesquieu at times also uses civil laws and political laws interchangeably or ambiguously (see for example 26.9.502).

In Part 3, Montesquieu designates separate books for discussing civil and political servitude in relation to climate, as well as another for domestic servitude. What Montesquieu describes in Part 2 as political liberty embraces both the civil and political liberty of Part 3. Civil laws strictly speaking concern “the relation that all citizens have with one another,” and political laws “the relation between those who govern and those who are governed” (1.3.7, 26.1.494). Or, as he puts it elsewhere, political laws are what “form” the nature and principle of the government, and civil laws are what “maintain” them (1.3.8). The civil in matters in question in Part 3 are the laws and customs regulating the use and ownership of labor and property. Slavery refers to a state where individuals labor under coercion, and do not own the products of that labor (14.5-9.236-38, 15.7-8.252-53, 17.2.278). Legally, it is “the establishment of a right which makes one man so much the owner of another man that he is the absolute master of his life and of his goods” (15.1.246). With civil liberty, then, the power of other men over one’s life and goods is subject to at least some limits. His treatment of civil liberty as distinguished from political liberty suggests that he means something like the 19th century concept of “free labor.”

The civil liberty that Montesquieu discusses in Parts 3 and 4 therefore embraces something like what we might call economic liberty. Montesquieu himself does not use this term, but speaks of the “liberty of commerce,” which has a rather different meaning than what is often meant by economic liberty today. In short, economic liberty for Montesquieu is a measure of the rules operating in a society as a whole, not of individuals’ independence or

³ This problem is discussed in Chapter 5 of this dissertation.

freedom from policies perceived as burdensome; it is a social condition.⁴ Like political liberty, economic liberty for Montesquieu exists only in a context of legal regulation. In a formulation resonant of his description of political liberty in Book 11, Chapter 3, he explains that,

Liberty of commerce is not a faculty granted to traders to what they want; this would instead be the servitude of commerce. That which hampers those who engage in commerce does not, for all that, hamper commerce. It is in countries of liberty that the trader finds innumerable obstacles; the laws never thwart him less than in countries of servitude (21.12.345).

In his analysis of tax, commercial, fiscal, and monetary policies in Book 13 and Books 20-22, Montesquieu emphasizes that economic liberty, like political liberty, is premised on rule of law (13.14.222). It is moderate countries and especially commercial ones that have closely regulated economies, and despotisms few and simple laws (13.12-13.220-21, 20.12.345). Low taxes are characteristic of despotism and relatively high taxes of moderate governments (though Montesquieu does counsel against excessively high taxes in moderate governments; 13.15.223).

As we saw in the case of the establishment of Gothic criminal justice, Montesquieu identifies the emergence of civil order as such, as distinguished from political laws, customs, and the right of nations, as a historical development in the transition of peoples from a barbaric way of life to a settled one. My discussion of Book 18 on terrain (Chapter 18) will highlight the particular conditions under which the civil order emerged; it is when semi-nomadic herdsmen settle specific territories, divide the lands among and within tribal groups, and begin to accumulate possessions beyond their livestock and weapons, that the civil code

⁴ For a detailed analysis of Montesquieu's political economy, see Catherine Larrère, "Montesquieu on Economics and Commerce," in *Montesquieu's Science of Politics*, 335-74. See also Cheney, *Revolutionary Commerce*, 52-95. Rahe, *Montesquieu and the Logic of Liberty*, 172-190.

“swells” (18.13.291). The civil order is premised on a formality and complexity of property ownership that marks the transition from a nomadic to a settled way of life, from a herding to an agriculture-based mode of subsistence.

Domestic servitude and liberty are prominent themes only in Part 3, though they of course dominated his earlier work, *The Persian Letters*. Domestic servitude refers to a condition where women are essentially their husbands’ slaves, subject to their arbitrary rule over their lives, property, and also their virtue or honor (15.12.255, 16.1.264). The practical manifestation of domestic servitude is strict enclosure of women inside the household, and separate even from their male relatives. Domestic servitude tends to go with polygamous marriages, although it may be the practice in societies with monogamous marriages as well (16.8.269, 16.11.272). While the *Persian Letters* demonstrates Montesquieu’s profound fascination with and opposition to domestic servitude in its own right, in *The Spirit of the Laws* domestic servitude is of concern primarily to the extent it feeds civil and political servitude (16.9.270). His analysis of the relations between the sexes in Book 16 also says a great deal about his understanding of the dynamic between human nature and the nature of the physical environment.⁵ I will discuss his account of the effects of different climates on domestic servitude and the relations between the sexes more broadly in Chapter 16 in contrasting the characteristic northern and southern temperaments.

Even while conceptually different, civil, domestic, and political servitude tend to go together, just as liberty in these realms does. It is on account of the difficulty of practically disentangling the different orders of law when making any comparisons between countries

⁵ Chris Nyland, “Biology and Environment: Montesquieu’s Relativist Analysis of Gender Behavior,” *History of Political Economy* 29 (1997), no. 3, 391-412.

that Montesquieu speaks of his subject as the “spirit of the laws.” Servitude in one area inevitably affects the status of liberty in the others (15.6.251, 15.13.256, 16.9.270, 18.14-19.292-95). For example, in a despotic country, individuals may not be directly bound to serve others men, but the violence and arbitrariness of the government means that their possessions and very lives effectively belong to the state (15.6.251, 18.19.295).

Distinguishing between the civil and political realm in primitive societies is especially difficult, as the civil order as such hardly exists where there are so few possessions, not fixed territories among or within peoples, and no formal currency. Therefore, my analysis of servitude in the different realms will also obscure the lines between them at times.

Physical accidents and the persistence of despotism

As discussed in Chapter 1, Montesquieu shows how servitude is offensive to human nature in its effects, and at the same time, receives some support in nature. There are at least three senses in which nature provides support for servitude. *Human* nature may lend support to servitude first through our natural tendency to pursue our goals directly and forcefully, the subject of Chapters 5 and 6. In addition, our tendency to become accustomed and attached to familiar mores, manners, and ways of life can enable servitude where these contribute to keeping us enslaved. “Men grow accustomed to anything, even to servitude, provided the master is not harsher than the servitude” (15.16.258). Conversely, “even liberty has appeared intolerable to peoples who were not accustomed to enjoying it. Thus is pure air sometimes harmful to those who have lived in swampy countries” (19.2.308-09). One of the many

paradoxes of human nature is that we are capable of coming to regard a corrupt condition as itself natural.

The physical environment—the nature external to man—represents the third and perhaps the most formidable natural support for servitude.⁶ The books on climate and terrain (14-18) are explicitly about servitude. The nature of the environment can facilitate servitude in at least three ways. First, a lush climate, fertile terrain, and/or easily accessible terrain can make a country appealing and amenable to foreign conquest (17.3.280-81, 17.6.283-84, 18.2-3.286-87). A rich land naturally invites invasion. Even infertile terrain can facilitate servitude among herdsmen if it is flat and otherwise lacking in natural boundaries or places of retreat.

Second, Montesquieu maintains that lush climates foster psychological tendencies supportive for servitude. The effects of living in such climates provide alternative means for obtaining obedience to the despot, allowing him to rely less upon tapping subjects' fear.

While Montesquieu presents despotism in Part 1 as being a more obvious and easier form of rule than moderation, he notes that it is less stable in itself once established, as the principle of fear wears down through overuse (6.12.84). To the extent that a despotic government is stable, it is usually because other factors in addition to force and fear help bolster it. Climate is foremost among the factors he lists that “force [despotism] to follow some order and to suffer some rule. These things force its nature without changing; its ferocity remains; it is, for a while, tractable” (8.10.119; see also 2.4.19, 3.10.29-30, 5.14.61).

One way despotism become “tractable” is through the direct physiological consequences Montesquieu attributes to hot climate. He famously contends that it makes people indolent,

⁶ Rahe similarly describes the theme of Part 3 as an examination of “the degree to which nature stands in liberty’s way.” *Montesquieu and the Logic of Liberty*, 155.

lustful, and submissive, thereby facilitating and perhaps even requiring civil, domestic, and political servitude, respectively.

In addition, climate and terrain can combine to favor modes of livelihood that are vulnerable to economic exploitation. Montesquieu highlights the risks of cultivating an easy as opposed to more challenging terrain for civil and political liberty. For example, some terrain favors the production of food and other goods that can be harvested or extracted through simple, brute labor, and thus can be performed adequately by coerced individuals (15.7-8.251-53, 18.6-7.288-89). Highly productive terrain also generates a level of material comfort that attaches people to the land, and makes them more concerned to preserve what they have than to take risks that might enhance their liberty but undermine their economic situation (18.1-2.285-86, 18.4.287).

By producing an indolent and submissive temperament and/or by encouraging dependence on the material comforts afforded by the land, then, a lush and otherwise materially convenient physical setting environment can supplement fear of violence with fear of labor and/or the loss of material prosperity to buttress servitude. In sum, Montesquieu argues that the easiest and most fertile terrain, perhaps counter-intuitively, presents more formidable challenges for moderate government than do middling conditions. Fertile terrain simply is apparently not fertile for moderate government.

Environmental roots of Gothic and commercial liberty

Indeed, while some physical accidents enable the persistence of servitude, others happen to have been quite favorable to liberty, serving as one of those factors of *le chance*

that has helped moderate government to develop (5.14.63). Climate and terrain figure prominently in Montesquieu's historical model of political liberty, Gothic government. There are at least three ways that certain physical environments can provide fortuitous conditions for liberty. In Book 14, Montesquieu identifies psychological effects of cooler climates that inadvertently aid the cause of liberty on all fronts; the cooler air of the northern countries stimulates physical activity and robustness, moderate sexual passions, and vigorous spirit of independence, thus frustrating the designs of civil, domestic, and political servitude, respectively (14.231-234).

Second, in Part 3, we begin to learn what it was about life in those forests of Germany that led its inhabitants to forge, if by accident, the rudiments of constitutional monarchy. The kind of liberty that the English found in the forests in Book 11 is independence, or natural liberty, which Montesquieu associates with savages and barbarians (11.6.166). While Montesquieu emphasizes that independence—being one's own boss—is distinct from political liberty properly speaking (11.2-3.155), this independence, or natural liberty, nonetheless played an important role in generating conditions that made political liberty itself possible.

This occurred through the implications of terrain on the mode of subsistence and settlement patterns for the ancient Germanic tribes. The character of the terrain—its topography, ecological features, relative geographic location, and quality of soil—favored a herding way of life, and allowed the tribes to persist in this mode of subsistence until well into the Middle Ages.

In general, terrain that is of middling quality—barren, rocky, mountainous, or remote—has tended to support civil and political liberty more easily than rich, easy,

conveniently located terrain. For one, such terrain is less inviting as well as less accessible to would-be conquerors (18.2-3.286-87, 18.5.288). In barren, rocky, or remote countries, people also have less to risk materially in defending their liberty from either a foreign conqueror or a local tyrant (18.1-5.285-88). In addition, middling terrain often favors herding over farming, at least where the terrain is divided by natural boundaries (18.13-17.291-93).

When peoples in these environments do turn to agriculture, as the inhabitants of the “low countries” eventually did, succeeding in it requires rulers to engage the industry of their people, and so to accord them a greater degree of civil liberty than in those places where abundant crops and other natural resources can be harvested with little ingenuity (18.4.287, 18.6-7.288-89). Marginal lands often have become commercial hubs precisely because of the particular challenges nature presents there (20.5.341).

The forests themselves played a crucial role, as they provided easy refuge from would-be oppressors, either from their own nation or outside. The rivers, “marshes, lakes, and forests” of northern Europe served as so many natural boundaries among these primitive tribes, allowing numerous small communities to govern themselves locally, and avoid the despotism associated with large, consolidated, centrally ruled empires (17.6.283-84). Montesquieu contrasts such topographic conditions in northern Europe with those at similar latitude in Asia, where he finds that open, flat plains have facilitated the consolidation of “various hordes” of barbarians under a single, central authority (18.19.295; 17.6.283-84, 18.11.290-91). The strongly independent spirit and history of local self-government among the Germanic tribes contributed to a decentralized political system once the tribes confederated in the face of the Roman threat (28.2.535).

While elevating commerce as a means to partially liberate peoples from both the “empire of climate” and the empire of their fellow men, Montesquieu nonetheless points to the tradeoffs among different modes of subsistence. In his account of the “four stages” of historical political economy, from hunting to herding to farming to commerce, he shows the loss of natural liberty that adoption of a civilized way of life (farming or commerce) necessarily entails, in comparison with those based on nomadic hunting or herding. The division of lands—both among peoples and among families or individuals within a nation—brings with it a host of new potential threats to liberty.

Climate and terrain in the commentary on *The Spirit of the Laws*

Part 3 of *The Spirit of the Laws* stands as one of the most famous, or rather infamous, parts of the book, and at the same time, one of the most superficially analyzed. Pierre Manent remarks, “those who know nothing else of *The Spirit of the Laws* know that it deals with climate and that the author makes a great deal of it.”⁷ Montesquieu’s biographer, Robert Shackleton, calls his theory of climate “his most influential doctrine” along with the separation of powers. There are three prominent approaches to analyzing Part 3. First, commentators have sought to clarify just how powerful physical causes are in Montesquieu’s account, and especially climate. Second, many have probed the intellectual antecedents of Montesquieu’s ideas about climate in order to establish the scope of his originality. Third, Montesquieu’s interpreters have analyzed Part 3 in order to identify what it says about

⁷ Manent, *City of Man*, 75. Shackleton, “The Evolution of Montesquieu’s Theory of Climate,” *Revue Internationale de Philosophie* 33-34, no. 3-4 (1955), 319. On the notoriety of this section, which began when it was first published, see also D’Alembert, “Climat,” in *Encyclopédie*, 3: 534. Shackleton, *Montesquieu: A Critical Biography*, 302. Carrithers, introduction to Montesquieu’s *The Spirit of the Laws*, trans. Thomas Nugent (London: Nourse, 1750) and ed. David Carrithers (Berkeley, CA: University of California Press, 1977), 44, 75.

Montesquieu's approach to both natural and social science.⁸ My examination is most closely related to this third approach to the books on climate and terrain. For my purposes, however, I am not concerned with defining him vis à vis Descartes, Newton, and other early modern natural scientists, but rather with understanding his approach to the study and practice of politics.

The archetypal "physical cause" in Montesquieu's language of causality, the discussion of climate puts a fine point on the power of factors transcending human intentions on social and political outcomes. Much of the controversy this section has inspired concerns the extent to which climate shapes political outcomes in Montesquieu's account.⁹ Even those among his contemporaries who were much more thoroughgoing materialists than Montesquieu, such as Turgot and Helvetius, criticized the author of *The Spirit of the Laws* for giving inordinate weight to environmental variables.¹⁰ A late 18th century poem caricaturing the book read, "One can, in our century/By only degrees of the sun/Calculate the value of

⁸ Catherine Volpilhac-Augier identifies these first two trends, and the third is suggested by my own survey the literature. "Sur quelques sources prétendues du livre XIV de *L'Esprit des lois*: De l'Essai sur les causes à *L'Esprit des lois* : la théorie des climats existe-t-elle?" <http://montesquieu.ens-lyon.fr/spip.php?article872>

⁹ D'Alembert, Jean de le Rond, "Climat," in the *Encyclopédie*, 3:534. Karl M. Kriesel, "Montesquieu: Possibilistic Political Geographer," *Annals of the Association of American Geographers* 58, no. 3 (1968): 557-74. Pangle, *Montesquieu's Philosophy of Liberalism*, 175.

¹⁰ Anne-Robert-Jacques Turgot, *Oeuvres de Turgot*, Vol. I, ed. Gustav Schelle (Paris, 1913), 116-42, cited in Meek, *Social Science and the Ignoble Savage*, 69. Claude Adrien Helvetius, *De l'esprit*, ed. J. Moutaux (Paris: Fayard, 1988), 391, and *De l'homme: de ses facultés intellectuelles & de son éducation* (1773). See also Paul-Joseph Barthez, *Nouveaux éléments de la science de l'homme*, 2nd ed. (Paris, Chez Goujon, 1806), vol. 2, 273. Cited in Williamson, *The Physical and the Moral*, 62. For a discussion of Montesquieu's relationship with the physiocrats, see also Meek, *Social Science and the Ignoble Savage*, 134, and Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 144-45.

men.”¹¹ The theological critics of *The Spirit of the Laws*, most notably the Jansenists via their publication, the *Nouvelles Ecclesiastiques*, certainly were not impressed with his suggestions about natural environmental constraints to the spread of Christianity (16.2.264-65, 16.4.266-67, 24.26.478, 24.24.276). As we will see, Montesquieu answered directly their accusations of “spinozism,” based in large part on the discussion of climate and terrain.¹²

Numerous commentators have ably defended Montesquieu against the charge of determinism in either a physical or social sense.¹³ To argue that there are notable trends, especially at a group level, is not to conclude that the environment definitely settles things. However great the influence of the physical environment, Montesquieu frequently shows how “moral causes shape the general character of a nation and determine the quality of its mind more than do physical causes” (EC, 60).¹⁴

While many thought Montesquieu attributed too much power to climate, others have been impressed precisely by his elevation of environmental variables. His illumination of

¹¹ René de Bonneval, cited in *Œuvres de Montesquieu*, ed. E. Laboulaye, Paris, 1875-9, VI, 245. Cited in Shackleton, 302. For other 18th century critiques, see Catherine Volpilhac-Augier, “Mémoire de la critique” in *Montesquieu* (Paris: Presses universitaires de la Sorbonne, 2003), 97-187. 20th century thinkers who have judged Montesquieu to be a “climatic determinist” include R.G. Collingwood, *The Idea of History* (Oxford, UK: Oxford University Press, 1956), 78-79, and Cedric Dover, “The Racial Philosophy of Herder,” *British Journal of Sociology* 3, no. 2 (1952): 125-126.

¹² Shackleton, *Montesquieu: A Critical Biography*. On the charge of “spinozism” in early modern Europe, see Jonathan Israel, *Radical Enlightenment* (New York: Oxford University Press, 2001). Rahe, *Montesquieu and the Logic of Liberty*, 151-52. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 144-45.

¹³ D’Alembert, “Climat,” 534. Pangle, *Montesquieu’s Philosophy of Liberalism*, 168. Manent, *City of Man*, 75. Aron, “Montesquieu,” *Main Currents in Sociological Thought*, 40-41. Henry Merry, *Montesquieu’s System of Natural Government* (West Lafayette, IN: Purdue Research Foundation, 1970), 28-30, 49-54. C.P. Courtney, “Montesquieu and Natural Law,” 57.

¹⁴ By far the most comprehensive critical edition of the *Essai sur les causes* is by Guillaume Barrera, in *Œuvres Complètes de Montesquieu*, Vol. 9 (Oxford: Voltaire Foundation, 2006), 205-269. As the Callois ed. is more widely available, however, I have cited this French edition in the text. Melvin Richter published an abridged English translation: “An Essay on the Causes that May Affect Men’s Minds and Characters,” *Political Theory* 4, no. 2 (1976), 139-162. David Carrithers also published an abridged translation of the *Essay on Causes* as part of his edition of *The Spirit of the Laws* (Berkeley, CA: University of California Press, 1977). Translations in the body of the dissertation of the *Essai sur les Causes* and from the *Pensées* are my own unless otherwise noted.

regular, if not absolute, relationships among physical, moral, and legal phenomena in this section influenced many of his readers in the 18th, 19th, and 20th centuries. Montesquieu was applying empirical, scientific methods to the study of human diversity in a far more comprehensive and rigorous manner than anyone who preceded him, and Part 3 on climate and terrain epitomized this approach. His attention to environmental influences and other non-legal underpinnings of politics were not the least imitated elements of his work. Indeed, his Scottish readers, as well as Rousseau, elaborated on his analysis of climate and terrain in their own writings on the relationship between economic and political history.¹⁵

Economist and historian of economic thought, Ronald Meek, contends that Montesquieu's methodology was as influential as his substantive argument on 18th century political economy.¹⁶ In the 19th century, Auguste Comte, widely considered the "father of sociology" praised Montesquieu for pioneering a positive concept of social laws. That is, he spoke of laws in the human sphere as necessary relationships obtaining among a set of factors, as an explanation for how societies actually behave, rather than how one thinks they should. In a similar vein, Durkheim interprets Montesquieu as the earliest model of a properly scientific acceptance of diverse conditions and possibilities. For both Comte and

¹⁵ See Adam Ferguson, *An Essay on the History of Civil Society* [1767], 8th ed. (Teddington, UK: Echo Library, 2007), 54, 66-76, 85-93. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, [1776], eds. Roy Campbell and Andrew Skinner (Indianapolis, IN: Liberty Fund, 1981), Vol. 2, cf. V.i.b, 708-23. Rousseau, *Essay on the Origin of Languages*, 289-332; *The Social Contract*, III.8-9, 181-85; *Discourse on the Origin of Inequality*, in *The Discourses and other political writings*, trans. and ed. Victor Gourevitch (Cambridge, UK: Cambridge University Press, 1997). See also Ronald Meek, *Social Science and the Ignoble Savage*, 31-35, 69, 101. James Moore, "Montesquieu and the Scottish Enlightenment," 183.

¹⁶ Meek, *Social Science and the Ignoble Savage*, (New York: Cambridge University Press, 1976), 32. See also Chris Nyland, "Biology and Environment: Montesquieu's Relativist Analysis of Gender Behavior," *History of Political Economy* 29 (1997), no. 3, 405.

Durkheim, Montesquieu's analysis of the influence of climate serves as a primary example of this new social scientific approach.¹⁷

Another major approach to the analysis of Part 3 has been to situate Montesquieu's discussion of climate within intellectual history. Examining possible early modern sources and precedents for Montesquieu's theories about the effects of climate, many commentators have sought to understand the extent to which his account of the influence of hot and cold climate is original. Montesquieu's attention to differences in climate and terrain is by no means unprecedented. From Herodotus and Aristotle, to Aquinas and Avicenna, to Machiavelli and Bodin, numerous political philosophers and historians have accorded significant influence to geographic considerations. Broadly similar characterizations of the differences between northern and southern, or cold and hot climate-inhabiting, peoples go back at least to Hippocrates' *On Airs, Waters, Places* and Herodotus' *Histories*.¹⁸

In a statement that would seem to echo Book 14 of *The Spirit of the Laws* if it hadn't in fact preceded it by two millennia, Aristotle suggests that hot and cold climates themselves bear an influence on politically-relevant passions. In particular, he attributes to climate an effect on a people's characteristic level of spiritedness, although he does not identify the causal mechanism at work.

¹⁷ Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology*, 15-18, 40-44.

¹⁸ See Rahe, *Montesquieu and the Logic of Liberty*, 303n1.

The nations in cold locations, particularly in Europe, are filled with spiritedness, but relatively lacking in thought and art; hence they remain freer, but lack [political] governance and are incapable of ruling their neighbors. Those in Asia, on the other hand, have souls endowed with thought and art, but are lacking in spiritedness; hence they remain ruled and enslaved. But the stock of the Greeks shares in both—just as it holds the middle in terms of location. For it is both spirited and endowed with thought, and hence both remains free and governs itself in the best manner and at the same time is capable of ruling all, should it obtain a single regime.¹⁹ Montesquieu’s dichotomy, as we will see, identifies similar qualities in peoples of both the cold countries, or the north, and the hot countries—synonymous with Asia for Aristotle as well as Montesquieu. He also draws similar conclusions about the implications of climatic differences for political liberty—that cooler climate is more supportive than hot, and that the moderate, or a mixture of both temperaments, is probably the best of all. Extreme climates mark extreme politics, and moderate climates moderate politics.

While Aristotle was by no means unconcerned with the environmental conditions of politics, these “external things” carry much less weight in his account of how and why regimes differ than in Montesquieu’s. He characterizes the best regime, like the best individual, by its virtue first and foremost, even as he maintains that virtue needs “equipment.”²⁰ His discussion of “external things” takes up just four of the one hundred six chapters of *The Politics*, while the bulk of Aristotle’s attention is devoted to the best, or best possible, political regime.²¹ “Equipment” supports virtue, but with the exception perhaps of the passage cited above, it does not *shape* it.

While ancient and medieval precedents for a “geography of liberty” invite such comparisons, Montesquieu’s commentators have shown more interest in identifying early modern sources for Part 3. Numerous commentators in the 20th have explored this line of

¹⁹ Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 1327b23-32.

²⁰ *Politics*, 1323b40-1324a2, 1325b38-39.

²¹ See for example, *Politics*, 1289a30, 1323a15-25.

inquiry, looking to writings on climate by Jean Bodin, Abbé Dubos, Jean Chardin, and John Arbuthnot for the basis of his analysis of environmental influences.²² Montesquieu himself cites Chardin's *Voyages*, based on his extensive travels through the Persian and Mogul empires in the 1660s and 70s, as a source for his observations about climatic influence in *The Spirit of the Laws*. Elsewhere in the book, Montesquieu draws on Bodin and Dubos.²³ In the *Essay on Causes*, Montesquieu also cites Hippocrates and Herodotus on their discussion of environmental variables (EC, 40).

An early 20th century scholar, Joseph Dedieu, originated the theory that Montesquieu relied heavily on the English doctor John Arbuthnot's physiology of "fibers" in *An Essay concerning the Effects of Air on Human Bodies* (1733), in addition to Bodin's *Methodus ad facilem historiarum cognitionem*. Montesquieu's biographer, Robert Shackleton, reaffirmed this view in the 1960s, based on textual similarities and speculation about Montesquieu's familiarity with Arbuthnot's writing and perhaps the man himself. Drawing on citations to him in the *Pensées*, Shackleton also suggests that Montesquieu was influenced by the 16th century Spanish doctor and psychologist, Juan Huarte, who elaborated a physical psychology based on the effects of different climates on the four humors in his 1575 *Examen de ingenios*

²² Joseph Dedieu, *Montesquieu et la tradition politique anglaise en France: Les sources anglaises de l'Esprit des lois*, (J. Gabalda et Cie: Paris, 1909). Roger Mercier, "La theorie des climats des Reflexions Critiques a L'Esprit des lois," *Revue d'histoire litteraire de la France* 53 (1953): 17-37, 159-174. Marian Tooley, "Bodin and the Mediaeval Theory of Climate" *Speculum* 28, no. 1 (1953), 64-83. Merry, *Montesquieu's System of Natural Government*. 49. Carrithers, introduction to *The Spirit of the Laws*, 45, and "Introduction," *Montesquieu's Science of Politics*, 1. Barrera, introduction to *Essai sur les causes*, 219 n1.

²³ While Dubos' *Histoire critique de l'établissement de la monarchie française dans les Gaules* is the work Montesquieu's criticizes in Part 6, it is in his *Réflexions critiques sur la poésie et sur la peinture* that Dubos elaborates his theory of climate. See Roger Mercier, "La théorie des climats des *Réflexions Critiques* à *L'Esprit des Lois*," *Revue d'histoire littéraire de la France* 53 (1953): 17-37, 159-174.

(Examination of Men's Wits).²⁴ Montesquieu actually cites Huarte as an earlier student of his same subject of physiological psychology. However, he does not seem to do so favorably, describing him as a *bonhomme*, which in this context means something like a "simpleton" (EC, 52).²⁵ Finally, Shackleton finds precedents for Montesquieu's discussion of the relationship between climate and national character, as well as his language of physical and moral causality, in the Abbé Espiard de la Borde's *Essais sur le génie et le caractère de nations* (1743).²⁶

Catherine Volpilhac-Augier most recently has revisited this debate over the intellectual sources for Book 14, in the context of the Voltaire Foundation's comprehensive collection and edition of the working manuscripts for *L'Esprit de Lois*. She minimizes the possible influence of Bodin, whose medieval physiology of biles and humors depended on an astrological outlook Montesquieu clearly rejected. Volpilhac-Augier questions in general the tendency among scholars to try to single out a definitive source for Montesquieu's understanding of climate, when his physiological concepts were so obviously informed by

²⁴ Shackleton, "The Evolution of Montesquieu's Theory of Climate," 322-25. See also *Montesquieu: A Critical Biography*, 306-08. See also Pierre Mauriac, "Une source espagnole méconnue de *l'Esprit des lois*," *Actes de l'Académie de Bordeaux*, 4th ser., vol. XV (1958), 61-68.

²⁵ "Huarte, auteur espagnol, qui a traité ce sujet avant moi, raconte que François I^{er}, rebuté des médecins chrétiens et de l'impuissance de leurs remèdes, envoya demander à Charles-Quint un médecin qui fut Juif. Le bonhomme cherche la raison pourquoi les Juifs ont l'esprit plus propre à la médecine que les Chrétiens, et il trouve que cela vient de la trop grande quantité de viande que les Israélites mangèrent dans le Désert." This passage is discussed below. For background on Huarte's great influence on early modern science and philosophy, see Barrera, ed., *Essai sur les causes*, 246 n100.

²⁶ Shackleton, "The Evolution of Montesquieu's Theory of Climate," 325-28. See also Pauline Kra, "The concept of national character in 18th century France," *Cromohs* 7 (2002), 1-6, http://www.cromohs.unifi.it/7_2002/kra.html

his wide reading in the medical and scientific literature of the day.²⁷ Disputing in particular Shackleton and Dedieu's Arbuthnot theory, she contends that any similarity in their notion of physical fibers was due only to the fact that they drew on common sources in the medical literature; Montesquieu's being influenced by others in his analysis of climate is overdetermined.

The bodily fiber, discussed in the first chapter of Book 14, was widely regarded as the fundamental physiological unit in both plants and animals in the 18th century. Contracting and expanding in response to environmental stimulation, fibers were thought to communicate juices, liqueurs, and other media throughout the body. Montesquieu's conceptualization of the basic elements of human physiology followed that of the most respected doctors and physiologists of the first half of the 18th century, including Boerhaave, Winslow, and Borelli. The fiber theory succeeded the medieval physiology of the four humors. It was greatly enhanced by Haller's late 18th century demonstration of the differences between nerves and muscular tissue. The fiber theory was ascendant in European medicine until it was supplanted by the cell theory only in the second quarter of the 19th century.²⁸

While Montesquieu's theories of climatic influence and human physiology may not have been original, at least in their physiological elements, after the publication of *The Spirit of the Laws*, his name would forever be associated with its application to moral and political science. In the entry on "climat" in the *Encyclopédie*, for example, D'Alembert mentions

²⁷ Catherine Volpilhac-Auger, "Sur quelques sources prétendues du livre XIV de *L'Esprit des lois*." Merry makes a similar point: "The theory of climate is not a product of *L'Esprit des Lois*, but rather one of the givens for Montesquieu. Clearly he did not originate the doctrine." Merry suggests that scientists and doctors were inspired to study the relationship between climate and human life in the wake of a number of epidemics in the 1730s. *Montesquieu's System of Natural Government*, 49.

²⁸ Barrera, introduction to *Essai sur les causes*, 219 n5; C.U.M. Smith, "Brain and Mind in the 'Long' Eighteenth Century," in *Brain, Mind, and Medicine: Essays in Eighteenth-Century Neuroscience*, ed. Harry Whitaker, C.U.M. Smith, and Stanley Finger, 15-28. New York: Springer Science + Business Media, 2007.

only “l'illustre auteur de *l'esprit des lois*” on the subject of climate’s influence on human mores, character, and laws.²⁹ While many theorized about physiological psychology and examined the effects of climate in particular on individuals, Montesquieu sought to integrate this analysis into a comprehensive social, economic, and political science.³⁰

Related to this line of inquiry, many commentators have examined Part 3 for what it demonstrates about Montesquieu’s scientific methods and his “philosophy of mind,” particularly in comparison with the Cartesian, Lockean, Baconian, and Newtonian currents of his age. In analyzing whether or not Montesquieu was a “Cartesian,” commentators seem to have different criteria in mind, from his scientific method to his conceptual metaphors to his “theory of mind” and its metaphysical implications—i.e. whether or not it entails a dualism of the physical and spiritual realms. Stark, Berlin, Shackleton, and Barrera conclude that Montesquieu’s science mostly departs from Cartesianism, emphasizing his empirical, inductive approach and general avoidance of abstract speculation. Barrera finds his science to be much closer to a reductive materialism than to a Cartesian dualism. Those arguing Montesquieu’s science is more or less Cartesian include Beyer, Klosko, and Lowenthal.³¹ Rahe describes him as Cartesian because he rejected the “blind fatality” of Spinoza and Lucretius, and because of his numerous mechanistic analogies. However, he suggests that

²⁹ D’Alembert, “Climat” [Geographie], in *Encyclopédie*, 3: 534. <http://encyclopedia.uchicago.edu/>

³⁰ Berlin, “Herder and the Enlightenment,” in *Proper Study of Mankind* (New York: Farrar, Straus, Giroux, 1998), Eds. Henry Hardy and Roger Hausheer, 363. Rahe, *Montesquieu and the Logic of Liberty*, 150.

³¹ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 1-9. Berlin, “Montesquieu,” 137. Shackleton, *Montesquieu: A Critical Biography*, 258-61, 309-10. Barrera, introduction to *Essai sur les causes*, 213-15. C.J. Beyer “Montesquieu et l’esprit cartésien,” *Actes du congrès Montesquieu* (Bordeaux : Delmas, 1956), 159-173. George Klosko, “Montesquieu’s Science of Politics,” 155-60. David Lowenthal, “Montesquieu,” *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey, 3rd ed. (Chicago: University of Chicago Press, 1987), 514. Rahe, *Montesquieu and the Logic of Liberty*, 153-54.

Montesquieu does not clearly settle on a dualism of soul and body in lieu of the reductive materialism.

While acknowledging the extent to which Rousseau drew on Montesquieu's language of causality and his analysis of climate in particular, Scott also concludes that Montesquieu neglected the historical dimension to the impact of environmental conditions and the "malleability of the human passions."

Montesquieu's interpreters seem divided over nature's status as a prescriptive standard, with some contending that he substitutes history as a standard (Pangle, Manent), others that nature remains a guide for Montesquieu (Courtney and Aron), and still others that he has no independent standard of political right at all, or at least not one ordering his whole project (Condorcet, Durkheim). Those in the last camp seem to take the account of climate and terrain seriously as theory, as an analysis of descriptive laws ordering the relationship between humans and their physical environment. Those moments where Montesquieu praises liberty or condemns despotism or torture must then be understood as accidental to his fundamental aim of elaborating descriptive laws of social science. Those in the first camp tend to emphasize the prudential function of his discussion of climate and terrain; recognizing the immense diversity of circumstances in which human beings find themselves, so the story goes, injects caution into the universal ambitions of early modern liberals like Locke.³² As indicated in the Introduction and Chapter 1, I share the view of Courtney and Aron that nature does remain a standard for Montesquieu, though in a complex, often contradictory way. In my analysis in Section 3, I will take Montesquieu's discussion of

³² Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology*, 40. Pangle, *Montesquieu's Philosophy of Liberalism*, 170-74.

environmental influences seriously as both theory and as support for a practical political purpose.

Those commentators primarily interested in his social science, as opposed to his physical science, focus on the language of causality that Montesquieu actually uses—his account of the difference and dynamics between physical and moral causes, as well his conceptualization of natural laws. A common distinction in 18th century France, “the physical and the moral,” serves to bridge matters of mind and body in a manner that neither reduces one to the other, nor poses them as a dualism.³³ The three most comprehensive analysis of Part 3 along these lines, all were published, as it happens, in 1968: *Montesquieu: A Critical Biography*, by the British French philologist and university librarian, Robert Shackleton, and *Montesquieu’s Sociology of Knowledge* by the central European sociologist and economist, Werner Stark, and Raymond Aron’s essay on Montesquieu in the first volume of his *Main Currents in Sociological Thought*. All three identify the importance of Montesquieu’s distinction between physical and moral causes for understanding his account of environmental influences, and treat his analysis as an entrée to his comparative political science. In addition, they highlight the important lessons for legislators that Montesquieu conveys through his emphasis on environmental obstacles to liberty.

While largely preoccupied with the question of the provenance of Montesquieu’s climate theory, Shackleton shows how his view of the role of climate developed in tandem with that of what he eventually calls *l’esprit général*, of a nation, its distinctive national

³³ On the usage of this distinction in 18th century French thought more broadly, see Anna Vila, *Enlightenment and Pathology: Sensibility in the Literature and Medicine of Eighteenth-Century France* (Baltimore, MD: Johns Hopkins University, 1998), 3, 182, 226, 294. See also Elizabeth Williams, *The Physical and the Moral: Anthropology, Physiology, and Philosophical Medicine in France 1750-1850* (Cambridge, UK: Cambridge University Press, 1994).

character. His overview of the contributing factors to the general changed slightly over numerous iterations from the unpublished manuscript *De la Politique* written in 1725 to Book 19, Chapter 4 of *The Spirit of the Laws*, written in the 1740s and first published in 1748. Climate did not figure among the contributors to the general spirit in Montesquieu's initial articulation of the general spirit, but was included in one fragment and in *The Spirit of the Laws*.³⁴ In what one commentator calls the most important chapter of the book, Montesquieu summarizes the diverse causes factoring into the general spirit.³⁵

Many things govern men: climate, religion, laws, the maxims of the government, examples of things passed, mores, and manners; a general spirit is formed as a result. To the extent that, in each nation, one of these causes acts more forcefully, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan; in former times mores set the tone in Lacedaemonia; in Rome it was set by the maxims of government and the ancient mores. Climate, then, represents the initial font of human diversity, and the starting point for comparing the unique configuration of physical and moral causes contributing to the general spirit in any given place and time.³⁶ Yet the power of physical environmental factors varies depending upon the full moral and political context. In civilized societies, moral causes predominate.

Integrating an analysis of Montesquieu's discussion of physical causes throughout his corpus, Stark emphasizes the multiplicity of causes influencing the general spirit. He carefully explains the dynamic between what he identifies as the two most powerful factors of geography and the form of government. Stark concludes that Montesquieu never settled

³⁴ *De la politique*, OC I, 114. In *Pensées* #1903, Montesquieu says "Men are governed by five different things: climate, manners, mores, Religion, and laws" (OC I, 1458). In *Pensées* #645, he writes, "States are governed by five different things: by Religion, by the general maxims of Government, by the particular laws, and by mores and manners (OC I, 1156). See also *Essai sur les causes*, OC II, 39; *Persian Letters* #75; *Considerations*, XXII.202; Barrera, ed., *Essai sur les causes*, 254 n131.

³⁵ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 86.

³⁶ Merry, *Montesquieu's System of Natural Government*, 48-51.

decisively upon the precise weight of environmental and other variables. For Stark, the indeterminate character of Montesquieu's theoretical framework constitutes the major *weakness* of his social science.³⁷ Berlin, in contrast, praises precisely what Stark and Durkheim lament: "It is to the eternal credit of Montesquieu that he committed this very crime" of "lapsing from strict determinism."³⁸

Analyzing Part 3 with an eye to what it demonstrates about Montesquieu's approach to political science, Aron also sees these books on climate and terrain as neatly juxtaposing Montesquieu the sociologist and Montesquieu the political philosopher, and thus highlighting a central purpose of the work as whole: to make an "original attempt to combine" the study of descriptive and prescriptive law, of positive and political right.³⁹ The books on climate and various forms of servitude force the matter by suggesting certain practices—slavery and despotism—are wrong, and yet difficult to avoid throughout much of the world. It is by trying to reconcile this apparent contradiction between his prescriptive and descriptive accounts of slavery, Aron suggests, that we can understand the unique character of Montesquieu's political philosophy. Aron also characterizes Part 3 as largely organized by the conceptual distinction between physical and moral causes and the dynamic relationship between the two.⁴⁰

Courtney too emphasizes the integration of both causal theorizing and political counseling in Montesquieu's discussion of geography. By depicting constraints upon

³⁷ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 106, 144. See also Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology*, 40-49.

³⁸ Berlin, "Montesquieu," 150.

³⁹ Raymond Aron, "Montesquieu," 33-48. George Klosko also characterizes the work describes the work in similar terms. "Montesquieu's Science of Politics," 153-77.

⁴⁰ Aron, "Montesquieu," 35-38.

political reform, Montesquieu simultaneously pointed towards the opportunities available to legislators “to manipulate these factors or even oppose them.”⁴¹ Courtney argues that natural law remains a standard for Montesquieu, which informs the broad ends to which he would have legislators manage natural constraints and opportunities. Because slavery opposes natural law, wherever other factors permit a people to stoop towards servitude, their leaders should take extra measures to counteract this trend and “right” the political culture.

Given the questions Part 3 raises in itself, there have not been many attempts to situate the analysis of climate and terrain in the work as a whole, and those few not very comprehensive.⁴² Pangle and Rahe both analyze Part 3 in light of the overall argument of *The Spirit of the Laws*. Linking the section on climate and terrain to what I have called in Chapter 1 the “paradox of despotism,” Rahe sees Part 3’s place in the work in a similar way as I will present it. The books on climate and terrain are concerned with facing squarely the challenges to establishing liberty throughout the world. The subject of Part 3, he concludes, is the “degree to which nature stands in liberty’s way.”⁴³ This section takes its bearings from the powerful and grim observation, originally made in Book 5, that servitude dominates more of the globe than liberty (5.14.63).

Rahe also puts Part 3 into the context of Montesquieu’s distinction between physical and moral causes, seeing Parts 1 and 2 as addressing the moral causes of type of government and laws, with Part 3 focusing on the physical. He emphasizes that Montesquieu is not praising Europeans or laying blame on Asians and southerners for the different degrees of

⁴¹ Courtney, “Montesquieu and Natural Law,” 58.

⁴² The only concerted efforts I have seen are Henry Merry, *Montesquieu’s System of Natural Government*; Thomas Pangle, *Montesquieu’s Philosophy of Liberalism*; and Paul Rahe, *Montesquieu and the Logic of Liberty*.

⁴³ Rahe, *Montesquieu and the Logic of Liberty*, 155.

liberty in their region, but on the contrary his explanation points to causes beyond human control in both cases. His political judgments in Part 3 are of the responses legislators have made to environmental conditions and their social effects.⁴⁴

Pangle explores many of the points that are of interest to me: in particular, the relationship between Montesquieu's analysis of non-human nature and his understanding of human nature (161-64, 170-73), and the upshots for political prudence of his emphasis on environmental constraints (168-69, 184-85). However, as discussed in the introduction, my understanding of fundamental aspects of Montesquieu's approach to *The Spirit of the Laws* is substantially different from his. Pangle largely conflates Montesquieu's understanding of nature and human nature with his view of those of Machiavelli, Hobbes, and Locke, interpreting him as a quintessential early modern philosopher, who would reduce human nature to the basest passions of fear and/or material interest. He portrays the argument of Part 3 as calling for a Baconian conquest of non-human nature.⁴⁵

As I have sought to demonstrate throughout this dissertation, the problem with nature that Montesquieu presents is not that it simply conflicts with human liberty or that variables of time and space dissolve it. Rather, the difficulty is that both human and non-human nature point in multiple, contradictory directions. The physical environment can pose opportunities for as well as constraints to establishing political liberty. Thus, Montesquieu's counsel is not to "conquer" either human nature or the natural environment, but rather to recognize the favorable and unfavorable implications of their physical situation for liberty and the "mixtures of vices and virtues" characterizing the general spirit of their people, and to play

⁴⁴ Rahe, *Montesquieu and the Logic of Liberty* 150-69. He notes ancient precedents for this preoccupation with the absence of liberty in the world in Aeschylus, Herodotus, Hippocrates, Cicero, and others (303 n).

⁴⁵ Pangle, *Montesquieu's Philosophy of Liberalism*, 161-64.

different aspects against one another to encourage a positive outcome for liberty (19.10.313). Even the natural constraints to liberty, by being understood, can be harnessed to this goal. Based in part on the dramatic appeal of the “vices of hot climate,” commentators often tend to overlook the extent to which Montesquieu identifies positive environmental accidents. Neither Pangle nor Rahe—nor any other commentator, so far as I have read—connects Montesquieu’s analysis of climate and terrain with his account throughout the book of the accidental origins of Gothic government and constitutional monarchy.

Finally, we should note that, despite the notoriety of Part 3, modern readers generally hesitate to delve too deeply into these books, as much of his argument strikes us as both scientifically and morally wrong. There are certainly both practical and theoretical reasons for hesitating to take his climate theory seriously. It is easy to imagine the “scientific racists” of the 19th and 20th centuries citing Montesquieu’s theory of southern/Asian peoples’ natural slavishness—and in fact some did.⁴⁶ Yet if Montesquieu made his analysis of climate and terrain perhaps too easy to misinterpret, an honest and thorough examination clarifies that it is fundamentally incompatible with racism. He specifically attributes psychological differences to the effects of physical environment, which would operate on any individual in that environment in the same way, rather than to innate aspects of certain types of people. In general, the praise and censure he offers in *The Spirit of the Laws* is not for the failings or strengths of particular peoples, but to legislative decisions about what tendencies to encourage and which to discourage in their states.

⁴⁶ For example, in 19th century debates in the British Parliament about colonial India, some MPs cited *The Spirit of the Laws* as evidence that the natives could not properly rule themselves. C.P. Courtney, *Montesquieu and Burke* (Oxford: Blackwell, 1963). In, Tzvetan Todorov argues that Montesquieu’s and Rousseau’s theories about national character have much less in common with 19th scientific racism than some have suspected. *On Human Diversity: Nationalism, Racism, and Exoticism in French Thought*, trans. Catherine Porter (Cambridge, MA: Harvard University Press, 1993).

In clarifying the place of Part 3 in the work as a whole, I will go beyond previous commentaries in at least three ways. First, I will integrate an analysis of physical causes from different works and different parts of the *Spirit of Laws* outside Part 3—most notably, his discussion of the implications of territorial size in Book 8 of *The Spirit of the Laws* and in the *Considerations*, and his references from Part 1 through 6 in *The Spirit of the Laws* of the geographic and historic roots of Gothic government.

Second, I will give more attention to terrain than to climate, relative to the length of their treatment. When commentators do delve into Part 3, they tend to emphasize Book 14 and the discussion of climate and neglect that of terrain.⁴⁷ With its reports on his dissection of a sheep's tongue, the suicide-inducing climate of England, and the lascivious behavior of women in the tropics, the account of climate certainly has a way of catching one's attention. Yet Book 18 is at least as important to the work as a whole as the books on climate, and its scientific findings are of more enduring significance.

Here, Montesquieu makes clear a crucial “intervening variable” between the environment and outcomes for political liberty: the mode by which “peoples procure their subsistence.” Whether peoples rely primarily on hunting, herding, farming, or commerce for its livelihood greatly affects their prospects for liberty, though not in a straightforward manner. There are tradeoffs for liberty among the different modes of livelihood, following

⁴⁷ There are a few exceptions to this general pattern. Rahe contrast the analysis of terrain with that of climate and also connects Book 18 with the subsequent discussion of commerce. *Montesquieu and the Logic of Liberty*, 170-74. Concerned primarily with Montesquieu's political economy, Cheney connects his natural and social science as it pertains to the history of commerce in *Revolutionary Commerce*, 92-95, 128-40. Pangle discusses Book 18 at some length, and notes that the importance of the variable of time begins in this book. However, he depicts historical change as conceptually contradicting natural fixedness in the *Spirit of the Laws*; in others words, he does not see the crucial interrelationship between the physical and conventional environment in Book 18. *Montesquieu's Philosophy of Liberalism*, 174-84.

from the different settlement patterns, and the degree of dependence among families and peoples, that they involve.

Book 18 broaches many phenomena of great importance in social science today, such as the geopolitical implications of different environmental conditions, as well as what is known today as “the resource curse,” and discusses them in a helpfully broad context. It is also helpful for shedding light on the logic of Part 3 in general. In Book 18, Montesquieu shows how the power of the physical environment depends in great part on other societal conditions: in particular, the means by which people make their livelihood, on the strength of their religion and mores, and especially on the constitution. All of these can vary over time, and the power of the physical environment varies greatly depending upon how closely dependent upon the environment a people is for making their livelihood. The infamous “empire of climate” is “first” in time primarily.

The third point of contrast in my analysis, then, is that I will emphasize the interaction between accidents in geography and history. Commentators tend to analyze the discussion of environmental conditions generally independently from the historical contingencies that dominate Parts 4-6.⁴⁸ However, it is Montesquieu’s depiction of the importance of changes across both time and space that, together, convey his uniquely comprehensive social science. His analysis of terrain in Book 18 and the general spirit in Book 19, serve as a key bridge to his exploration of the historical developments in commerce, demography, religion, and civil laws in the rest of the book. The crucial

⁴⁸ For example, in comparing Rousseau’s and Montesquieu’s analyses of the influence of environmental conditions, John Scott argues that Montesquieu’s account of climate lacks the “historical or developmental dimension” that is closely intertwined with the geographic dimension in Rousseau’s *Essay on the Origin of Languages*, because he did not hold the same understanding of the malleability of human passions. Scott, “Climate, causation, and the power of music in Montesquieu and Rousseau,” *Studies on Voltaire and the Eighteenth Century*, no. 8 (2004), 60.

importance of environmental differences to the early history of nations and their economies often continues to make itself felt long after those initial conditions have changed. The interaction of physical and temporal variables comes to a head in rise of Gothic government and of modern commerce.

Finally, I will connect Montesquieu's analysis of non-human nature with the views he conveys of human nature in a more comprehensive manner than previous commentators. Book 15 will be especially important for this line of argument. The tension between human nature and non-human nature—between the effects of hot climate and humans' inborn constitution, between fertile terrain and the prospects for moderate politics—highlights the conflicted status of nature as an evaluative standard for Montesquieu. Both Books 15 and 18 convey the disconnect between the better locales, physically speaking, and the better governments or nations. This incongruity suggests that what is good for human beings is not simply equivalent to whatever nature happens to present—either internally or externally. Yet neither does it seem to be synonymous with subduing the physical environment or our natural inclinations, for both the better and worse kinds of politics initially emerged from human interaction with particular environmental conditions. Nature conflicts with itself, and discerning what constitutes the “natural policy” is, at best, not a straightforward matter.

Following this attention to both opportunities and constraints nature poses to liberty, my analysis of prudential implications of Part 3 will consider a much broader set of lessons for liberal statesmanship than previous commentators have recognized. I will draw out Montesquieu suggestions for tempering “northern spiritedness” as well as “southern submissiveness” by cultivating the spirit of commerce. I will also link Montesquieu's praise of spurs to industriousness in Part 3 with his efforts throughout the book to educate would-be

liberal reformers on the way to encourage necessary changes in mores and manners in a non-tyrannical manner: through the use of persuasive examples and social and economic incentives and disincentives.

Chapter 15: Physical and moral causes

While Montesquieu references “moral causes” only twice in *The Spirit of the Laws* (both in the context of China), his account of the influence of climate and terrain can be fruitfully understood in terms of the distinction he makes between moral and physical causes, and the dynamic between them (8.21.127, 14.5.236). Montesquieu organizes his *Essai sur les causes qui peuvent affecter les esprits et les mentalités*, a “storehouse of ideas” for his *chef d’oeuvre*, into two sections: the first on physical causes and the second on moral causes.⁴⁹ The prominence of these categories in the *Essay on Causes*, as well as their importance to a lesser degree in other published and unpublished works, justifies using them as analytic categories in reading Part 3 of *The Spirit of the Laws*.⁵⁰

Broadly speaking, both physical and moral causes might be environmental influences, with the latter coming from the conventional or social environment. Montesquieu describes many psychological characteristics as the direct result of physiological causes. Physical causes include temperature, humidity, wind, air quality and other external physical conditions. They might be internal, originating in diet, sleep, or drug-taking. While Montesquieu discusses such internal physical causes in the *Essay on Causes*, *The Spirit of the Laws* emphasizes external physical causes since he is more concerned in this work with patterns of behavior at the group level than at the individual.

As explained in my discussion of Montesquieu’s “philosophy of history” in Chapter 8, physical and moral causes are the two types of “general causes” influencing a country’s

⁴⁹ Shackleton, *Montesquieu: A Critical Biography*, 314-15.

⁵⁰ See also Montesquieu’s prominent usage of this terminology to classify factors influencing political outcomes in the *Persian Letters* 113, 122; *Considerations* XII.117, XVIII.169; *Pensées* #1208 (1302-03), #1389 (1328-29); “Défense de *L’Esprit de Lois*,” OC II, 1137; *Response to Theological Faculty* OC, II, 1173; and “Letter to Hume, May 19, 1749” in *Correspondance de Montesquieu*, ed. F. Gebelin and A. Morize, vol. 2 (Paris: Champion, 1914), 189. <http://artfl-project.uchicago.edu>

general spirit and the trajectory of its government (CC, XVIII.169). We can also relate these categories to Montesquieu's introduction in Book 1 to the "various things" influencing the spirit of the laws in any given country. The spirit of the laws consists in "the various relations that laws may have with various things," which include "the nature and the principle of the government that is established or that one wants to establish...the physical aspect of the country...the way of life of the peoples...the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores, and their manners" (1.3.8-9, 19.4.310). These "various things" fall into the overarching categories of physical and moral causes. The interaction between these types of causes is essential to shaping the "way of life of the peoples...their inclinations, their wealth, their number and their commerce." Physical causes even bear influence on the particular religion of a people, and, in tandem with religion and the constitution, their mores and manners.

Moral causes, on the other hand, are the various social, political, and economic conditions influencing individuals and peoples. These include the form of government, laws, and the overt ethical principles characteristically advanced in one's community. Still, moral causality as such, is much broader in Montesquieu's usage.⁵¹ It includes the mores, manners, religious views and practices, economic incentives, and educational influences to which one is exposed. As Richter defines them, moral causes in Montesquieu's usage are "those determined by human will, belief, and action, such as law, philosophy, religion, and

⁵¹ Pangle neglects the full array of moral causes that factor into Montesquieu's account in Part 3, identifying only legislators and laws as moral causes. *Montesquieu's Philosophy of Liberalism*, 166.

institutions, including legislation consciously devised to take such considerations into account.”⁵²

While physical causes affect individuals in more or less the same way universally, the effects of moral causes depend upon who is conveying them as well as who is receiving them. The same object can move individuals very differently depending upon their emotional state and their opinions about those objects, which are themselves mediated by the opinions of those whom we love or admire (EC, 55-56). Physical and moral causes are indirectly related, but they represent independent orders of analysis, in the contemporary parlance. Neither can be reduced to the other, but must be analyzed in its own right in addition to in relation to other causal influences. The latter are interpersonal phenomena.

To connect these to Montesquieu's other categories of accidental and intentional causes, we could say that moral as well as physical causes could be accidental, in the sense of being accidental to human plans and purposes. For example, as I discussed in Chapters 9 and 10, the early Franks' barbaric mores, manners, and right of nations served as an accidental cause of criminal practices that protected liberty of the citizen. A number of moral causes could be intentional in themselves, but their confluence a matter of historical contingency. For example, the invention of the letter of credit by persecuted Jewish merchants was intended to protect their wealth from arbitrary seizure by European monarchs with whom they had fallen out of favor. This device, fulfilled its intended purpose of protecting their property from arbitrary seizure. In addition, however, it had the accidental effect of

⁵² Melvin Richter, "An Introduction to Montesquieu's 'An Essay on the Causes That May Affect Men's Minds and Characters,'" *Political Theory* 4, no. 2 (1976), 132. Montesquieu also distinguishes actions that depend on individual will rather than external coercion or internal physical impulses as "moral actions" (6.1.74). Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 112. However, moral causes are not purely spiritual or free. Individual will simply participates in moral causes.

revolutionizing the economic power structure in Europe, by making wealth fluid and easy to transport internationally (21.20.389).

Some laws, such as the Spartans' singular institutions for cultivating martial virtue, were precisely crafted to achieve their ends, and succeeded in doing so for many centuries (4.6.36-37). These laws, then, would represent intentional moral causes. The Romans too, Montesquieu praises as being better able to direct laws to their intended ends than any other people. He emphasizes that these laws, however, depended upon certain physical conditions: a small population in a small territory. As will be discussed below, the expansion of Rome enabled accidental causes to interfere with the functioning of these laws, generating negative unintended consequences.

As an example of these different types of causes, we could compare Montesquieu's assessment of the propensity for suicide among the ancient Romans with that among the modern English. The first has a moral cause: education, customs, and maxims. By contrast, the English, in Montesquieu's evaluation, kill themselves on account of purely physical causes: a melancholy induced by the English climate and air (and, one is tempted to add, the food).

It is the effect of an illness; it comes from the physical state of the machine and is independent of any other cause.

It is likely that there is a failure in the filtering of the nervous juice; the machine, when the forces that give it motion stay inactive, wearies of itself; it is not pain the soul feels but a certain difficulty in existence. Pain is a local ill which inclines us to desire to see this pain cease; the weight of life is an illness having no particular place, which inclines us to desire to see this life end (14.12.242; see also EC, 43; CC, XII, 117).⁵³

⁵³ The second paragraph from Book 14, Chapter 12, is one that was originally part of the *Essay on Causes*. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 113.

Montesquieu's early interests in physical causes

Montesquieu's unpublished piece, the *Essay on Causes*, is the most important text for supplementing our examination of Montesquieu's understanding of causality in human affairs. Written in the 1730s as a kind of "working paper" in support of his masterwork, the *Essay on Causes* affirms that Montesquieu thought seriously about causality as such in human affairs, and about how different types of causes interact and relate to the observable phenomena of human diversity.⁵⁴ It provides the raw material for his key conceptual frameworks in Part 3: the distinction between physical and moral causes, and between the characteristically northern and southern dispositions and political tendencies.

Montesquieu eventually extracted parts of the piece for use in Books 14 and 19 of *L'Esprit*. A passage from the first page of the essay on the effects of cold and hot air on the body was moved to form the first seven paragraphs of Book 14, Chapter 2. The last five paragraphs of the same chapter, contrasting the characteristically northern and southern temperaments and their different sensitivities to pain and pleasure, also came from the essay. Another passage on the differing effects of alcohol on the body in hot versus cold climates became Book 14, Chapter 10, paragraphs 1-2 and 7. His discussion in Book 14 of the English propensity to melancholy and suicide also was drawn from the essay.⁵⁵

⁵⁴ The *Essay on Causes* was first published as part of *Mélanges Inédits de Montesquieu*, ed. Baron Gaston de Montesquieu (Paris, 1892), 105-33. Earlier commentators variously placed the writing of the *Essai sur les causes* between 1732 and 1743. See Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 83-84; Shackleton, *Montesquieu: A Critical Biography*, 315; and Richter, "An Introduction," 132-38. Examining the fullest collection of extant manuscripts, Barrera concludes that *Essai sur les causes* could not have been written later than 1739, based on when the secretary in whose hand the manuscript is written was employed. Comparing the *Essai* to other of his fragments on similar subjects, Barrera estimates that it was probably written between 1734 and 1736. Marginal notes from secretaries employed by Montesquieu in the 1740s, indicating which paragraphs were taken for use in *Spirit*, suggest the manuscript was consulted periodically over more than a decade while Montesquieu was completing his masterwork. Barrera, introduction to *Essai sur les causes*, 207-10.

⁵⁵ See Callois, ed., *Essai sur les causes*, OC II, 39n3, 40n5, 40n6, 45n14.

Organized around the distinction between physical and moral causes, the *Essay on Causes* provides a more detailed explanation of his understanding of the physiological and psychological effects of different environmental factors. Here he discusses a greater variety of physical causes—from air, wind, and climate to diet, sleep, drug use, and bodily differences between the sexes and across the human lifespan. Montesquieu’s early discussion of moral and physical causes shows him wrestling with understanding the dynamic interaction among them, and their relative weight. In his earlier writings, it was not the influence of climate but air and wind that piqued Montesquieu’s interest. Air quality, and particularly that of Rome, was a frequent subject of concern among travelers of a scientific bent.

Another physical cause of “the English disease,” Montesquieu suggested, was a seasonal wind. A number of 18th century writers hypothesized about a peculiar English tendency to suicide. Dubos, for example, noted that the great majority of English suicides occur at the two times during the year when the winds come from the north-east.⁵⁶ The effects of different seasonal winds were also a subject of interest in Italy. The *chiroc* wind blowing across the peninsula from North Africa “governs Italy. It exercises its power over all spirits. It produces a heaviness and a universal *inquiétude*” (EC, 45). Because Lombardy is shielded from Mediterranean winds by the Apennine Mountains, Montesquieu explained, the people there do not suffer its ill effects, which may account for a good deal of the difference between northern and southern Italians. Montesquieu also thought that the fineness of air in ancient Athens affected the quality of minds in ways that modern Athenian air did not (EC, 43-44).

⁵⁶ Cited in Shackleton, *Montesquieu: A Critical Biography*, 303.

In an address to the Academy of Bordeaux in 1732, Montesquieu weighed in on contemporary debates about historical changes in the air quality in Rome, and how these might relate to cultural and political changes in the city.⁵⁷ Based on his own investigation of the Roman environment, he affirmed the theory that water accumulated seasonally in various cavities underground, which were the pockets left by the covering over of the ruins of ancient Rome. This stagnant water contaminated the air above ground.⁵⁸

The major moral causes of interest in the *Essay on Causes* are the sources of one's education in the broadest sense.⁵⁹ Family, religious teachers, society in general, the company one keeps and the books one reads all contribute to one's education (EC, 54-65). There is also an informal education imparted by the example of those people held in esteem—for example the royal court in the French monarchy—who set the standard for behavior, fashion, and interests. This “general education...is received from the society where one lives.” In sum, Montesquieu explains,

In every nation there is a general character, which affects every member, more or less. This is produced in two ways: by physical causes, which derive from the climate...and by moral causes, which are a combination of laws, of religion, of mores, manners, and that certain emanation of a way of thinking, of the airs and follies of the Court and the Capital, which spreads throughout (EC, 58).

This great moral cause of the education in society is itself dependent upon certain physical conditions in order to become active—namely, the concentration of people in a

⁵⁷ *Réflexiones sur les habitants de Rome*, OC I, 910-912. The address is called *Réflexions sur la sobriété des habitants de Rome compare à l'intempérance des anciens Romains* in the Masson edition. On this lecture, see Shackleton, *Montesquieu: A Critical Biography*, 303-05 and Richter, “An Introduction,” 135-36. For other reflections on air quality and its implications, see *Pensées* in OC I, 663, 717, 724-28, 757, 888, 905, 1198-99; *Essai sur les causes*, OC II, 43-44.

⁵⁸ *Voyage de Gratz à La Haye*, OC I, 663. *Memoire sur les Mines*, OC, I, 906. These passages discussed in Shackleton, *Montesquieu: A Critical Biography*, 305.

⁵⁹ Shackleton, *Montesquieu: A Critical Biography*, 315.

particular, fixed locale. Savage and barbarian peoples do not experience this kind of society, and farmers only when they go to the towns and marketplaces (7.1.91; EC, 53).

In another example of how the effects of physical causes can become moral causes, Montesquieu contends that physical beauty and physical deformity may bring with them certain moral tendencies: beautiful people seem to have less need to cultivate their character and intellect in order to be received well. In contrast, “hunchbacks are characteristically intelligent” (EC, 63). Travel, which might be motivated by physical or moral causes, is itself merely a physical change in location. Yet the exposure to new environments, social as well as physical, that this change of locale makes possible, in turn becomes a moral cause in itself.

Moral causes also can have both physical and moral effects. The choice to adopt an ascetic or solitary lifestyle, or that of an athlete, brings with it significant physiological outcomes (EC, 40, 52). The practice of making eunuchs creates an anomalous type of man, in whom physical and moral causes interact in a most infelicitous way—a prominent theme in the *Persian Letters* (EC, 49).

Montesquieu’s account of human psychology, particularly in the *Essay on Causes*, is fairly materialist in its scope of inquiry. For example, even in discussing moral causes such as education and one’s lifestyle, he spends more time examining their physiological rather than their moral effects.⁶⁰ Still, Montesquieu does not insist that the *only* effects of these causes are physiological, but simply is more interested in analyzing that aspect. Variations among individuals in their physical qualities alone make it very difficult to fully explain how any

⁶⁰ “Solitude is no less dangerous to the mind than fasting, sleepless nights, and shrieking. The immobility in which solitude leaves the fibers of the brain makes them almost incapable of movement. It has been observed that the Indian quietists, who pass their life in contemplating nothingness (*le néant*) became nothing but animals. No part of our body can retain its function, if it does not exercise it. Those teeth that are not used are spoiled, and if only one eye is used the other is spoiled” (EC, 52. Translation from Richter, “An Essay on the Causes,” 147).

given man has become what he is, and there is much about human physiology that is far beyond our understanding. “Even the observations that have been made are nothing compared to those that are not in our power” (EC, 46-47). In both the *Essay on Causes* and *Spirit of the Laws*, Montesquieu consistently emphasizes the multiplicity of factors, moral as well as physical, influencing our temperament and behavior.⁶¹

In closing the first part of the essay on physical causes, Montesquieu also suggests that one could go too far in seeking physiological accounts of human psychology. He jeers at the theory of a key founder of physiological psychology, the 16th century Spanish doctor and philosopher, Juan Huarte, apparently for explaining an intellectual skill in purely physical terms.

I believe that, in a matter as complicated as this, one must avoid going into too great of detail. Huarte, a Spanish author who has treated this subject before me, relates that Francis I, displeased with his Christian doctors and the impotence of their treatments, sent to Charles V asking for a Jewish doctor. The simpleton (*bonhomme*) seeks the reason why Jews have minds better suited for medicine than Christians, and he finds that this is due to the great quantity of manna the Israelites ate in the Desert (EC, 52). In the *Essay on Causes*, Montesquieu also makes more explicit the greater weight, at

least potentially, of moral causes in forming the general spirit: “The moral causes form the general character of a nation and decide the quality of its spirit more than the physical ones”

⁶¹ See for example 8.8.118, 8.21.126; *Pensées* #1208, #1209, #1389, in *OC*, I, 1302-03, 1328-29; *Considerations*, XVII.169; “Défense de L’Esprit de Lois,” *OC* II, 1145-46; “Response to Theological Faculty,” *OC*, II, 1173. Montesquieu, “Letter to Hume,” May 19, 1749. Hume had written the essay, “On National Characters,” criticizing those who overemphasize physical causes. Published in the first month after *Esprit de Lois* appeared, it is possible Hume had Montesquieu in mind in writing this essay. Montesquieu, however, wrote the above letter to Hume indicated his agreement with the Scotsman about the predominance of moral over physical causes. On this exchange between Montesquieu and Hume, see Rahe, *Montesquieu and the Logic of Liberty*, 156, and James Moore, “Montesquieu and the Scottish Enlightenment,” 183.

(EC, 60).⁶² Throughout his published and unpublished writings, and in his response to criticisms of *The Spirit of the Laws*, Montesquieu reiterates that moral causes have the final say. In addition to the form of the government, he consistently emphasizes the way individuals are profoundly influenced by what their family, religious community, and broader culture elevate as admirable behavior. His calls in Books 19 and 28 to change mores and manners through the appealing example of different mores and manners is premised on the power of this moral cause.⁶³

A key example Montesquieu uses to illustrate the primacy of moral causes is the relative uniformity of Jewish culture across the diverse regions where Jews have settled. Despite the great variety of physical locales where they reside, he contends that Jews have a similar cast of mind, which he attributes to the effects of education in the Talmud. In Montesquieu's view (which does not appear to be based on any first-hand experience with either the Talmud or the academies in which it is studied) this is a petty and slavish cast of mind (EC, 60-61). Montesquieu's point here does not depend upon his evaluation of the merits of the mentality instilled by a Talmudic education, but on the powerfully formative

⁶² Examining the body of his work, Stark, Shackleton, and Richter all conclude that Montesquieu's writings before the publication of the *Spirit of the Laws* (including the *Essay on Causes*) were both more mechanistic in their description of human mind, and focused more on physical causality. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 83-84, 121. Shackleton, *Montesquieu: A Critical Biography*, 302-03, 313-15. Richter, "An Introduction," 133-35.

⁶³ See Chapter 12 of this dissertation for an analysis of his discussion of Saint Louis and Peter the Great: examples of how to promote changes in mores and manners and how not to promote such changes, respectively.

influence of such an education, and the relative consistency of its effects across time and space.⁶⁴

Given his emphasis on the feedbacks between physical and moral causes and the primacy at least potentially of moral causes, Montesquieu's approach to the human sciences cannot be characterized as reductive simply because he traces much of human psychology to physiological causes. In comparing Montesquieu's and Rousseau's understanding of the way climate and music bear influence on humans, John Scott argues that Montesquieu reduced the moral to the physical, which my analysis contradicts.⁶⁵ One of the examples on which he rests his case does show Montesquieu neglecting intervening moral variables in his interpretation of the effects of music: to illustrate the greater sensitivity of the southern peoples and their "fibers," Montesquieu reports on the dramatic difference he has witnessed between English and Italian opera audiences. "The same music produces such different

⁶⁴ See also *Persian Letters* #60. According to Barrera, there was not any edition of the Talmud in either Montesquieu's library at La Brede or in his possessions in Paris. The only related document he had was a copy of Léon de Modène's *Cérémonies et coutumes qui s'observent aujourd'hui parmi les Juifs* (Paris, 1681), translated from the Spanish by Richard Simon, which discussed the historical development of the Mishna, Gemara, and subsequent rabbinic commentaries (255n133; see also 257n141). See Richter's notes to his abridged translation of the *Essay of Causes*, 162n54. As Richter notes, notwithstanding this standard Christian prejudice against the Talmud, Montesquieu's general stance towards the Jews and Judaism was about as favorable as one could hope for in the French Enlightenment. Arthur Hertzberg credits Montesquieu as the source of almost all Enlightenment era attempts to defend Jews and/or Judaism and to promote toleration of Jews. *The French Enlightenment and the Jews: The Origins of Modern Anti-Semitism* (New York: Columbia University Press, 1968), 273-76, 287, 294. Interestingly, while diverging in their assessments of its moral and intellectual effects, many others also have identified education in Talmudic reasoning as a culturally unifying force; the basic point holds that an intensive and distinctive education will have a more powerful influence over the general spirit than the particular physical environment and even other moral causes. On more positive interpretations of the formative influence of Talmudic study, see for example Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* (Cambridge, MA: Harvard University Press, 1997) and Talya Fishman, *Becoming the People of the Talmud: Oral Torah as Written Tradition in Medieval Jewish Cultures* (Philadelphia: University of Pennsylvania Press, 2011). I thank Elizabeth Alexander for directing me to these sources.

⁶⁵ Pangle also exaggerates Montesquieu's materialism in comparison with Rousseau's. *Montesquieu's Philosophy of Liberalism*, 165 n2.

effects in the people of the two nations that is seems inconceivable, the one so calm and the other so transported” (14.2.233).⁶⁶

Montesquieu may have been insensible to the moral operations of the musical experience, and as I will explain in the next section, he draws a direct causal link between physical and moral sensitivity. However, these examples belie the overall thrust of his social scientific framework in both *The Spirit of the Laws* and *Essay on Causes*, which is to emphasize the multiplicity of causes influencing differences among peoples—moral as well as physical—their dynamic interrelation, and the distinct configuration of causes particular to each nation. In Parts 3-6, Montesquieu accords far more attention to the moral causes of custom, manners, commerce, religion, and historical contingency than to climate.

The changing character of Rome: physical or moral?

Another key exploration of the relationship between moral and physical causes in Montesquieu’s earlier work concerns changes in the general spirit of Rome from ancient to modern times. The example of Rome demonstrates the dynamic interaction of moral and physical causality in Montesquieu’s analysis, and the irreducible character of one type of cause to the other. He analyzed major transitions in ancient Roman history in various unpublished fragments, his 1732 presentation before the Academy of Bordeaux, his second major work on *Considerations on the Causes of the Greatness of the Romans and Their*

⁶⁶ This example provides an especially apt contrast with Rousseau, who elaborates upon the distinction between moral and physical causes in the context of his critique of Rameau’s hyper-materialist theory of music in the *Essay on the Origin of Languages*. Especially with regard to the experience of the arts and romantic love, Rousseau ever championed the intervening variable of moral causality. See also Rousseau’s critique of Montesquieu’s theory of sexual passions flaring in hot climates in the *Discourse on the Origin of Inequality*, II.40-44, 154-56

Decline in 1734, and again in *The Spirit of the Laws*, where he admitted he “can never leave the Romans” (11.13.172).⁶⁷

Reflecting on the profoundly different mores and political organization of modern Rome versus those in the classical period, Montesquieu concludes, “there are several causes for this change: some physical, and others moral.” He analyzes the relative influence of physical causes, such as changing air quality, and moral causes like religion and the form of government in the decline of (western) Roman power. In addition to the influence wrought by the accumulation of stagnant water underground, Montesquieu suggests that another significant change in air quality occurred with the shift of the city center from the seven hills, with its “more subtle air,” to the plain along the Tiber.⁶⁸

In the department of moral causes, Montesquieu explains that modern Romans have accustomed themselves to quite a different “manner of living,” which has brought with it dramatic physical *effects*. In ancient times, Romans were restlessly engaged in political and physical exertions, ate more and coarser foods, and bathed more frequently.⁶⁹ In contrast, modern Romans lack worldly ambitions and are active only spiritually. Consequently, “Rome is today the most tranquil city in the world.” Modern Romans need to nap frequently. They eat by themselves, which means they consume much less food and drink than their ancient counterparts did in their communal feasts—the latter a physical effect of a moral cause.

⁶⁷ See also *Pensées* OC I, 1328-29.

⁶⁸ *Réflexions sur les habitants de Rome*, OC I, 910-12. Translations are my own. See also *Pensées* #1389, in OC I, 1328-29.

⁶⁹ Frequent bathing, Montesquieu explains, had the important effects of increasing the appetite and giving the body’s fibers and liqueurs some respite from the enervating effects of the climate. *Réflexions sur les Habitants de Rome*, OC, I, 911-12.

These different physical *effects* of the moderns' "reserved life," Montesquieu attributes to the "constitution of the State," by which he means the nature and principle of government. The striking difference may reflect the relative lack of power of the modern constitution versus the ancient. While the ancient constitution and the habits and mores it bred could "easily conquer the force of climate." In modern times, without the formative influence of a robust republican constitution, the heat of Rome has its way with the inhabitants.⁷⁰ However, Montesquieu seems ambivalent as to whether it is ancient or modern Roman culture that reflects the "default" state of political culture in the region; in an unpublished fragment, he suggests that it is the modern case where religion and the form of government prevail over climate:

This warlike spirit that the climate gave formerly to people of Rome, has through moral causes, been limited today to the fighting he sees in the theater. And the climate which rendered the former people of Athens so unruly, serves only to show us slaves, if perhaps a little less stupid. Nature acts always, but she is overwhelmed by mores.⁷¹

Thus, Montesquieu concludes here and elsewhere that the political constitution is the single most powerful influence on the general spirit in most cases, including that of Rome. Montesquieu attributes Rome's changing spirit to the transition in the form of government first from a republic to an empire, and then from a pagan to a Christian empire.

Attributing more force to the moral cause of the constitution does not easily settle the question of why Rome changed, however, because the form of government itself Montesquieu crucially links with of the size of the country. This relationship between Rome's territorial expansion and the character of its internal governance forms a major

⁷⁰ *Réflexions sur les Habitants de Rome*, OC I, 912.

⁷¹ *Pénees* #1389, in OC, I, 1328-29. Montesquieu had a note in the manuscript to put this passage in the *Spirit of the Laws*.

theme in the *Considerations*. The particular case of Rome exemplifies a vexing dilemma facing republics generally, and the difficulty of disentangling the various causes involved in this dilemma.

In *The Spirit of the Laws*, Montesquieu's analysis of the importance of environmental conditions actually begins in Part 1, in Book 8, where he presents his general theory of territorial size and form of government. After explaining how the corruption of the principles of the different forms of government leads to the dissolution of their institutions, Montesquieu adds, "I shall be able to be understood only when the next four chapters have been read" (8.15.123).

The natural property of small states is to be governed as republics, that of medium-sized ones, to be subject to a monarch, and that of large empires to be dominated by a despot...[Thus] in order to preserve the principles of the established government, the state must be maintained at the size it already has...[or] it will change its spirit to the degree to which its boundaries are narrowed or extended (8.12.126).

The territorial considerations for republics will be emphasized here, while I will return to those for despotisms and monarchies in discussing terrain and liberty in Section 4. A major cause of the corruption of republics is an expansion in the size of territory, and with it a disruption of the conditions needed for sustaining the republican principle of virtue: a robust, all-encompassing education to love of the homeland and her laws, and a willingness to defend the homeland against her enemies.

As the Greeks themselves emphasized,⁷² republican political institutions depend upon a robust civic education and what Montesquieu calls "singular institutions"—comprehensive

⁷² For example, see Aristotle's *Politics*, Bk. 7, Ch. 4-5 (1326a25-1327a10).

ways of life wherein laws, mores, manners, and religion are closely coordinated towards pursuit of a common purpose.⁷³ Such institutions, he explains,

can have a place only in a small state, where one can educate the general populace and raise a whole people like a family. The laws of Minos, Lycurgus, and Plato assume that all citizens pay a singular attention to each other. This cannot be promised in the confusion, oversights, and extensive business of a numerous people (4.7.38).

In a larger territory with more people, citizens interact with and communicate with one another differently than in a small city-state. The “continuous preference [for] the public interest over one’s own” becomes very difficult to sustain in a country where citizens have never met most of their fellows (4.5.36). The social dynamics of a large republic are further complicated by the intensification of commercial activity among a broader, more dispersed population. In addition, the sumptuary laws critical to maintaining equality and frugality in ancient republics become more difficult to enforce in a larger society (4.6.38). Along with these changes in social and economic interaction comes a kind of educational revolution: an interruption of the unified education to civic virtue that is necessary to maintain a robust republic. Montesquieu concludes therefore that

It is in the nature of a republic to have only a small territory; otherwise, it can scarcely continue to exist. In a large republic, there are large fortunes, and consequently little moderation in spirits: the depositories are too large to put in the hands of a citizen; interests become particularized; at first a man feels he can be happy, great, and glorious without his homeland; and soon, that he can be great only on the ruins of his homeland. In a large republic, the common good is sacrificed to a thousand considerations; it is subordinated to exceptions; it depends upon accidents. In a small one, the public good is better felt, better known, lies nearer to each citizen; abuses are less extensive their and consequently less protected (8.16.124).

⁷³ Montesquieu associates virtue with what he calls the “singular institutions” (*institutions singulières*) of the Greek republics, as well as some ancient nations that have survived through modern times—the Chinese and the Jews (4.6.36, 4.7.38, 19.21.321–322, 23.7.431). These “singular institutions to inspire virtue” are singular in the sense of being peculiar, as well as collapsing into one distinct realms of law. They “confuse laws, mores,” which “even though they are separate...are still closely related” (19.21.321).

The size and configuration of national territory, then, give rise to these political effects indirectly; the immediate cause of the corruption of republican virtue is a change in the kind and quality of social interaction. Centralized social regulation in general becomes more difficult, as the exponential increase in opportunities for interaction tends to increase the variety of mores and manners with which individuals come into contact (19.8.311). Republican virtue depends upon citizens' ability to "constantly supervise and check each other," which becomes increasingly difficult in a large, diverse country.⁷⁴ Or rather, the communities doing the supervising multiply and do not give the same feedback among them. "Accidents...always increase in proportion to the size of the state" (8.19.126). The physical cause leads to a moral effect, which itself becomes a cause of subsequent moral effect. The question is, which comes first? The corruption of republican virtue or territorial expansion?⁷⁵

If the dangers of expansion for republics are so clear, then why didn't the classical city-states just maintain stable borders and population? The republican problem of scale is exacerbated by the challenge Montesquieu identifies in Book 9: the small territory size required for sound internal governance makes republics vulnerable externally. "If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice" (9.1.131). Finding themselves in constant danger of attack, small republics must cultivate

⁷⁴ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 60.

⁷⁵ Of course, another pressing question is whether there might be any way to transcend or at least mitigate the tradeoffs between large and small countries, between external and internal strength. Reflection on this dilemma led Montesquieu to discuss confederation, a possible remedy that James Madison would make famous in *Federalist* No. 9 (9.1.132). Confederation, Madison contended, could allow a group of small republics to obtain the external advantages of monarchy without sacrificing the internal advantages of republican government. Anti-federalist writers, such as Cato, cited Montesquieu on territorial size and republics to contend that the proposed Union could never sustain itself. See third letter of "Cato," *The New-York Journal*, October 25, 1787. Teaching American History Document Library (Ashland University) <http://teachingamericanhistory.org/ratification/timeline-antifederalist.html>

strong military forces and a general focus on martial training (10.2.138). This constant preoccupation with war in turn contributes to a taste for military glory.

Early republican Rome (along with Sparta) exemplified for Montesquieu a republic on the classical order, that is, a martial republic (5.6.48). Rome's expansionary tendencies were based upon those belonging to any small state in a relatively busy part of the world. He emphasizes numerous features of the Roman constitution—those characteristic of republics generally as well as those peculiar to Rome—that all but decided its military career. In its laws, mores, way of life, and education of, Rome was perfectly constituted to form a martially brilliant nation (CC, II-III.33-42). Another factor pushing Rome to military aggression were the incentives generated by the one-year term elected consul offices. Montesquieu contends that the need to demonstrate political prowess in a short period of time to gain reelection as consul encouraged many consuls to embark upon military expeditions.

The result of being so proficient in war, however, was that Rome expanded to too large a size for maintaining the constitution that enabled it to become great in the first place. "Rome's downfall was the remote effect of her rise."⁷⁶ There was a growing disconnect between mores and laws once the country expanded and absorbed many diverse peoples (CC, III.40, IX.91-93). The troops' loyalty to Rome re-centered on individual generals.

Rome was no longer a city whose people had but a single spirit, a single love of liberty, a single hatred of tyranny...Once the peoples of Italy became its citizens, each city brought to Rome its genius, its particular interest, and its dependence on some great protector. The distracted city no longer formed a complete whole. And since citizens were such only by a kind of fiction, since they no longer had the same magistrates, the same walls, the same gods, the same temples, and the same graves, they no longer saw Rome with the same eyes, no longer the same love of country, and Roman sentiments were no more (CC, IX.92-93).

⁷⁶ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 136.

But was it the expansion of Rome or the loss of virtue that made Rome despotic? In other words, which came first? Stark explores in depth the particular case of the interaction between physical and moral causes in Rome's expansion and corruption in Montesquieu's social science. He concludes that this dynamic between the physical cause of territorial size and the moral cause of the status of virtue is irreducible in Montesquieu's account in the *Considerations*.

Was it the physical extension of the territory that destroyed virtue and republicanism, or was it the loss of virtue and the right republican spirit that led the Romans to become conquerors and push out their border lines *ad ultimas fines terrae*? Who can tell? Government and geography are to Montesquieu the two blades of a pair of scissors: though distinct, they can only be effective when they work together, and it is senseless to ask which has done the cutting—the nether blade or the upper.⁷⁷

It is through an interaction of physical and moral causes, then, that republican virtue is corrupted.

While government and geography both necessarily participate in this explanation, Stark also suggests how the form of government represents the more dominant cause. A large country is itself the result of conquest, which is a moral rather than a physical cause. “The size of the Roman empire was only superficially the cause of its corruption. The important question is why did Rome grow? Why was she able to cross mountains and seas? Only because she was constantly at war and successful in war. And she was that because of her republican constitution.”⁷⁸

As Stark notes, however, historically, it has been much easier to conquer by crossing plains than by climbing mountains. This will be an important point in understanding

⁷⁷ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 108; see also 71-72, 113-14, 133-36.

⁷⁸ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 136, 114.

Montesquieu's explanation of the pattern of European political liberty and Asian despotism in Book 17.

Conclusion

In his earlier writings, Montesquieu demonstrated a keen interest in understanding the nature of causality in human affairs generally, and in his most beloved example of ancient Rome in particular. As with his "philosophy of history," in his exploration of physical and moral causes, Montesquieu is more concerned with explaining particular cases than general theories.⁷⁹ His discussion of physical causes before the 1730s also are notable for lacking attention to climate and terrain, given how prominent these are in Part 3 of *The Spirit of the Laws*. Montesquieu does make a few references to the influence of climate and terrain in the *Persian Letters* and other writings before his travels around Europe in the late 1720s.⁸⁰ These suggest he had thought about climate before writing *The Spirit of the Laws*, but not in

⁷⁹ See Chapter 8 for a discussion of Montesquieu's approach to historical analysis in its intellectual context.

⁸⁰ See *Persian Letters* #75, 121, 113, 122. (NB: #121 was added to 1754 edition.) These letters indicate that Montesquieu at least had thought about climatic influences in his early writing. In Letter 113, for example, Usbek discusses moral and physical causes for population decline in the ancient Mediterranean—a subject that Hume and Montesquieu would debate vigorously in their own epistolary exchange. Published in the first month after *The Spirit of the Laws* appeared, it is possible Hume had Montesquieu in mind in writing this essay. Rahe, *Montesquieu and the Logic of Liberty*, 156. In Letter 121, Usbek argues that the form of government is the most powerful moral cause, and that moral causes overall are more powerful than physical causes. While Montesquieu does affirm a similar view in his own name in the *Essay on Causes*, I would hesitate to treat all of Usbek and/or Rica's statements as synonymous with Montesquieu himself thought. For one, he wrote the *Persian Letters* early in his career, in 1721. This was before an extended tour abroad, which at least two of Montesquieu's more comprehensive interpreters contend marked a significant change in his view and intellectual propensities (Stark and Shackleton). Unrelated to any possible changes in his own views, these statements were not made in his name and do not necessarily represent his own ideas and sentiments even at that time. While there may exist a reliable technique for drawing out Montesquieu's own views from the *Persian Letters*, I myself am not proficient in such a technique. For analyses reconciling the discussion of physical and moral causes in the *Persian Letters* with those in later writings, see Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 79. Richter, "An Introduction," 133-34. Shackleton, *Montesquieu: A Critical Biography*, 314-15.

a comprehensive manner.⁸¹ In *The Spirit of the Laws*, however, climate and terrain are the major physical causes of interest, probably because his interest here is in comparing political communities rather than explaining human psychology at the individual level.

His analyses of climate and terrain nonetheless follow a similar approach to his earlier examinations of physical causes: the subject of Part 3, we will see, is as much the dynamic interaction among physical and what he calls moral causes, as physical causes themselves. As we saw in Montesquieu's analysis of medieval Frankish development, he does not manifest a partisanship for a particular type of cause. In Part 3 as well, he encourages his readers above all to confront the multiplicity of causes, the complexity of their interaction, and the distinct character of the configuration of causes particular to each nation. For in different times and places, different causes may predominate. The power of any given variable depends in large part on the full environmental, economic, social, and political context. Different environments presents different challenges—for example, extreme temperatures, seasonal variation in temperate climes, and scarcity of water in the hot climates—to human survival—i.e. obtaining subsistence, organizing protection against invaders, propagating new members of the community. These in turn make for different demands of legislators and peoples in different climes. Physical causes lead to both physical and moral effects, which become moral causes in themselves. This characteristic causal chain in Montesquieu's social science in turn becomes a crucial entrée for legislative action (14.9.240).

⁸¹ Shackleton, *Montesquieu: A Critical Biography*, 302-303.

Chapter 16: North and South, Hot and Cold

In addition to physical and moral causes, the other major dichotomy organizing Montesquieu's analysis of environmental conditions is that between cold and hot, or northern and southern countries. As summarized in the *Essay on Causes*, "the cold and heat of climate gives different nations such disparate characters" (EC, 39). Climate and terrain represent the initial font of human diversity, particularly as it supports and/or undermines political liberty. The north and south typology figures more prominently in *The Spirit of the Laws* than in the *Essay on Causes*⁸² although there are some notable differences about his account of north and south in latter. The discussion in Part 3 juxtaposing cold and hot countries follows Montesquieu's focus on the influence of physical causes on the communal level in *The Spirit of the Laws*, while the *Essay* evinces as much concern for effects on the individual level.

It is in the first paragraph of the *Essay on Causes*, however, that Montesquieu notes it is more feasible to characterize and explain a nation or group as a whole than an individual. "We know better what gives a nation its special character than what gives an individual his particular spirit" (EC, 30).⁸³ In identifying characteristically northern and southern tendencies, therefore, Montesquieu is not claiming that every individual or even every country in a given climate necessarily conforms to the general tendencies. We should also keep in mind that Montesquieu's typology of northern and southern countries is only the most conspicuous aspect of his comparative politics, giving way upon closer analysis to his

⁸² For other references to north/south typology, see *Pensées* #1713, in *OC* I, 1412 and *Réflexions sur la Monarchie Universelle*, *OC* II, 23-24, 29.

⁸³ Hume makes a similar point in "Of the Rise and Progress of the Arts and Sciences," 56-57, which is cited in Chapter 8 of this dissertation

science of the *esprit général*. That one could show him many examples of countries that do not conform to the tendencies of their climate (or of individuals who do not conform to the national character) affirms rather than undermines his basic theory: the particular dynamic among of causes influencing the general spirit is unique (1.1.8-9).⁸⁴

The contrast between north and south nonetheless plays a crucial role in underscoring the mentalities and habits that Montesquieu sees undermining the prospects for political liberty in a country. The vices of hot climate take center stage in Part 3, though he clarifies here and especially in the *Essay on Causes* that each climate has its mixture of characteristics, some positive and some negative. The characteristically southern temperament is not without its virtues, or the northern its vices. Yet the southern virtues have negative implications for political liberty, whereas the northern vices happen to be favorable to political liberty. His focus on the political vices of the southern temperament, I will show, reflects his particular agenda for reform in the modern world, and especially in Europe.

Northern and southern climes are practically synonymous with Europe and Asia in Montesquieu's treatment, though he also makes occasional mention of Africa and the

⁸⁴ In the *Essay on Causes*, he notes that the physical causes alone that influence an individual's state of mind are innumerable (EC, 46-47). He qualifies his explanation of tendencies towards despotism in Asia and moderate government in Europe with a mechanical analogy: "As mechanics has its frictions which often change or check its theoretical effects, politics, too, has its frictions" (17.8.284). Rousseau defends Montesquieu's characterization of northern and southern political tendencies on a similar logic in the *Social Contract*. "Let us always distinguish between general laws and the particular causes that can modify their effect. Even if the entire south were covered with Republics and the entire north with despotic States, it would be no less true that in terms of the effects of climate despotism suits warm countries, barbarism cold countries, and good polity intermediate regions. I do also see that one might grant the principle but dispute the application: one might hold that some cold countries are extremely fertile, and some warm ones extremely barren. But this is a difficulty only for those who fail to look at the matter in all its relations. As I have already said, the relations of labor, of forces, of consumption, etc. all have to be taken into account." III.8, 182. See for example *Spirit of the Laws* (1.1.9, 8.15-20.123-26, 17.1-7.278-84, 18.1-4.285-87).

Americas (17.2, 17.7.284).⁸⁵ The different climes are characterized by contrasting psychological propensities. These opposing characters of human beings in hot and cold climates in turn dispose them to different forms of civil, domestic, and political government. For, “if it is true that the character of the spirit and the passions of the heart are extremely different in the various climates, laws should be relative to the differences in these passions and to the differences in these characters” (14.1.231). But does Montesquieu mean “should” in a predictive or prescriptive sense in Part 3? His analysis points to both to some extent. His predictions for hot climate, however, conflict with his prescriptions for humanity in general, and he goes to great lengths to suggest how a legislator might favor the latter over the former. In its simplified version, the upshots of hot climate are as follows: it gives rise to an indolence and speculative bent that is conducive to civil servitude, a heightened erotic zeal and imagination that point to domestic servitude, and a submissiveness leading to despotism. The cold, northern climes, in contrast, give rise to a physical as well as a moral vigor—a spirit of independence that supports, and which can tolerate nothing but, political liberty.⁸⁶

In Book 14, Montesquieu also contends that hot and cold climates incline inhabitants to different religious practices and beliefs. The implications of environmental conditions for religion are not announced with their own book heading, for reasons that are clear given the attacks the work unleashed notwithstanding. Nonetheless, they figure prominently in his analysis of climate (14.5-7.236-37, 14.10-11.239-41, 16.2.265, 23.24-26.475-78, 24.12.467, 24.14.468). I will focus on those aspects of his analysis of the relationship between climate and religion that affect the prospects for civil, domestic, and political liberty: the tendencies

⁸⁵ Rahe, *Montesquieu and the Logic of Liberty*, 158.

⁸⁶ Other discussions of the relationship between liberty and cold climates can be found in the *Essai sur les causes*, OC II, 23 and *Pensées* #769, #1475-77, #1479, in OC I, 1212, 1353-54, 1355.

in hot climates towards monasticism and worldly indifference, and towards polygamy. The latter is central to Montesquieu's argument about the tendency towards domestic servitude, which promotes civil and political servitude independent of the effects of climate itself.

Sometimes proceeding from physical cause to mental or political effect, and sometimes from observed effect to physical cause, Montesquieu synthesizes different types of evidence in Part 3. He musters examples from across the globe and throughout history, drawing on travel accounts, foreign histories, and his own observations to trace a pattern of civil slavery, polygamy and strict confinement of women, and despotic government, in hot climates in Books 15, 16, and 17, respectively. In addition to his own empirical observations, Montesquieu also famously cites his own experiments as evidence of the physiological effects of heat and cold.

The physiological effects of hot and cold climate

Montesquieu's analysis begins with his observations of and hypothesizing about the effects of hot and cold air on individuals. How impressionable a man is to the people and things around him depends largely on the flexibility of his fibers (EC, 42). The great impact of hot and cold climate in this theory occurs via its effects on the sensitivity of the nerves, which end in the surface of the skin, to external stimulation. Along with nerves (*nerfs*), juices (*sucs*), and fluids (*liqueurs*), fibers (*fibres*) constitute basic units of Montesquieu's neuroscience. The hot climate found in the southern countries relaxes, lengthens, and increases the exposed area of the fibers, making its inhabitants exquisitely sensitive to their environment, "to the weakest action of the slightest objects." The cold climate of the northern countries, on the other hand, contracts and strengthens the body's fibers and nerves. "The

little bunches are in a way paralyzed; sensation hardly passes to the brain except when it is extremely strong and is of the entire nerve together. But imagination, taste, sensitivity, and vivacity depend on an infinite number of small sensations.” With their stronger, coarser fibers, the inhabitants of cold climates also draw more nutrition from their food, which contributes to their having larger bodies (14.2.232).⁸⁷

In addition to his empirical and historical observations, Montesquieu supports his argument here with his infamous experimental evidence from microscopic investigation of a frozen sheep’s tongue.⁸⁸ The “papillae” (*mamelons*) on the surface of the tongue, he observed, appeared under the microscope to consist of “tiny hairs, or a kind of down,” between which “were pyramids, forming something like little brushes (*pinceaux*) at the ends.” These pyramids, he speculates, constitute the sheep’s “principal organ of taste” (14.2.233). Montesquieu reports that he had half of the sheep’s tongue frozen, whereupon he could observe by the naked eye that the papillae on the frozen half had contracted.

Some of the rows of papillae had even slipped inside their sheaths (*gâînes*): I examined the tissue through a microscope; I could no longer see the pyramids. As the tongue thawed, the papillae appeared again to the naked eye, and, under the microscope, the little brushes (*houppes*) began to appear.

⁸⁷ In sections from the *Essay on Causes* that did not make it into *L’Esprit des Lois*, Montesquieu explains in more detail his understanding of sensation and its mental processing. For example, he indicates that “humidity” in the brain also can affect our sensitivity to external stimulation (EC, 43). Another significant exploration of physiological psychology can be found in the *Essai sur le goût dans les choses de la nature et de l’art*. The last work Montesquieu wrote, the *Essai sur le le goût* reaffirms a similar basic understanding of sensation and our psychological experience of it as conveyed in the *Essay on Causes* and *The Spirit of the Laws*.

⁸⁸ In notes to the *Essay on Causes*, he refers to additional experiments he wanted to conduct in order to better understand the effects of heat, cold, and other environmental conditions on different bodily elements. For example, he wanted to compare the bone weight of a Dutchmen with that of a man from the Pyrenees—apparently an inquiry into the effects of living at different altitudes (EC, 42). On the significance of Montesquieu’s experiments on tendons and tongues, see Renato G. Mazzolini, “Dallo ‘spirito nerveo’ allo spirito delle leggi: un comment alle osservazioni di Montesquieu su una lingua di pecora,” in *Enlightenment Essays in Memory of R. Shackleton* (Oxford: The Voltaire Foundation, 1988), 205-221.

This observation confirms what I have said, that, in cold countries, the tufts (*houppes*) of nerves are less open; they slip inside their sheaths, where they are protected from the action of external objects. Therefore, sensations are less vivid (14.2.233). From this experiment, Montesquieu sees bolstered his theory that hot climate increases individuals' sensitivity—to dangers as well as to temptations, to pain and to pleasure. In contrast, he explains, the “coarse fibers of the northern peoples are less capable of falling into disorder than the delicate fibers of the peoples of hot countries; therefore, the soul is less sensitive to pain. A Muscovite has to be flayed before he feels anything” (14.2.233).

Southern slavishness and northern independence

After explaining the striking physical consequences of different temperatures, Montesquieu's next crucial step is translating the physical sensitivity of those inhabiting hot climates quite directly into a moral sensitivity; the action on one's bodily fibers directly affects the quality of one's moral fiber, so to speak. Heat saps “strength and courage,” whereas cold air makes for strength of both “body and spirit” (17.2.278). In this element of his theory, psychological differences do reduce readily to physical differences, though as we will see, the physical environment in any particular locale may stimulate multiple, contradictory psychological qualities.

Montesquieu links the sensitivity of those inhabiting hot climates to at least four politically relevant qualities of spirit. They are imaginative, indolent, sensual, and submissive. Northerners' coarseness makes them dull-witted but physically energetic, lacking in erotic passion, and courageous (14.2.231-34; EC, 39-41). Even the musical sensitivity of southerners are heightened; Italians, he observes, are profoundly moved by the same operas that leave the English sedate (14.2.233; EC, 48). Both their fears and their

desires are heightened by the slightest stimulation (14.2.233). This imaginativeness in turn interacts with other dimensions of the southern temperament, sometimes in counterintuitive ways, and the particular dynamics of these qualities vary from country to country depending upon other aspects of the general spirit.

Immediately after describing the effects of heat and cold on the body's "surface fibers" (*fibres extérieures*), he explains,

Therefore, men are more vigorous in cold climates. The actions of the heart and the reaction of the extremities of the fibers are in closer accord, the fluids (*liqueurs*) are in better equilibrium, the blood is pushed harder toward the heart and, reciprocally, the heart has more power. This greater strength should produce many effects: for example, more confidence in oneself, that is, more courage, better knowledge of one's superiority, that is, less desire for vengeance; a higher opinion of one's security, that is, more frankness and fewer suspicions, maneuvers, and tricks. Finally, it should make very different characters. Put a man in a hot, enclosed spot, and he will suffer, for the reasons just stated, a great slackening (*défaillance*) of heart. If, in the circumstance, one proposes a bold action to him, I believe one will find him little disposed toward it; his present weakness will induce discouragement in his soul; he will fear everything, because he will feel he can do nothing. The peoples in hot countries are timid like old men; those in cold countries are courageous like young men (14.2.232).

As evidence of the cowardice-inducing effects of hot climates, he cites the poorer performance during the War of the Spanish Succession of the northern peoples of the Grand Alliance as compared to when they were fighting on Spanish ground, than when they were fighting in what was then the Low Countries (i.e. Blenheim and Ramillies).⁸⁹

Montesquieu concludes his analysis in Book 14 with an extremely negative assessment of the prospects for free labor in southern climes, and a strong statement of what he sees as the physical origins of their moral weaknesses:

⁸⁹ See also *Pensées* #1477, in *OC I*, 1354, on conquests in northern versus southern parts of the Roman Empire in ancient times.

The heat of the climate can be so excessive that the body there will be absolutely without strength. So, prostration will pass even to the spirit; no curiosity, no noble enterprise, no generous sentiment; inclinations will all be passive there; laziness there will be happiness; most chastisements there will be less difficult to bear than the action of the soul, and servitude will be less intolerable than the strength of spirit necessary to guide one's own conduct (14.2.234).

The indolence encouraged by hot climates will be a central concern throughout Part 3, as it forms a major obstacle to civil liberty. Hot climate induces a “natural laziness” that makes men flee agricultural labor, which in most times and places has been the major form of labor (14.6.236). “Heat enervates the body and weakens courage so much that men come to perform an arduous duty only from fear of chastisement” (15.6.251). In the northern climes, in contrast, Montesquieu finds that the climate stimulates physical strength and energy, and a spirit of independence (14.2.231-234). In Europe, slavery would be “useless:” however arduous the work to be undertaken, individuals’ physical vigor, combined modest financial incentives, will suffice to engage their labor (15.8.252).

While for many this taste for idleness may be considered a moral weakness in the pejorative sense, Montesquieu seems to evaluate this tendency from a more practical or political perspective; idleness may or may not reflect moral vice, but what’s problematic is that it eases the establishment of civil servitude. It is in that respect that Montesquieu seeks to counter them. He reserves some of his highest praise in the entire book for those legislators who have found ways to encourage industriousness in naturally lazy climes—and most pointed criticism for those who exacerbate indolence and passivity.

In Book 17, Montesquieu reports observed differences in courage and physical vigor between hot versus cold countries, and even within the northern and southern regions of the same country, for example China and Korea (17.2.278). In the Americas as well, he notes that the native peoples of Mexico and Peru (*le midi*) live under despotic kings, while those in

North America are free nations. The natural timidity of those who inhabit hot climates is what explains the greater prevalence of political servitude in the hot regions. “One must not be surprised that the cowardice of the peoples of hot climates has almost always made them slaves and that the courage of the peoples of cold climates has kept them free. This is an effect that derives from its natural cause” (17.2.278).

Montesquieu’s argument about despotism in hot climates, and particularly Asian despotism, hinges as much on terrain as on climate, a point that I will develop in Chapter 18 on terrain and liberty. Asia, he recognizes, has as much land in the cold climate as in the torrid, and Book 17 on the relation between the laws of political servitude and “the nature of the climate” is almost exclusively concerned with Asian cases of despotism. One aspect of Asian terrain—the presence of many expansive, open, relatively barren plains—bears directly on climatic factors. Citing extensively from travelers’ accounts of central and northern Asia, Montesquieu concludes that most of Asia is very cold and barren.⁹⁰ The lands that are at a similar latitude as those of northern Europe are more like the frigid zones on account of their poor soil and broad, open plains. The crucial difference he identifies between Europe and Asia, then, is the presence of a large, gradually changing temperate zone in the former and the lack of a proper temperate zone in Asia. The cold countries therefore are immediately adjacent to the hot countries in Asia, represented by Turkey, Persia, the Mogul Empire, China, Korea, and Japan (17.3.279-80).⁹¹

Thus, while in Europe neighboring peoples have a roughly similar level of courage, “in Asia the strong and weak nations face each other; the brave and active warrior peoples

⁹⁰ See Cohler et al., ed., *The Spirit of the Laws*, 279n3.

⁹¹ See also *Pensées* #669, in *OC I*, 1211-12.

are immediately adjacent to effeminate, lazy, and timid peoples.” This opposition has established persistent patterns of domination and accustomed peoples to being either the conquerors or the conquered. Montesquieu claims originality for this explanation of the “liberty of Europe and the servitude of Asia,” exemplified by his statistic that central and northern Asia have endured thirteen conquests in recorded history—by the Scythians, Medes, Persians, Greeks, Arabs, Moguls, Turks, Tartars, Persian, and Afghans (some more than once; 17.3.280). In Europe, on the other hand, he counts four major conquests since the establishment of Greek and Phoenician colonies: by the Romans, the northern barbarians, Charlemagne, and the Normans, all of which he judges to be more arduous and protracted than the Asian conquests (17.3-4.280-81). Furthermore, one of Asia’s most prominent conquering peoples, the Tartars, have been held in civil slavery themselves. Accustomed to rule by force at home, they knew only how to rule by force abroad (17.5.282-83).

In Europe, in contrast, the “strong nations face the strong.” They therefore tend to each maintain a basic level of political independence, even when united by an empire like that of the Franks under Charlemagne. When they have conquered—which has come only with great difficulty—the Germanic peoples established monarchies rather than despotisms. In Book 17, Montesquieu actually invokes a Scandinavian rather than a Germanic origin for European political liberty, which he claims is itself the source of “almost all that there is today among men” (17.5.283). Referring to Olof Rudbeck’s *Atlantica*, he offers his most dramatic declaration of the northern roots of political liberty—and the southern of servitude:

The Goth Jordanes has called northern Europe the manufactory of the human species. I shall rather call it the manufactory of the instruments that break the chains forged in the south. It is there that are formed the valiant nations who go out of their own countries to destroy tyrants and slaves and to teach men that, as nature has made them equal, reason can make them dependent only for the sake of their happiness (17.6.283).⁹²

To fully make sense of the environmental roots of this northern liberty, whether Gothic or Nordic, we will have to examine the analysis of terrain in Book 18, for this spirit of independence sketched above is not synonymous with political liberty as Montesquieu understands it.

As Stark has remarked, and I will show below, Montesquieu's emphasis on the vices of hot climates and the virtues of the cool climates in *The Spirit of the Laws* represents a striking contrast with his more balanced presentation of northern and southern temperaments in the *Essay on Causes*.⁹³ Why then does Montesquieu accentuate the disadvantages of the southern temperament in *The Spirit of the Laws* and the advantages of the distinctly northern temperament? It is the centrality of political liberty in this work that would seem to explain the slant he gives to his physiological analysis in Part 3.

Even in *The Spirit of the Laws*, however, Montesquieu suggests that the psychological effects of hot climate *in themselves* are not more blameworthy than those engendered by cold climate. As he puts it in Book 19, "the various characters of the nations are mixes of virtues and vices, of good and bad qualities. The happy mixtures are those that result in great goods, and one would often not expect them; some result in great evils, and one would not expect them either" (19.10.313). It is the particular combination of propensities, the degree to which

⁹² Montesquieu's stark predictions about the persistence of despotism in Asia from Book 17 of the *Spirit of the Laws* first appear in the unpublished *Réflexions sur la Monarchie Universelle*, OC II, VIII.23-24. On the provenance of the *Réflexions* and its relation to Montesquieu's published corpus, see Rahe, *Montesquieu and the Logic of Liberty*, 20-26. See also *Pensées* #1469, in OC I, 1354.

⁹³ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 121.

the religion and legislators play up one or another, and the implications of these propensities for the economy and the political order that determine Montesquieu's judgments. A more precise statement of the problem is that the qualities of mind bred in the south happen make people more vulnerable to civil and political servitude.

Contradictions within northern and southern temperaments

In speculating about environmental reasons for the geographic ranges within Europe of Protestantism and Catholicism, Montesquieu also speaks to the contrast between northern independence and southern submissiveness. He does so in ways suggesting northern "courage" and southern "submissiveness" are not wholesale moral judgments.

In our Europe, there are two kinds of religion: the Catholic, which requires submission, and the Protestant, which wants independence. The peoples of the North were the first to embrace the Protestant religion; those of the South have kept the Catholic. But this independence of the Protestant peoples means that they are fully instructed in human knowledge; and this submission of the Catholic peoples, which is a very reasonable thing, and something essential to a religion founded on mysteries, means that the people, who knows only what is necessary to salvation, ignore entirely what does not pertain to it, such that the peoples of the South, with healthier ideas about the great truths, even with more natural intelligence, nonetheless have a great disadvantage compared to the peoples of the North (EC, 62; 24.5.463, 24.23.475). Montesquieu reformulates this theory in *The Spirit of the Laws*, where he suggests that it is not only the climate that inclined northern Europeans to adopt a religion "with no visible leader" and which suited their "spirit of independence," but also their being accustomed to republican government (in the Low Countries at least). We should note that the causal arrow linking religion and the political laws runs in both directions in *The Spirit of the Laws*: in the case of Protestantism, the constitution seems to have imprinted itself on religion, whereas he attributes to the rise of Christianity in Europe a softening of mores

among princes and peoples alike in the Europe, and even changes in political right and the right of nations (24.3.461-62, 23.21.448).

Montesquieu's characterization of northern and southern Europeans inclinations with regard to religion points to a striking disconnect between moral virtues and vices, on the one hand, and virtues and vices in a political sense on the other. This kind of disconnect, he contends, is central to understanding his argument in *The Spirit of the Laws* (xli, 19.11.314). After explaining the counterintuitive implications of Spanish fidelity in banking and Chinese unscrupulousness in the same, Montesquieu devotes a crucial chapter of the crucial Book 19 to clarifying this phenomenon of a "heterogony of ends" between moral and political matters.

I have not said any of this to diminish in any way the infinite distance there is between vices and virtues. God forbid! I have only wanted to make it understood that not all political vices are moral vices and that not all moral vices are political vices, and that those who make laws that run counter to the general spirit should not be ignorant of this (19.11.314).

Just as moral vices might lead fortuitously to happy political outcomes, moral virtues can give rise to regrettable political consequences. The problem with the southern temperament vis avis liberty it makes people too tolerant of authority, too comfortable and content with their lot. Servitude, in turn, corrupts their minds, undermining the sheer physical advantages they have.

While one might doubt the earnestness of Montesquieu's defense of Catholicism against Protestantism, he reiterates in the *Essay on Causes* that the southern temperament does have its virtues, and the northern its vices.

It must be said that timid people, who flee death in order to enjoy real benefits, such as life, tranquility, and pleasure, are born with a brain better tempered than those madmen of the north, who sacrifice their life to a vain glory, that is, who prefer living in the memory of posterity to being alive. But since the good mind of the first by chance produces servitude as a consequence, and since the poor mind of the others produces liberty as a consequence, it happens that slavery debases, depresses, and destroys the mind, while liberty forms, elevates, and fortifies it. The moral cause overcomes the physical one, and Nature is so well deceived that those peoples to which it has given better minds turn out to have worse judgment, while those who have been given worse judgment have better minds (EC, 61-62).⁹⁴

The supreme example of this disconnect between psychological propensities and political upshots involves the bizarre phenomenon of “the English disease,” a profound malaise caused by the climate (EC, 43; 14.12.242). Over the course of just half a page, Montesquieu explains how the same propensities that make the English want to commit suicide also help them to sustain political liberty (14.12-13.242-43; see also EC, 43).

In a nation whose soul is so affected by an illness of climate that it could carry the repugnance for all things to include that of life, one sees that the most suitable government for a people to whom everything can be intolerable would be the one in which they could not be allowed to blame any one person for causing their sorrows, and in which, as laws rather than men would govern, the laws themselves must be overthrown in order to change the state (14.13.242).

The particular climate also makes the English very impatient. Their impatience makes it difficult for the English “to tolerate the same things for long.” In addition, as a cool climate it stimulates the more familiar effect of courage. It is a combination of this uneasiness, impatience, and courage that give the English a uniquely strong spirit of independence. “The characteristic of impatience,” he explains, “is not serious in itself, but it can become so when it is joined to courage.” The mixture of these characteristics makes a people

⁹⁴ See also his praise of the gentleness of south Asians, which he gleans from Francois Bernier’s *Travels in the Mogul Empire*. “The people of the Indies are gentle, tender, and compassionate. Thus, their legislators have put great trust in them. They have established few penalties, and these are not very severe or even strictly executed...They easily give liberty to their slaves; they marry them; they treat them like their children: happy is the climate that gives birth to candor in mores and produces gentleness in laws!” (15.15.245). Here he suggests that there is a kind of political liberty compatible with the general spirit of at least some warm climates. While the spirit of independence seems to be associated with cool climates, that of gentleness certainly is not.

Apt to frustrate the projects of tyranny, which is always slow and weak in its beginnings, just as it is prompt and lively at its end, which shows at first only a hand extended in aid, and later oppresses with an infinity of arms.

Servitude begins with drowsiness. But a people who rest in no situation, who constantly pinch themselves to find the painful spots, could scarcely fall asleep (14.13.243).

Constantly suspecting that the politicians, his fellows, perhaps even his own shadow, are poised to harass him in his already harried condition, he resists first and asks questions later. In envisioning phantom oppressors, he develops the finely-tuned radar to catch genuine threats before they can take hold. This libertarian mentality seems to represent a version of the Gothic spirit of independence. As Montesquieu emphasizes in Book 11, it is a gross error to mistake independence for political liberty. Yet the very errors of the Englishmen among us can support political liberty indirectly, even if in a rather different way than they understand themselves to be defending liberty.

Beyond the sheer discontent associated with this “extreme political liberty,” Montesquieu also indicates that it bears some explicitly political disadvantages (11.6.166). The English, he suggests, tend to lack the characteristics necessary for deliberation and diplomacy. “Politics is a dull rasp which by slowly grinding away gains its end. Now the men of whom we have just spoken could not support the delays, the details and the coolness of negotiations; they would often succeed in them less well than any other nation, and they would lose by their treaties what they had gained by their weapons” (14.13.243). There are tradeoffs, then, between the characteristically southern and northern temperaments.

This weakness in the character of a northern people has a striking counterpart in a quality Montesquieu associates with southern peoples: a speculative bent. If encouraged too much by religion, this quality can exacerbate the indolence that helps facilitate civil servitude. However, we should keep in mind the effects suggested above of having *no*

patience for speculation. Montesquieu finds that the heat exacerbates men's speculative inclinations and fires their imagination. As a consequence, the level of monasticism (*monachisme*) seems to be directly proportional to the warmth of the climate (14.7.237). The "number of dervishes, or monks, seems to increase with the heat of the climate" in both Asia and Europe (14.7.237). This speculative inclination combines with the natural laziness in hot climates to form a major obstacle to civil liberty, because it exacerbates the tendency to scorn labor and to venerate idleness. The physical inclination to rest is fortified by a doctrine of "indifference to worldly things."⁹⁵

Buddhism, what Montesquieu calls the religion of "Foë," exemplifies the spirit of "southern religion" for Montesquieu, promoting passivity and a kind of fatalism as the cosmic ideal.⁹⁶ "In these countries where excessive heat enervates and overwhelms, rest is so delicious and movement so painful that this system of metaphysics appears natural" (14.5.236). As we will see in examining the upshots for legislative prudence of Part 3, one of Montesquieu's greatest criticisms is for legislators and philosophers in hot climates who have encouraged speculative inclinations among peoples already inclined to laziness (14.5-7.236-37, 24.12.467, 24.14.468).

Climate and domestic servitude

While the heat makes southerners submissive to authority and disinclined to laborious tasks, it seems to make them especially active in the erotic realm. "With that delicacy of organs found in hot countries, the soul is sovereignly moved by all that is related to the union of the two sexes; everything leads to this object" (14.2.233). The "Latin lover" born of the

⁹⁵ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 102.

⁹⁶ Foe was the French Jesuit missionaries' transliteration of the Chinese name for the Buddha, which Montesquieu probably culled from their *Lettres édifiantes et curieuses des jésuites de Chine*.

sultry south has a “delicate, weak, but sensitive machine.” He is temperamentally jealous, and vulnerable to the enticements of the seraglio, where love “is constantly aroused and calmed; or else to a love which as it leaves women much more independent is exposed to a thousand troubles” (14.2.234).

The women are bolder still in their pursuit of sensual pleasures and romance in hot climates, where they seem to be constantly in heat, as it were. Drawing on accounts from missionaries and other travelers (and one is tempted to say, Spring Break Cancun promotional materials), he concludes that women’s innate inclination to modesty is overpowered by the erotic sensitivity the environment stimulates in hot climates. “There nature has a strength, and modesty, a weakness, that is incomprehensible. In Patani, women’s lust (*lubricité*) is so great that men are constrained to make a kind of rigging to shield themselves from women’s enterprises” (16.10.271). Such men and women simply cannot be trusted with one another. Knowing this makes jealousy rage all the more fiercely. “It is from this different constitution of the machine that the different force of the passions is born; in a country where love is the greatest interest, jealousy is the greatest passion” (EC, 40; 16.13.273).⁹⁷ In sum, “as you move towards the countries of the south, you will believe you have moved away from morality itself” (14.2.234).

As one heads north, in contrast, men become more and more indifferent to the charms of love and the power of lust. “In northern climates, the physical aspect of love has scarcely enough strength to make itself felt” (14.2.233). The men are drawn as powerfully to other pursuits, and women’s natural modesty is not contradicted by the effects of climate

⁹⁷ See Stark on Montesquieu’s analogizing of men to machines. While this language invites a comparison with Newton, Stark contends that Montesquieu’s use of such mechanistic language was merely figurative. Newtonian language provided a ready medium for modeling his theory. *Montesquieu: Pioneer of the Sociology of Knowledge*, 173.

(14.12.273). Man in the cold countries is “a healthy and well-constituted but heavy machine finds its pleasures in all that can start the spirits in motion again: hunting, travels, war, and wine” (14.2.234).

The effect of the heightened passions and imagination in the hot climates is an increased need for legislators to regulate commerce between the sexes. The subject of polygamy is integral to Montesquieu’s analysis of the geographic range of Christianity and relatedly, to that of domestic servitude, which primarily means the enclosure of women. The strict separation of women from public life, and even from male relatives within the home, is required by polygamy, though it may occur in countries where men have only one wife as well (16.11.272).

In perhaps the most audacious claim of the book, Montesquieu argues that Islam is bound to be more successful in Asia than Christianity, because polygamy is less opposed to nature there on account of the generally hot climate.

The law permitting only one wife has more relation to the physical aspect of the climate of Europe than to the physical aspect of the climate of Asia. It is one of the reasons why Mohammedanism found it so easy to establish itself in Asia and so difficult to spread into Europe, why Christianity has been maintained in Europe and destroyed in Asia, and why, finally, the Mohammedans make so much progress in China and the Christians so little. Human reasons are always subordinate to that supreme cause that does all that it wants and makes use of whatever it wants (16.2.265; 19.18.319, 24.15.492-493, 24.24-26.476-78).

This bold declaration of geographic limits to the spread of Christianity understandably was one of the aspects of the book that the Catholic establishment found most objectionable. Given the context, it is not clear whether Montesquieu means that the “supreme cause” is the sheer accident of climate, or whether he is slyly suggesting that God himself does not intend for Christianity to be the universal religion, and so “makes use” of climate to frustrate man’s taste for “uniformity” (29.18.617). His emphasis on the apparent

geographic specificity of many religious prohibitions and requirements also points in this direction (14.10.238-39).⁹⁸

Montesquieu condemns polygamy in its own right, while explaining how hot climate creates conditions that essentially require it. Polygamy “is not useful to mankind or to either of the sexes, either to the one which abuses or the one abused” (16.6.268). Paternal affection is weakened by having many children through multiple wives. In the case of polyandry, paternal affection is even weaker given the uncertainty of paternity. Moreover, when a man possesses many wives, the temptation to adultery is actually greater, as “thirst increased with the acquisition of treasures” (16.6.268).

Montesquieu does not argue against the enclosure of women in general, though his defense of the easy French commerce between the sexes suggests he favors the latter, attendant indiscretions acknowledged (19.5-6.310-110). On the question of commerce among versus separation between the sexes, Montesquieu’s personal tastes are clear. Nonetheless, his analysis in Book 16 suggests Montesquieu’s overall evaluation of the question of enclosure may be morally relative. “It is climate that should decide these things” (16.11.272).⁹⁹

In part this would seem to be because Montesquieu does not regard the “natural law” of relations between the sexes as a kind of liberty, but more an interdependence.¹⁰⁰ Unlike in

⁹⁸ See also fragment from his *Pensées* marked for use in the *Spirit of the Laws*, which, no doubt prudently, was not ultimately included. “We can consider God as a monarch who has several nations in his empire. They all come to give him their tribute and each speaks its own language.” *Dossier de L’Esprit de Lois*, OC II, 1098-99.

⁹⁹ For a lengthier discussion of Montesquieu’s analysis in Book 16, see Chris Nyland, “Biology and Environment: Montesquieu’s Relativist Analysis of Gender Behavior,” *History of Political Economy* 29, no. 3 (1997), 391-412.

¹⁰⁰ However he does reflect at length on divorce and repudiation as it relates to religious, natural, civil, and political laws (16.15-16.274-76, 26.3.496-97, 26.9.502-03, 26.13.505-06).

the relations among individuals in civil society and between the rulers and the ruled in the political realm, what human nature calls for in the relations between the sexes is modesty (16.12.273, 23.2.428, 26.3.496, 26.8.502, 26.14.506-09) and the shared generation and care of children (16.10.271, 23.2.428, 23.10.433, 23.21.441-43, 26.5-6.498-500). In addition, hot climate more powerfully promotes domestic slavery than either civil or political because it has to do with different natures of men and women. Montesquieu emphasizes modesty in the case of women, who are naturally more dependent in relations between the sexes. Still, he indicates that modesty is natural to humans generally: “it is in the nature of intelligent beings to feel their imperfections; therefore, nature has given us modesty (*pudeur*), that is, shame (*honte*) for our imperfections” (16.12.273).

While there is no reason to doubt the sincerity of Montesquieu’s critique of polygamy, his rationalization of this institution is markedly less pained than that of slavery and despotism. He spends much more time offering a climatic rationalization for domestic slavery than he did for civil slavery (8 chapters versus 1 chapter). Only in the domestic realm does he actively encourage the measures that legislators have taken to reduce liberty (16.12.273). He states quite plainly that hot climate sometimes “requires empire” over women in the form of their enclosure (16.9.270). When the “the physical power” of hot climates inflames lust, it therefore “violates the natural laws of the two sexes and that of intelligent beings” (16.12.273). Thus, Montesquieu recommends that the legislator must favor the “primitive laws” over the “nature of the climate” by artificially encouraging modesty through the enclosure of women. When the force of climate is great, “morality can do practically nothing.” In such situations, there “must be bolts rather than precepts” (16.8.269).

There are also various secondary physical effects of hot climate creating “circumstances that make [polygamy] somewhat tolerable” (16.6.268). His first finding, based upon French histories of the prophet Mohammed and the kingdom of Algeria, is that girls reach sexual maturity earlier in hot climates than in temperate. This leads to a “natural inequality” between the sexes. Girls marry at a younger age, and are in a greater state of dependence in marriage as they have matured sexually before they have matured intellectually. As they marry girls for their beauty in the hot climates, they naturally seek additional wives as the girl begins to age. Moreover, Montesquieu suggests that it costs less to provide for a wife’s subsistence in hot climates, which makes it feasible for a man of ordinary means to support many wives (16.3.266).

In temperate climates, in contrast, women mature sexually at a later age. Men and women are closer in age and therefore intellectual development when they marry. In this way, “a kind of equality between the sexes has been introduced, and consequently the law permitting only a single wife.” The latter, he explains, “has more relation to the physical aspect of the climate of Europe than to the physical aspect of the climate of Asia,” to which he adds the unfortunate corollary about the better prospects for Islam than Christianity in Asia (16.2.265).

Another reason that women in hot climates find themselves in an unequal relationship with men points more directly to polygamy. Drawing on English medical studies and travel accounts from Asia and Africa, he theorizes that a higher proportion of girls than boys are

born in the tropics.¹⁰¹ He suggests that ratios are unlikely to be so different as to compel the introduction of polygamy (notwithstanding the curious reports of ten women for every one man in Bantam), but that the slightly higher number of girls in the tropics, and of boys in cold countries, “means only that having many wives or even many husbands is not as far from nature in certain countries as in others” (16.5.267; 23.12.434).¹⁰²

With regard to polygamy, Montesquieu claims, “I do not justify usages, but I give the reason for them” (16.5.267). On the basic issue of separating the sexes, however, Montesquieu readily recommends the practice if the climate causes men and especially women to forget their natural modesty. “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 climate and reestablish the primitive laws” (16.12.273).

Polygamy itself, independent of climate, exacerbates the need to separate and enclose the many wives: “domestic order requires it to be so; an insolvent debtor seeks to hide from the pursuit of his creditors” (16.8.269). In addition, the establishment of women’s quarters within the home helps to unify the family, with its multiple focal points in the succession of wives.

¹⁰¹ Recent research indicates that the ratio of births of girls to boys is slightly higher in the tropics than in the temperate and cooler regions. Kristen Navara, “Humans at tropical latitudes produce more females,” *Biology Letters* 5, 524-27. doi: 10.1098/rsbl.2009.0069 In general, slightly more boys than girls born around the world. Boys, however, have slightly lower rates of childhood survival, meaning that the ratio of young men and women turns out to be 50-50—or at least it does if sex-selected abortion, infanticide, and neglect of girl children were not the practice in many countries.

¹⁰² In what is probably the most mistaken theory of the book (but which compensates for its inaccuracy with its entertainment value), Montesquieu suggests that the combination of a high ratio of women to men and an extremely large number of children in seaports might occur because “the oily parts of fish can supply the matter that serves for procreation” (23.13.435).

The *Persian Letters* makes plain the cruelty to women and the corruption of both sexes (not to mention the “third sex” of the eunuchs who guard the harem) that polygamy generates, as well as the symbiosis between domestic and political servitude.¹⁰³ In *The Spirit of the Laws*, however, Montesquieu seems concerned primarily with the latter. Domestic slavery bears more systemic implications than civil slavery, because it colors relations *within* the family of citizens or subjects, that first and most powerful source of one’s education. Slaves, in contrast, are excluded from the body of the citizenry itself. The dynamics of civil slavery can be kept at least at some distance from the citizenry as such.

Thus, domestic slavery brings despotism in its wake with greater regularity than does civil slavery (16.9.290, 19.15.316, 24.3.461).¹⁰⁴ In countries where some combination of climate and religion make marriages monogamous, even for the princes, they “are less confined, less separated from their subjects, and consequently more human; they are more disposed to give laws to themselves and more capable of felling that they cannot do everything” (24.3.461).

Conclusion

While focusing on the “vices of climate” in the south, even in *The Spirit of the Laws* Montesquieu notes the positive aspects of the southern mentality with regard to liberty. In hot, fertile locales, “the fertility of a country gives, along with ease, softness and certain love

¹⁰³ On this theme, see Diana Schaub, *Erotic Liberalism: Women and Revolution in Montesquieu’s “Persian Letters”* (Lanham, MD: Rowman & Littlefield Publishers, 1995).

¹⁰⁴ Pangle, *Montesquieu’s Philosophy of Liberalism*, 173; Rahe, *Montesquieu and the Logic of Liberty*, 158-62.

for the preservation of life” (18.4.287).¹⁰⁵ In the southern climes, a contentment that seems related to “opinion of one’s security” that constitutes liberty of the citizen comes to people more naturally. The English may enjoy an extreme liberty (11.6.166), but “they kill themselves in the very midst of their happiness” (14.12.241). The French, a consummate mix of northern and southern it would seem, are spirited enough to defend their liberty, but ultimately “love nothing so much as their gaiety.” They often win battles, but even when they don’t “are consoled for the loss of a battle by singing of their general.” They are capable of being a powerful nation, but will never have the heart to dominate all of Europe (9.7.136).¹⁰⁶

Moreover, while Montesquieu highlights the northern origins of European liberty, he nonetheless commends the softening of Germanic mores and manners, which has to do in part with the introduction of a southern religion—albeit one that eventually had to undergo a “northern reform.” We should also recall from Chapter 9 the “harshness of the conqueror” that Montesquieu associates with the Germanic peoples. They may have had a spirit of independence that served well the cause of civil and political liberty, but the other side of the Germanic coin is the “indomitable humor” of the Saxons, which resists for the sake of resistance (28.1.534). A slight variation on the Germanic spirit was that of the Visigothic, which regrettably married the northern harshness with the southern indolence and violent imagination.

Even with the “good Goths,” the Franks, their reliance on pecuniary penalties as criminal punishments had nothing to do with gentleness, but rather a barbaric martial honor.

¹⁰⁵ As Pangle puts it, “the soft inhabitants of the fertile lands lacked the courage necessary to defend themselves, [but] they better understood the reason for such protection,” *Montesquieu’s Philosophy of Liberalism*, 181. He concludes that Montesquieu’s mix of northern and southern qualities is still weighted towards northern industriousness and independence (Ibid., 182-83).

¹⁰⁶ The controversy over Louis XIV’s quest for a universal monarchy is a recurring subject for Montesquieu. See especially *Réflexiones sur la Monarchie Universelle*, OC II, 18-38.

A gentle spirit, as distinguished from laws with gentle effects, is characteristic of southern people, and particularly of south Asians it would seem (14.15.244-45). In a fragment collected in the *Pensées*, Montesquieu depicts the typology of hot and cold temperaments in particularly stark terms—though he also suggests that the pronounced contrast between northern and southern has been softened by commerce and mixture over time: “There are only two sorts of peoples: rough and ferocious peoples and peoples softened by the heat.”¹⁰⁷

With his defense of the French *joie de vivre* (see especially 19.5-6.310-11), his praise of the softening impact of an originally southern religion, and his clear-eyed portrayal of the brutality accompanying northern spiritedness, Montesquieu suggests that what really serves the cause of liberty is some combination of southern and northern moral qualities, of the spirit of gentleness and repose, and the spirit of independence.¹⁰⁸ His emphasis on industriousness—a trait he associates with marginal terrains as much as northern climate—is directed towards European monarchies as well as despotic countries in other parts of the world. His emphasis on the vices of hot climate in *The Spirit of the Laws*, then, would seem to reflect, at least to some extent, a rhetorical or pedagogical purpose.

One commentator suggests that the categories of north and south, hot and cold climates, though he means them to refer to reality to some extent, go beyond mere empirical description. Not unlike the ideal types of democracy, monarchy, and despotism that he lays out in Part 1, the characteristically northern and southern temperaments are logical extrapolation from real phenomena that become abstract models of human types and political

¹⁰⁷ *Pensées* #769, in *OC I*, 1212.

¹⁰⁸ Pangle comes to a similar conclusion: “It is true that this proud and warlike spirit [of the Germanic barbarians] appears to be necessary in some measure as a precondition for any liberty... Yet while the soft inhabitants of fertile lands lacked the courage necessary to protect themselves, they better understood the reason for such protection... Rational political liberty requires some combination of the opposed spirits of these two kinds of peoples.” *Montesquieu’s Philosophy of Liberalism*, 181.

tendencies. In this view, these geographic classes are in some sense meant to serve the pedagogical purpose of highlighting those qualities that are most dangerous to modern liberty, as well as those that should be cultivated in support of that liberty.¹⁰⁹ To the extent that this is true, Montesquieu is not “essentializing” particular peoples, but rather giving a particular face to broadly human characteristics.

As I will clarify in the next section on climate and civil slavery, Montesquieu’s critique of southern indolence and other vices markedly contrasts with 19th and 20th century racially-based theories to which it may at first glance seem to resemble. To compare these theories, it would be necessary to clarify just how rapidly Montesquieu thinks that psychology changes upon shifting climes, and when the laws would and should follow. How long would it take northern migrants to hot regions to succumb to the vices of hot climate, or the southern transplants to the north to strengthen their fibers and become courageous? Why don’t residents of the temperate zone become Montesquieuian southerners during the summer? Must the men of Marseilles, like those of Patani, India, contend with the fervent advances of the local women when the mercury climbs high in August? (16.10.271)

He sometimes suggests the transition would be rather quick, and other times slow. The case of the temperate climes, which would shed light on how Montesquieu understands these changes proceeding, receives very little attention in Part 3. Montesquieu says only that “the climate is not sufficiently settled to fix them.” There “you will see peoples whose manners, and even their vices and virtues are inconstant” (14.2.234).

According to Montesquieu’s conclusions from his experiment with the sheep’s tongue, the body’s sensitivity changes almost immediately in response to temperature

¹⁰⁹ C.P. Courtney, “Montesquieu and Natural Law,” 56.

fluctuations. In his hypothetical example of a man placed in a hot, enclosed space, laziness and cowardice seem to set in almost immediately (14.2.232-3). However, with the Englishmen who governed India, he explains that it was only their children, born and raised in the hot climate, who became cowardly (14.3.234). Discussing the Portuguese conquest of Goa, on the west coast of India, he suggests that the conversion, at least to the virtues born of hot climates, takes even longer. The native Canarins were sharper intellectually than their Portuguese rulers, much to the indignation of the latter, who did everything they could to try to weaken them through servitude.¹¹⁰ “From this we can conclude two things,” Montesquieu explains: “the first is that climate contributes very much to modifying the mind; the other, that the effect is not instant, and that it takes a long succession of generations in order to produce—for the Portuguese, since the conquest, are still about the same as they were” (EC,42).

While I have emphasized that Montesquieu’s argument is based on environmental and not racial or genetic causality, the line becomes ambiguous with this last example, though with “anti-colonial” twist it would seem. Following on the question of the pace of temperamental changes is how quickly the social and political upshots should follow. The Visigoths required new laws when they moved from the forests of Germany onto the hot Spanish plateaus (with a few stops in between), but only over the course of generations. He contrasts Visigothic sumptuary laws with those of their Germanic cousins and ancestors.

¹¹⁰ Barrera notes that Montesquieu had copied in his *Geographica* II an observation from the French diplomat, Simon de la Loubère making a point about the Portuguese in India similar to the above about the English: “every many born in the Indies, albeit of European parents, is also without courage; the Portuguese are a good example.” *Essai sur les causes*, 234n59.

Our fathers, the ancient Germans, lived in a climate where the passions were calm. Their laws found in things only what they saw, and they imagined nothing more. And just as these laws judged insults to men by the size of the wounds, they put no greater refinement in the offenses to women (14.14.243).
 He goes on to describe a law of the Alemanni that promoted female modesty by penalizing immodest exposure in direct proportion to the size of the area revealed. “The law did not punish the crime of the imagination, it punished that of the eyes.” Yet in the hot countries, male jealousy seems to grow exponentially as skirts are shortened arithmetically. The Visigoths lost their cool—or their cool Germanic temperament at least—and took on that of their new environment. Thus,

When a Germanic nation moved to Spain, the climate required quite different laws. The laws of the Visigoths prohibited doctors from bleeding a freeborn woman except in the presence of her father or mother, her brother, her son, or her uncle. The imagination of the peoples was fired, that of the legislator was likewise ignited; the law suspected everything in a people capable of suspecting everything (14.14.243).
 Because of their wild sexual passions, easily inflamed jealousy, and the other physical consequences of the climate, the peoples in these countries would lack any semblance of social order and domestic harmony unless their mores, manners, and laws provided for complete separation of the sexes—generally effected by the enclosure of women (16.8.269).

How quickly the effects of climate become a people’s “second nature” will be a significant factor affecting the prospects for liberty for Montesquieu’s discussion of climate and slavery, the subject of the next section.

Chapter 17: Montesquieu's case against slavery and the "natural reason" for it

Book 15 constitutes a dramatic climax to many of the key themes of *The Spirit of the Laws* that I have been tracing. Here he puts a fine point on nature's conflicting messages vis à vis liberty, and on the tension between the power of circumstances and our capacity to shape social and political outcomes. In other words, this book makes us confront, more explicitly than any other in the work, the question of nature's status as a standard in *The Spirit of the Laws*, as well as the perennial questions of the work's suspected determinism and relativism. All of these controversies point us to the question of what one who wants to guide a community towards greater political liberty can do, and should do.

The book highlights these tensions because it is here that Montesquieu offers his boldest denunciations of slavery, servitude in the civil realm. According to a number of commentators, Montesquieu's critique of slavery was pioneering in its forthrightness, comprehensiveness, and influence.¹¹¹ Yet just after disputing a series of common justifications for slavery, he proposes what he calls a "natural reason" for it in hot climates. At the same time that slavery contradicts human nature in many respects, hot climate and its impact on human nature seems to support it.

After tracing Montesquieu's critique of slavery in its ancient and modern incarnations, I will explain the two exceptions he makes, which link up with what he identifies as the two most powerful influences on the *esprit général*: the form of government and the physical environment. Under despotism, slavery may be justified because it puts a

¹¹¹ According to Rahe, Montesquieu was first among "intellectuals of the very first rank" to denounce slavery. *Montesquieu's Logic of Liberty*, 57. Fletcher shows how Blackstone and many other 18th century British liberals copied and/or paraphrased Montesquieu's arguments in Book 15 in their own critiques of slavery. Frank Fletcher, "Montesquieu's Influence on Anti-Slavery Opinion in England," *The Journal of Negro History* 18, no. 4 (1933): 414-25.

man in no worse condition than the average subject, and perhaps even better. The second exception of climate Montesquieu calls a “natural reason” rather than a justification. To help explain Montesquieu’s distinction between a natural reason versus a justification for slavery, I will draw on Tocqueville’s discussion of slavery in Jacksonian America.

Montesquieu’s judgment of slavery, I will clarify, is indeed universally binding. However, his climatic exception raises serious questions about the ultimate foundation for human liberty. His critique of slavery in general suggests the need for a transcendent foundation for human equality as well.

In this book, the contrast between Montesquieu’s various approaches to political science also is especially pointed. He wields distinct approaches to political analysis in order to treat comprehensively the practice of slavery across time and space. His critique of slavery in this book is much more theoretical than is typical in the rest of the work (excepting Book 1). Still, he argues on numerous foundations, from virtue to natural law to economic utility; even at his most theoretical, Montesquieu is rather practical, working to cover all of his bases.

While he does not broach the influence of climate until seven chapters into Book 15, and then only in two chapters (7 and 8), Montesquieu’s understanding of and recommendations regarding slavery still are powerfully informed by the most innovative aspect of his political science—his climatic psychology. His favored approach of analyzing historical examples and the contradictions they reflect also figures prominently in Book 15. We will see that Montesquieu also relies in this book on his fine sarcastic wit to help make his point as well (15.3-5.248-50).

The critique of slavery

Montesquieu defines slavery as “the establishment of a right which makes one man so much the owner of another man that he is the absolute master of his life and of his goods” (15.1.246). Strictly speaking then, slavery is an arbitrary power of one man over another, though as Schaub notes, Montesquieu also includes more limited forms of servitude under the umbrella of slavery.¹¹² He begins by addressing common claims to a right of slavery from both the ancient and modern worlds, which he disputes on a variety of bases. Over the course of the book, he challenges slavery in the name of the virtue of both master and slave (15.1.246), the nature of both monarchic and republican constitutions (15.1-2.246-47; 15.13.256), the widely observed right of nations (15.2.247), the logic of civil laws (15.2.247-48), the nature of human relations (15.2.248), humans’ inborn constitution (15.7.252, 17.5.283), economic utility (15.8.252), and Christianity (15.5.250, 15.7.252).

Starting with his obscure assertion that slavery “is not good by its nature,” Montesquieu outlines his case against slavery in unusually universal and comprehensive terms. Slavery, he contends, “is useful neither to the slave nor to the master” (15.1.246). In this context, Montesquieu is referring to utility in a very loose sense—of usefulness to the cultivation of one’s moral character. The institution of slavery makes the slave incapable of doing anything for reasons other than coercion, and thus not on account of virtue or even honor. Slavery also corrupts the master “because he contracts all sorts of bad habits from his slaves, because he imperceptibly grows accustomed to failing in all the moral virtues, because he grows proud, curt, harsh, angry, voluptuous, and cruel” (15.1.246). In Chapter 9, Montesquieu does argue in terms of utility in the narrow sense, conceding that slavery could

¹¹² Diana Schaub, “Montesquieu on Slavery,” *Perspectives on Political Science* 34, no. 2 (2005): 70-78.

be considered “useful to the small, rich, and voluptuous part of each nation.” It is more obvious, of course, that slavery is not useful to the one who is enslaved. The utility of slavery from the master’s point of view, however, is only to “luxury and voluptuousness” rather than to “public felicity” (15.9.253).

Slavery’s utility may be only to the frivolity of the master, but the sticking point of Montesquieu’s critique in this chapter is that slavery must serve the “the desires of all” involved in order to become “legitimate” (15.9.253). If slavery offends because it does not factor in the interests and desires of all, then Montesquieu’s argument would seem to hinge on the view that humans are by nature equal, at least at a basic level, such that each merits some say in what constitutes the public felicity. While many of his democratic readers have been wary of Montesquieu’s comfort with monarchic and aristocratic nobility, he in fact does affirm humans’ inborn equality in Books 15 and 17.¹¹³ “As nature has made them equal, reason can make them dependent only for the sake of their happiness” (17.5. 283; 15.7.272).¹¹⁴

In addition to the theoretical arguments, in Book 15, Chapter 2, Montesquieu confronts a number of legal justifications for a right of slavery in the *Corpus Juris Civilis*, or Justinian code, of the 6th century Eastern Roman empire, which reflect the three most common modes to slavery in Rome: the enslavement of prisoners of war, insolvent debtors’ “selling themselves” to their creditors, and fathers selling their children into slavery. The first

¹¹³ For example, Thomas Jefferson, responded to news of a speech critical of Montesquieu, “I am glad to hear of everything that reduces that author to his just level, as his predilection for monarchy, and the English monarchy in particular, has done mischief everywhere, and here also to a certain degree,” “Letter to William Duane,” September 16, 1810, in *The Writings of Thomas Jefferson*, ed. H.A. Washington (New York: J. C. Riker, 1853-55), Vol. 5, 535.

¹¹⁴ On early modern political philosophers’ evaluation of these claims to slavery, see Mark Waddicor, *Montesquieu and the Philosophy of Natural Law*, 152-59.

follows from the Romans' right of nations, and the second from their civil right, both of which he suggests internally contradict themselves on the matter of slavery. The third supposed claim is weakened if the first two do not hold, and depends upon a claim to benefit the enslaved that he suggests can be persuasive only to the masters.

The largest number of Roman slaves came into their condition by being taken as prisoners of war. The Justinian code (as well as canonical law for many centuries subsequently) allowed prisoners of war to be enslaved on the idea that, since they could only have been killed instead, enslaving them represented a kind of mercy. Dubious of the suggestion that "pity established slavery," Montesquieu reasons that one must not have been in the heat in battle if one was in a position to take a man as a prisoner (15.2.247; 10.3.139-42). Therefore, it could not have been necessary to kill him in such circumstances. Furthermore, as "murdering in cold blood by soldiers after the heat of the action is condemned by all the nations of the world," such men would not necessarily have been killed otherwise, though he allows that nations routinely imprison their enemies during ongoing conflicts. This right of nations is not universally binding, Montesquieu concedes. He helpfully suggests that a nation might align itself instead with the norms of "those who eat their prisoners" (15.2.247n2).

The Justinian code also permitted citizens to "sell themselves," and/or their children, to their creditors to settle unmanageable debts. The very notion of contracting away one's entire life and possessions is logically impossible, Montesquieu contends, because whatever a man receives in exchange for selling himself into slavery would become the possession of his master; this would be a contract in which one sides gives everything and other receives everything, and so not a contract at all. Moreover, a primary function of the civil laws in any

society, and particularly in the well-developed Roman civil code, is to provide citizens with compensation for injuries done to them by fellow citizens. There is no way, Montesquieu reasons, that laws can compensate “for an agreement that contains the most enormous of all injuries” (15.2.248). In addition to confounding the logic of civil laws, slavery runs counter to republican constitutional principles, where “the liberty of each citizen is a part of the public liberty” (15.2.247; 15.13.256).¹¹⁵

If one accepts his argument that an individual cannot sell himself into slavery, then “even less can he sell a man who has not been born” (15.2.248). He contrasts this practice with that of punishing a criminal with death. The difference is that

The law punishing [the criminal] was made in his favor. A murderer...has enjoyed the law that condemns him; it has preserved his life at every moment; therefore, he cannot make a claim against it. It is not the same with the slave; the law of slavery has never been useful to him; it is against him in every case, without ever being for him, which is contrary to the fundamental principle of all societies (15.2.248).¹¹⁶

The nature of relations among men calls for them to be bound to one another only for the sake of their mutual benefit (15.2-5.247-250, 15.9.253).

A master cannot be said to benefit his slave simply by feeding him, because all but the youngest children could obtain their sustenance at least as well if they lacked a master, and the former are sustained by their mothers. While there may be a few adult incapable of caring for themselves, Montesquieu finds this point rather disingenuous, because such people are never the ones sought out as slaves. Rather, it is those most capable who are prized as

¹¹⁵ However, while Montesquieu contends that slavery defies the logic of civil laws as such, which assume equality before the laws, he suggests that institution of slavery should be understood as outside the realm of civil law; it removes the enslaved from the laws of civil society and places him in the realm of family or domestic laws, which comprehends the “law of the master” quite well (15.2.248).

¹¹⁶ A major avenue to slavery in medieval Christendom was as a punishment for the crimes of selling Christians into slavery, or of cooperating with the Saracens (i.e. the Moors). John Noonan, Jr. *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* (South Bend, IN: University of Notre Dame Press, 2005). See also Avery Cardinal Dulles, “Development or Reversal? Review of *A Church That Can and Cannot Change*,” *First Things* 156 (October 2005): 53-61.

slaves. The idea that a master is satisfying the demands of natural right by holding men in bondage, then, serves only to bring a deceptive self-satisfaction to the master (15.2.248).

Montesquieu's theoretical arguments against slavery in this first half of Book 15, in sum, are that slavery corrupts master and slave alike, and that it contradicts the natural law of human relations by constraining them against their interests and their happiness. This latter criticism also seems to assume a basic equality among individuals—and one wherein everyone is not just equally worthless, as in despotism, but equal in a basic level of honor.¹¹⁷ In taking what is an unusual step for the work as a whole, Montesquieu also criticizes slavery with reference to human nature in the abstract. He affirms the crucial precept of modern natural law, which is that “slavery is against nature,” because “all men are born equal” (15.7.252; see also 15.1.246, 15.2.248, 17.5.283).

Montesquieu then turns to modern European slavery. In the context of Christianity, the Spanish conquistadors and other European conquerors had to carve out exceptions to the “brotherhood of men” in order to legitimize enslaving natives Africans and Americans. Montesquieu mocks the rationales that they were compelled to muster in order to reintroduce a practice that had largely been eliminated in Europe in the Middle Ages. The Spaniards claimed that the Americans merited slavery as a punishment for their crimes. He exposes their professed right to enslavement as little more than a disdain for morally irrelevant cultural differences, “the scorn that one nation conceives for another, founded on the

¹¹⁷ In monarchy and aristocracy, individuals in some ranks clearly have more honor than those in others, but everyone's life and liberty is still worth something. “In moderate states where the head of even the lowest citizen is esteemed, his honor and goods are removed from him only after long examination; he is deprived of his life only when the homeland itself attacks it; and when the homeland attacks his life, it gives him every possible means of defending it.” The subjects under despotism are also equal, but in the sense of being more or less equally subjugated and worthless (6.2.75).

difference in customs.” For example, “they smoked tobacco...and did not cut their beards in the Spanish fashion” (15.3.248).

Similarly, Montesquieu wryly undermines the case for slavery based on the prejudice of race. Chapter 5 must be quoted at length in order to give a taste of his utter contempt for racially-based justifications for slavery, as well as his reliance on acerbic wit to address claims that are based so purely on bigotry, that they cannot be rationally disputed.¹¹⁸ As with the case of his attempt to confront the spirit of the Inquisition, “when it is a question of proving such clear things, one is sure not to convince” (25.13.490).

If I had to defend the right we had of making Negroes slaves, here is what I would say:

The peoples of Europe, having exterminated those of America, had to make slaves of those of Africa in order to use them to clear so much land...

Those concerned are black from head to toe, and they have such flat noses that it is almost impossible to feel sorry for them.

One cannot get into one’s mind that god, who is a very wise being, should have put a soul, above all a good soul, in a body that was entirely black.

It is so natural to think that color constitutes the essence of humanity that the peoples of Asia who make eunuchs continue to deprive blacks of their likeness to us in a more distinctive way.

One can judge the color of the skin by the color of the hair, which, among the Egyptians, who are the best philosophers in the world, was of such great consequence that they had all the red-haired men who fell into their hands put to death...

It is impossible for us to assume that these people are men because if we assumed they were men one would begin to believe that we ourselves were not Christians (15.5.250).

With this last barb, Montesquieu speaks to the major contradiction in European slavery: its incongruity with the peoples’ professed religion (15.7-8.252). While early church fathers and medieval popes long approved of “just forms” of slavery—such as for those duly convicted of crimes or who sold themselves into slavery—the latter frequently criticized the transatlantic slave trade and the enslavement of natives who had not explicitly committed

¹¹⁸ On Montesquieu’s mocking mode of attack on racially-based slavery, see Schaub, “Montesquieu on Slavery,” 73-74, and Fletcher, “Montesquieu’s Influence on Anti-Slavery Opinion in England,” 415-16.

crimes.¹¹⁹ The Spanish and Portuguese above all promoted themselves as Christian conquerors. “These brigands,” he mocks, “who absolutely wanted to be both brigands and Christians, were very devout” (15.4.249). They had the audacity to enslave Native Americans and Africans in the name of converting them to a religion based on the equality of humans before God. Montesquieu’s critique of slavery, then, again seems to come back to the premise of human equality.

The “just origin” of the right of slavery

Montesquieu’s critique of ancient and modern claims to slavery points to specific (if narrow) conditions under which the practice might be legitimate. With Chapter 6, “It is time to seek the true origin of the right of slavery. It should be founded on the nature of things; let us see if there are cases where it does derive from it” (15.6.251). A “true origin of the right of slavery” cannot be a matter of dubious claims to fellow-feeling, or a punitive spirit that amounts to mere prejudice. Instead, it would have to “be founded on the nature of things” (15.6.251). Thus, Montesquieu suggests that being in accord with nature is at least a necessary, if not a sufficient condition for making slavery just.

However, as emphasized throughout this dissertation, “nature” for Montesquieu does not constitute a monolithic standard. His natural standards, at least conceptually, are multiple and sometimes divergent. The “nature of things” which Montesquieu often cites in *The Spirit of the Laws* refers not only to humans’ inborn constitution, but also to the nature of human society and to that of nature of the non-human environment. The “thing” whose

¹¹⁹ For an account emphasizing the Catholic Church’s approval of and participation in at least some forms of slavery, see John Noonan, Jr. *A Church That Can and Cannot Change*, 17-126. Cf. Avery Cardinal Dulles, “Development or Reversal?” 53-61

nature seems to matter most in Book 15, Chapter 6, is not climate, nor is it man in the sense of his natural equality to his fellows. Rather, Montesquieu is primarily concerned here with the nature of relations among men. Indeed, his discussion of “natural laws” generally refers to “relations” among things and/or men (1.1.3-5).¹²⁰ Slavery’s primary affront to nature is that it contradicts something like a natural law or a precept of natural right, which is that men only bind themselves to others because it serves their mutual “utility,” in both the narrow and broad sense (15.1.246, 15.2.248, 15.6.251, 15.9.253, 15.12.255).

The “just origin” of the right of slavery, then, is the situation where becoming the slave of another would actually benefit him. In his refutation of the Roman jurists’ justifications for slavery, Montesquieu claims to have shown that in all cases, their usages of slavery did not in fact serve the utility of the enslaved (15.2.247-8). Thus, Montesquieu affirms the Romans’ implicit view of a natural justification for slavery, though he criticizes them for misapplying it. If the chains of servitude actually are forged for mutual benefit, only then does slavery accord with what is naturally right for human society.

Montesquieu in fact does identify circumstances in which slavery is rooted in a “just origin.” In a political climate of despotism, “civil slavery is more bearable” (15.1.246, 15.7.251). When everyone is effectively a slave to the despot’s whims, civil servitude becomes a matter of indifference. For a man to have “his sustenance and his life” under despotism is the most for which anyone can hope. “Thus, the condition of the slave is scarcely more burdensome than the condition of the subject” (15.1.246). Whereas the political liberty available to the average citizen in moderate governments only serves to

¹²⁰ Laws in the broadest sense, “are the necessary relations deriving from the nature of things” (1.1.3). Men are governed by “natural laws because they are united by feeling” (1.1.5). Natural rules in general are “consistently established relations” (1.1.4). Shackleton, *Montesquieu: A Critical Biography*, 244-53. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 36.

exacerbate the slave's sense of his plight, under despotism "political slavery more or less annihilates civil liberty" even for those not explicitly enslaved (15.6.251; 15.13.256). Just as the "liberty of the man brought with it the liberty of the citizen" among the extremely independent Germanic tribes, here the servitude of the citizen (or rather the subject) brings with it the servitude of man (18.14.292).

"Herein lies the just origin, the one conforming to reason, of the very gentle right of slavery that one sees in some countries...it is founded on the free choice of a master, a choice a man makes for his own utility" (15.6.251). Montesquieu cites the Muscovites and residents of Achim as his examples. It is easy for the former to sell themselves "because their liberty is worth nothing" (15.6.251). In the latter, "the freemen, who are too weak to oppose the government, seek to become the slaves of those who tyrannize the government" (15.6.251).¹²¹ Beyond diminishing its burdens, despotism may actually make slavery a matter of *advantage*, if a man can bond himself to a particularly powerful, well-connected master. In this way, the doubly enslaved man finds that civil chains loosen his political ones, and slavery comes into accord with his better interest.

Given the overarching condition of servitude in despotism, what then makes anyone fit to crack the whip rather be on the receiving end? The master's distinction from the slave under such circumstances can only be a matter of the unvarnished "right of the stronger." In this situation, however, there is not an insistence upon disguising the crude basis of slavery, as would seem to be the case with the Roman jurists' claims to a legitimate rights to slavery.

¹²¹ It is worth noting the correspondence of this exception in Book 15 to his account in Book 31 of the way freeholders voluntarily subjected their lands to the rules of vassalage during the civil wars among Charlemagne's grandsons (31.8.682-684, 31.24.706-709). See Chapter 10 of this dissertation.

A “natural reason” for slavery

Montesquieu gives his chapter on climate in Book 15 (Ch. 7) the same title as two others in the book, both of which considered justifications for slavery that he found lacking. Hot climate, however, is not simply “another origin of the right of slavery” for Montesquieu. While it may oppose the nature of man and that of human society, under certain conditions slavery is not justified, but “may be founded on a natural reason (*raison naturelle*)” (15.7.252). Montesquieu does not say that slavery accords with *human* nature in hot climates. Given the multifold implications of nature’s influence, “natural” is by no means synonymous with *necessary* in Montesquieu’s usage. Nevertheless, he speaks of this case as one of “natural slavery” (15.8.252; see also 5.14.63).

Montesquieu observes an entrenched servitude in hot countries, though as Schaub notes, he does not identify any of these countries by name in Book 15.¹²² In hot climates, slavery runs “less counter to reason” than does servitude in the cold and temperate climates. “Heat... weakens the courage so much that men come to perform an arduous duty only from fear of chastisement” (15.7.251).¹²³ Their “laziness of spirit” makes them bear servitude more readily, because it “will be less intolerable than the strength of spirit necessary to guide one’s own conduct” (14.2.234).

While discussing a reason for slavery based on non-human nature in this chapter, Montesquieu challenges Aristotle’s notion of “slaves by nature” (*esclaves par nature*), that is, natural-born slaves. “What he says scarcely proves it,” Montesquieu asserts, without

¹²² Schaub, “Montesquieu on Slavery,” 75.

¹²³ For a detailed discussion of this paragraph, see Aron, “Montesquieu,” 39-40.

elaborating.¹²⁴ Yet he immediately adds, “if there are any such [slaves by nature], they are those whom I have just mentioned;” they are those long and relaxed-fibered cowards forged in the hot climates (15.7.252).

In a passage that highlights the delicacy of his argument, Montesquieu qualifies his suggestion that the men of hot countries are nature’s slaves,: “As all men are born equal, one must say that slavery is against nature, although in certain countries it may be founded on a natural reason, and these countries must be distinguished from those in which even natural reasons reject it, as in the countries of Europe” (15.7.252; 15.8.252). Thus, his proposal of a climatic rationale for slavery becomes the occasion to bolster the case *against* it in Europe.¹²⁵

Montesquieu comes very close to suggesting that servitude is required in the hot countries. As Rahe puts it, Montesquieu “did everything he could to convey his distaste and to persuade his readers that slavery is not only unjust but contrary to the interests of masters and slaves alike and quite likely to corrupt both.” Yet he nonetheless has a “willingness to contemplate the possibility that slavery may also be a necessity in the tropics.”¹²⁶ He suggests that climate writes its own natural laws, and to a great degree rewrites human nature or even participates in defining it. Given how profoundly human nature is shaped by climate in Montesquieu’s account, the inhabitants of hot countries seem to require the bonds of servitude in order to enjoy any semblance of public tranquility. “Laziness there will be happiness” (14.2.234). Montesquieu’s natural slaves, in one aspect at least, are rather similar to Aristotle’s natural-born slaves, beasts in human form, incapable of ruling or being ruled except by force.

¹²⁴ He cites the Aristotle’s *Politics*, Book 1, Chapter 1 (1254a17-1255a2).

¹²⁵ Pangle, *Montesquieu’s Philosophy of Liberalism*, 172. See also Schaub, “Montesquieu on Slavery,” 75.

¹²⁶ Rahe, *Montesquieu and the Logic of Liberty*, 157-58.

There must be two major qualifications to this comparison, however. For one, Montesquieu does not see such slavishness as inhering in any type of individual or physical class of people. At the very least, there is always the possibility that a change of physical environment could rehabilitate this tendency. The southern disposition is not a *predisposition*. Relatedly, the effects he attributes to hot climate would affect both master and slave similarly. The former would be “as cowardly before his prince as his slave is before him” (15.7.251). With his adamant opposition to racially, culturally, and religiously-based slavery, the only comprehensible basis for determining who is master and who is slave in such climes would seem be the “right of the stronger.” Given the tendency towards despotism in hot climates, and the symbiosis between civil and political servitude, the climatic reason for servitude is difficult to separate from the “just origin,” at least in practice.

Another way in which these geographic trends in servitude do not amount to an inescapable hierarchy is via the possible reforms that could be undertaken in the hot climates themselves. Enervating though the heat may be, Montesquieu suggests that even in the hot countries, the economy could be run on free labor by employing some combination of labor incentives, technical aids, and development of new economic sectors. He notes the way that such tools have facilitated a transition from forced to free labor in the mines of temperate climes, such as Hungary, where this formerly was considered impossible (15.8.253). “I do not know if my spirit (*esprit*) or my heart (*cœur*) dictates this point. Perhaps there is not a climate on earth where one could not engage freemen to work” (15.8.253). Thus, Montesquieu explores the possibility that hot climate is at least insufficient for making men ripe for enslavement. He acknowledges the difficulty of judging just which way the causal arrow runs in cases of servitude; “Because the laws were badly made, lazy men appeared;

because these men were lazy, they were enslaved.” In this vein, he promotes throughout Part 3 various measures short of the chains of servitude that combat the “vices of climate” in hot countries—as well as examples of measures exacerbating these vices—which I will elaborate in Chapter 19 (14.3.235, 14.5-9.236-38, 15.8.252-53, 18.6-7.288-89, 19.9-11.312-14).

A more serious question raised by Montesquieu’s climatic exception is the ultimate foundation for human liberty, and for his assertion of human equality. On what basis can we insist that humans are “born equal” if this fact is made manifest only in certain climates? If our very moral fiber is shaped by climate, then why shouldn’t we consider human nature as, practically speaking, one thing in cold and temperate climates and another in hot climates? Indeed, the line between human nature and the nature of the climate is often blurred in these books on servitude. Montesquieu occasionally refers to the effects of climate as human nature itself. He states in Book 14, for example, that “Indians are by nature without courage” (14.3.234). This raises the possibility that liberty is merely a contingent response to the conditions of northern Europe—more an exception to human nature, or a chance variety of it, than its quintessential form. To make liberty the standard requires the universal principle that humans are born equal, and that it is fundamentally wrong for their life and liberty to be arbitrarily seized.

Similarly, to the extent that it is true that “murdering in cold blood by soldiers after the heat of the action” is universally condemned, it is because of a conventional agreement based on shared convictions that every individual shares in a common humanity, and each life has value. The ultimate basis of this norm, Montesquieu suggests, is the adoption of a particular religious worldview. He praises the role of Christianity in the changing right of nations in Europe.

Let us envisage...the continual massacres of the kings and leaders of the Greeks and Romans, and...the destruction of peoples and towns by Tamerlane and Genghis Khan, the very leaders who ravaged Asia, and we shall see that we owe to Christianity both a certain political right in government and a certain right of nations in war, for which human nature can never be sufficiently grateful. This right of nations, among ourselves, has the result that victory leaves to the vanquished these great things: life, liberty, laws, goods, and always religion, when one does not blind oneself (24.3.461-62).

Some variation on the biblical principle that all humans are created in the image of the one God would seem to be necessary in order to clinch at least the moral element of Montesquieu's critique of slavery as well. He alludes to the role of Christianity in abolishing slavery—at least among Christians in northern Europe—during the Middle Ages. “Plutarch tells us in the life of Numa that there was neither master nor slave in the age of Saturn. In our climates, Christianity has brought back that age” (15.7.251). He explicitly identifies the historical influence of Christianity in the following chapter, explaining that “Christianity had abolished servitude in Europe” (15.8.252).¹²⁷

Tocqueville on the material causes of slavery in the American south

In order to shed more light on the climatic rationale for slavery, as well as to suggest a way around this limitation to Montesquieu's moral critique of slavery (though a way that is itself also limited), it will be helpful to make a brief comparison with Tocqueville's analysis of climate and slavery. While it might be comforting to reject out of hand the suggestion that there can be anything like a practical reason for slavery to be more common some places than

¹²⁷ Tocqueville cites the role of Christianity at least in weakening the legitimacy of slavery in Europe, as well as the role of the Spanish and Portuguese conquests in the “age of discovery” in reviving it on novel bases. “Christianity had destroyed servitude; Christians of the sixteenth century reestablished it; they nevertheless accepted it only as an exception in their social system, and they took care to restrict it to a single one of the human races. They thus made a wound in humanity less large, but infinitely more difficult to heal” (1.2.10, 326-27; also 334).

others, it does not serve our understanding of the phenomenon, nor the goal of liberty itself to deny the reality of this category.

To make better sense of the category of “natural reasons” for servitude, I will draw on Tocqueville’s reflections on what he calls “material causes” for explaining the history and 19th century distribution of slavery in America.¹²⁸ Tocqueville follows Montesquieu very closely in many ways, undertaking what could fairly be called a study of the general spirit of Jacksonian America, with his emphasis on the interrelation among mores, manners, religion, and laws. He also devotes the very first chapter of the book to describing the “External Configuration of America,” a choice that makes much more sense in light of the importance of this theme to two of the philosophers whom Tocqueville identified as among his major teachers.¹²⁹ Yet he rejects slavery even more forcefully and unequivocally than Montesquieu, and questions his theory of the direct effects of hot and cold climate on the general spirit.¹³⁰ For this reason, Tocqueville provides a somewhat “safer” account in which to draw out the significance of this category of “natural reasons.”

Tocqueville seeks to explain differences in the distribution of slavery between north and south. Like Montesquieu, he confronts not only the moral repugnance of slavery but also

¹²⁸ *Democracy in America*, 1.2.10, 326-39.

¹²⁹ “There are three men with whom I live a little every day; they are Pascal, Montesquieu, and Rousseau.” Letter to Louis de Kergorlay, November 12, 1836, *Œuvres Complètes* 13.1:418. Cited in Harvey Mansfield and Delba Winthrop, “Editor’s Introduction” to *Democracy in America*, (Chicago: University of Chicago, 2000), xxx.

¹³⁰ Tocqueville specifically criticizes the theory of hot climate inciting “loose morals” among women (2.3.11, 567-68). However, he considered the physical environment important enough to begin *Democracy in America* with a description of the “external configuration of North America,” which emphasizes terrain (1.1.1, 19-23; see also 1.2.9, 265-72, 1.2.10, 355-56, 1.2.16, 394). He contrasts the inviting abundance and sensuality of South America with the “inhospitable coast” and the “somber and melancholy foliage” of North America. The distinct environments of North and South America gave rise to equally distinct native populations. Similarly, the northern and southern sections of the would-be United States presented different possibilities and challenges to the English colonists. The difficulty of cultivating the terrain in much of the North, Tocqueville explains, excluded the possibility of a landed aristocracy, because it required the daily care of the property owner and could support only a farmer and his family. *Democracy in America*, 1.2.10, 357-70.

practical challenges involved with emancipation. He rejects the argument that it is physically impossible for Europeans, in contrast with Africans, to conduct physical labor in hot climates, though he acknowledges that labor in general is more difficult in the heat. Still, “as one descends toward the South, it is more difficult to abolish slavery usefully. This results from several material causes which it is necessary to develop.”¹³¹

Tocqueville’s material causes include differences in the quality of the terrain that are themselves related to differences in climate. To cultivate the crops that grow well in the north—wheat, corn, and other grains, a full-time workforce of slaves is neither necessary nor even beneficial. As the work involved in growing them fluctuates greatly over the course of the year, “slavery is an extravagant means of cultivating cereals.”¹³² One would have to feed and clothe a team of slaves year round while only requiring their labor during certain periods of the year. “The cultivation of tobacco, cotton, and above all sugar cane, on the contrary requires continuous care... Thus, slavery is naturally more appropriate to countries where one extracts the products that I have just named.”¹³³ This has established the fact that a much higher proportion of blacks live in the South than in the North, which in itself made it much easier for northerners to abolish slavery.

In a sentence that Montesquieu might have written had he seen Jacksonian America, Tocqueville summarizes his moral and practical judgments of slavery:

¹³¹ Ibid., 1.2.10, 337.

¹³² Ibid., 1.2.10, 338.

¹³³ Ibid., 1.2.10, 339.

What is taking place in the South of the Union seems to me at once the most horrible and the most natural consequence of slavery...when I see the order of nature reversed, when I hear humanity crying and struggling in vain under the laws, I avow that I cannot find the indignation to stigmatize the men of our day, authors of these outrages; but I gather all my hatred against those who after more than a thousand years of equality, introduced servitude into the world one again.¹³⁴

Tocqueville's hesitation to simply condemn contemporary slaveholders stems from the recognition, which he shared with Montesquieu, that numerous practical difficulties militate against the abolition of slavery once it is already established. Aside from his prescient observation that emancipation by itself would do little to undercut the racial prejudice, Tocqueville confronted the challenge of possible unintended consequences of emancipation, for example reprisals by those formerly enslaved.

It is clear from the section on the three races in America that Tocqueville unambiguously opposes the institution of slavery. He refers to this institution, particularly in the American, racially-based form, as an "evil."¹³⁵ His argument is rather that the North could more easily do without it and more easily phase out the practice. To put it another way, Tocqueville emphasizes, as many contemporary historians corroborate, that northerners evinced at least as much racial prejudice as southerners, and in many ways more; on the whole, their opposition to southern slavery was based more on concerns of competing with slave labor than on regard for the plight of the slave.¹³⁶ Accordingly, Tocqueville concludes

¹³⁴ Ibid., 1.2.10, 348.

¹³⁵ The modern form is worse because it cannot be changed by merely by laws, as the ancient could. "Among the ancients, the slave belonged to the same race as his master, and often he was superior to him in education and enlightenment. Freedom alone separated them; freedom once granted, they easily intermingled. The ancients therefore had a very simple means of delivering themselves from slavery and its consequences; this means was emancipation, and when they employed it in a general manner, they succeeded...What was most difficult among the ancients was to modify the law; among the moderns it is to change mores, and for us, the real difficulty begins where antiquity saw it end. This is because among the moderns the immaterial and fugitive fact of slavery is combined in the most fatal manner with the material and permanent fact of difference in race. The remembrance of slavery dishonors the race, and race perpetuates the remembrance of slavery" (Ibid., 1.2.10, 327).

¹³⁶ Ibid., 1.2.10, 329.

that late modern efforts to abolish slavery should emphasize utility rather than religion.

“Christianity destroyed slavery only by asserting the rights of the slave; in our day one can attack it in the name of the master. On this point interest and morality are in accord.”¹³⁷

He suggests how to pursue this approach in his description of the great cultural differences on the left and right banks of the Ohio River, which marks the dividing line between south and north. The fatal flaw of slavery from a utilitarian perspective (in a commercial society at least), is that the association of labor with servitude destroys industriousness *among whites* in the south. “On the left bank of the Ohio work is blended with the idea of slavery; on the right bank, with that of well-being and progress; there it is degraded, here they honor it; on the left bank of the river, one cannot find workers belonging to the white race, [for] they would fear resembling slaves.”¹³⁸

By linking idleness with liberty and labor with servitude, the institution of slavery leads to profound differences in southern mores, manners, education, and eventually to great disadvantages in “commercial capacity” and “material prosperity” in comparison with the north. For example, “today it is only the North that has ships, manufactures, railroads, and canals.” Tocqueville emphasizes that the opportunity in Jacksonian America to juxtapose two quite similar societies, differing only in the reliance of one on slavery and the other on free labor, makes it possible to derive economic insights “imperfectly known in antiquity,” for “servitude existed then in the whole ordered universe.”¹³⁹

In sum, it would seem that any state wanting to compete in the world of modern commerce and enjoy its benefits has an interest in establishing free labor (or at least freer

¹³⁷ Ibid., 1.2.10, 334.

¹³⁸ Ibid., 1.2.10, 332.

¹³⁹ Ibid., 1.2.10, 334.

relative to chattel slavery), even if it lacks the moral impulse and/or political will. The disutility of slavery in a commercial society has its counterpart in the disutility of a monarch's arbitrarily seizing merchants' wealth in the same (see also CC, IV, 47). The emergence of the modern economy, with its dependence on the cultivation of "commercial virtues," is like the letter of credit invented by persecuted Jewish businessmen in the late Middle Ages: it forces the oppressor's hand in the name of his own interest. The letter of credit was invented to make wealth easily transportable across national boundaries, so that when princes decided to turn against their country's Jews, the latter would not have to start over from scratch wherever they landed next. The inadvertent effect of this invention was to dissuade princes from expelling them at all.

Since that time princes have had to govern themselves more wisely than they themselves would have thought, for it turned out that great acts of authority were so clumsy that experience itself has made known that only goodness of government brings prosperity.

One has begun to be cured of Machiavellianism, and one will continue to be cured of it. There must be more moderation in councils. What were formerly called *coups d'état* would at present, apart from their horror, be only imprudences.

And, happily, men are in a situation such that, though their passions inspire in them the thought of being wicked, they nevertheless have an interest in not being so (21.20.390).

Confronting the abuses and dangers of slavery where it exists

While Montesquieu suggests ways civil servitude can be mitigated and even eliminated in the modern world, he nonetheless spends the last half of Book 15 (chapters 11-19) discussing ways of improving the institution of slavery where it exists. "Whatever the nature of slavery, civil laws must seek to remove, on the one hand, its abuses, and on the other its dangers" (15.11.254). In proposing ways of improving slavery, as well as advising against the precipitous emancipation of large numbers of slaves, Montesquieu appears to

sanction the institution he has just censured in such comprehensive terms. By deigning to distinguish between better and worse instances of slavery, between gentle and cruel slavery, however, Montesquieu could encourage reforms that stood to make substantive improvements in the personal security of slaves (15.10-19.254-263). He sought to enhance the prospects for liberty wherever and however he could, even if it involved getting his hands a bit morally dirty. Thus, in the last chapters of Book 15, Montesquieu discusses possible reforms of the institution of slavery short of emancipation, and recommends pathways to emancipation.

As slavery in the most robust sense is an arbitrary authority over another a person, his property, and his very life, the reforms Montesquieu recommends are limitations to the power of masters. First and foremost, a master's power must not involve sexual coercion, a limitation that he defends on the grounds of the natural law of modesty as well as a kind of "enlightened theory of mastery," which concludes that "reason wants the power of the master not to extend beyond things that are of service to him; slavery must be for utility and not for voluptuousness" (15.12.255). In addition, Montesquieu notes that the ostensible purpose of domestic servitude in eastern seraglios, the safeguarding of the wives' honor or virtue, is undermined by master's insistence on treating them as sexual slaves. By elevating idleness and the satisfaction of pleasure as the highest goal, "one runs counter event to the spirit in which slavery is established" (15.12.255).¹⁴⁰

A second and related limitation Montesquieu recommends concerns the domestic life of civil slaves (i.e. not harem wives). Denying them the right to marry and have families in

¹⁴⁰ See also the behavior of Usbek's "virtuous wives" in the *Persian Letters*. See Schaub on this admonition against sexual slavery, "Montesquieu on Slavery," 75-76.

accord with their own desires went with the practice of masters sexually coercing their slaves in Rome. Beyond encouraging the “incontinence of masters,” denying slaves the right of marriage prevented them from acquiring decent mores, which had a corrupting influence on the marriages of citizens (15.12.255).

Finally, Montesquieu prioritizes limiting the master’s physical cruelty with regard to his slave. This requires subjecting punishment of slaves to some degree of judicial formalities, a seemingly minor reform that could go a long way to improving the everyday experience of liberty. “When the law permits the master to take the life of his slave, it is a right he should exercise as a judge and not as a master; the law must order formalities, which remove the suspicion of a violent action” (15.17.259). Montesquieu’s analysis of criminal justice throughout *The Spirit of the Laws* suggests that his argument here is based in part on a concern for the “liberty of the slave,” so to speak, in the limited sense of his perception of being governed by rules rather than the master’s arbitrary will. Indeed, Montesquieu refers in all sincerity to the liberty of a slave whom the laws require to be clothed, nourished, cared for in sickness and old age, and—if abandoned in his sickness—allowed to escape to freedom.

The explicit grounds for advocating a moderate, rule-bound slavery, however, is the utility of the master. “In moderate states, the humanity one has for slaves will be able to prevent the dangers one could fear from there being too many of them” (15.16.258). Gentle slavery, Montesquieu contends, is more durable than harsh slavery. The states that have maintained a harsh form of slavery—Lacedaemonia, imperial Rome—are the ones that have faced the constant danger of slave revolts. It is the “prudent legislator [who] avoids the misfortune of becoming a terrifying legislator” (15.16.259). Ironically this means that he is recommending reforms which should enable slavery to persist longer than it might otherwise.

That these penal reforms for slaves do not threaten the fundamental principle of the existing government is both their weakness and their strength.

In addition to the danger of particular abuses of slavery, Montesquieu confronts the risk coming from a different angle: those associated with emancipation. How can a moderate state manumit slaves without opening itself up to reprisals or to the burden of supporting individuals who are no longer slaves but not yet free? In acknowledging the practical challenges involved in manumitting slaves, Montesquieu demonstrates his concern for the problem of unintended consequences and his associated preference for an incremental approach to the problem of servitude.¹⁴¹

Slavery is much more threatening to a moderate state than to a despotism—and to a republic most of all. It is the presence of large numbers of slaves as well as the prospect of emancipating them that threatens moderate states. Both of these problems he turns back on the masters; Montesquieu acknowledges the dangers masters fear from their slaves, but indicates that they stem from the contradictions that the masters themselves have sown into society. Slaves in moderate states are more dangerous because they constantly witness others enjoying the liberty they are denied. “He sees a happy society of which he is not even a part; he finds security established for others and not for himself; he feels that his master’s soul can expand, and that his own soul is constantly constrained to sink. Nothing brings the condition of the beasts closer than always to see freemen and not to be one” (15.13.256).

While having many slaves physically threatens a moderate state (beyond whatever moral threats it involves), Montesquieu acknowledges that rapid emancipation would not

¹⁴¹ Schaub analyzes Montesquieu’s approach in the context of the antebellum U.S., contrasting it with that of the radical abolitionists. “Montesquieu on Slavery,” 75.

necessarily favor liberty on the whole either. “The republic can be equally endangered by too many freed men and by too many slaves” (15.18.261). The precise approach to take depends to a great degree on the particular circumstances of the republic. Montesquieu raises examples of laws putting limits on the duration of servitude or providing for the gradual emancipation of a group or family. For example, one could allow slaves to earn money so they could eventually buy their freedom and/or family members’ freedom, or emancipate first the most educated or capable slaves. One could also engage slaves in the labor they already perform for wages. An emancipation scheme, he suggests, should take place over the course of a generation (15.18.261-62).

With these efforts to immerse himself in a comprehensive analysis of historical examples of an institution he believes repugnant, Montesquieu demonstrates what he means by “the spirit of moderation” (29.1.602). He is keenly aware that there is always more than one extreme to be avoided, and thus no “safe side” on which to err in attempting reforms. Pangle eloquently captures the sentiment at work in the latter chapters of Book 15: “Montesquieu believed that in order to benefit humanity one must never permit the sense of humanity to blur one’s clarity of vision.”¹⁴² His willingness to get his hands dirty also enabled him to do something for the cause of liberty that sticking to the morally unambiguous would have prevented.

¹⁴² Pangle, *Montesquieu’s Philosophy of Liberalism*, 172.

Chapter 18: The terrains of liberty and servitude

According to a number of contemporary observers of the 18th century, the emergence of political economy as a focus of philosophic inquiry, a turn often identified with the Scottish Enlightenment, was largely inspired by the publication of *The Spirit of the Laws*. While Voltaire himself would not deign to credit Montesquieu for this shift, he memorably articulated it: “Around the year 1750, France, sated with poetry, tragedy, comedies, operas, novels, and adventure stories...at last started philosophizing about grain.”¹⁴³ This “philosophizing about grain” and other agricultural products necessarily bridges considerations of the physical environment and of civil and political laws. Montesquieu’s turn to environmental causes in Part 3, as the structure of the book indicates, is closely related to his turn to commerce in Part 4 (21.5.357). Throughout Part 3, he emphasizes the importance to liberty of cultivating popular economic initiative. Book 18 in particular serves as a crucial link to his history of commerce, monetary policy, and demography in Part 4.

This is because in Book 18, Montesquieu makes clear what is implicit in his analysis of climate in earlier books: differences in the physical environment bear influence in great part through their effects on what would later be called political economy. The mode by which “peoples procure their subsistence,” is a crucial intervening variable between the physical environment and the prospects for liberty. It affects peoples’ settlement patterns, the

¹⁴³ This development in intellectual history and Montesquieu’s role in it are comprehensively discussed by Paul Cheney in *Revolutionary Commerce*, 52-95. See also Meek, *Social Science and the Ignoble Savage*; James Moore, “Montesquieu and the Scottish Enlightenment.” Voltaire’s statement is from 1764 in “GOUVERNEMENT, dans Dictionnaire philosophique,” in *Œuvres Complètes* (Paris: Garner Frères, 1870) article BLE ou BLED (Grain). Cited in Cheney, *Revolutionary Commerce*, 52.

degree to which they are dependent upon their fellows, their vulnerability to oppressors, and their relative political priorities (18.8.289).¹⁴⁴

The first way the mode of subsistence affects the prospects for liberty completes Montesquieu's earlier argument about the challenges hot climates pose. The problems for inhabitants of the hot climes go beyond the indolent and submissive temperament that he sees the heat inducing. A crucial physical aspect of the tropics is the natural abundance that tends to come with hot climate, which facilitates an agricultural version of what contemporary political economists call the "resource curse."¹⁴⁵ Abundance brings with it both physical and moral challenges to liberty.

The second way terrain affects the prospects for liberty is through its impact on what can be summarized as the degree and kind of commerce, in the broad sense of "communication among peoples" (21.5.357).¹⁴⁶ To what extent and in what way does the terrain make inhabitants accessible to and in need of both the positive and negative consequences of contact with other individuals and peoples? In the contemporary world, where developments in transportation and communication technology make it possible for at least powerful countries and determined fanatics to wage war on a global scale, and for almost all peoples to participate in commerce in goods and ideas, it is difficult for us to

¹⁴⁴ Rousseau characterizes the importance of the mode of subsistence in an even stronger way: "Whether one investigates the origin of the arts or examines the first morals...one sees that everything is related in its first principle to the means of providing for subsistence" *Essay on the Origin of Languages*, IX.310.

¹⁴⁵ In affirming Montesquieu's thesis that "freedom [is] not...a fruit of every Clime," Rousseau emphasizes the natural abundance of the hot countries rather the heat. *The Social Contract*, III.8, 181-85. The term "resource curse" was coined by Richard Auty, although study of the basic phenomenon goes back at least as long as 17th and 18th century inquiries—such as those of Montesquieu—into the paradoxical poverty that Spain earned from its massive extraction of gold and silver from the Americas, and the Netherlands comparatively sustained prosperity (i.e. 21.23-24.393-97). *Sustaining development in mineral economies: The resource curse thesis* (New York: Routledge, 1993). See also Terry Karl, *The paradox of plenty: Oil booms and petro-states* (Berkeley and Los Angeles: University of California Press, 1997). I thank Kerem Öge for directing me to these resources.

¹⁴⁶ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 111-12.

imagine the imposing physical constraints that oceans, mountains, rivers, and deserts have posed for most of human history. Yet until very recently, these physical obstacles to both the good and bad aspects of interaction among peoples have played a much more powerful role in distinguishing nations.

There are some terrains, which I will describe below as the “landscapes of liberty,” that facilitate the political independence of numerous small peoples in a region. Montesquieu suggests that the separation of peoples by natural boundaries—mountains, rivers, lakes, marshes, dense forests, and other features—has supported natural liberty in many ways. In ancient northern Europe, natural obstacles provide places of refuge to escape both tyrannical leaders and foreign aggressors, thus making it more difficult for military and political chiefs to consolidate power.¹⁴⁷ In addition to providing the physical possibility of “exit,”¹⁴⁸ formidable natural features facilitate the development of numerous distinct peoples in a region, with their own languages, customs, laws, and independent political authorities. When numerous small peoples live independently in a region, however, they live in state of war with their neighbors—in theory at least if not necessarily in practice. Communal hatreds and feuds are the bane of the condition of state of nature, as discussed in Chapter 5.

The intermingling of peoples and their ideas, practices, and goods similarly can bring both advantages and disadvantages to the state of liberty. Independent peoples whose physical ranges overlap often engage in violent conflict. If, like the various clans of central Asia, they lack natural refuges from tyrants and aggressors, they are either exterminated or

¹⁴⁷ See James Scott’s account of the “friction of terrain” in southeast Asia highlands and the way it similarly facilitated local independence and a fierce attachment to that independence for centuries. *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

¹⁴⁸ Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

forced to unite in submission to the stronger khans and armies. On what I will call the “steppes of servitude,” this forceful political consolidation undermines natural liberty without replacing it with rule of law. When peoples settle in fixed territories in order to cultivate the land, they become dependent upon one another and specific physical locale in a way that also undermines their natural liberty. The mixing of peoples in the context of marketplaces, ports, and other places of commerce, however, can bring with it great advantages for political liberty—alleviating tensions among peoples by focusing them on mutual interests, and providing the opportunity to compare diverse practices and ideas.

After analyzing Montesquieu’s paradox of fertility and the topography of liberty and servitude, I will explain his typology of modes of livelihood. From Book 18 through Part 6, he analyzes the characteristic general spirit accompanying savage, barbarian, and civilized ways of life—that is, one based primarily on hunting, on herding, and on plowing or commerce, respectively. Montesquieu’s analyses of geographic and historical variables, and of the fertility and topography of terrain, all come together in his prototype of the “four stages theory” of political economic development. One could say that the different ways of life emerge at the end of Part 3 as yet another typology of societies, in addition to the forms of government from Part 1 and the distinction between moderate and immoderate governments in Part 2. Different modes of subsistence bring with them distinctive settlement patterns. Most notably, those who cultivate the land occupy a fixed territory, whereas those who subsist primarily on hunting, herding, or fishing are nomadic or semi-nomadic. Each mode of subsistence also tends to bring with it distinctive mores, manners, demography, civil laws, political laws, right of nations, and even religious practices (18.10-17.290-93, 18.22-31.296-307, 20.1-2, 338-39, 20.4-7.340-43, 20.16-18.348-49, 20.21-23.350-53, 21.1.354,

21.5-7.356-64, 21.11-16.374-84, 21.20.387-90, 22.1-4.398-401, 22.8.404-05, 22.14.416, 23.14-16.435-37, 23.29.455-56, 24.17-18.471-72, 25.3-4.481-84).

The distinction among ways of life does not override or overshadow those of political forms, but speaks rather to differences as viewed on a much longer historical scale. In particular, this typology is needed to explain social, economic, and political differences between civilized and pre-civilized peoples. In the pre-agricultural history of peoples, that is through the vast majority of human history, the mode of subsistence has been a defining feature of peoples, as the form of government has been in civilized societies. The distinction among political forms embraces most of the major points of comparison and contrast among the classical, medieval, and modern worlds. However, it does not sufficiently explain the political world of peoples who do not have fixed territories or divisions of lands and therefore are governed more by customs and a right of nations than by civil and political laws. Moreover, as discussed in Chapter 9, Montesquieu traces the development of monarchy properly speaking to a specific period and place in history: the transition of the northern Europe from barbarian to civilized peoples.

The typology of ways of life is a crucial supplement to Montesquieu's account of political liberty and moderate government because it serves to show the weaknesses as well as the strengths of the state of nature. While a theoretical account of the state of nature is conspicuously absent from *The Spirit of the Laws*, Montesquieu uses his analysis of the different modes of subsistence to depict the tradeoffs between a condition of natural liberty, or independence, and political liberty, and the ambiguous relationship between these two kinds of liberty. What changes the calculus about the comparative merits of a natural versus a

civilized existence is whether a people is nomadic or occupies a fixed terrain, and relatedly, whether they rely on cultivating the land.

A people's way of life also greatly influences the degree to which physical causes shape their general spirit; the more closely their economy is dependent upon cultivation or extraction of natural resources—which itself can change over time—the more powerful physical causes will be. His analysis of different ways of life, then, clarifies that physical conditions and historical contingencies in practice cannot be fully disentangled. The consequences of a given environment as well as a particular mode of subsistence vary depending upon the full physical, social, and political context.

With the cultivation of agricultural arts and technology, and even more so through reliance on commerce, peoples have been able to liberate themselves to some extent from the “empire of climate” as well as the empire of their fellow men. As the Gothic spirit of independence “broke the chains forged in the south” in late antiquity, modern commerce pulled the rug from under absolute and inquisitorial monarchy in the early modern period (17.5.283). In commerce, the occupation of the inhabitants of marginal terrain and of an economically marginalized people, Montesquieu finds a crucial accidental cause of liberty in the modern world.

Whether peoples rely primarily on hunting, herding, farming, or commerce for their livelihood greatly influences the state of their liberty, though not in a straightforward manner. Montesquieu suggests tradeoffs for liberty among, and pitfalls particular to, each of the historical “four stages” of political economic development—a schema upon which Rousseau as well as Adam Ferguson and Adam Smith in Scotland would build, similarly linking mores,

manners, and laws with particular modes of subsistence.¹⁴⁹ The mode of subsistence itself affects settlement patterns, as well as the degree of dependence among families and peoples, and their vulnerability to economic exploitation. Savage and barbarian families generally are more self-sufficient, and are less vulnerable to economic exploitation. They enjoy a natural liberty lacking among those who cultivate the land, but they suffer the disadvantages that go with independence as well, including extremely violent relations with outsiders, and an inability to sustain large populations. While he emphasizes the dangers of conflating independence with political liberty in Part 2, in Book 18, as in Books 28 and 30, Montesquieu emphasizes the valuable resources that a “spirit of independence” has provided, at least in particular circumstances, to the formation of balanced constitutions and liberal criminal practices.

The mode of subsistence in itself does not determine whether a people enjoys liberty—either the independence that is the best kind available in the state of nature, or political liberty properly speaking. For example, because of the variegated topography of northern Europe, the barbarism of the Germanic tribes served their liberty, while the barbarism of the Tartars, a loose collection of nomadic, horse-riding herdsmen from the central Asian steppes, supported servitude (17.5.282-83, 18.19.294-95, 18.20.295). Even commerce, a subject that speaks to this Frenchman’s appetite for poetry and adventure stories, is not without its own potential risks for liberty—a point that Rousseau would shout from the rooftops, but was at least not foreign to Montesquieu’s analysis.

¹⁴⁹ Rousseau, *Discourse on the Origin of Inequality*, I.22, II.4, 15, 18, 23, 24, 30-33, 39, 49, 57 and *Essay on the Origin of Languages* IX. Adam Ferguson, *History of Civil Society* (1767), II.ii.iii. Adam Smith, *Wealth of Nations*, V.i.a , V.ii.a.1-5, Vi.i.b.2. See Shackleton, *Montesquieu : A Critical Biography*, 302; James Moore, “Montesquieu and the Scottish Enlightenment,” and Cheney, *Revolutionary Commerce*, 52-95, 128-40; and Meek, *Social Science and the Ignoble Savage*, 31-35, 69, 101.

The paradox of fertility

As with the disconnect between the southern temperament in itself and its implications for liberty, fertile terrain is surprisingly challenging for moderate government. For one, a fertile country has the disadvantage of being appealing to outsiders. The very goodness of the land invites the subjugation, expulsion, or even extermination of its inhabitants. If the land is relatively flat, unprotected by mountains or other natural boundaries, and/or otherwise conveniently located, a country with natural abundance or otherwise with conspicuous prosperity, is especially ripe for conquest (17.3.280-81, 17.6.283-84, 18.2-3.286-87, 20.5.341). It is the history of repeated conquests of the better lands in Europe and Asia, Montesquieu argues, that explains the apparent paradox of population patterns in the early modern world.

It is natural for a people to leave a bad country in search of a better and not for them to leave a good country in search of a worse. Therefore, most invasions occur in countries nature had made to be happy, and as nothing is nearer to devastation than invasion, the best countries most often lose their population, whereas the wretched countries of the north continue to be inhabited because they are almost uninhabitable (18.3.286-87; 18.4.207).¹⁵⁰

Certain terrains, moreover, can be conducive to modes of livelihood and economic arrangements that threaten civil liberty. For example, where the economic activity primarily involves brute labor, it can be performed adequately by enslaved workers, even if not as well as by voluntary laborers (15.8.252-53, 18.6-7.288-89).¹⁵¹

In addition to making it more appealing for would-be conquerors, “the fertility of a country gives, along with ease, softness and a certain love for the preservation of life”

¹⁵⁰ See Rousseau’s response, *Essay on the Origin of Languages*, IX.311.

¹⁵¹ In my discussion of Montesquieu’s “natural reason” for servitude in Section 3 of this chapter, I noted Tocqueville’s observations of the greater utility of slavery in the American south than in the north, based upon the kinds of crops that grow well in each region (cotton and tobacco versus cereals) and their differing labor requirements (year-round labor-intensive versus only seasonally labor-intensive). See also Rousseau, *Social Contract*, III.8, 181-85.

(18.4.287). There are, then, adverse moral as well as physical effects of material abundance. Highly productive terrain generates a level of material comfort that attaches people to the land, and makes them more concerned to preserve what they have than to take risks that might enhance their liberty but undermine their economic situation. The more abundant the land, the more closely attached to it inhabitants tend to become.

The goodness of the country's lands establishes dependence there naturally. The people in the countryside, who are the great part of the people, are not very careful of their liberty; they are too busy and too full of their individual matters of business. A countryside bursting with goods fears pillage, it fears an army... Thus, government by one alone appears more frequently in fertile countries and government by many in the countries that are not, which is sometimes a compensation for them.

In this way, a fertile physical environment can buttress servitude by supplementing the despotic principle of fear of violence with fear of loss of one's prosperity. Moreover, experiencing the condition of servitude itself reinforces the preference to preserve what they have rather than to take risks to acquire more. It is in a free nation, in contrast, that "one works more to acquire than to preserve" (20.4.341). Only where there is rule of law can individuals assume that what they acquire would actually be secure (13.14.222, 20.4.340).

Montesquieu's most dramatic statement of the paradox of natural abundance comes in his analysis of the history of ancient and modern commerce. In a passage recalling his account of southern timidity leading to servitude, and northern vainglory to liberty, Montesquieu contrasts the effects of abundance in southern Europe with relative barrenness in northern Europe (EC, 61-62).

There is a kind of balance in Europe between the nations of the South and those of the North. The first have all sorts of the comforts of life and few needs; the second have many needs and few of the comforts of life. To the former, nature had given much, and they ask but little of it; to the others nature gives little, and they ask much of it. Equilibrium is maintained by the laziness it has given to the southern nations and by the industry and activity it has given to those of the north. The latter are obliged to work much; if they did not, they would lack everything and become barbarians. What has naturalized servitude among the southern peoples is that, as they can easily do without wealth, they can do even better without liberty. But the northern peoples need liberty, which procures for them more of the means of satisfying all of the need nature has given them. The northern peoples are, therefore, in a forced state unless they are either free or barbarians; almost all the southern peoples are, in some fashion, in a violent state unless they are slaves (21.3.355).

In sum, Montesquieu suggests a tendency for an inverse relationship between natural abundance and the prospects for civil and political liberty. Lands that nature made to be happy are not necessarily those where men have been able to establish and maintain the happiest governments.

The landscapes of liberty

Terrain that is barren, rocky, mountainous, or otherwise isolated has tended to support political liberty more easily than rich, easy, conveniently located terrain. As suggested in the passage about population loss in the fertile climes, harder terrain is less inviting as well as less accessible to would-be conquerors (18.2-3.286-87, 18.5.288).

Mountain people preserve a more moderate government because they are not as greatly exposed to conquest. They defend themselves easily, they are attacked with difficulty; ammunition and provisions are brought together and transported against them at great expense, as the country provides neither. Therefore, it is more difficult to wage war against them, more dangerous to undertake it, and there is less occasion for the laws one makes for the people's security (18.2.286).

Island dwellers often enjoy similar benefits as mountain peoples, insofar as they are less accessible to outsiders. He seems to regard the fixed size of island territory as favorable for liberty internally as well, although the large island (s) of Japan serves as model of

despotism throughout *The Spirit of the Laws* (i.e. 6.13.86-88, 14.15.244-45). In general, though,

Island peoples are more inclined to liberty than continental peoples. Islands are usually small; one part of the people cannot as easily be employed to oppress the other; the sea separates them from great empires, and tyranny cannot reach them; conquerors are checked by the sea; islanders are not overrun by conquest, and they preserve their laws more easily (18.5.288).

When Montesquieu discusses the strangely favorable environment liberty in England, then, he would seem to have in mind its non-negligible, if not insurmountable, distance from the continent and its marginal terrain, as well as its usefully unpleasant climate.

In contrast to those dwelling in fertile country, those inhabiting marginal terrains have less to risk materially in defending their liberty from either a foreign conqueror or a tyrant (18.1-5.285-88). “In mountainous countries, one can preserve what one has, and one has little to preserve. Liberty, that is, the government they enjoy, is the only good worth defending. Therefore, it reigns more frequently in mountainous and difficult countries than in those which nature seems to have favored more” (18.2.286). Whereas natural abundance has a tendency to engender servitude, the relative poverty of a society as a whole can support liberty because it means people are more equal. This correlation in fact motivated sumptuary laws, the banishment of silver, and promotion of frugal mores among classical republicans and their admirers (see for example Cromwell and Rousseau; 20.3.339).¹⁵²

That mountainous and infertile terrain often favors herding over farming also means they have relatively few and simple possessions beyond their livestock and do not use money. The settlement patterns and political economy characteristic of the barbarian way of

¹⁵² While one could argue that the primary purpose of these laws was to promote virtue, they also were clearly meant to support economic egalitarianism as well (4.6-7.36-39, 5.3-7.43-49).

life Montesquieu links with natural liberty, as I will discuss below, although barbarians can just as easily live in a despotic state as a free one (18.13-17.291-93, 22.1.398).

Finally, marginal terrain forces men to work hard and be clever in order to obtain their living. “The barrenness of the land makes men industrious, sober, inured to work, courageous, and fit for war; they must procure for themselves what the terrain refuses them” (18.4.287). It is because such terrain is more common in the north that Montesquieu concludes that northerners are “obliged to work much” (21.3.355). If they did not toil so, they could not make agriculture work, but would have to remain herdsmen. This, of course, is not necessarily a bad plight in itself, but a barbarian mode of living makes it difficult to sustain a large population, and to defend against larger peoples.

The challenges involved in forging a subsistence in difficult terrain are crucial for understanding Montesquieu’s discussion of historical examples of agricultural innovation and of early commercial hubs. When peoples in marginal environments do turn to agriculture, succeeding in it requires rulers to engage the industry of their people, and therefore to accord them a greater degree of liberty than in those places where abundant crops and other natural resources can be harvested with brute labor and little ingenuity (18.4.287, 18.6-7.288-89). The overlap between marginal terrain and northern latitudes plays a significant role in Montesquieu’s characterization of northern climes as more conducive to liberty. “The northern peoples need liberty, which procures for them more of the means of satisfying all the needs nature has given them” (21.3.355).

In other locales too, there are natural features making agriculture more challenging. In places like ancient Persia, Egypt, and China, and the modern Low Countries, peoples and their legislators have developed the agricultural arts of irrigation and dams to make marginal

terrain viable. These “countries that have been made inhabitable by the industry of men and which need that same industry in order to exist call for moderate government” (18.6.288).

The way that agricultural innovation and commerce can help diminish the empire of climate as well as the empire of men is crucial to Montesquieu’s prescriptions for modern liberty. Before examining this in further detail, however, we need to analyze his two very different examples of herding peoples: the Goths and the Tartars, models of the barbarianism of liberty and the barbarianism of servitude, respectively. The topographic and historical differences between northern Europe and central Asia explain why he considers the two regions to have such different prospects for political liberty.

Environmental roots of Gothic liberty

Montesquieu’s argument about the environmental roots of “Gothic liberty” draws more on considerations of terrain than does explanation of the “slavish South.” The Gothic government that represents Montesquieu’s historical model of liberty is rooted in the way of life and settlement patterns to which the climate and terrain of northern, western continental Europe are conducive, and the mores, manners, demographics, civil practices, and political arrangements that accord with these conditions.

The landscape of northern Europe is broken up by “marshes, lakes, and forests” and rivers, which formed so many natural boundaries among these primitive tribes (28.2.535). In this terrain, numerous small peoples formed and maintained greater separation and independence from one another (17.6.283-84). The experience of being able to maintain this natural liberty bolstered the “spirit of independence” (complete with the downsides of a taste for brutality and resistance to authority in general) that Montesquieu considers native to the

climate itself. In addition, in both Books 18 and 31, Montesquieu emphasizes the relatively limited authority that the Frankish kings exercised (18.30.206, 31.4.677, 31.16.694-95). The immediate cause of the “spirit of independence,” then, is not the terrain *per se*, but the long experience of local independence that the different tribes, regions, and towns brought to their unified national government. The spirit, customs, and even judicial usages forged in the forests of Germany helped them to maintain civil diversity and a relative distribution of power among local, regional, and national authority even when they confederated under the Frankish monarchy (28.2.535, 30.18.646).

This convergence of environmental and historical accidents gave rise to that most “well-tempered government” of the early Frankish monarchy, with its favorable balance between the demands of external security and those of moderate government internally (11.6.166). The long history of being governed by moderate-sized monarchies and republics in Europe entrenched mores and manners averse to despotism through much of the continent. “This is what has formed a genius for liberty, which makes it very difficult to subjugate each part to put it under a foreign force other than by laws and by what is useful to its commerce” (17.6.283-84).

The formative influence of the Germanic conquerors’ early history could be fruitfully compared to the legacy of town and state-level self-government in colonial America. The tradition of governing many matters at the state and town level, and of identifying with their particular states (in addition to England herself), caused the revolutionary generation to establish a strongly federal republic. Even the more centralized second attempt of the Constitution preserves the equal status of the states in the Senate (and an increased status of small states relative to their population in the Electoral College). Advances in transportation

and communication have long since increased commerce and movement among peoples from different states, and with it, increasing homogeneity among them. The country as a whole has forged a much stronger national identity through, among other things, the shared experiences of wars and increasingly national policy debates. Still the decentralized origins of the nation retain their formative influence on our political system because they were entrenched in the laws, which in turn reinforce the mores and manners initially giving rise to them.

The Germanic tribes' barbarian lifestyle, which they maintained until well into the Middle Ages, was an additional source of their independence beyond the dispersed settlement patterns in and of themselves. Throughout his account of Gothic mores, manners, and laws, Montesquieu emphasizes that they did not cultivate the land (18.22.297, 18.23-24.301-02, 18.26.303, 18.30.306, 30.3-9.620-26). As the quality of the soil and the prominence of dense forests, marshes, and swamps made the land ill-suited to agriculture, at least of a primitive kind, the peoples made their livelihood primarily through herding and raiding. Their herding way of life in turn brought with it characteristic barbarian demographics, mores, manners, civil codes, inheritance laws, economic usages, political arrangements, right of nations, and even relations between priests and political power (18.10-17.290-93, 18.22-31.296-307, 25.3-4.481-84, 28.2.534-36, 28.14.549-72, 30.3-22.620-58).

As discussed in Chapter 9, the Germanic tribes' occupation as herdsmen-warriors was crucial to the rudimentary rule of law they established. The usage of personal laws rather than territorial laws, i.e. laws which followed individuals rather wherever they went—among the Germanic tribes, for example, had everything to do with their barbarian way of life. This usage contributed to civil diversity, judicial independence, and a degree of decentralization in the new political order. About the personal laws, Montesquieu explains,

I find the origin of this in the mores of the Germanic peoples. These nations were divided by marshes, lakes, and forests; one can see in Caesar that they even liked their separation. The fright the Romans gave them made them band together; each man, in this mixture of nations, had to be judged by the usages and customs of his own nation. All these peoples, taken individually, were free and independent: *the homeland was in common and the republic particular; the territory was the same and the nations various*. Therefore, there was a spirit of personal laws among these peoples before they left their homes, and they took it with them in their conquests” (28.2.535, emphasis added).

The long-standing pattern of tribal independence created mores, manners, and usages that in turn reinforced civil diversity, decentralization, and limited kingship even when the tribes united to counter the Romans and to invade Gaul under the Franks.

The steppes of servitude

The sheer fact of being a shepherd, however, does not necessarily make for political independence.¹⁵³ A northern people living a barbarian lifestyle of semi-nomadic herding, the Tartars would seem to represent the Asian counterpart to the Germanic tribes of northern Europe.¹⁵⁴ He identifies them as “Asia’s natural conquerors” (17.5.282). Montesquieu refers to the nomadic, horse-bound herdsmen of the central Asian steppes generically as Tartars—similar to the way northern European barbaric tribes of antiquity all came to be known as Goths. Thus Montesquieu’s Tartars encompass a broad group of Turkic and Mongol tribes, from the ancient Scythians who conquered the Greek empire, to the various northern

¹⁵³ Similarly, Montesquieu clarifies that effects of a mining-based economy for liberty depend upon other factors. Whereas the coal mines of Germany and Hungary “make cultivating the land worthwhile...working those of Mexico and Peru destroy that cultivation” (21.22.396). The Spanish mines barely bring in more than they cost to operate (21.21.395).

¹⁵⁴ Montesquieu occasionally discusses the Arabs as an example of a people whom, by the nature of the environment at least, were inclined to a kind pastoral-commercial mode of subsistence (18.19.294, 21.16.383). “Nature destined the Arabs to commerce; she had not destined them for war; but, when these tranquil peoples found themselves between the Parthians and the Romans, they became the auxiliaries of both. Aelius Gallus had found them a commercial people, Mohammed found them warriors; he gave them enthusiasm, and they became conquerors” (21.16.383).

conquerors of China to the armies of Genghis Khan and even the original conquerors of Japan (10.15-17.151-53, 17.5.283-84, 24.14.468, 25.3.481, 28.3.537).

The Tartars, like the Germanic tribes, were distinguished more by general patterns in their mode of subsistence, mores, manners and right of nations than by a civil or political order or national identity. They had in common with the ancient Germans numerous aspects of the characteristically barbarian general spirit. Relying on herding rather than cultivation well into the medieval era, neither knew the use of money or possessed fixed tracts of lands. Their mores and right of nations reflected a distinctly barbarous mixture of gentleness and cruelty (18.4.287, 18.20.295).¹⁵⁵

Despite these similarities, however, Montesquieu emphasizes that the Tartars, whom he calls the “most singular people on earth,” lived in both civil and political slavery (18.19.294). Whereas the Germanic tribes exemplified a “spirit of independence,” the “various hordes” of central Asia, inhabiting, or ^{rather} wandering nomadically across, the high, infertile plateau of “Greater Tartary,” conquering eastward, westward, southward, serve as a model of barbaric servitude throughout the book (17.5.282-83).¹⁵⁶

¹⁵⁵ “So much naturalness and so much inhumanity, such ferocious morals and such tender hearts, so much love for their family and aversion for their species.” Rousseau, *Essay on the Origin of Languages*, IX.306.

¹⁵⁶ Montesquieu draws on works on the region by Father Jean Baptiste du Halde, *Description de l’Empire de la Chine*; Justin, *Epitoma historiarum Philippicarum*; Ebulgazi Bahadir Han, Khan of Khorezm, *Histoire généalogique des Tatars*; and *Receuil de Voyages au Nord*, ed. Jean Frédéric Bernard, 10 vols. (Amsterdam, 1715-38). Early 18th century western European maps depict “Greater Tartary” as the region encompassing the great Russian steppe—spanning roughly the width of the Asian section of contemporary Russia, bound by the Caspian Sea, Volga and Tobol Rivers in the east and the Pacific Ocean in the west, and extending from the Arctic Sea in the north to the contemporary countries of Mongolia, Kazakhstan, Turkmenistan, and Uzbekistan in the south. “Great Tartary. With the Tract of the Moscovite Ambassador’s Travels from Moscow to Peking in China,” in *Atlas minor: or a new and curious set of sixty-two maps, in which are shewn all the empires, kingdoms, countries, states, in all the known parts of the earth; with their bounds, divisions, chief cities & towns, the whole composed & laid down agreeable to modern history*, Herman Moll, 3rd ed. (London: Thos. Bowles and John Bowles, 1736), Accessed online via David Rumsey Historical Map Collection at <http://www.davidrumsey.com/maps4540.html>. See also René Grousset, *The Empire of the Steppes*, trans. Naomi Walford (New Brunswick, NJ: Rutgers University Press, 1970).

The key factor giving rise to the radically different political trajectories of the Tartar and Germanic barbarians, the “natural conquerors” of Asia and Europe, respectively, is topography. Montesquieu analyzes at length the implications of different topographic conditions for liberty. Flat, open terrain, whether fertile or infertile, facilitates political servitude. The fact that fertile terrain often stretches over expansive plains and broad river valleys exacerbates the risks described above. “The fertile countries have plains where one can dispute nothing with the stronger man: therefore, one submits to him; and, when one has submitted to him, the spirit of liberty cannot return; the goods of the countryside are a guarantee of faithfulness” (18.2.286).

Topography is crucial for Montesquieu’s account of Asian servitude, for much of the continent is not tropical, nor even particularly fertile. The Tartars “live in a wasteland,” but nonetheless are subject to great servitude (18.19.295). While northern Europe is divided by numerous natural boundaries, the lands at a similar latitude in Asia, those of Greater Tartary, are dominated by a “high, infertile plateau”—what is now called the “Great Steppe” (17.3.279-80). Even its rivers “form slighter barriers,” as they are more subject to periodic drying. Thus, unlike the Germanic tribes of northern Europe, the inhabitants of central and northern Asia lack the natural boundaries that would facilitate their independence. Montesquieu also suggests that this region has a much harsher climate than that of northern Europe as well (17.3.280).

In a chapter re-worked from his *Réflexions sur le Monarchie Universelle*,¹⁵⁷ Montesquieu explains that the flat, open terrain of central Asia has made it possible for despotic empires to consolidate “various hordes” of nomadic herdsmen under a single,

¹⁵⁷ OC II, 23-24. Rahe, *Montesquieu and the Logic of Liberty*, 159.

central authority—or at least one at any given time, for the khans could fall from power as quickly and violently as they rose (17.6.283-84; 18.11.290-91, 18.19.295). He even suggests that in Asia, all semblance of political order will disappear *unless* government is despotic. “For if servitude there were not extreme, there would immediately be a division that the nature of the country cannot endure” (17.6.283). In perhaps his harshest prediction for the unfortunate climes of the south and of central Asia, Montesquieu declares, “In Asia there reigns a spirit of servitude that has never left it, and in all the histories of this country it is not possible to find a single trait marking a free soul; one will never see there anything but the heroism of servitude” (17.6.284).

Montesquieu directly juxtaposes the Tartars and the ancient Germans in Book 18, with three chapters on the former immediately followed by ten chapters on the latter. The last chapter on the Tartars in Book 18 emphasizes their similarities with other pastoral peoples, and the significance of a pastoral as opposed to an agriculture mode of subsistence for inheritance laws and other civil customs. Comparing them to the Arabs, however, Montesquieu explains that the Tartars’ great weakness is that they lack refuge from tyranny.

They have no towns, they have no forests, they have few marshes; their rivers are almost always frozen; they live in an immense plain; they have pastures and herds and consequently goods; but *they have no place of retreat or defense*. As soon as a khan is vanquished, his head is cut off, so are his children’s, and all his subjects belong to the vanquisher (18.19.294, emphasis added).¹⁵⁸

They are not civil slaves in the sense of their labor being subjected to the arbitrary rule of other men. However, they are effectively slaves to the extent that the khans rule their empires despotically, and that despotic power changes frequently. Their lives and possessions are constantly in danger.

¹⁵⁸ The early Franks, Montesquieu notes, were also especially brutal in matters of succession, treating even their own relatives according to the right of nations (18.19.305-06).

In a country where the various hordes are continually at war and constantly conquer one another, where the political body of each vanquished horde is always destroyed by the death of the leader, the nation in general can scarcely be free, for there is not a single part of it that must not have been subjugated a great many times (18.19.295). Montesquieu links this lack of refuge to the Tartars' reputation as especially harsh conquerors, even compared to other barbarians, who in general tend to be harsh conquerors (18.20.295-96, 24.3.461-62).¹⁵⁹ While gentle among each other, excepting matters of succession, they routinely exterminated all the towns they conquered in their raids to the west and the south. They held their conquests by fear and force, and ruled them through a feudatory system of local princes with administrative but not political authority, and "compensate" their subjects for their servitude with simple, low taxes (9.4.134, 10.15-17.151-52, 13.11.220, 13.17.224, 30.13.634).¹⁶⁰ Montesquieu reasons that this right of nations developed on the open plains of central Asia, where clans faced stark choices before them in battle. They could conquer and put to the sword, join the stronger army, or be utterly annihilated. A clan that survived their conquest would live to put them to sword another day. If a clan anticipated they would be out-fought, there was no option to escape or otherwise avoid a fight; they could only join the stronger army in their conquests. Thus, the Tartars knew only how to conquer or be conquered (18.20.295-96).

Thus, the Tartars could unite only despotically, while the Franks conquered western Europe as a confederation of independent peoples. The Tartars conquered Central Asia and parts of China "as slaves and have been victorious only for a master" (17.5.282). It is the

¹⁵⁹ See Adam Smith, *The Wealth of Nations I*, V.i.a.5, 692.

¹⁶⁰ Despotism prevails in large empires through what Montesquieu calls "feudatory" (*feudataire* as opposed to *féodal*) arrangements: by making local princes the agents of the central government (9.4-5.134-35, 10.16-17.152-53)

historical legacy of this kind of rule—the habit of submitting to might—that is directly responsible for the “spirit of servitude” which he sees in Asia.

This spirit has made its impact on their very conquests. Their empires have been heavily dependent upon the strength of the man at the top. The armies of Attila, Genghis Khan, Tamerlane, were exceedingly proficient in conquest, but their empires disintegrated as soon as the strong man fell, and they left only devastation in their wake. The Frankish empire, in contrast, persisted for centuries (though never as strong as under Charlemagne), fluctuating in size, but maintaining a more or less stable internal structure. “When the Tartars destroyed the Greek empire, they established servitude and despotism in the conquered countries; when the Goths conquered the Roman Empire, they founded monarchy and liberty everywhere” (17.5.282).

The difference in the suitability of northern Europe and central Asia for the use of cavalry would seem to represent a major variable connecting topography and the different patterns of settlement, military conquest, and political organization in the regions (CC, XXII.202). As Montesquieu notes in the *Considerations*, it was very difficult for the Romans and the Tartars to make use of their cavalry in the dense forests of northern western Europe (CC, XXII.202). In addition to making cavalry charges infeasible, the forests provided easy refuge from would-be oppressors in any form, and from either their own tribe or outside.

Political liberty and the spirit of independence

At the roots of Gothic liberty, then, lies the physical possibility of fleeing oppressors and the habits of resistance and spirit of independence that follow over the generations. Book 18 brings clarity to our question regarding the character and foundation of Gothic liberty. At

the same time, however, it raises a difficulty in relation to his careful account of political liberty in Part 2. As emphasized in Chapter 4, Montesquieu distinguishes independence—being one’s own boss—from political liberty rightly understood. Nonetheless, he contends that the Franks’ “spirit of independence,” a spirit characterizing mountain peoples as well as savages and barbarians, somehow played a crucial role in their ability to establish the rudiments of a constitutional monarchy. The kind of liberty that the English “found in the forests” is much different—even in profound tension with—the liberty he praises in the modern English government.

In Book 18, Montesquieu also links democratic government to liberty, in contrast with his treatment of liberty in Part 2, where he emphasized the dangers to rule of law characteristic of popular government. The tendency to mistake independence for political liberty is for Montesquieu a characteristically democratic misconception, and a major reason why monarchy is at least as likely to protect rule of law as popular government (11.2-3.155).¹⁶¹ Citing Plutarch’s *Life of Solon* in Book 18, Montesquieu notes that the Greek mountain-dwellers were the most zealous for popular government. After a civil crisis, the people of Attica were “divided into as many parties as there were sorts of territories in the country of Attica. The people in the mountains wanted popular government at any cost; those of the plains demanded government by the principal men; those near the sea were for a government of mixing the two” (18.1.285).

Somehow, this spirit of independence, which often can threaten rule of law in an established democracy, has played a vital role in the historical development of moderate

¹⁶¹ See Chapter 4 for explanation of the difference between independence and political liberty properly speaking.

government.¹⁶² Political liberty seems to arise from the transition from barbarianism to a civil state that avoids the worst aspects of the independence of the former and the worst aspects of the subjection of the latter. It occurs when the laws, mores, manners, and religion of civilization partially tame the barbaric cruelty and resistance to rule as such, but also makes use of the spirit of independence to support constitutional balance and rule of law. The spirit of independence fuels a balance of powers horizontally among the different seats of power and the different parties, as well as vertically among local, regional, and national authorities. The consequence overall is to counter tendencies towards centralization and uniformity in large states. In addition, the spirit of independence supports a readiness to defend a people against foreign aggression.

Tradeoffs between the condition of natural liberty and civilized society

Tracing the different trajectories of the Germans and Tartars, we can see that the mode of subsistence, like the form of government (at least the distinction between monarchies and republics) does not determine the degree of liberty in itself. A barbarian way of life in particular seems to be amenable to either great natural liberty or despotism. Still, the hunting, pastoral, agricultural, and commercial ways of life characteristically stamp everything from a people's population size, domestic arrangements, inheritance laws, right of nations, to even their religious practices are influenced in great part by their mode of subsistence and the settlement patterns it entails (18.8-31.289-307; 20.4-5.340-41, 23.14-15.435-36, 25.3-4.481-84, 28.2.534-36, 28.14.549-72, 30.3-22.620-58).

¹⁶² Pangle also notes the role of this spirit of independence, but does not discuss the tension between it and Montesquieu's definition of political liberty in Part 2. "This proud and warlike spirit appears to be necessary in some measure as a precondition for any liberty." *Montesquieu's Philosophy of Liberalism*, 181.

The different stages of political economy pose advantages and drawbacks with respect to liberty. The transition from a hunting or herding based economy to one based on farming or commerce is particularly fraught with tradeoffs. Montesquieu's contrast between civilized and non-civilized societies sheds light on the complex dynamic between rule of law and the spirit of independence. Savages and barbarians are in some ways more exposed to the vicissitudes of the physical environment, having to migrate seasonally towards more favorable environments. Because they do not cultivate the land, however, they are in other ways more independent than farming peoples, who must count on the regularity of yearly cycles of rain, sun, and other physical causes in one particular place. Crucial to Montesquieu's account is his explanation for why hunting and herding involve fewer opportunities for civil and political servitude to establish itself. In civilized societies, inequalities among individuals can be leveraged politically to a degree not possible among savage and barbaric peoples—a point Rousseau would underscore in his *Discourse on the Origin of Inequality*, but Montesquieu also makes clear (18.16-17.293, 18.23.301).¹⁶³

Montesquieu's analysis of the "four stages," unlike that of someone like Turgot, is not necessarily one of historical progress.¹⁶⁴ The agricultural stage in particular is fraught with dangers for liberty from both one's fellows and one's government. Commerce can offer a way to mitigate these dangers by unchaining the means of prosperity from the constraints of both local environmental conditions and local social and political authorities. A commercial mode can help to "liberate" people from the empire of climate, and in some ways at least, from the domination of other men society. Commerce broadly speaking—the

¹⁶³ See also Smith, *Wealth of Nations* II, V.i.b, 710.

¹⁶⁴ Rahe, *Montesquieu and the Logic of Liberty*, 174n8.

communication among peoples—also accelerates the tendency for change, undermining traditions and settled patterns of life. The nature of commerce is to multiply the number and power of moral causes. As Montesquieu recognized—and Rousseau and his followers have emphasized—this multiplication of moral causes brings potential problems for liberty as well. The gentleness it inspires is in some tension with the spirit of independence he praises among the Goths and the inhabitants of mountains and marginal terrain. A commercial society *can* be the best for liberty in the modern world, but only if legislators take into account both its advantages and disadvantages.

The independence of savages and barbarians

Savages and barbarians are distinguished from civilized peoples by their means of subsistence and associated settlement patterns. Savages rely primarily on hunting and barbarians on herding, and both are nomadic or semi-nomadic, wandering from place to place in pursuit of games and ripe plants in the case of savages, and pasture and water in the case of barbarians. A herding way of life cannot sustain a large population or concentrated settlements, and hunting even less so (18.10.290).¹⁶⁵ Savages live as “small scattered nations” (18.11.290). As herds, unlike wild game, can be brought together, barbarians can unite in larger numbers. This gives barbarians a marked advantage over savages, who cannot form large armies. The latter therefore are very vulnerable to violent destruction in the face of encounters with consolidated hordes of barbarians or armies of civilized peoples (18.11.290-91).¹⁶⁶

¹⁶⁵ On the lower population numbers that hunting can support, see also Rousseau, *Essay on the Origin of Languages*, IX.309.

¹⁶⁶ See also Smith, *Wealth of Nations II*, V.ii.a, 690-92

Savages and barbarians characteristically are very skilled at war, and practice a brutal right of nations as well (18.11-12.290-91, 18.26.303).¹⁶⁷ Defensively, they have the advantage of lacking fixed dwellings to protect or tie them down, so they if they find themselves vulnerable to attack or overpowered, they can flee more easily.

These [barbarian] peoples enjoy a great liberty: for, as they do not cultivate the land, they are not attached to it; they are wanderers, vagabonds; and if a leader wanted to take their liberty from them, they would immediately go and seek it with another leader or withdraw into the woods to live there with their family. Among these peoples, the liberty of the man is so great that it necessarily brings with it the liberty of the citizen (18.14.292; 18.30.306). As the wars of late antiquity amply demonstrate, civilized peoples can be quite vulnerable to these nomadic barbarian armies.¹⁶⁸

In addition to the ability to flee oppressors, the natural liberty of savages and barbarians also stems from the simplicity of their political economy. Both savages and barbarians have a much less extensive civil code than civilized peoples because they lacked fixed territory, do not cultivate the land, and have not formally divided lands among tribes or within them. Moreover, because they do not cultivate the land—and with it, the arts—they have few possessions beyond their herds, whose ranks are used as currency, and no formal money (22.2.400). Barbarians, then, need only very simple civil laws—mostly concerning livestock theft (18.13.292). Everything else is governed by mores or the right of nations (18.12.291, 18.26.303).

¹⁶⁷ Both Rousseau and Smith emphasize the leisure of a barbarian way of life in comparison with that of both farming and hunting. For Smith, the crucial aspect of this leisure is that it enables them to constantly train for war. *Wealth of Nations II*, V.i.a.3, 690-91. For Rousseau, this leisure is good for its own sake, and it accords with man's natural laziness. "The pastoral art, father or repose and of the idle passions, is the one that is most self-sufficient. It furnishes man with his livelihood and clothing almost effortlessly. It even furnishes him with his dwelling" *Essay on the Origin of Languages*, IX.309.

¹⁶⁸ Smith, *Wealth of Nations II*, V.i.a.5-15, 692-97.

Interestingly, while Montesquieu associates a well-regulated civil order with political liberty in Part 2, here we see that the very need for such a code reflects the loss of a kind of natural liberty. Peoples who cultivate the land require a more extensive civil code because the division of lands among and within their groups exposes them to new potential threats to their liberty (18.11-17.290-293). “It is the division of lands,” Montesquieu emphasizes, “that principally swells the civil code” (18.13.291).¹⁶⁹ The division of lands that agriculture involves brings with it an enhanced prospect for the accumulation of wealth and the establishment of a currency-based economy—and therefore new vulnerabilities to domination by one’s fellows and regional authorities. The poverty of savages and barbarian peoples across the board makes it difficult for any individual or clan to leverage wealth as political power. The establishment of money enables greater consolidation of wealth, and therefore greater economic inequality, which in turn can be leveraged politically.

What most secures the liberty of peoples who do not cultivate the land is that money is unknown to them. The fruits of hunting, fishing, or herding cannot be brought together in great enough quantity or be protected well enough for one man to be in a position to corrupt all the others; whereas, when one has signs for wealth, these signs can be amassed and distributed to whomever one wants. Among peoples without money, each man has few needs and satisfies them easily and equally. Equality, therefore, is forced; thus, their leaders are not despotic (18.17.293). The use of money also thus enables deception in matters of wealth, which creates the need for a more extensive civil code.

¹⁶⁹ Smith also discusses the crucial relationship between, on the one hand, the development of agriculture, and on the other, the rise in population, expansion of the civil code, and increased prospects for inequality. *Wealth of Nations II*, IV.ix, 663-88.

When a people do not use money, one finds among them scarcely any other injustices but those stemming from violence; and weak people, by uniting defend themselves from violence. Among them, therefore, there are scarcely any arrangements that are not political. But among a people who have established the use of money, one is subject to injustices that come from trickery, and these injustices can be exercised in a thousand ways. Therefore, one is forced to have good civil laws there; these arise along with the new means and the various ways of being wicked (18.16.293).¹⁷⁰
 This passage clarifies the distinct tradeoff peoples make in entering a civil society.

Those who do not cultivate the land are less vulnerable to these new “ways of being wicked,” but the right of nations—i.e. the laws of force and violence—regulates much of their world. When they dwell in vicinity to other savages and barbarians, they are constantly at war. “They will have so many things to regulate by the right of nations that they will have few to decide by civil right” (18.12.291). To put it another way, they will endure fewer crimes, but more acts of war.

The modes of subsistence practiced by peoples encountering each other in war—i.e. whether both are farming peoples, one is a herding people and the other farming, or one agricultural and the other commercial—are matters of contingency of great significance throughout history.¹⁷¹ For example, while lacking an established currency is quite favorable in itself for liberty, many savages and barbarians have had the misfortune to inhabit lands rich in deposits of metals and other natural resources to which foreigners attribute great value. Since they did not value them beyond their physical properties, numerous African tribes willingly traded them in exchange for frivolous goods (21.2.355).

¹⁷⁰ Drawing on the history of the ancient Israelites, especially in their transition from a barbarian to a civilized state, Rousseau remarks of Cain, “the first plowman proclaimed the bad effects of his art by his character.” *Essay on the Origin of Languages*, IX.309.

¹⁷¹ Montesquieu suggests that the disparity between the Germanic tribes’ herding and the Romans’ farming lifestyles in the wake of the barbaric conquest actually promoted a positive coexistence because their livelihoods did not directly compete. They were not primarily interested in dwelling the same kinds of lands, and when the herdsmen and the farmers abutted one another, there was even a symbiosis to the interaction of their livelihoods: “the herds of the Burgundians fertilized the field of the Roman” (30.9.625).

The tradeoffs for liberty of cultivating the land

Settling land, farming it, and dividing it among and within peoples is an historical moment of literally biblical proportions for a people. *How* a people makes this transition is of crucial importance to its constitution in the long run. Just *why* they would adopt a civilized mode, given the dependence upon a particular plot of land that it entails, and the new civil conflicts it breeds, Montesquieu does not make clear.¹⁷²

Agriculture, which makes a particular environment yield more food than it would if left to nature's own devices, makes a people more dependent upon physical conditions in a particular locale, and also brings with it new potential threats to liberty from other men. The full implications of the political economic transformation, however, may not be clear in advance.¹⁷³

A herding-based economy, Montesquieu explains, cannot sustain a particularly large population. In northern Europe, the relatively remote location of the territory vis à vis the ancient population centers of the Mediterranean also militated against the influx of great numbers of other peoples (18.10.290, 23.14.435). The low population density in turn may help explain why they did not remake the landscape and turn to an agricultural economy until

¹⁷² The difficulty of understanding this motivation for this transition is of course a major theme in Rousseau's *Discourse on the Origin of Inequality*. It is not only on account of the disadvantages to an agricultural mode that Montesquieu discusses—the increased prospects for inequality, the difficulty of fleeing with one's crops, and the greater opportunity for deception with the use of money that civilization brings—but also the much greater toil and time commitment agriculture requires over hunting and herding; for Rousseau, laziness is not an effect of climate, but a deep-seated, universal tendency. See *Discourse on the Origin of Inequality*, I.22.143-44.

¹⁷³ Rousseau famously depicts this transition as fraught with the most tragic unintended consequences in human history. "All ran toward their chains in the belief that they were securing their freedom; for while they had enough reason to sense the advantages of a political establishment they had not enough experience to foresee its dangers; those most capable of anticipating the abuses were precisely those who counted on profiting from them, and even the wise saw that they had to make up their mind to sacrifice one part of their freedom to preserve the other, as a wounded man has his arm cut off to save the rest of his Body" (II.32, 173).

medieval times.¹⁷⁴ The need to secure what is in many ways a more regular, abundant source of food in order to sustain a larger population, in order for a people to defend themselves against other large peoples, is a possible configuration of motives suggested by his account.

In his discussion of the general and particular histories of peoples engaging in these different ways of life, we can see how the effects of the physical environment depend in great part upon social and political conditions; in other words, the impact of physical accidents is always mediated by a peoples' historical situation. How dependent the local economy is upon cultivation or extraction of natural resources, which itself can change over time, is an especially significant consideration for how powerful physical causes will be. The more closely dependent upon the land people are for their livelihood, the more powerful the influence of climate and terrain.

Montesquieu's analysis suggests the importance of the early history of a nation on its constitutional order in the long term. Moreover, it serves as a helpful reminder for citizens of commercial societies, who are less dependent upon local environmental conditions for subsistence, who enjoy even a controlled climate, that the capacity to detach one's self from the demands of the local environment is an extremely recent phenomenon.

Marginal terrain and enterprising farmers

When a people do turn, for whatever reason, to cultivation of the land as their primary mode of subsistence, Montesquieu suggests that the most favorable conditions for doing so are again those that present significant natural challenges. A counterintuitive benefit to inhabiting marginal terrain is that the need to outsmart one's natural environment in order to

¹⁷⁴ See Rousseau's *Discourse on the Origin of Inequality*, II.4, 22.

survive stimulates human industry and creativity. People can not only counter the bad effects of certain physical conditions, but alter physical conditions themselves.¹⁷⁵ This capacity can result in both massive destruction of land and its improvement: “just as destructive nations do evil things that last longer than themselves, there are industrious nations that do good things that do not end with themselves” (18.7.289).¹⁷⁶

Montesquieu praises the efforts of ancient peoples like the Egyptians, Persians, and Chines, and modern ones like the Dutch, who developed irrigation techniques, made marshes arable, and otherwise “by their care and goods laws have made the earth more fit to be their home” (18.7.289). His interest in these projects is not simply material—i.e. that they make it possible to feed more people living in a particular place—but the political trends they reflect and encourage. The agricultural projects he praises have involved savvy political guidance in the form of encouraging popular initiative and industry.

China serves as important example of the indirect moderating effects of certain environmental conditions. Montesquieu returns to China’s unique political situation in numerous contexts throughout the book. While he frequently laments that the form of government and other moral causes reinforce vices of climate, China represents a unique case wherein physical causes actually ameliorate the effects of despotic government.¹⁷⁷

Montesquieu questions the laudatory reports of the Chinese government brought back by Christian missionaries, which moved many *philosophes*, insisting that China must be

¹⁷⁵ Rahe highlights Montesquieu’s interest in “man’s capacity to consciously alter the environment” in early unpublished writings. *Montesquieu’s Logic of Liberty*, 172.

¹⁷⁶ He seems to have in mind the destruction of towns, forests, and fields, as well as knowledge of commercial routes through war (21.6.385, 23.19-20.439-40).

¹⁷⁷ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 147-48.

understood as more or less a despotic country.¹⁷⁸ Despotism attends China's very large size (8.19.126).

A large empire presupposes despotic authority in the one who governs. Promptness of resolutions must make up for the distance of the places to which they are sent; fear must prevent negligence in the distant governor or magistrate; the law must be a single person; and it must change constantly, like accidents, which always increase in proportion to the size of the state (8.19.126). Nonetheless, Montesquieu allows that China avoids the worst features of despotism, because other physical causes help counteract the negative implications of the large territorial size and the constitution (8.21.126-128).¹⁷⁹ "There is often something true even in errors. Particular and perhaps unique circumstances may make it so that the Chinese government is not as corrupt as it should be. In this country causes drawn mostly from the physical aspect, climate, have been able to force the moral causes and, in a way, to perform prodigies" (8.21.127).

The climate and terrain in China, Montesquieu contends, support exceptional population growth, and at the same time great vulnerability to famine because of the favorability of the environment for rice-growing. An economy based on rice-growing can support a very large population, because it is labor-intensive, provides a high yield per acre, and feeds people more efficiently by giving them grains directly rather than feeding them livestock. In countries where rice is grown, "the cultivation of the land becomes for men an immense manufactory" (23.14.236). In sum,

¹⁷⁸ See Robert Shackleton, "Asia as Seen by the French Enlightenment," in *Essays on Montesquieu and the Enlightenment*, ed. David Gilson, and Martin Smith (Oxford, UK: Voltaire Foundation at the Taylor Institute, 1988), 231-42.

¹⁷⁹ In addition, manners govern China almost as regularly as fixed civil and political laws would. The fastidious observance of ceremonies in all aspects of social activity greatly reduces the arbitrariness of life under this despotism (19.4.310, 19.13.315, 19.16.317, 19.17.318).

The climate of China is such that it prodigiously favors the reproduction of mankind. Women there have such great fertility that nothing like it is seen elsewhere on earth. The cruelest tyranny cannot check the progress of propagation. Despite tyranny, China, because of its climate, will always populate itself and will triumph over tyranny (8.21.128).

Montesquieu's prediction about the impossibility of checking population growth in China is prescient even in its historical inaccuracy; something is anomalous about the dynamic among population, political economy, and governmental power in China.

The dependence on rice and the large population combine to make the Chinese very vulnerable to famines. Unless the food supply for this numerous people is well-managed, the rulers frequently will face rebellious mobs of starving farmers.

The nature of the thing is such that bad government there is immediately punished. Disorder is born suddenly when this prodigious number of people lacks subsistence. What makes it so hard to recover from abuses in other countries is that the effects are not felt; the prince is not alerted as promptly and strikingly as in China...He will know that, if his government is not good, he will lose his empire and his life (8.21.128).

In addition, the Chinese terrain requires significant labor in order to yield sufficient produce to feed the large population. As opposed to more fertile and easy lands that generate abundance with little effort, that in China requires subjects to attend diligently to their farming efforts. In such an environment, the government must both encourage people to attend to this work and refrain from harassing them in ways that would undermine their labors (8.21.128).

Thus, while lacking liberty of the constitution and of the citizen, the government at least must be competent in overseeing provision of the basic necessities of life. As Stark describes, despotism in Montesquieu's China is "a modified, reduced, chastened, humanized despotism, though it is a despotism all the same."¹⁸⁰ The despotism of Chinese government,

¹⁸⁰ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 148.

we could say, is more paternalistic than imperious. “The Chinese legislators had the tranquility of the empire as the principal object of government” (19.19.320).

In other southern and/or Asian locales, such as where it is warm but semi-arid or marshy, legislators have found ways to encourage productive agriculture. Montesquieu praises the example of the ancient Persians, who “when [they] were the masters of Asia, they permitted those who diverted the water from its source to a place that had not yet been watered to enjoy it for five generations; and, as many streams flow from the Taurus Mountains, they spared no expense in getting water from there.”¹⁸¹

It is “a people attached to commerce and the sea” who need the most extensive code of laws, followed by plowmen, then, herdsman, then hunters (18.8.289). However, like economies based on early agricultural innovations, commerce seems to foster the establishment of better versions of a civilized order—where the laws are more likely to be clear, moderate, and regularly applied. Through a commercial civil order, a people can improve upon both the natural insecurity of barbarianism and the servitude of an agriculture-based civil order. With commerce, then, “one corrects with art both the defects of nature and the defects of art itself” (21.6.361).

Montesquieu’s view of the advantages of commerce for liberty, as well as its drawbacks, is an expansive subject appropriate for a separate study.¹⁸² My aim here is not to address his treatment of commerce comprehensively, but to highlight the significance of the environmental context for Montesquieu’s account of both ancient and modern commerce. In addition, I will suggest the implications of commercial life for reshaping the relationship

¹⁸¹ Montesquieu cites Polybius on this Persian policy. *Historiae*, Book 10, 10.28.3-4 per Cohler et al.

¹⁸² See Catherine Larrère, “Montesquieu on Economics and Commerce,” 335-74; Rahe, *Montesquieu and the Logic of Liberty*, 174-201.

between a people and their physical environment. Commerce can remake the dynamic among physical and moral causes. In doing so, commerce can help diminish the empire of climate, as well as the empire of one's fellow men. With regard to the former, commerce can weaken dependence upon the constraints of any one particular locale.¹⁸³ The expansion of commerce also can counter threats to liberty in the civil, political, and international realms, by tying prosperity to moderation in civil and political laws and the right of nations. Reliance on commerce can alter both individuals' and states' evaluations of their interests. In addition, by facilitating comparison among different practices and ideas, commerce hastens moral changes.

Like agriculture in marginal terrain, commerce has thrived on the challenge to prevail over environmental obstacles to making a living. Marginal lands often have become commercial hubs. Here, peoples have bypassed the "third stage" of a predominantly agricultural existence and gone directly from a savage or barbaric existence to a commercial one (20.5.341). In Marseilles, for example, "the barrenness of [the] territory made its citizens decide on economic commerce. They had to be hardworking in order to replace that which nature refused them" (20.5.341).¹⁸⁴

Montesquieu associates commerce not only with marginal physical conditions, but also with marginal social and political situations. The settlement of marginal lands has been

¹⁸³ Montesquieu notes that the development of coal mines in parts of Hungary in Germany have freed up the forests to be cleared for cultivation, because they supply fuel that would otherwise need to be obtained from wood. This in turn enables these lands to sustain larger populations (23.14.435). With this brief reflection, he suggests the important changes that the development of fossil fuels would have in altering domestic political economy and relative economic importance of different regions around the globe.

¹⁸⁴ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 95-98. Other ancient commercial republics he mentions are Rhodes (20.17.348) and Corinth (21.7.363). The abundance of coastlines and islands made ancient Greece well-suited for commerce (21.7.364).

motivated by the need to flee danger elsewhere and escape to where no one else would want to go.

It has been seen everywhere that violence and harassment have brought forth economic commerce among men who are constrained to hide in marshes, on islands, on the shoals, and even among dangerous reefs. Thus were Tyre, Venice, and the Dutch towns founded; fugitives found security there. They had to live; they drew their livelihood from the whole universe (20.5.341).

In the pre-modern world, commerce went hand and hand with seafaring and its arts of navigation and shipbuilding. These rugged coastal towns like Marseilles had the lone advantage of being strategically located. They leveraged this advantage to make themselves into a locus of transit and exchange for the bearers of goods from more fertile lands. By learning to “draw their livelihood from the whole universe,” these peoples overcame the natural limitations of their physical locale for supporting human settlement. Thus, the last line intimates the way commerce can “liberate” a people from the constraints of physical causes, or at least those particular to one place.

The cultivation of the arts, the starting point for commerce in agricultural societies, also serves to detach political economy from the constraints of particular physical conditions—which are linked to the constraints of particular political communities. Montesquieu reflects in the *Considerations* that the trade of an artisan, unlike that of a farmer, does not necessarily connect a citizen to his fatherland. Artisans in Rome “had no country in the proper sense of the term, and could pursue their trade anywhere” (CC, III. 41).¹⁸⁵ Montesquieu similarly describes the impact of the development of modern economic

¹⁸⁵ Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 134.

tools for making wealth more fungible. Wealth tied up in “movable effects,” like letters of exchange, “[belongs] to the whole world” (20.23.353).¹⁸⁶

Individuals with fungible wealth do not need to abide arbitrary civil and political harassments under a particular government. Just as peoples in marginal locales settle on commerce as the solution to their physically constrained situation, practitioners of commerce themselves have sought refuge in particular social and political environments—those with political liberty in the full sense. “Commerce, sometimes destroyed by conquerors, sometimes hampered by monarchs, wanders across the earth, flees from where it is oppressed, and remains where it is left to breathe: it reigns today where one used to see only deserted places, seas, and rocks; there where it used to reign are now only deserted places” (21.5.357).

Commerce and medieval Jews found each other in “the seat of harassment and despair” (21.20.389). The invention of the letter of credit by persecuted Jewish businessmen in medieval Europe highlights the potential for a commercial economy to “liberate” prosperity from the empire of the physical. “In this way, commerce was able to avoid violence and maintain itself everywhere, for the richest trader had only invisible goods, which could be sent everywhere and leave not trace anywhere” (21.20.389; 22.14.416-17).

The capacity for commerce to weaken political empires is closely related to its capacity to weaken the physical empire. In both the ancient and modern worlds, states that have wanted to enjoy the benefits of commerce have found themselves having to favor civil liberty, for while there may be some simple tasks of physical labor that masters and despots

¹⁸⁶ On the growing importance of “movable effects” in 18th century Europe, see Cheney, *Revolutionary Commerce*, 59-60. Smith, *Wealth of Nations* I, IV.i.3, 430.

can coerce people to do and obtain a similar product as if by free men, one cannot force people to be clever or creative (20.4.340-41, 20.7-14.342-47). A legislator will be much more successful in generating commercial wealth by encouraging or simply allowing people to labor and innovate for their own gain. To encourage maritime enterprises, the kings of Egypt “did not have to constrain the genius of their subjects; they had only to follow it” (21.9.369).

In addition to following from and requiring free labor, the pursuit of a successful commercial economy pushes a country towards political liberty in other senses. In a monarchy or aristocracy, the development of commerce can contribute to constitutional balance by raising a merchant class to temper the pride and privileges of the nobility. Commerce, “the profession of equal people” serves, in Rahe’s expression, as a “Trojan Horse” for democracy in monarchy, mixing the equalizing principle of interest with that of the discriminating principle of honor (2.3.15, 5.8.53).¹⁸⁷

The “spirit of commerce” characteristic of commercial republics in particular also brings with it a kind of virtue that serves to uphold moderate government. While not as heroic as the virtues of classical martial republics, the virtues attending the spirit of commerce still help to restrain the simple pursuit of immediate gratification. In Montesquieu’s ode to Marseilles, he suggests that commercial life requires, and therefore encourages, a certain discipline and moderation in mores. The commercial life these inhabitants of a barren country adopted not only made them “hardworking in order to replace that which nature refused them,” but also “just, in order to live among the barbarian nations that were to make their prosperity; moderate, in order for their government always to be

¹⁸⁷ Rahe, *Montesquieu and the Logic of Liberty*, 167.

tranquil; finally, of frugal mores, in order to live always by a commerce that they would the more surely preserve the less it was advantageous to them” (20.5.341).¹⁸⁸

The territory that became the modern country of Holland figures as the native soil for both ancient Gothic liberty and modern commercial liberty. Discussing Holland’s rise as a hub of commerce, Montesquieu explains, “Nature made [Holland] so that attention would be paid to her and that she would not be abandoned to indifference or caprice” (18.6.288). He speaks as though the land itself compelled Holland to be what it is in modern times. As he notes in the *Considerations*, however, when the Romans tried to conquer the Germanic tribes north of the Rhine, these lands “were not yet made.” It was only “after the rivers were changed in their course [that] these marshes disappeared, and the appearance of Germany was altered” (CC, XXII.210). Until the 13th century, the Low Countries, the deltas of the Rhine, Meuse, and Scheldt, and Ems rivers, were largely “submerged lands artificially made suitable for human habitation” (CC, XXII.202n3). It was human ingenuity that quite literally put Holland on the map, making it possible to adopt a civilized mode of livelihood and thereby enable a sizeable population to inhabit the land.

Maintaining Holland as arable land, he emphasizes, necessitates moderation in both governance and popular mores and behavior. “Countries which have been made inhabitable by the industry of men and which need that same industry in order to exist call for moderate government” (18.6.288). The need for government to be moderate in a place like Holland, and to be moderate republican in particular, has a great deal to do with the fact that the altered landscape was well-suited for commerce. Holland, like other rugged, coastal locales, engaged in what Montesquieu calls a commerce in economy rather than a commerce in

¹⁸⁸ In his description of ancient Marseilles, Montesquieu draws on Justin’s *Epitoma historiarum Philippicarum*.

luxury. This is a trade in basic goods for marginal returns. It occasionally leads to large commercial enterprises, but only through incremental successes. With its middling gains, the “carrying trade,” had little appeal to princes and noblemen, and thus is less related to the constitution of monarchy than to that of republics (20.4.340).

Nonetheless, in dramatically altering the landscape, the people and their legislators generated new physical causes that in turn imposed a certain salutary discipline on their behavior and governance. Maintaining the dikes and dams that secured this new landscape required coordination among representatives of towns and villages.¹⁸⁹ Moreover, the development of commerce made possible by elevating the coastal marshes itself called for a kind of public and legislative moderation. In his ode to the ancient commercial republic of Marseilles, Montesquieu explicates the moderation born of the need to wrest one’s livelihood from a challenging terrain through commerce.

Marseilles, a necessary retreat in the midst of a stormy sea, Marseilles, where all the winds, the shoals, and the coastline order ships to put in, was frequented by sea-faring people. The barrenness of its territory made its citizens decide on economic commerce. They had to be hardworking in order to replace that which nature refused them; just, in order to live among the barbarian nations that were to make their prosperity; moderate, in order for their government always to be tranquil; finally, of frugal mores, in order to live always by a commerce that they would the more surely preserve the less it was advantageous to them (20.5.341).

“Men, by their care and their good laws,” he goes on to explain in Book 18, “have made the earth more fit to be their home. We see rivers flowing where there were lakes and marshes; it is a good that nature did not make, but which is maintained by nature.” Thus, the dynamic relationship between environmental conditions and human initiative and ingenuity

¹⁸⁹ On the history of land reclamation in Holland, and the economic and political institutions needed to maintain it, see Jonathan Israel, *The Dutch Republic: It’s Rise, Greatness, and Fall* (New York: Oxford University Press, 1998), 9-17, 111-12, 274-75, 284.

continues even once the relative balance has been shifted more in favor of the moral (18.7.289).

Pangle dramatizes the tension between human creativity and natural abundance in Book 18, drawing the lesson that

Man achieves his humanity and the satisfaction of his needs only when he reacts against his natural state and transforms and overcomes the state of nature. It is tempting to say that nature's only kindness to man is the ferocity of her malevolence. Man can be thankful that in at least some regions of the earth his misery is originally so acute that it is literally unbearable.¹⁹⁰

However, Montesquieu does not pose the conflict between nature and humanity so starkly.

Part 3 as a whole militates against the lesson that overcoming physical causes is either feasible or desirable. His point, rather, is that legislators should attempt to mitigate the worst effects of each physical environment by “turning effect against cause,” that is, by using balancing natural forces against one another. Physical causes, he suggests, continue to act upon human efforts to modify them (18.7.289).

Another key example of the possible advantages of the way lands “made habitable by men” in turn require moderate government is the provinces of Kiangsu and Chekiang¹⁹¹—the “low countries” of China, as it were.

¹⁹⁰ Pangle, *Montesquieu's Philosophy of Liberalism*, 183.

¹⁹¹ These two provinces, also known as Jiangsu and Zhejiang, are located on mainland China's east coast, adjacent to Shanghai on the north and south, respectively.

The former emperors of China were not conquerors. The first thing that they did to enlarge their country was the one that most demonstrated their wisdom. The finest provinces in the empire were seen to rise from under the water; they were made by men. The indescribable fertility of these two provinces has given Europe its ideas of the felicity of that vast region. But the continuous care necessary to protect such an important part of the empire from destruction required the mores of a wise people rather than those of a voluptuous people, the legitimate power of a monarch rather than the tyrannical power of a despot. Power had to be moderate there, as it was in times past in Egypt. Power had to be moderate there as it is in Holland, which nature made so that attention would be paid to her and that she would not be abandoned to indifference or caprice (18.6.288).

Other benefits of commerce in turn include a greater tendency to interdependence and therefore to peace among nations, and an enlightenment that comes from the comparison of diverse practices and ideas. In a statement resonating of contemporary theories of economic peace, Montesquieu explains, “the natural effect of commerce it to lead to peace. Two nations that trade with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling, and all unions are founded on mutual needs” (20.2.338).¹⁹²

While commerce can counter belligerence by focusing attentions on physical needs and interests, Montesquieu is equally interested in the moral recalculations that commerce encourages. For one, commercial life encourages a focus on prosperity and material comfort. Peoples become less bellicose with their neighbors not simply because they trade with them, but because they *care* more about trade than war; they have come to put a higher priority on material gain and physical comfort than honor and military prowess. Commerce becomes the occasion for moral comparisons and exchange of ideas and practices, which can serve to undercut national hatreds and jealousies by encouraging gentle (*doux*) mores. Gentleness

¹⁹² See for example Michael Mousseau, Håvard Hegre and John Oneal, "How the Wealth of Nations Conditions the Liberal Peace," *European Journal of International Relations* 9 (2003), no. 4, 277.
doi: 10.1177/1354066103009002005

comes with exposure to and increasing preference for gentler mores, customs, and laws—perhaps, for example, the gentler penal practices that Montesquieu hopes more legislators will present to their peoples in his analysis of Saint Louis’ reforms.¹⁹³

Commerce cures destructive prejudices, and it is an almost general rule that everywhere there are gentle mores, there is commerce and that everywhere there is commerce, there are gentle mores.

Therefore, one should not be surprised if our mores are less fierce than they were formerly. Commerce has spread knowledge of the mores of all nations; they have been compared to each other, and good things have resulted from this (20.1.338).

In a passage evidently about France, Montesquieu illustrates an extreme example of a

people who engages in commerce in this broad sense of communication among peoples.

This exchange of goods, glances, ideas, mores, and manners accelerates social changes,

develops refined preferences, and a taste for novelty itself. Commerce multiplies both ideas

and feelings, and makes for greater distinctions among individuals than in non-commercial

societies. “The more communicative peoples are, the more easily they change their manners,

because each man is more a spectacle for another; one sees the singularities of individuals

better” (19.8.311). It is in a commercial society, where “the principle faculty of the soul,”

that of making comparison, comes into its own (EC, 54). The general education of society,

the moral cause Montesquieu emphasizes in the *Essay on Causes*, becomes all the more

powerful in a commercial society. Savages and barbarians do not receive an education in this

sense. One has to go to marketplaces, ports, and cities, salons and royal courts, in order to

receive an education in the society of a distinct locale.

Those who are beginning to make use of their reason are found among a barbarous people, where one does not have any sort of education, or else among a people with a police, where one receives a general education in society.

¹⁹³ I discuss the process of enlightenment regarding criminal practices that Montesquieu’s account of Saint Louis implies in Chapter 12.

Those who are born among a barbarous people do not have ideas properly speaking except in relation to the conversation of their being; they live in an eternal night in regard to all of the rest. There, the differences from man to man, from mind to mind, are less great: the coarseness and the dearth of ideas equalize them in some measure (EC, 53).

The opportunity to compare diverse practices and ideas, however, is the source of both the advantages and disadvantages of commerce. Montesquieu neatly encapsulates the tradeoff to be made: “The laws of commerce perfect mores for the same reason that these same laws ruin mores. Commerce corrupts pure mores, and this was the subject of Plato’s complaints; it polishes and softens barbarous mores, as we see every day” (20.1.338).

What this “corruption” consists in from Montesquieu’s point of view is a complex matter. It includes the vanity¹⁹⁴ and general preoccupation with frivolity¹⁹⁵ that Rousseau elaborates and condemns in the *Second Discourse* (7.2.113, 19.8.311-12, 20.1-2.338-39, 20.23.353). In addition, “commerce in economy,” which encourages the virtues of frugality and moderation discussed above, can degenerate into “commerce in luxury,” wherein these mores deteriorate and the political order with it (7.1-2.96-98, 8.2.112-13, 20.4.340-41). Montesquieu also criticizes what he calls a “certain feeling for exact justice.” While “the spirit of commerce unites nations, it does not unite individuals in the same way. We see that in countries where one is affected only by the spirit of commerce, there is traffic in all activities and all moral virtues; the smallest things, those required by humanity, are done or given for money” (20.2.338-39). This intrusion of market mores into personal and civic relationships, labeled pejoratively as Dutch since the 17th century, and perhaps now deemed

¹⁹⁴ Citing Mandeville’s reflections on fashion in large towns, Montesquieu explains, “The more men are together, the more vain they are, and the more they feel arise within them the desire to call attention to themselves by small things. If their number is so great that most are unknown to one another, the desire to distinguish themselves redoubles because there is more expectation of succeeding” (7.1.97).

¹⁹⁵ “It is the nature of commerce to make superfluous things useful and useful ones necessary.” But Montesquieu goes on, “therefore, the [commercial] state will be able to give the necessary things to a greater number of its subjects” (20.23.353).

American or Western, marks an improvement over the banditry practiced by savages and barbarians, but also brings an end to the hospitality and robust generosity they practiced.¹⁹⁶

The implications of these drawbacks of commerce for political liberty are not entirely clear from Montesquieu's account. However, the gentle mores born of focusing on material prosperity rather than personal and national honor would seem to represent an ambiguous good for political liberty. Montesquieu had lamented the softness (*la mollesse*) of peoples inhabiting fertile lands in Book 18, which makes them more concerned to preserve their material possessions than to defend their liberty against either homegrown tyrants or foreign aggressors (18.4.287).¹⁹⁷ In critiquing the mentality of those dwelling in fertile climates as slavish, Montesquieu indicates a possible problem for commercially prosperous peoples as well. Indeed, he notes that the Roman Gauls, who used to be able defeat Germanic tribes, were "spoiled" (*gâtés*) in terms of their military strength by living for a few generations in proximity to his beloved Marseilles (20.1.338). The commercial life, he suggests, may go so far in remaking attachments to particular places and peoples that it undermines a nation's ability and/or willingness to defend itself.

In addition, while Montesquieu often praises laws with gentle *effects*, we should recall that he does not trace moderate government historically to people with a *spirit* of gentleness, but to the rather harsh Frankish monarchy. Just as the harsh spirit of independence inadvertently resulted in gentle practices, the spirit of gentleness might

¹⁹⁶ Montesquieu describes Dutch mores in particularly harsh terms in his European travelogue, *Voyage de Gratz a La Haye*, OC I 862-74. We should emphasize, however, that Montesquieu did not publish this and the tone is markedly different from writing he saw fit to print: "Everything I had been told of the avarice, the dishonesty, and the fraud of the Dutch is not made up; it is the pure truth. I do not believe that, since a famous man called Judas, there has ever been a Jew more Jewish than some of them." (OC I, 863).

¹⁹⁷ While *moeurs doux* and *molles* are not precisely the same (the latter having a more negative connotation) they are close enough to warrant comparison, especially given the similar phenomenon with which they are associated—that of attachment to material prosperity.

inadvertently invite harsh consequences. The spirit of independence and the spirit of commerce, at least in this aspect of gentleness, then, have rather contrary implications. Yet Montesquieu praises at different points the contribution both have made to the establishment and maintenance of moderate government.

In sum, Montesquieu's presentation of the tradeoffs among the various modes of subsistence for liberty suggests that modern liberty will be forged through some mutual tempering of the spirits of independence, industriousness, and gentleness—none of which makes for political liberty in itself, but all of which contribute something vital to upholding that liberty in the face of the diverse possible threats to it. We should note that what he praises in the mature form of Gothic government, England, is not one particular spirit, but the robust presence of three. The English are “the people who have best known how to take advantage of these three great things at the same time: religion, commerce, and liberty” (20.7.343).

Chapter 19: Legislating to counter the vices of climate

Before explaining the lessons of Part 3 for liberal statesmanship, we must first clarify how legislative initiative is possible in light of the powerful influence of the physical environment in shaping a country. On what basis can legislators and reformers exercise any leadership given the profound constraints posed by the physical and social environments?¹⁹⁸ From the time *The Spirit of the Laws* was first published, many of the book's critics have accused the author of treating physical causes as determinative, omnipotent. The passages most often cited as evidence include his statement in Book 19 that "the empire of climate is the first of all empires," as well as his conclusions about the dramatic impact of climate on sexual passion (19.14.310).¹⁹⁹ While it can be fairly argued that he accorded inordinate weight to the variable of climate, the charge of determinism goes too far, a point that many commentators, beginning with D'Alembert and other contemporaries, have ably explained.²⁰⁰ They emphasize his insistence on at least the potential for moral causes to predominate over the physical (8.21.126, 16.12.272; EC, 60; CC, XVIII.169)²⁰¹, as well as his numerous

¹⁹⁸ I will take up the question of Montesquieu's ultimate standards for guiding legislators in the dissertation conclusion.

¹⁹⁹ "There are climates in which the physical aspect has such strength that morality can do practically nothing. Leave a man with a woman; a temptation is a fall, attack is sure, and resistance null. In these countries there must be bolted doors instead of precepts" (16.8.269). Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 144-146.

²⁰⁰ Jean De Le Rond D'Alembert, "Analyse de *L'Esprit de Lois*," in *De L'Esprit de Lois* (London, 1777) Vol. 1. http://fr.wikisource.org/wiki/Livre:Montesquieu_Esprit_des_Lois_1777_Garnier_1.djvu Pangle, *Montesquieu's Philosophy of Liberalism*, 168; Manent, *City of Man*, 75; Aron, *Main Currents in Sociological Thought*, 40-41; Henry Merry, *Montesquieu's System of Natural Government*, 28-30, 49-54; Courtney, "Montesquieu and Natural Law," 57; Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 144-45, 151, 162-63; Shackleton, *Montesquieu: A Critical Biography*, 313-18; Berlin, "Montesquieu," 151; Pangle, *Montesquieu's Philosophy of Liberalism*, 168.

²⁰¹ See also Montesquieu's "Letter to Hume, May 19, 1749;" *Response to the Theological Faculty*, OC II, 1172-74. The full title is *Réponses et Explications donnés a la faculté de théologie: Explications données a la Faculté de Théologie sur les 17 Propositions qu'elle a extraites du livre intitulé "l'Esprit des Lois," et qu'elle a censurées. Defense de L'Esprit de Lois*, OC II, 1145-46.

suggestions about the ways legislators not only can but should counter the “vices of climate” (16.12.272; 14.3.235, 14.5-9.236-38, 15.8.252).

Moreover, just as Montesquieu suggests wedges for liberty in unfavorable environments, he warns that climate is no guarantee despotism could not embed itself in northern Europe (8.8.118). “Most European peoples are still governed by mores. But if, by a long abuse of power or by a great conquest, despotism became established at a certain time, neither mores nor climate would hold firm, and in this fine part of the world, human nature would suffer, at least for a while, the insults heaped upon it in the other three” (8.8.118). This warning, rather prophetic in light of 20th century European history,²⁰² is not exactly reassuring for Europeans who value their liberty, but precisely because it points to the vulnerabilities of even those countries where liberty seems so deeply rooted.

Montesquieu defended himself—or rather the anonymous “author of *The Spirit of the Laws*”—against charges of, among other things, according all to climate in the *Defense de L’Esprit de Lois*, as well his *Response to the Theological Faculty*.²⁰³ The *Defense* was written

²⁰² In a quote from Montesquieu’s correspondence that Paul Rahe frequently cites, he similarly presaged, “The last sigh of liberty in Europe will be heaved by an Englishman,” Letter to Domville, 22 July 1749, in Nagel ed. of Montesquieu’s *Œuvres Complètes*, vol. III, 1244-45. Cited in Rahe, *Soft Despotism, Democracy’s Drift: Montesquieu, Rousseau, Tocqueville and the Modern Prospect* (New Haven, CT: Yale University Press, 2009), 54, 59, 271.

²⁰³ Interestingly enough, in a fragment from the mid-1730s published in his *Pensées* Montesquieu expressed concern that readers of the *Considerations* would think he had *neglected* physical causes: “I beg that no one accuse me of attributing to moral causes things that belong only to those of climate” Montesquieu was more concerned at this juncture that he would be accused of attributing too *little* to physical causes, whereas the opposite was the case in the wake of the *Spirit of the Laws* (*Pensées* #1209, in OC I, 1303). See Shackleton, *Montesquieu: A Critical Biography*, 317. In this *Response*, Montesquieu agreed to purge a number of provocative statements from subsequent editions of the text, including, “One must make Divinity honored, and one must never avenge it” (12.4.190). OC II, 1175

in response to Jansenist criticism in their publication, *Nouvelles Ecclesiastiques*.²⁰⁴ The statement about climate being the “first of all empires,” he explains, was simply “a metaphorical expression,” the context of which suggested that climate is not all-powerful; the mores and manners Peter the Great found among the Russians did *not* accord with what one would expect in such a climate—that is, climate was overpowered by other factors.²⁰⁵

In Part 3, he explains, the author sought to explain only what is obvious: that peoples in diverse countries exhibit distinct sets of characteristics, and that their different physical environments have something to do with this. “The physical climate can produce different tendencies in *esprits*; these tendencies may influence human actions: does this offend the empire of Him who created, or the merits of Him who redeemed?”²⁰⁶

Regarding the suggestion of environmental constraints on the spread of Christianity, Montesquieu contends that he meant only that it constrains human agents, not the divine power underlying the physical makeup of the earth itself. As suggested in Chapter 16, Montesquieu’s ambiguous articulation of this constraint could be read as suggesting that the divine wisdom must have used physical conditions to constrain the spread of particular religious practices not meant to be universal.²⁰⁷ Of course, this explanation would do little to reassure his Catholic critics.

²⁰⁴ The *Défense*, was published in 1750 by Barillot in Geneva, and, like *L’Esprit*, was published anonymously. Callois, ed., *OC* II, 1121n. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 104-05. As discussed in Chapter 14, it was not only the Church establishment that balked at the emphasis on physical causes, but also philosophers of a much more materialist bent than Montesquieu himself. See Meek, *Social Science and the Ignoble Savage*, 134, and Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 144-45.

²⁰⁵ *Response to Theological Faculty*, *OC* II, 1173.

²⁰⁶ *Défense de L’Esprit des Lois*, *OC* II, 1145.

²⁰⁷ “Human reasons are always subordinate to that supreme cause that does all that it wants and makes use of whatever it wants” (16.2.265).

Montesquieu's defense against these accusations of determinism—made by churchmen and *philosophes* alike—does not, thankfully, rest on the plausibility of his attempts to depict the book as friendly to the Catholic political establishment. His specific point is that human institutions—whether they represent fundamental causes or are causes “secondary” to divine intentions—influence the general spirit more powerfully than do physical causes overall.²⁰⁸

It seems that the author of *The Spirit of Laws* should be the last to be accused of ignoring the power of moral causes, and, therefore, of morality itself. As he spoke a lot about climate in several books that had climate for their subject, there is much discussion of moral causes in almost all of his work, because it was a question of moral causes there, and one can say that the book *The Spirit of Laws* forms a perpetual triumph of the moral over the climatic, or rather, in general, over the physical causes. One needs only see what he has said about the force of these causes on *l'esprit* of the Lacedaemonians, Greeks, and Romans.²⁰⁹

It is the example of the “singular institutions” of the ancients, then, which best demonstrate the power of moral causes to shape the general spirit (4.6.36, 4.7.38, 19.21.321-322, 23.7.431). In Sparta and the Roman republic, as well as among the Jews and the Chinese—Montesquieu's other examples of peoples with “singular institutions”—mores, manners, religion, received examples, and laws all direct people to the same ends, though very different ends in each case (11.5.156). The total effect of the moral causes under such institutions is extraordinarily powerful. Even where moral causes do not coincide in their effect on the general spirit, they can still be quite powerful. Religion and the constitution in particular put a strong stamp on the general spirit.

²⁰⁸ Montesquieu explains his statement about the importance of confederation to the Israelites' defeat of the Canaanites as concerning “secondary” rather than ultimate causes; the God of the Hebrew Scriptures in particular constantly uses physical causes to realize his ends (9.2.132). *Response to the Theological Faculty*, OC II, 1173-75.

²⁰⁹ *Response to the Theological Faculty*, OC II, 1173.

What, then, are the lessons Montesquieu conveys to legislators about pursuing liberal reform? One broad principle I have drawn from his analysis in this section is that the influences of the physical environment in any given locale present legislators with opportunities for as well as constrains upon the goal of advancing political liberty. Even the physical constraints Montesquieu discusses, can, by being understood, be countered or guided. A physical cause in itself is always accidental to human intentions at some level. However, by studying physical causes and discerning their logic, Montesquieu suggests that we can manage them for our own purposes. Our *knowledge* of physical causes, like that of moral causes, can be wielded deliberately. As Machiavelli famously recommended, we can build “dikes and dams” in times of calm to help withstand the periodic flooding that experience teaches us nature will be bring.²¹⁰

Montesquieu does suggest ways men can purposefully reshape their natural environment to accord with their best interests, as the inhabitants of Holland and the Chinese provinces turned low-lying marshes into productive farmland. However, he focuses more on countering the vices of human psychology attending different climates, and generally appealing to the “natural resources” for liberal reform latent in the general spirit of any people. Human nature itself provides support for both liberty and servitude. The possibility for a legislator to lead a people in any given direction begins with the fact of this multifold, self-contradictory character of human nature. Moreover, the psychological propensities characteristic of southern and northern climes are also multiple and interactive. They can be used to temper or enhance one another.

²¹⁰ Niccolò Machiavelli, *The Prince*, trans. Harvey Mansfield (Chicago: University of Chicago Press, 1998), 2nd ed., XXV.98.

There are, for example, “contradictions in the characters” of peoples in both the north and the south (14.3.234-35). The heightened sensitivity of people in the “Indies,” he explains, is the source of both timidity and great imagination. Sensitivity can motivate both cowardice and bravery. “The same delicacy of organs that makes them fear death serves also to make them dread a thousand things more than death. The same sensitivity makes the Indians both flee all perils and brave them all” (14.3.235). It is the competing implications of this sensitivity, he suggests, that explain the practice most striking to India’s visitors since ancient times, of widows throwing themselves on their husbands’ funeral pyre.

Moreover, while dwelling in hot climate may make people in the Indies indolent, it also makes them gentle, which supports political liberty in a different way than does the spirit of independence. This gentleness means that legislators can put great trust in them and restrain them with few penalties. After spending much of Book 14 lamenting the character of peoples inhabiting hot climates, Montesquieu ends it by exclaiming some of their virtues: “Happy is the climate that gives birth to candor in mores and produces gentleness in laws” (14.15.245).

Northern climes as well give rise to contradictory psychological tendencies, or inclinations with contradictory implications. English restiveness, for example, pushes in two directions: towards suicidal melancholy, but also towards a faculty for frustrating the slightest attempts towards tyranny (14.13.242-43). The spirit of the independence of the early Franks made them quick to seek vengeance for perceived wrongs against them or their families, but it also made them effective forces for humbling Rome in its imperial designs. The ancient Germanic spirit of independence, we should keep in mind, also took forms with rather unfavorable consequences for liberty, including that of the Saxons’ “indomitable

humor” and “harshness of the conqueror” and the Visigothic spirit of the Inquisition (28.1.534).

The characteristics Montesquieu is especially concerned to counteract are those that make people disdain or otherwise avoid laboring to generate the goods of this world. Laziness, the taste for idleness and luxury, pride in one’s status as a member of a “leisure class,” and speculative inclinations all undermine the work ethic that Montesquieu sees as crucial to civil liberty in the modern world. All of these dispositions he finds to be characteristic of peoples in hot climates. Montesquieu’s encouragement of the spirit of commerce and the gentleness it inspires *vis à vis* foreigners also suggests he is wary of national jealousy as a potential threat to political liberty.

It is not only psychological propensities following directly from the climate and way of life that Montesquieu sees as resources for a nation’s “self-improvement.” In a brief chapter that goes a long way towards illuminating the logic of his argument in *The Spirit of the Laws* as a whole, Montesquieu emphasizes the multiplicity of causes contributing to the general spirit, or common character of a nation. Moreover, the weight and particular configuration of the various causes is unique in each nation at any given point.

Many things govern men: climate, religion, laws, the maxims of the government, examples of things past, mores, and manners: a general spirit is formed as a result. To the extent that, in each nation, one of these causes acts more forcefully, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannized Japan; in former times mores set the tone in Lacedaemonia; in Rome it was set by the maxims of government and the ancient mores (19.4.310).²¹¹

²¹¹ On the development of Montesquieu’s articulation of the general spirit through various earlier incarnations, see Shackleton, “The Evolution of Montesquieu’s Theory of Climate,” 320-22; Richter “An Introduction,” 135. Shackleton calls the “assembly of causes” one of the most important ideas in the entire work. Shackleton, *Montesquieu: A Critical Biography*, 316. Stark identifies Book 19, Chapter 4 as the most important chapter in the *Spirit of the Laws* as a whole. *Montesquieu: Pioneer of the Sociology of Knowledge*, 86-87.

Montesquieu's advice to legislators in Part 3 speaks to the underlying political psychology he considers necessary for sustaining the institutional and legal architecture of moderate government. The characteristics that he deems supportive of liberty, and encourages legislators to promote in Part 3, can be summarized under the umbrellas of the spirit of commerce and the spirit of independence. The former brings with it the virtues of industriousness, frugality, and regard for legal order, as well as gentle mores and an openness to change. The spirit of independence takes numerous forms, from the Germanic tribes' insistence on governing themselves locally and separately, to the Frenchman's love of personal honor, to the Englishmen's party spirit and readiness to suspect his fellows and his government of oppressing him.

In praising both the spirit of independence and that of commerce, Montesquieu points to rather different springs for political liberty, which stand in clear tension with one another, particularly in the attitudes towards authority and order each would seem to entail. Both contribute something vital to moderate government, and yet neither leads directly to political liberty by itself. This tension, however, can prove fruitful for a legislator, as each provides the means for tempering the other. The spirit of independence, with its readiness to defend one's own and one's personal honor, must be submitted to legal order in some way, and yet it must not be destroyed. The taste for material well-being, tranquility, and order must be encouraged, but not indulged.

The legislator's task is to balance these spirits by discerning which needs to be emphasized at any given point, and the particular grounds for appealing to that spirit given the different elements of the general character of the particular nation. Just which qualities a legislator should encourage and which he should downplay will vary depending upon the

particular people, and the most pressing challenges it faces at any given point in time. In general, then, legislators in each country must familiarize themselves with the particular mixture of political vices and political virtues inherent in the general spirit of their nation, and appeal to native virtues to combat native vices.

Consciously altering the course of a nation's general spirit is not impossible, but it is extremely difficult. One of the basic premises of Montesquieu's notion of the general spirit is that the laws, mores, manners, religion, mode of subsistence, and environment all are linked in some way with each other. When one element of the general spirit is changed, this alters the dynamic with the other elements. "These things each have a mutual relation with one another. If you change one, the others will follow but slowly, which makes for a kind of disharmony throughout."²¹²

Thus, Montesquieu warns that a reformer who reasons that one aspect of the general spirit—say, the laws or mores in one particular area, must be careful to understand the way that law or more is linked with others laws and mores and other aspects of the general spirit. A major national reform, he suggests, "can be proposed only by those who are born fortunate enough to fathom by a stroke of genius the whole of a state's constitution" (xliv). In general, the legislator's spirit should be that of moderation: "I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator; the political good, like the moral good, is always found between two limits" (29.1.603).

Different aspects of the general spirit can be turned against each other in the same way that the psychological propensities Montesquieu traces directly to climate can. A legislator should build on what it is that society already esteems, rewards, to encourage

²¹² *Pensées* #645, in *OC* I, 1156.

needed changes. Through both negative and positive examples of legislative acts, Montesquieu suggests ways legislators can make use of the general spirit to correct its very defects *vis à vis* liberty. He praises a number of legislators who have tapped economic and honorific incentives to encourage industriousness. Monetary and honorary rewards, economic incentives, and simple acts of leading by example all can serve as non-accidental moral causes that motivate a positive work ethic, so to speak. He also conveys lessons for reformers via his criticisms of those who have exacerbated the vices of climate with centralized land ownership arrangements and metaphysical doctrines that deter popular economic initiative.

A key example of the way to use one aspect of the general spirit against another is Montesquieu's proposal for encouraging agricultural labor in southern Europe. The love of honor, which is the defining principle of monarchy, not only can inspire individuals to risk their lives in battle and in personal combat (3.7.27, 4.2.31-34), but is even powerful enough to counter the laziness fostered by hot climate. The overlap of monarchic government and hot climate in southern Europe provides a prime opportunity to appeal to honor to combat indolence. The warm climate, he argues, makes the Spanish lazy. Their particular code of monarchic honor, forged through the initial conquests of those bad Germans, the Visigoths, and the experience of the age of the conquistadors, makes them arrogant. This arrogance reinforces the laziness native to the climate, because it is an arrogance based on one's status as a master and conqueror of those who labor. Yet one could use this very arrogance against laziness, Montesquieu argues.

Ordinarily, lazy nations are arrogant. One could turn effect against cause and destroy laziness by arrogance. In southern Europe, where peoples are so impressed by the point of honor, it would be well to give prizes to the plowmen who had best cultivated their lands and to the workers who had been most industrious. This practice will succeed in every country. In our time it has been used in Ireland to establish one of the largest textile mills in Europe (14.9.238; 19.9.312-13).

A legislator who recognizes the unfortunate consequences of the climate, and the way the particular code of honor exacerbates it, could present new objects of pride to this people. By bestowing honors on enterprising farmers, legislators in southern Europe could encourage industriousness. This recommendation fits with Montesquieu's praise elsewhere in the work of the elevation of classes like France's *noblesse de la robe*. The prospect of buying a title to nobility motivates commercial or professional enterprise (20.22.350-51).

The pride that people take in distinguishing themselves as superior to others may be morally suspect, but it can be tapped to very positive effects for the political community as a whole. Honor in a monarchy, Montesquieu emphasizes, is a "false honor." That is, the nobles pride themselves on distinctions that do not constitute true merits (2.6-7.26-27, 4.2.31-34). In Book 19, he returns to this subject and shows how honor is itself an extremely malleable principle. Even among monarchies, the particular content of what is honored can vary dramatically. Some versions of the principle of honor are more conducive to Montesquieu's proposal for appealing to honor to combat laziness. French vanity, tied up as it is with luxury and the cultivation of the arts, is much more susceptible to this manipulation than Spanish arrogance—to which Montesquieu refers in the above passage from Book 14. "Laziness is the effect of arrogance; work follows from vanity; the arrogance of a Spaniard will incline

him not to work; vanity of a Frenchman will incline him to try to work better than the others” (19.9.312).²¹³

In the case of a nation like Spain, then, what was needed was an effort by the nobles and clerics—the “opinion-leaders” of early modern Spain—to change the object of popular honor, to promote new models of the honorable Spaniard. The objective in turning arrogance against laziness, then, is to remake the grounds for arrogance as well, so that it is more useful for liberty. Legislators of those peoples for whom nobility is synonymous with idleness must inspire people to take pride in work.

While honor is what makes the constitution itself tick in monarchies, it nonetheless exists in some form in other governments. In all civilized societies, there is a general education imparted through the mores, maxims, received examples, and laws that convey what is held admirable and what is held in contempt. As Montesquieu suggested in his recommendations for regulating mores, religion, and manners outside the criminal code, social approval and disapproval constitute very powerful incentives (6.9-13.82-88, 12.4.189-91). In addition, under any government the desire for even a modest gain in material well-being also can motivate great changes (15.8.252, 25.12.489). The power of these motives speaks to the greater influence, if tapped, of moral causes.

Another important example comes from China. As we have seen, Montesquieu identifies a unique dynamic between physical and moral causes in China, whereby the particular mixture of physical conditions constrains legislators to govern more moderately than one would expect given the large size of the empire and the more or less despotic

²¹³ Similarly, Montesquieu lauds Caesar’s efforts to encourage the corrupt Romans to have families by prohibiting “women under forty-five and who had neither husbands nor children to wear precious stones or to use litters, an excellent method of attacking celibacy through vanity” (23.21.442).

character of the constitution (7.7.103, 8.21.128, 19.20.321). In order to avoid disastrous cycles of famine and population surges, China's rulers must develop a well-organized, stable system of food production. This involves continuous efforts on the part of Chinese farmers to make their lands productive.

He reports "a good custom in China" that supports this purpose, wherein the emperor avows the national importance and the dignified status of agricultural labor through his own example and by bestowing honors on those who are outstanding in their field.

The accounts of China tell us of the ceremony that the emperor performs every year to open the cultivation of the fields. By this public and solemn act one has wanted to rouse the peoples to their plowing. Moreover, each year the emperor is informed of the plowman who has most distinguished himself in his profession; he makes him a mandarin of the eighth order (14.8.238).²¹⁴ Similarly, he praises ancient Persian kings for linking their honor to that of the common plowmen through holding a communal feast: "On the eighth day of the month named *Chorem ruz* the kings would lay aside their pomp and eat with the plowmen. These institutions are remarkable for encouraging agriculture" (14.8.238). He also praises Persian leaders for establishing a kind of primitive "patent," wherein farmers who improved the irrigation of their land could enjoy the rights to the diverted water for five generations" (18.7.289).²¹⁵

This Persian incentive for improving agricultural land suggests another key mode by which legislators could encourage changes beneficial to civil liberty. The desire for even a modest improvement in prosperity—and to pass on to one's descendants those hard-earned

²¹⁴ Montesquieu takes this example from Du Halde's account of emperor Ven-ti (180-157 BCE) of the Han dynasty, who "cultivated the land with his own hands, and had the empress and her women make silk in the palace" (14.8.237 n13). Thomas Malthus also makes much of this and other Chinese emperors' agricultural inducements, drawing on both Du Halde and Montesquieu in his 1798 *An Essay on the Principle of Population* (New York: Cosimo, 2011), 127-130.

²¹⁵ Montesquieu cites Polybius on this Persian policy. *Historiae*, Book 10, 10.28.3-4 per Cohler et al.

gains—can motivate individuals to undertake laborious tasks. In his insistence that wealth rather than poverty motivates industry, Montesquieu is in the same camp with Hume and Smith of criticizing mercantilist claims that the poor will be motivated to work only if they are kept poor (13.2.214, 20.4.340-41).²¹⁶ This desire would seem to form part of a modern spirit of independence, which has economic rather than political self-sufficiency as its goal. To cultivate independence in this sense, Montesquieu would have legislators tap material as well as honorific incentives. Drawing on changes in the Hungarian mining industry,²¹⁷ he proposes that reformers could spur people to undertake arduous labor through a simple wage system. He notes that,

Before Christianity had abolished civil servitude in Europe, work in the mines was regarded as so arduous that one believed it could be done only by slaves or criminals. But today one knows that men employed there live happily. One has encouraged this profession by small privileges; to an increase in work one has joined an increase in gain, and one has come to make them love their condition more than any other they could have assumed.

Another approach legislators might take is to promote agricultural and industrial innovations that could diminish the utility of forced labor.

There is no work so arduous that one cannot adjust it to the strength of the one who does it, provided that reason and not avarice regulates it. With the convenience of machines invented or applied by art, one can replace the forced labor that elsewhere is done by slaves. The mines of the Turks, in the Province of Timisvara, were richer than those in Hungary, but they did not produce as much because the imagination of the Turks never went beyond the brawn of their slaves.

These technical aids facilitating a transition to free or freer labor represent a counterpart to “natural reasons” supporting slavery—morally neutral factors that reformers can harness in

²¹⁶ On the “utility of poverty” argument, see Edgar Furniss, *The Position of the Laborer in a System of Nationalism: a study in the labor theories of the later British mercantilists* (Boston: Houghton Mifflin Press, 1920). I thank Christopher Martin for directing me to this reference.

²¹⁷ On the influence of Montesquieu’s travels in Hungary to his understanding of both feudal monarchy and the early modern mining industry, see Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 8, 71. See *Mémoires sur les Mines*, OC I, 885-909.

order to promote the cause of civil liberty.²¹⁸ By emphasizing that an industry based on free labor can be even more productive than one based on slavery, Montesquieu also speaks to simple calculations of utility, in the manner that Tocqueville recommended in his critique of slavery.

Montesquieu expresses the hope that, through the development of a wage-labor system, shifts in the means of livelihood, and technological improvements, civil liberty might subsist even in those climates where it is most unappealing to engage in hard labor. “I do not know if my spirit or my heart dictates this point. Perhaps there is no climate on earth where one could not engage freemen to work. Because the laws were badly made, lazy men appeared; because these men were lazy, they were enslaved” (15.8.253).

With this reflection, uncertain as it is, Montesquieu admits that the laziness he observes in certain climes may in fact derive as much from deleterious moral causes as from physical causes. Along these lines, Montesquieu criticizes legislators who have exacerbated native tendencies towards indolence or otherwise encouraged idleness. He points the finger at politically damaging metaphysics in various religions and philosophies, from Buddhism to Islam to Catholicism, that inspire indifference to worldly occupations.

In Book 24, where “laziness of the soul” is also a subject of concern, Montesquieu attacks the doctrine of predestination, which discourages all efforts to improve one’s worldly condition.²¹⁹ From the “dogma of predestination is born laziness of the soul. One has said, it

²¹⁸ However, he notes that the mechanization of arts and industry can put people out of work, as well as to work, exemplified by the case of the water-mill (23.15.426-37). Where mechanization makes it possible for fewer people to work the land in order to produce food for a large community, however, people can shift to other modes of living besides agriculture that might make them less dependent on the vicissitudes of nature, and possibly less beholden to those of human masters.

²¹⁹ Merry, *Montesquieu’s System of Natural Government*, 50.

is decreed by God, so one must rest. In such cases, the laws should arouse men made drowsy by the religion” (24.14.468, 24.11.466, 14.11.241).

The Buddha is a prime example for Montesquieu of one who taught a metaphysics that exacerbated the vices of climate. “Foë, legislator of the Indies, followed his feelings when he put men in an extremely passive state; but his doctrine, born of idleness of the climate, favoring it in turn, has caused a thousand ills” (14.5.236). After criticizing Foë and other Asian philosophers for elevating asceticism, idleness, and the pursuit of emptiness as the spiritual ideal, Montesquieu lauds the concrete, this-worldly orientation of Confucianism:

The legislators of China were more sensible when, as they considered men not in terms of the peaceful state in which they will one day be but in terms of the action proper to making them fulfill the duties of life, they made their religion, philosophy, and laws all practical. The more the physical causes incline men to rest, the more the moral causes should divert them from it (14.5.236).

In Catholicism as well, Montesquieu identifies practices that undermine civil liberty. While he later questions the doctrine of predestination and priestly celibacy²²⁰ as devaluing the goods of this world in and of themselves, Montesquieu’s critique of monasticism in Book 14 points to the conflation of religion and economic values as the problem. It is ecclesiastical arrangements that link wealth to speculative pursuits that attack society’s incentives to labor.

In order to conquer the laziness that comes from the climate, the laws must seek to take away every means of living without labor, but in southern Europe they do the opposite: they give to those who want to be idle places proper for the speculative life, and attach immense wealth to those places. These people who live in an abundance that is burdensome to them correctly give their excess to the common people: the common people have lost the ownership of goods; the people are repaid for it by the idleness they enjoy and they come to love their very poverty (14.7.237; 24.12.467).

²²⁰ Interestingly, in his discussion of doctrines and ways of life that dangerously diminish population levels, Montesquieu puts libertinism in the same camp with priestly celibacy, as they both lead to adults not procreating and raising future citizens, and distancing themselves from the public business (23.21.442-50).

Returning to this theme in Book 24, he urges that “penances [should] be joined to the idea of work, not with the idea of idleness” (24.12.467).

Similarly, he criticizes land ownership arrangements in India that undermine incentives to engage in agricultural labor by amassing lands in the princes’ hands (15.6.236-37). This would be especially dangerous for civil liberty given the encouragement to idleness by climate and religion. “The cultivation of land is the greatest labor of men. The more their climate inclines them to flee this labor, the more their religion and laws should rouse them to it. Thus, the laws of the Indies, which give lands to princes and take away from individuals the spirit of ownership, increase the bad effects of the climate, that is, natural laziness (14.6.236).” Facilitating ownership of land for individuals or families, then, would seem to represent a step legislators could take to encourage industriousness. Good legislators would offset inclinations to idleness and speculation through (if not religious reform) then the promotion of an “ownership society” and by honoring labor; these legislators instead exacerbated these inclinations.

While Montesquieu is primarily concerned with countering the vices of hot climates in Part 3, we should note that he suggests elsewhere ways of tempering the spiritedness characteristic of northerners.²²¹ As I discussed in Section 3, Montesquieu describes favorably the primitive Germanic judicial customs, which channeled barbaric honor itself to begin putting fiercely independent peoples under rule of law. Moreover, he lauds the

²²¹ Montesquieu also describes the way that the ancient Greeks used music (and homosexuality) to soften the harsh mores generated by their martial education (4.8.39-41).

softening effects of Christianity (a religion born in a southern climate) on both political right and the right of nations in Europe (24.3-4.462).²²²

In Book 14, he also suggests that their native restiveness makes Englishmen perhaps not speculative *enough*: “The men of whom we have just spoken could not support the delays, the details and the coolness of negotiations; they would often succeed in them less well than any other nation, and they would lose by their treaties what they had gained by their weapons” (14.13.243). The English may need to be led to greater patience for deliberation, perhaps through their religion education, and/or through the education imparted by the historic vehicle of their popular liberty, the representative legislative assembly.

Northern legislators will also have to cultivate the spirit of commerce, which embraces both industriousness and gentleness. Indeed, the same forests that gave rise to the rudiments of Gothic liberty were eventually cleared, and the marshes built-up, so that Holland could become the great early model of a modern commercial republic. Where their long-lost ancestors once exemplified the spirit of independence, the Goths, or their cousins, came to embody the spirit of commerce, gentle with strangers, if avaricious and ungenerous (20.1-2.338-39). The striking contrast between Tacitus’ Germanic tribes in Part 6 and the cosmopolitan Dutch businessmen described in Part 4 indicates how profoundly the general spirit in a country can change over time.

With his theory that it can mitigate international enmities, Montesquieu suggests that this power of commerce might become handy for European and other legislators. It may be

²²² “Let us envisage...the continual massacres of the kings and leaders of the Greeks and Romans, and...the destruction of peoples and towns by Tamerlane and Genghis Khan, the very leaders who ravaged Asia, and we shall see that we owe to Christianity both a certain political right in government and a certain right of nations in war, for which human nature can never be sufficiently grateful. This right of nations, among ourselves, has the result that victory leaves to the vanquished these great things: life, liberty, laws, goods, and always religion, when one does not blind oneself” (24.3.461-62).

beneficial for political liberty on the whole in some cases for legislators to appeal to a people's desire for material prosperity in order to temper feelings of honor and independence whose pursuit would lead them to wars that would destroy them and/or that they would lose.

Finally, another possible legislative task suggested by Montesquieu's discussion of commerce is that of preventing the spirit of commerce from being corrupted by luxury (5.6.48). Aside from the problem of extreme inequality in wealth, which leads to idleness among both the very rich and the very poor, the spirit of luxury encourages a preference for material comfort that, if taken to an extreme, can make a people slavish. That is, it can make them fear loss of prosperity and tranquility more than loss of liberty (18.1-2.285-86, 18.4.287). To address this very different kind of problem, legislators might have to find ways to tap the more ancient spirit of independence.

In conclusion, we must admit that Montesquieu does not exactly show confidence in the possibility for overcoming tropical and Asian servitude, but he does express the hope that it can be overcome, and points to positive examples that liberal reformers might imitate. Moreover, his tone suggests that no one would be more pleased than Montesquieu to discover that his assessment of southern and Asian servitude was too pessimistic. If Montesquieu could visit, say Florida, Costa Rica, Taiwan or South Korea today, it is hard to believe that he would lament that their examples contradict his theories in Part 3. Rather, there is every reason to believe that Montesquieu would embrace any findings of reformers and/or technological developments disrupting the trend of tropical and Asian servitude. The way that such places have managed to establish moderate government, moreover, may well be explained on Montesquieuian grounds. Such a statement would have been to be defended with an extensive analysis of their comparative development beyond the scope of this

dissertation. However, in the conclusion to this Section (Chapter 20) I will suggest a couple of ways that Montesquieu's science of environmental influences sheds light on some contemporary political issues.

Chapter 20: Evaluating Montesquieu's science of environmental influence

In evaluating Montesquieu's science of environmental influence, it is important to distinguish among his physiological theories in themselves, his methodological approach, and the overall trends and modes of influence he identifies. The quality and importance of his analysis as a whole is better than that of many of his particular theories. Whatever inaccuracies there may be in the specific chains of causality he drew, there is a great deal to the basic patterns he identified, as well to his broad theories of the mode by which physical causes impact politics. Although none have achieved the breadth of his approach, the indirect influence of Montesquieu's political science can be seen in the work of many contemporary political scientists.

Montesquieu's physiological theories themselves, in which he traces many psychological tendencies directly to physical circumstances, often skip over at least potentially intervening variables. As discussed in Chapter 16, his ambiguous assessment of how quickly climate bears its impact, as well as the related question of the status of the temperate zones, also represent problems internal to Montesquieu's own analysis. It is fair to say that there are some points where Montesquieu does reduce moral phenomena to physical causes, and inaccurately so. In particular, he draws a direct causal arrow between the "slackness of fibers" among those inhabiting hot climates to the weakness of their moral fibers, so to speak. He contends that hot climate is not merely physically enervating, which is plainly true, but weakens courage itself (14.2-4.231-35). We should note, however, that he does suggest that the slavishness he observes in hot climates could be because "laws were badly made" rather than because of the immediate effects of climate (15.8.253). In describing the different impacts of the same musical performance on northerners and

southerners, as well the different experiences of lust in hot and cold climates, Montesquieu also underplays moral influences on the psychological experience of music and love, which Rousseau subsequently would emphasize (14.2.233, 14.14.243, 16.8.269).²²³

Still, as emphasized in Chapter 15, Montesquieu's overall depiction of physical causes and their influence on the social and political order belies any suggestion that his social science is reductive or materialist. In all but the most primitive conditions, the primary or immediate influences on the general spirit are social and political: education, mores, manners, laws, and fundamentally political passions, such as love of the homeland in republics, honor in monarchies, and the sense of shame, whatever its particular content, in all societies. This view of his depiction of human nature and the nature of human affairs is reaffirmed by his repeated advice to legislators that a people's way of thinking should be changed, and *can* be changed, by appealing to their sense of honor and shame, that is, their desire to be praiseworthy as understood in their society.

It is not difficult to find questionable, or at the very least, unsubstantiated claims in Part 3 of *The Spirit of the Laws*. We can commend contemporary social scientists for having access to data and tools of analysis that Montesquieu did not, but as Barrera notes in his introduction to the *Essay on Causes*, this approach misses the significance of his study even for just the purposes of intellectual history. "It is easy, of course, to emphasize the archaism of medical thought that did not know the discoveries of Haller, holds air to be a simple element, ignores the elasticity, irritability, and separation of nervous and muscular functions,

²²³ He does distinguish jealousy born of passion and that born of "custom, mores, and laws...and sometimes even the religion." However, jealousy born of passion he considers to be "almost always the result of the physical force of the climate" (16.3.273).

and then abuses hydraulic and musical metaphors.”²²⁴ It would be more worthwhile, he argues, to consider the intellectual contributions not of his anatomical science, but of his overall methodological approach. Montesquieu’s observation that the physical environment has contributed profoundly to political differences across the globe and throughout history, and his comprehensive efforts to understand and explain those contributions, helped inspire a newfound attention to physiological psychology, political economy, and other sub-political influences upon and reflections of legal differences.

Beyond its intellectual influence *per se*, his methodological approach in its own right holds up fairly well. His comparative approach involved scrutinizing the most compelling contemporary physiological and anthropological research available, in addition to the best ancient and modern histories, works of philosophy, and legal treatises. In short, he did what a good political scientist today would do, if serious about the same questions Montesquieu sought to answer. What is striking is that Montesquieu was personally capable of and involved in undertaking each type of analysis he integrated into his study. He did not simply cite the most compelling research in history, biology, geography, and comparative law, but undertook primary research in all of these areas on his own.

After Aristotle, there are few if any parallels to the comprehensiveness of Montesquieu’s political science.²²⁵ Whatever this work’s shortcomings, it is not clear that any subsequent attempts at a global comparative science of political liberty have surpassed it in breadth and depth of insight. Possible contemporary counterparts just to the study centered in Part 3 include Jared Diamond’s *Guns, Germs, and Steel* and David Landes’ *The Wealth*

²²⁴ Barrera, introduction to *Essai sur les causes*, 214.

²²⁵ A possible parallel might be the late medieval historian, Ibn Khaldun.

and Poverty of Nations. It is worth noting that both Diamond and Landes arrive at a similar thesis about the difference between the relative political trajectories of Europe and Asia as Montesquieu: the fragmented topography and thus political decentralization of the former and openness and political centralization of the latter.²²⁶ While these authors make much more precise and better-substantiated causal claims, they lack Montesquieu's appreciation of the variety and interrelation of both moral and physical influences underlying different national trajectories and his keen eye for distinctly political comparisons. For example, as he freely admits, Diamond's argument about the environmental underpinnings of Western political domination cannot help us understand most comparative political and international rivalries from the late modern era on, i.e. between England and its allies and Germany and its allies in the world wars, and between the United States and the Soviet Union. Also, while the strength to win wars and/or not be destroyed in them is clearly important to political liberty, Diamond's framework does not distinguish among countries with regard to internal considerations of political liberty—i.e. between moderate and immoderate governments.

While Diamond and Landes are particularly focused on economic measures of political success, Francis Fukuyama's *The Origins of Political Order* focuses on the distinctly political question of the history of rule of law.²²⁷ Like Montesquieu, he narrows in on the unusual confluence of historical accidents in the wake of the Germanic conquest of the western Roman empire as the origins of liberal government. *The Origins of Political Order*, with its pending second volume, may represent the closest thing to a contemporary

²²⁶ Jared Diamond, *Guns, Germs, and Steel: The Fates of Societies* (New York: W.W. Norton and Company, 1999), 412-16. David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (New York: W.W. Norton and Co., 1999), 33-38.

²²⁷ Francis Fukuyama, *The Origins of Political Order: From Prehuman times to the French Revolution* (New York: Farrar, Straus, and Giroux, 2011).

counterpart to the *Spirit of the Laws*. However, while Fukuyama's book may bear numerous insights for legislators, it does not provide the kind of legislative guidance that Montesquieu did. Writing after what he himself declared as the definitive ascendance of liberal democracy, Fukuyama is not confronted with the task of defending political liberty understood as rule of law the way that Montesquieu was.

The controversies these books have raised—i.e. over the relative weight of institutions, values, and physical conditions—also suggest the continued resonance of Montesquieu's analytic framework of the *esprit général*. Unlike any of these authors, Montesquieu did not specialize in any particular variable. In marked contrast to the great 19th and early 20th century social scientists, such as Comte and Durkheim, he was not a partisan of material, ideational, cultural, or structural types of causes. His framework of the *esprit général* defines the major categories of influences on national differences, depicts their mutually dynamic relations, and accounts for the unique particulars of each nation, as well as civilizational changes over time, with a breadth of genius that arguably has not been surpassed by any subsequent author.

Finally, in evaluating Montesquieu's science of environmental influences, we unfortunately must admit that political liberty largely remains limited to northern and western countries, even after many peoples have found a way to use Montesquieuian modes of liberal economic, social, and political development. The overall geographic patterns he identified still resonate today, even if he drew the causal arrows from environment to politics too directly. For example, by whatever measure, contemporary geographic representations of "Freedom in the World" illustrate a concentration of servitude in the global south and east,

and liberty in the north and west.²²⁸ It seems worth noting that the Asian countries that have managed to transcend the “heroism of servitude” to which Montesquieu thought they were consigned are all islands, peninsulas, or coastal regions (17.6.284). They are located in the types of environments that Montesquieu deemed favorable to political liberty, and relatedly, to international commerce.

Similarly, even if particular details of his theories of environmental influence may be inaccurate, the relationships he identified between environment and political economy in particular have proven rather prescient. Montesquieu identified the kinds of demographic and political economic problems that pose major political problems around the world today, such as skewed sex ratios, vulnerability to famine and fluctuations in environmental cycles, and population decline among wealthy, sophisticated peoples. Regardless of the accuracy of his theory of hot climate’s physiological effects, Montesquieu helpfully identifies the importance of industriousness to modern liberty, and of providing incentives to industriousness as a critical task of modern legislators.

His account of the complacency *vis à vis* the liberty of peoples inhabiting naturally rich countries stands as perhaps the first account of the phenomenon contemporary political economists call the “resource curse,” generally discussed in the context of mineral-rich countries.²²⁹ Montesquieu’s describes the agricultural version of this problem, and suggests

²²⁸ See the American NGO, Freedom House, and their annual report and maps entitled “Freedom in the World.” Available online at <http://www.freedomhouse.org/report-types/freedom-world>

²²⁹ The term “resource curse” was coined by Richard Auty, although study of the basic phenomenon goes back at least as long as 17th and 18th century inquiries—such as those of Montesquieu—into the paradoxical poverty that Spain earned from its massive extraction of gold and silver from the Americas, and the Netherlands comparatively sustained prosperity (i.e. 21.23-24.393-97). *Sustaining development in mineral economies: The resource curse thesis* (New York: Routledge, 1993). See also Terry Karl, *The paradox of plenty: Oil booms and petro-states* (Berkeley and Los Angeles: University of California Press, 1997). I thank Kerem Öge for directing me to these references.

the curse is moral as much as physical. It is not simply that oppression is structurally easier where the primary economic goods can be obtained with little popular initiative and ingenuity; in naturally rich locales, people actually come to value prosperity and stability more than independence. Similarly, he suggests that peaceful consequences of increased international trade are due not simply to changing calculations of interests, but to changing valuations of material prosperity versus honor.

Even the more dubious aspects of Montesquieu's science of climate, the impact of heat and cold in themselves on political development and political differences, are by no means simply off-base. The direct and indirect effects of heat figure prominently in studies of higher crime rates in the summer in North American cities, where summer heat is exacerbated by the "heat island effect" in densely built-up areas. Our understanding of this phenomenon is well-served by putting it in Montesquieuian terms: physical causes become the occasion for moral causes to emerge. Because of the heat and traditional agricultural tasks associated with the summer, schools close during this season. Thus, the student population, i.e. an age group disproportionately involved in criminal activity, is less occupied with structured, supervised activities during the summer months and has more time to hang out in the streets and other public places—and generally more opportunity to get into trouble.

The warm weather also becomes the occasion for public festivals, concerts, games, and other outdoor gatherings. These large public gatherings facilitate commerce to negative as well as positive ends; where there are crowds—and especially intoxicated crowds—there are significantly more opportunities for violent altercations to arise. Similarly, the heat causes many people without central air conditioning to gather outside their homes in the evening.

When more people gather in open spaces in close proximity to one another, interactions that could lead to social friction increase.²³⁰

In addition, some research suggests that *the heat itself* really does exacerbate violent passions and lead to an increase crime.²³¹ However, this trend continues only to a point; above approximately 85 degrees, it apparently becomes too hot to fight, and crime rates actually decline.²³²

The case of gathering on the front porch or stoop in urban homes without central air conditioning raises another notable example of the powerful impact that climate and changes in climate—in the case the development of climate control—can have.²³³ In tracing important American electoral developments in the second half of the twentieth century, political scientist Nelson Polsby forwards an “air-conditioner theory of southern American politics.” The rise of the Sun Belt states as economic powerhouses, he explains, was inconceivable before both industrial and residential air-conditioning became widespread in the late 1950s

²³⁰ Ellen Cohn and James Rotton, “Weather, Seasonal Trends and Property Crimes in Minneapolis, 1987-1988: A Moderate-Variable Time-Series Analysis of Routine Activities,” *Journal of Environmental Psychology* 20, no. 3 (2000), 257-72. <http://www.sciencedirect.com/science/article/pii/S0272494499901573>. For an overview of research on this phenomenon, see Brendan Keim, “The Hazy Science of Hot Weather and Violence,” *Wired*, July 22, 2011. <http://www.wired.com/wiredscience/2011/07/hot-weather-violence/>

²³¹ See for example Craig Anderson, “Heat and violence,” *Current Directions in Psychological Science* 10 (2001), 33-38. Paul Bell, “Reanalysis and Perspective in the Heat-Aggression Debate,” *Journal of Personality and Social Psychology* 89 (2005), no. 1, 71-73. The relationship between climate and subjective, i.e. self-reported, well-being is also a lively area of contemporary scholarly research. See for example, Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus, Giroux, 2011), 402-03. Ronald Fischer and Evert Van de Vliert, “Does Climate Undermine Subjective Well-Being? A 58-Nation Study,” *Personality and Social Psychology Bulletin* 37 (2011), 1-31. David Schkade and Daniel Kahneman, “Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction,” *Psychological Science* 9, no. 5 (1998), 340-347. The short answer to the question posed in the title is no, because inhabitants become accustomed to the climate wherever they live. Nonetheless, people in the Midwest *think* those who live in California are happier. According to the authors, this is because we tend to focus on what is most apparent in differences between, say, Michigan and California.

²³² James Alan Fox, “Heat Wave Has Chilling Effect on Violent Crime,” *Boston Globe*, July 6, 2010. http://boston.com/community/blogs/crime_punishment/2010/07/heat_wave_has_chilling_effect.html.

²³³ Nelson Polsby, *How Congress Evolves: social bases of institutional change* (New York: Oxford University Press, 2004).

and 1960s.²³⁴ The emerging possibility of year-round industrial activity in the south and associated economic opportunities has encouraged many northerners to move south. The thirteen Sun Belt states,²³⁵ for example, went from a combined population of 33 million in 1950, amounting to less than half the total population of the Rust Belt and northeastern states,²³⁶ to 88 million in 2002, which was almost as many people as were living then in the fourteen northern states.

This demographic shift in turn has led to the growing political importance of the southern states at the expense of the traditional centers of gravity in the Northeast and Midwest. The movement of northerners into southern states, Polsby contends, has led finally to a full integration of the Southern economy and political culture into the nation with the South becoming more like the North economically, and the political culture of the nation as a whole more like the South. These demographic shifts—the increase in population in southern states via an influx of northerners with historic ties to the Republican party—have contributed to some of the significant changes in the party system in the latter half of the

²³⁴ He also notes Congressional decisions to situate military installations in southern states as crucial to the relative demographic ascendance of the south.

²³⁵ These states are Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and Nevada.

²³⁶ These states stretch from Maine to Minnesota and include New York, New Hampshire, Vermont, Connecticut, Massachusetts, Rhode Island, Pennsylvania, Ohio, Indiana, Illinois, Michigan, and Wisconsin.

twentieth century, such as the rise of the two-party south, i.e. the establishment of strong Republican parties in the south.²³⁷

The relative economic and demographic rise of the Sun Belt states has led to their increasing electoral and political power, at the expense of that of the historic political centers of gravity in the Northeast and Midwest. In 1950, these fourteen states were apportioned 197 members in the House of Representatives while the thirteen Sun Belt states were apportioned 96 representatives. In 2000 the former were down to 146 and the latter had 132—a net gain of 86 House seats by the Sun Belt. Noting the traditionally more liberal character of the northeastern and Rust Belt states in comparison with the Sun Belt states, some social scientists and political commentators have taken this “air-conditioner theory” even further. One article suggests that liberals should “[b]lame air-conditioning for Kerry loss.”²³⁸ While this embrace of the variable of air-conditioning is probably overzealous, it would be difficult to deny the tremendous importance of this technological development (as well as those enhancing water resources, at least in the short-term, in the southwest) in making possible the rise of cities like Atlanta, Houston, Dallas, Phoenix, and Las Vegas as economic powerhouses. Given our national electoral system, the economic opportunities that have

²³⁷ Polsby, *How Congress Evolves: social bases of institutional change*, 152-54. “The nationalization of the South, with its eventual impact on the rise of southern Republicans and, paradoxically, on the liberalization of the House, rests at least in some respects on a technological footing, for example, on the mechanization of agriculture that depleted the nation, and especially the most rural part of the nation, the South, of its rural population. Or consider the effects of air conditioning, that made intolerably hot places in the summer habitable and made of some of these places targets for year-round settlement by retirees, new white-collar industries, and other migrants from places with political traditions that differed from local habits and customs” (152). On the mixing of southern and northern mores, economies, and politics, see Augustus Cochran, *Democracy Heading South: National Politics in the Shadow of Dixie* (Lawrence, KS: University Press of Kansas, 2001).

²³⁸ James Wiley, “Blame air-conditioning for Kerry loss,” *Casper Star Tribune*, December 5, 2004. http://trib.com/editorial/forum/blame-air-conditioning-for-kerry-loss/article_c0ed9ef0-28ff-5ff3-8d02-5473902c88c7.html See also Stan Cox, “America’s Air-Conditioned Nightmare,” *AlterNet.org*. Parts 1 and 2. June 22, 2009 and June 29, 2006. <http://www.alternet.org/story/37882/> and <http://www.alternet.org/story/38154/>.

brought people to these regions in droves soon gave them national political importance as well.

The fact that a 20th century development like climate control could enable dramatic economic and demographic shifts should make us recall that, until late modern times in western countries, people were much more intimately affected by environmental conditions, seasonal cycles, and natural fluctuations in weather, and of course this is still the case throughout much of the world. It is much easier today to maintain the illusion that our political order reflects *only* our values, our philosophy, our actions, and the prudential leadership of our founders and subsequent statesmen—and not, as Tocqueville put it, “accidental or providential causes.”²³⁹

One does not need to deny or even to downplay the importance of laws, legislators, education, institutions, mores, and/or religion to see how environmental variables of climate and terrain—and technological developments changing them—play a powerful role in shaping the conditions of politics. As the American founders themselves emphasized in their disputes (and with reference to Montesquieu), the massive scale of the project was a significant physical condition affecting the prospects for a successful republican experiment in the United States. Just the original thirteen colonies (and most of them even by themselves) far exceeded the size of territory and population that political philosophers had long considered to be the necessary limit for republican government to be successfully be established. Whether republican government can be sustained under such conditions remains an open question, and underlying concern in many debates about federalism, civic

²³⁹ *Democracy in America*, I.2.9, 265-74.

associations, and political participation in the United States, as well as the prospects for continued consolidation in the European Union.

Conclusion

Montesquieu's case for political liberty, and against despotism and slavery, emphasizes the many ways in which legislators are not simply free to will what they see fit. For one, the full consequences of their political actions often transcend their intentions and designs in ways that undermine those very intentions and design. In addition, the physical, economic, and cultural conditions in any given country constrain legislative possibilities—and *should* constrain legislators, if they are to be successful in pursuing their aims in accordance with moderate government. Understanding of these constraints is a key aspect of legislative prudence itself.

The laws most favorable to liberty have not emerged all at once, nor by sheer legislative invention. Rather, they have developed in large part through a series of physical and historical accidents. Many of these laws were introduced for reasons accidental to that goal of political liberty. Legislators, a term Montesquieu uses to refer to political philosophers and jurists as well as statesman, have subsequently refined and promulgated the better laws they observed, but they do not typically invent them out of whole cloth—at least not the better ones.

Montesquieu's analysis of political liberty begins with a study of despotism in Part 1. Despotism represents both the normative and analytic opposite of moderate government, which is the province of political liberty. The rule of one alone without a fundamental law, despotism brings countless outrages to human nature, including arbitrary violence, physical cruelty, forced immodesty, and the abject enslavement of some individuals to others. Despotism reduces both despot and subject to the level of the beasts. Yet despite its doing violence to human nature, despotism is the most common form of government, and moderate

government very rare in human history. Montesquieu's approach to liberal reform takes seriously this paradoxical reality of human freedom that he identifies at the end of Book 5: as much as slavery and despotism may fly in the face of human nature, the unfortunate reality is that most of humanity lives in something closer to these states than to that of free government.

The prevalence of despotism makes a great deal of sense, Montesquieu explains, because it is much easier to establish despotism than moderate government. Despotism "leaps to view." It serves as a political default, depending only upon the lowest common denominator of political conditions and human passions. In contrast, "to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to prudence" (5.14.63).

Despotic laws may well be premised on decent intentions and plausible reasoning about governance. For example, as I discuss in Chapter 2, Locke himself, though a great critic of absolute monarchy, acknowledged that rule by one alone initially emerged as a solution to a genuine difficulty: the threat of foreign conquest in a harsh, lawless world of small peoples. Yet attempts at political reform often generate consequences that their human authors do not and in some cases perhaps cannot, anticipate. Laws interact with others laws and a myriad of circumstantial variables, confounding legislative purposes—for the better as well as for the worse.

Montesquieu comprehensively explores the meaning of political liberty in Part 2. Political liberty in its essence is an achievement of laws: the fundamental laws establishing

the configuration of political institutions, and the criminal and tax laws. It is a measure of the relationships among political and social powers in a particular state, and the dynamic between the laws and the particular people whom they govern. In other words, political liberty cannot be defined by a generally applicable formula. The *goal* of political liberty is universal, but the particular laws, economics, and configuration of social powers and political institutions establishing it in any particular nation will vary depending upon the general spirit. What matters for political liberty is not who rules, but how they rule—that is, how power is exercised. Whether a state has it cannot be judged in the abstract, but only by examining whether a balance exists among its powerful bodies, and whether individuals in practice enjoy non-arbitrary criminal justice and taxation.

One way despotism can become “tractable” is through the direct physiological consequences Montesquieu attributes to hot climate. He famously contends that it bears a direct psychological effect on individuals, making them slavish and submissive, and thereby paving the way for slavery and despotism.

An underappreciated aspect of Montesquieu’s analysis in Part 3 is that of terrain and the different modes of livelihood. He highlights the risks of cultivating an easy as opposed to more challenging terrain for civil and political liberty. Highly productive terrain also generates a level of material comfort that attaches people to the land, and makes them more concerned to preserve what they have than to take risks that might enhance their liberty but undermine their economic situation (18.1-2.285-86, 18.4.287). By encouraging dependence on the material comforts afforded by the land, naturally rich lands can enable servitude by supplementing fear of violence with fear of hard labor and/or the loss of material prosperity. Moreover, when the land easily produces resources, it is easier for one or a small handful of

rulers to dominate the country as despots, because they do not need to encourage the people to be resourceful; forced labor can generate more or less the same output.

In contrast, Montesquieu explains the advantages for political liberty of lands that support a pastoral mode of subsistence, require agricultural innovation in order to be made arable, or favored economic commerce. He also highlights the importance of terrain to the prospects for commerce in its negative aspects. While the variegated terrain of northern Europe led to a proliferation of local political centers of gravity, the open, exposed steppes of central Asia facilitated political centralization and despotism has been reaffirmed by numerous contemporary political scientists—all of whom overlook Montesquieu's contributions to the study of the geography of liberty and despotism.²⁴⁰ While Montesquieu does not exactly show confidence in the possibility for overcoming tropical and Asian servitude, he does express the hope that it can, and to that end suggests positive examples that liberal reformers might imitate. In particular, he promotes the use of economic incentives and the distribution of honors to encourage popular industriousness.

Montesquieu also traces his exemplary models of political liberty to particular times and places. Gothic government, the prototype of the modern English and medieval Frankish government, came from the cool forests of Germany in the early Middle Ages. Modern commerce was born in the marginal terrains and marginalized communities of Western Europe during the rise of absolute monarchy in the later Middle Ages and early modern period.

²⁴⁰ Diamond, *Guns, Germs, and Steel*, 412-16. Landes, *The Wealth and Poverty of Nations*, 33-38. The historical political importance of mountainous and otherwise variegated terrain is the central theme in James Scott's *The Art of Not Being Governed*.

Just as laws and legislators can generate negative unintended consequences, so too can individuals and peoples take political actions that lead fortuitously to positive outcomes that they did not intend or foresee. After highlighting the negative unintended consequences of attempts to enforce religious and moral laws through the criminal code, Montesquieu directs us to the *positive* unintended consequences of the conquest of the Western Roman Empire by barbaric peoples. The English found a well-balanced constitution—with a distribution of powers, confederation, intermediate bodies, a national, representative assembly, and an independent judiciary—as well as the rudiments of a liberal criminal justice system “in the forests” of Germany.

The most important developments for political liberty first emerged through a confluence of environmental and historical accidents. The peoples who forged feudal monarchy did not have in mind the goal of political liberty as Montesquieu understands it, but were defending their independence, pursuing their primitive code of honor, and attending to their livelihood as warrior-herdsmen. Yet in the unique conditions of the early medieval period in northwestern Europe, when the Franks conquered Roman Gaul and ruled over a greatly expanded territory, they formed a government that happened to have limited kingship, civil diversity, independent judging, and relatively gentle criminal justice. The disconnect between intentions and results was in this case quite favorable to political liberty. Gothic government provides the counterpart to the fatal flaws Montesquieu identifies in republics on the classical order and ancient kingships: judicial power entrenched in either the body of the people or the office of the king.

The “forests of Germany” contributed to a “spirit of independence” among their inhabitants. This occurred via the direct effects of the cool climate on the psychology of

northern Europeans, and at least as importantly, through the indirect effects of a variegated, challenging terrain of dense “marshes, lakes, and forests” (28.2.535). These served as natural boundaries and places of refuge for small tribes, and favored a warrior-herdsmen way of life. The mores and practices that developed in these conditions helped the Germanic tribes unite under the Franks to establish an unusually “well-tempered government” (11.8.167)

In his account of political liberty, then, Montesquieu highlights the frequent disconnect between legislative purposes and political outcomes. The larger and complex the society, the more this seems to be the case; “accidents...always increase in proportion to the size of the state” (8.19.126). In depicting this phenomenon of heterogonous intentions and results, Montesquieu’s analysis is in tune with famous teachings of other 18th century social scientists. Most notably, his account brings to mind Bernard Mandeville’s theory of “private vices” leading to “publick benefits” and Adam Smith’s notion of an “invisible hand.”²⁴¹ Like them, Montesquieu highlights numerous ways that individuals can contribute to great public goods without deliberately trying, and indeed while acting on mundane or even morally dubious motives. For Montesquieu, it is the honor of monarchic subjects—false as he acknowledges it to be—that has served as a private vice with great public benefits in European history.

Montesquieu also approves of Mandeville’s theory of “private vices” leading to “publick benefits,” but only in the context of the specifically economic effects of individual

²⁴¹ Bernard Mandeville, *The Fable of the Bees or Private Vices, Publick Benefits* [1714, 1732], 2 vols. With a Commentary Critical, Historical, and Explanatory by F.B. Kaye (Indianapolis: Liberty Fund, 1988). Vol. 1. Smith uses this term in the context of explaining how individuals seeking work close to home strengthen the local economy while they are merely pursuing their own interests. Adam Smith, *The Wealth of Nations*, Vol. I, Eds R.K. Campbell and A.S. Skinner (Indianapolis, IN: Liberty Fund, 1981), IV.ii.9, 456. See also IV.ii.4, 453. According to Rahe, it is possible that Smith found the basic outlines for his theory in Montesquieu’s work. *Montesquieu and the Logic of Liberty*, 190-92.

selfishness. As Stark notes, Montesquieu's argument is not so much that vice can lead to virtue, but that one vice can counter another vice.²⁴² Montesquieu does not embrace economic self-interest as a political panacea like Mandeville or like many of Smith's followers. He makes clear that there are distinct tradeoffs to cultivating the spirit of commerce. Moreover, he emphasizes that unintended consequence can be negative as often as they can be positive. Finally, Montesquieu's version of this phenomenon highlights the role of the legislator, whereas as 18th century economists' version diminishes, or would diminish, the role of the legislator.

Highlighting Montesquieu's attention to unintended consequences and accidental causes helps illuminate his distinctive case for liberal constitutional government, criminal justice, and political economy. While he defends similar basic tenets of liberal government as many other modern political theorists, I argue that he makes a primarily practical, rather than theoretical, case for them. Montesquieu affirms with Hobbes and Locke that government which protects political liberty in the sense of rule of law accords with human nature. He goes even *farther* than them and the natural law thinkers in denying any just claim for a right of slavery. However, for the most part he does not argue for political liberty and against servitude on the basis of a rational deduction from human nature or other foundations of human society. In Montesquieu's presentation, the wisdom of organizing government with a view to political liberty, as well as the means for doing so, does not simply follow from an examination of human nature abstracted from the circumstances in which individuals and families have forged political communities.

²⁴² *Pensées* #1978, in OC I, 1489. Stark briefly compares Montesquieu to Mandeville and Smith on this phenomenon. *Montesquieu: Pioneer of the Sociology of Knowledge*, 51-53.

Indeed, Montesquieu indicates that nature provides support for both political liberty *and* for despotism. While he warns that servitude does violence to human nature, Montesquieu shows that nature is not a monolithic standard, but rather points in many, sometimes contradictory directions. Despotic laws may well be premised on decent intentions and plausible reasoning about governance. For example, as I discuss in Chapter 2, Locke himself, though a great critic of absolute monarchy, acknowledged that rule by one alone initially emerged as a solution to a genuine difficulty: the threat of foreign conquest in a harsh, lawless world of small peoples. Yet attempts at political reform often generate consequences that their human authors do not and in some cases perhaps cannot, anticipate. Laws interact with others laws and a myriad of circumstantial variables, confounding legislative purposes—for the better as well as for the worse.

Laws and ways of governing that have generated despotic effects often are much more natural from a legislator's point of view than those that actually protect political liberty. It is more intuitive to think to govern in a direct, forceful manner, than in an indirect and gentle manner, as moderate government requires. The *effects* of moderate government may accord better with human nature than those of despotic government, but its institutions and laws are quite counterintuitive.

Related to this natural tendency to seek our ends directly and forcefully, Montesquieu speaks of the soul's taste for "dominating other souls." This predilection can be dangerous even among those who mean well, for "even those who love the good love themselves so much that no one is so unfortunate as to mistrust his good intentions" (28.41.591). Thus, as Montesquieu famously warns in Book 11, "even virtue has need of limits" (11.4.155).

The idea that a good government is a limited government arises only through the experience of the abuses of unlimited government. Without seeing it in action, the English government of the 18th century (or the American constitution for that matter), with its dispersion, counter-balancing, and limitation of power, seems like an extremely inefficient and chaotic approach to governance. Nature alone cannot explain why servitude is wrong; or perhaps it would be more accurate to say as Montesquieu notes elsewhere in his critique of Machiavellian statecraft, one cannot persuade those who would dominate that such domination is wrong by reference to nature alone. Such an argument would “convince everyone but influence no one.”²⁴³

Another potential obstacle to political liberty inherent in human nature is our tendency to become accustomed and attached to familiar mores, manners, and ways of life can enable servitude where these contribute to keeping us enslaved. However, the fact that we are profoundly influenced by our physical and cultural environment does not in itself represent an obstacle to political liberty from Montesquieu’s perspective; this socially-embedded character of individuals’ mores, manners, maxims, religion and way of thinking can just as easily be relied upon to encourage the mentalities needed to support political liberty as to undermine them. What this attachment to custom means is that legislators are constrained to engage popular will in order to change customs that may undermine liberty.

Montesquieu also points to the limitations of human intelligence that complicate, though do not simply preclude efforts to establish political liberty. Our ability to imagine

²⁴³ *De la politique*, in *OC* 1, 112. Cited in David Carrithers, “Montesquieu’s Philosophy of History,” 69. Carrithers suggests that Montesquieu took a similar rhetorical approach to undermining “Machiavellianism” in this early work, *De la politique*: “Rather than attacking the prevalent doctrine of *raison d’état* on abstract moral grounds...he chose to focus upon the real, empirical world of recorded human history in order to demonstrate the futility of self-serving, immoral statecraft (Ibid., 68-69).”

political possibilities, he suggests, is limited by what we have experienced, either directly or vicariously. “The principle faculty of the soul is to compare” (EC, 48). This faculty leads to a tendency to choose a political or moral course in a reactive manner, guided by the errors we seek to avoid. Yet given the opportunity to compare the experiences of different governments, however, people *will* tend to opt for institutions and policies that support political liberty (12.2.188, 28.38.590).

Finally, the nature of the physical environment can pose natural obstacles to political liberty. Climate and terrain represent the foremost accidental causes enabling despotism and slavery to persist despite their many drawbacks. Climate is foremost among the factors he lists that “force [despotism] to follow some order and to suffer some rule. These things force its nature without changing; its ferocity remains; it is, for a while, tractable” (8.10.119; see also 2.4.19, 3.10.29-30, 5.14.61).

While he suggests that the effects of moderate government, the home of political liberty, agree with human nature, Montesquieu shows that what political liberty is and what it requires cannot be derived from human nature in the abstract. Our knowledge of moderate government—even the idea that political liberty should be the immediate goal of government—has been acquired in large part through reflection on different experiences with actual governments. Montesquieu effectively picks up where Locke left off in tracing the history of negative unintended consequences in the pursuit of rule of law. He highlights the threats to political liberty native to republics, and the especially intractable problem of reining in arbitrary violence in the judicial realm.

Thus, Montesquieu bases his case for political liberty and the means he recommends for establishing that liberty—and his case against the laws and practices he deems despotic—

on an evaluation of the consequences of actual institutions and practices. He shows how many institutions and laws have led inadvertently to arbitrary violence against individuals and arbitrary domination of some humans by other humans. To come to embrace political liberty as a primary goal of civil government, and to learn the means for securing that liberty, requires reflection on experiences with many different institutions, laws, and peoples. One must see how laws actually play out in practice, in specific political communities and in particular conditions, not only consider them in principle.

In Montesquieu's case for liberalism, it is first and foremost the awful experience of living under despotic government that opens one to the wisdom of limiting the purposes and powers of political government. Secondly, Montesquieu indicates that the notion of establishing moderate government depends upon exposure to examples of practices and institutions that have more favorable effects for liberty, even if they were not initially established for that purpose. One has to experience, either directly or vicariously, how a government like England's actually works in order to understand its benefits. It is in reflecting on these two kinds of experiences that political liberty comes to sight as the proper end of civil government, and balancing political powers the means to this end.

Even given the basic insight that one should "balance political powers" to prevent tyranny, however, there still are many ways that efforts to establish political liberty can go awry. Indeed, many political thinkers before Montesquieu have embraced liberty as a legislative purpose and sought to balance political powers in some way in order to establish it. Yet what balancing entails is not obvious. Montesquieu highlights common errors in historical attempts at balancing among both governments of many and governments of one alone. He shows how attempts to counter a threat to liberty from one source often lead

reformers to back themselves into a threat from a different angle. There is often a tension between what immediately strikes us as the body or power to be counterbalanced, and what makes for constitutional balance on the whole. Moreover, those political arrangements that preserve a balance of powers in one country might not work the same in another. Learning how to replicate the political forms of moderate government in different contexts is a challenge that clearly remains with us today, even as many countries have been able to make use of some of the hard-earned lessons about constitutional balancing that Montesquieu sought to impart.

Finally, in upholding the fundamental liberal principle of separating religious and moral governance from civil, Montesquieu also takes a more practical tack. He does not stake his case on religious skepticism or a critique of traditional mores in their own right. Montesquieu, in fact, repeatedly affirms the importance of religion and decent mores to any moderate political order, and particularly to republics. Rather, his case against administering religious, moral, and political government as one hinges on two practical difficulties, which reflect the particular conditions in which modern nations find themselves.

For one, he contends that the singular education to virtue on which the classical republics depended is no longer possible in the modern world of large nation-states, and of the Christian religion (4.4.35). The contradictions among the educations that individuals receive make it impossible for them to direct all of their passions to a single-minded love of the homeland.

Secondly, in the circumstances in which most modern legislators find themselves, attempts to enforce religion and morality through the political laws, whatever their intentions, almost always have despotic and counterproductive effects. Through an analysis of numerous

criminal laws and punishments, he shows that attempts to enforce religion and morality through the political laws, whatever their intentions, have a tendency of inviting arbitrary accusation, prosecution, and punishment of individuals. Moreover, attempts to legally compel obedience to religious precepts and moral standards often undermine more than bolster the integrity of religion and morality, in addition to endangering rule of civil law. Montesquieu thus bases his case against conflating the administration of religion and morality with civil government on the argument that the actual, historic effects of doing so belie the ostensible intentions of such government.

That Montesquieu largely stakes his case on a critique of internal contradictions in the institutions and practices of servitude is not to say that Montesquieu's project does not ultimately rest upon certain theoretical foundations. Rather, he did not seem to think that establishing such foundations was the task he faced. The cause of political liberty did not need another treatise on natural law, but instead a framework for understanding and evaluating the internal logic of actual laws. Montesquieu largely affirms what were then conventional natural law arguments for the universality of basic legal and ethical principles, though he made a point of circumscribing their reach.²⁴⁴

Montesquieu impresses his positive political project upon his readers first through his straightforward condemnations of despotism and slavery, as well as his expressions of horror at physical torture and forced violations of natural modesty. In addition, he shows us what he seeks to promote largely through the phenomena he chooses to analyze, and through the practical advice he gives to legislators. His repeated calls for legislators to counter the vices

²⁴⁴ Stark helpfully notes that Montesquieu rejects more expansive accounts of natural law. Laws of succession and inheritance, for example, are properly matters of political and civil laws, not natural law (26.6.498-500). Similarly, Montesquieu suggests that "property rights" in general depend upon the political and civil laws, and are not grounded in natural right. Stark, *Montesquieu: Pioneer of the Sociology of Knowledge*, 197-98.

of climate represent the clearest indicators of his commitment to a standard transcending particular environmental and historical conditions.

His critique of slavery, I argue in Chapter 17, ultimately does rest on the theory or religious conviction that humans are born equal, in the limited sense that all individuals' lives and liberty are worth something by virtue of their being human. Montesquieu's critique of any justification for slavery, as he makes clear in Book 15, ultimately depends upon the view that humans are born equal, and equally worth something rather than nothing. All individuals share in a basic humanity. Their lives have value in and of themselves above that of mere animals. For political liberty to be more than an accidental outcome of certain geographic and historical conditions, it must be rooted but a standard transcending particular places and times. Nature cannot provide this standard because it points in many, often contradictory directions. While some might wish Montesquieu elaborated upon the theoretical foundations for his insistence on human equality and the goodness of political liberty, the paucity of such analysis in the *Spirit of the Laws* does not suggest he wasn't sincerely committed to those goods, but only that his political values would require a deeper defense for those not convinced that humans in fact are equal by nature.

Montesquieu's critique of despotism seems to depend upon the more or less explicitly religious view that individuals should not be subjected to physical cruelty and arbitrary violence. He seems to count on the fact that his readers will sympathize with his invocation of humane values his embracing of that "general virtue that includes love of all"²⁴⁵—his outrage at physical cruelty, arbitrary violence, violation of individuals' basic dignity (their

²⁴⁵ In the Preface, Montesquieu apparently explains his purpose in writing *The Spirit of the Laws*, "by seeking to instruct men one can practice the general virtue that includes love of all" (xliv).

“natural modesty” in Montesquieu’s terms). For both logical and rhetorical reasons, he points to the Christian roots of gentler mores, political right, and right of nations in Europe. He helpfully highlights the complicated, contradictory relationship between nature broadly speaking and such values.

While he makes clear that his critique of despotism and slavery ultimately as a moral basis, Montesquieu does not hesitate to appeal to utilitarian considerations in order promote the cause of political liberty. He shows how the laws and practices he deems despotic contradict their own ostensible purposes—i.e. to maintain governmental power or economic prosperity, or to promote patriotism, piety, and/or morality. For example, even slavery that is limited to a certain population, whom the rest has persuaded themselves are less than human, inevitably endangers the liberty of freemen, because it dishonors labor and industriousness (15.1-2.246-48, 15.5.250, 15.7.252, 15.8-9.252-53, 15.13.256, 17.5.283).²⁴⁶ He also argues in terms of the great models of monarchy and republican government that he laid out in Books 2-10; despotism and slavery fundamentally contradict the principles of these forms of government. Thankfully, he suggests, certain economic and religious developments make despotism and slavery less useful than perhaps they used to be to those at the helm.

Under Montesquieu’s political standard of moderate government, the laws accord every individual at least enough honor such that his life, liberty, and possessions are not to be taken arbitrarily (6.2.74-75). Beyond this basic level of honor, individuals, families, and classes might vary dramatically in terms of their rights and privileges. Thus, his standard encompasses a much wider variety of institutions, practices, and customs than most people

²⁴⁶ This last point is one Tocqueville emphasizes, but Montesquieu does discuss the negative effects of slavery on the culture and personal virtue of freemen, including the growth of voluptuousness and the taste for luxury, which go with idleness (15.1.246, 15.9.253). *Democracy in America*, 1.2.10, 332-34.

are likely to accept as legitimate forms of government; What matters for liberty is not who rules, but how they rule. For partisans of either republican or monarchic government, aristocracy or democracy, to remain agnostic on the distinction between the forms of government does represent a troublesome moral flexibility. But Montesquieu is not concerned with debating the classical question of who should rule nor the modern question of the legitimate foundations of rule. He is a liberal in a very precise sense. Mansfield summarizes this viewpoint with artful concision: “Montesquieu respects individuals as the object of laws, not as its originators.” The content of the laws is a matter of concern to the extent that some laws are inherently subject to arbitrary interpretation—i.e. laws against insulting the government. Beyond that, however, rule of law can be premised on many different kinds of laws, based on very different authorities.

That Montesquieu considers it more difficult to establish moderate government in some places than in others does not undermine the view that it is worthwhile to do so (14.3.235). Rather, it suggests that those hoping to establish liberty in the tougher cases must redouble their efforts to understand the nature of the obstacles to political liberty in each case, and to learn from others’ experiences trying to overcome them in similar circumstances.

He emphasizes what constrains the prospects for political liberty not to undermine its advancement, but to support it. Indeed, it is in the books on climate and terrain, as well as the historical contingencies of medieval France, that Montesquieu makes his most ardent defense of liberty, as well as many of his practical recommendations for legislators to gently promote liberty and to mitigate the depredations of slavery and despotism

In calling our attention to the accidental causes of both liberty and its opposites, Montesquieu shows that the establishment of governments favorable to liberty depends in

great part on having supportive conditions. His attention to accidental causes serves as a warning about the care needed to promote lasting liberal reform. Those who do not recognize free government as a rather extraordinary development in the course of human history, a chancy thing to establish and maintain, are likely to undermine their own efforts. Even with the best of intentions, reformers can undermine their goals if they neglect the need for supportive conditions. The implication is not that major social and political changes are impossible or unadvisable but that such “changes can be proposed only by those who are born fortunate enough to fathom by a stroke of genius the whole of a state’s constitution” (xliv).

To promote liberal reforms, Montesquieu’s counsel to legislators is to appeal to existing elements of the general spirit in order to encourage necessary changes in mores, manners, mode of livelihood, and way of thinking. In France, for example, he appeals to the latent Gothic spirit of independence, monarchic sense of honor, Christian morality and secularized humanism derived from it—to counter tendencies also ingrained in the general spirit—a Roman spirit of uniformity, Visigothic spirit of conquest, and monarchic and Mediterranean taste for idleness.

Which elements of the general spirit should be leveraged at which points represents its own challenge. Montesquieu’s overriding counsel is that legislators follow a “spirit of moderation.” They must constantly keep in mind that there is more than one extreme to be avoided.

In an enlightened age, one trembles even while doing the greatest goods. One feels the old abuses and sees their correction, but one also sees the abuses of the correction itself. One lets an ill remain if one fears something worse; one lets a good remain if one is in doubt about a better. One looks at the parts only in order to judge the whole; one examines all the causes in order to see the results (Preface, xlv).

Bibliography

- Adams, John. *Papers of John Adams*, edited by Robert Taylor, Mary-Jo Kline, and Gregg L. Lint. Vol.1. Cambridge: Belknap Press of Harvard University Press, 1977.
- Aristotle. *Constitution of Athens*. Translated by Thomas J. Dymes. London: Seeley and Co., 1891. <http://oll.libertyfund.org/title/580>
- . *The Politics*. Translated by Carnes Lord. Chicago: University of Chicago Press, 1984.
- Aron, Raymond. *Main Currents in Sociological Thought I*. Translated by Richard Howard and Helen Weaver. Garden City, NY: Doubleday & Co., Inc., 1968.
- Auty, Richard. *Sustaining development in mineral economies: The resource curse thesis*. New York: Routledge, 1993.
- Barrera, Guillaume. Introduction to “Essai sur les causes qui peuvent affecter les esprits et les caractères,” by Charles-Louis de Secondat, Baron de Montesquieu, 205-269. In *Œuvres et écrits divers*, edited by Pierre Rétat. Vol. 9 of *Œuvres Complètes de Montesquieu*, edited by Pierre Rétat and Catherine Volpilhac-Augier. Oxford: Voltaire Foundation, 2006.
- Bartlett, Robert C. “On the Politics of Faith and Reason: The Project of Enlightenment in Pierre Bayle and Montesquieu.” *The Journal of Politics* 63, no. 1 (2001): 1-28.
- Bartlett, Robert. *Trial by Fire and Water: The Medieval Judicial Ordeal*. Oxford: Clarendon Press, 1986.
- Berlin, Isaiah. “The March of History.” In *Political Ideas in the Romantic Age*. Edited by Henry Hardy, 208-259. Princeton, NJ: Princeton University Press, 2006.
- . “Montesquieu.” In *Against the Current: Essays in the History of Ideas*. Edited by Henry Hardy, 130-61. Princeton, NJ: Princeton University Press, 2001.
- Beyer, C.J. “Montesquieu et l’esprit cartésien.” In *Actes du congrès Montesquieu*, 159-173. Bordeaux: Delmas, 1956.
- Bloch, Marc. *Feudal Society*. Translated by L.A. Manyon. Chicago: University of Chicago Press, 1961.

- Boulainvilliers, Henri, Comte de. *Histoire des anciens parlements de France ou états généraux du royaume*. London: Jean Brindley, 1737.
- Carcassonne, Elie. *Montesquieu et le problème de la Constitution française au XVIIIe siècle*. Paris: Presses Universitaires de France, 1927.
- Carrese, Paul. *The Cloaking of Power: Montesquieu, Blackstone, and the rise of judicial activism*. Chicago: University of Chicago Press, 2003.
- . “Montesquieu’s Complex Natural Right and Modern Liberalism: The Roots of American Moderation.” *Polity* 36, no. 2 (Jan. 2004): 227-50.
- Carrithers, David. “Introduction: An Appreciation of *The Spirit of the Laws*.” In Carrithers et al., eds., *Montesquieu’s Science of Politics*, 1-40.
- . Introduction to Montesquieu’s *The Spirit of the Laws*. Translated by Thomas Nugent and edited by David Carrithers, 1-88. Berkeley, CA: University of California Press, 1977.
- . “Montesquieu and the Liberal Philosophy of Jurisprudence.” In Carrithers et al., eds., *Montesquieu’s Science of Politics*, 291-334.
- . “Montesquieu’s Philosophy of History,” *Journal of the History of Ideas* 48, no. 1 (1986): 61-80.
- . “Not So Virtuous Republics: Montesquieu, Venice, and the Theory of Aristocratic Republicanism.” *Journal of the History of Ideas* 62, no. 2 (1991): 245-268.
- Carrithers, David W., Michael A. Mosher, Paul A. Rahe, eds. *Montesquieu’s Science of Politics: Essays on “The Spirit of the Laws”*. Lanham, MD: Rowman and Littlefield, Inc., 2001.
- Ceasar, James W. *Nature and History in American Political Development*. Cambridge, MA: Harvard University Press, 2006.
- Cheney, Paul. *Revolutionary Commerce: Globalization and the French Monarchy*. Cambridge, MA: Harvard University Press, 2010.
- Chenon, Émile. *Histoire générale du droit français*. Vols. 1 and 2. Paris : Recueil Sirey, 1929.

- Cicero, Marcus Tullius. *De Legibus*, in *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Law*. Translated by Francis Barham. Vol. 2. London: Edmund Spettigue, 1841-42.
<http://oll.libertyfund.org/title/545>
- Cochran, Augustus. *Democracy Heading South: National Politics in the Shadow of Dixie*. Lawrence, KS: University Press of Kansas, 2001.
- Cohler, Anne. *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*. Lawrence, KS: University of Kansas Press, 1988.
- Cohn, Ellen and James Rotton, "Weather, Seasonal Trends and Property Crimes in Minneapolis, 1987-1988: A Moderate-Variable Time-Series Analysis of Routine Activities," *Journal of Environmental Psychology* 20, no. 3 (2000): 257-72.
- Collingwood, R.G. *The Idea of History*. Oxford, UK: Oxford University Press, 1956.
- Comte, Auguste, "Plan of the Scientific Operations Necessary for Reorganizing Society." Reprinted in *Auguste Comte and Positivism: The Essential Writings*, translated and edited by Gertrude Lenzer, 9-69. Chicago: University of Chicago Press, 1975.
- Courtney, Cecil P. *Montesquieu and Burke*. Oxford: Blackwell, 1963.
- . "Montesquieu and Natural Law." In Carrithers et al., eds., *Montesquieu's Science of Politics*, 41-68.
- Cox, Iris. *Montesquieu and the History of French Laws*. Oxford: The Voltaire Foundation, 1983.
- . "Montesquieu and the History of Laws." In Carrithers et al., eds., *Montesquieu's Science of Politics*, 409-429.
- D'Alembert, Jean De Le Rond. "Analyse de *L'Esprit de Lois*." In *De L'Esprit de Lois*, Vol. 1, xcix-cxxiv. London: Garnier, 1777.
http://fr.wikisource.org/wiki/Livre:Montesquieu_Esprit_des_Lois_1777_Garnier_1.djvu

- Destutt de Tracy, Antoine Louis Claude. *A Commentary and Review of Montesquieu's "Spirit of Laws": To which are annexed, Observations on the Twenty-Ninth Book by the late M. Condorcet; and Two Letters of Helvetius, on the Merits of the same Work*. Translated by Thomas Jefferson. Philadelphia: William Duane, 1811. <http://oll.libertyfund.org/title/960>.
- Diamond, Jared. *Guns, Germs, and Steel: The Fates of Societies*. New York: W.W. Norton and Company, 1999.
- Dedieu, Josph. Montesquieu et la tradition politique anglaise en France: Les sources anglaises de l'Esprit des lois. J. Gabalda et Cie: Paris, 1909.
- Diderot, Denis and Jean le Rond D'Alembert, eds. *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc.* University of Chicago: ARTFL Encyclopédie Project, Spring 2011 Edition, edited by Robert Morrissey. <http://encyclopedia.uchicago.edu/>
- Dover, Cedric. "The Racial Philosophy of Herder." *British Journal of Sociology* 3, no. 2 (1952): 124-33.
- Dubos, Abbé Jean-Baptiste. *Histoire critique de l'établissement de la monarchie françoise dans les Gaules*. Paris: Osmont, 1734. <http://www.archive.org/details/histoirecritiqu00jeagoog>
- . *Réflexions critiques sur la poésie et sur la peinture*. Paris: Pierre-Jean Mariette, 1733. <http://archive.org/details/reflexionscriti03jeagoog>
- Dulles, Avery Cardinal. "Development or Reversal? Review of *A Church That Can and Cannot Change*." *First Things* 156 (October 2005): 53-61.
- Durkheim, Emile. *Montesquieu and Rousseau: Forerunners of Sociology*. Translated by Ralph Mannheim. Ann Arbor, MI: University of Michigan Press, 1960.
- Edwards, Martin, Kevin Scott, Susan Allen, and Kate Irvin. "Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission." *Political Research Quarterly* 61, No. 3 (Sep., 2008): 390-402.
- Eidelberg, Shlomo. "Trial by Ordeal in Medieval Jewish History: Laws, Customs, and Attitudes." *Proceedings of the American Academy of Jewish Research* 46/47 (1979): 105-120.
- Ferguson, Adam. *History of Civil Society*. 8th ed. Teddington, UK: Echo Library, 2007.

- Fishman, Talya. *Becoming the People of the Talmud: Oral Torah as Written Tradition in Medieval Jewish Cultures*. Philadelphia: University of Pennsylvania Press, 2011.
- Fletcher, Frank H. "Montesquieu's Influence on Anti-Slavery Opinion in England." *The Journal of Negro History* 18, no. 4 (1933): 414-25.
- Force, Pierre. "Voltaire and the Necessity of Modern History." *Modern Intellectual History* 6, no. 3 (2009): 457-87. doi: <http://dx.doi.org/10.1017/S147924430999014X>
- Forsyth, William. *History of Trial by Jury*. 2nd ed. Jersey City, NJ: Frederick D. Linn & Company, 1875. <http://constitution.org/cmt/wf/htj.htm>
- Furniss, Edgar. *The Position of the Laborer in a System of Nationalism: a study in the labor theories of the later British mercantilists*. Boston: Houghton Mifflin Press, 1920.
- Fukuyama, Francis. *The Origins of Political Order: From Prehuman times to the French Revolution*. New York: Farrar, Straus, and Giroux, 2011.
- George, William. "Montesquieu and de Tocqueville and Corporative Individualism." *The American Political Science Review* 16, no. 1 (1922): 10-21.
- Grant, Ruth. "Locke's Political Anthropology and Lockean Individualism." *Journal of Politics* 50, no. 1 (1988): 42-63.
- Gregory of Tours. *The History of the Franks*. Translated by Lewis Thorpe. London: Penguin Book, 1974.
- Grousset, René. *The Empire of the Steppes*. Translated by Naomi Walford. New Brunswick, NJ: Rutgers University Press, 1970.
- Halbertal, Moshe. *People of the Book: Canon, Meaning, and Authority*. Cambridge, MA: Harvard University Press, 1997.
- Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*, edited by Clinton Rossiter and Charles Kesler. New York: Signet Classics, 1999.
- Hardouin, Jean. *Prolegomena*. Translated by Edwin Johnson. Edited by Hermann Detering. Berlin: Books on Demand GmbH, Norderstedt, 2010.

- Hertzberg, Arthur. *The French Enlightenment and the Jews: The Origins of Modern Anti-Semitism*. New York: Columbia University Press, 1968.
- Hirschmann, Albert. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Cambridge, MA: Harvard University Press, 1970.
- Hobbes, Thomas. *Leviathan*. Edited by C.B. MacPherson. London, England: Penguin Books, 1968.
- Hullung, Mark. *Montesquieu and the Old Regime*. Berkeley, CA: University of California Press, 1976.
- Hume, David. *Selected Essays*. Edited by Stephen Copley and Andrew Edgar. Oxford, UK: Oxford University Press, 1998.
- Hyneman, Charles and Donald Lutz, eds. *American Political Writing during the Founding Era, 1760-1800*. Indianapolis: Liberty Press, 1983.
- Israel, Jonathan. *The Dutch Republic: It's Rise, Greatness, and Fall*. New York: Oxford University Press, 1998.
- . *Radical Enlightenment*. New York: Oxford University Press, 2001.
- Jefferson, Thomas. *The Writings of Thomas Jefferson*. Edited by H.A. Washington. Vol. 5. New York: J. C. Riker, 1853-55.
- Jordan, William. *Louis IX and the Challenge of the Crusade*. Princeton, NJ: Princeton University Press, 1979.
- Kaufman, Herbert. *Red tape, its origins, uses and abuses*. Washington, DC: Brookings Institute, 1977.
- Keohane, Nannerl. *Philosophy and the State in France*. Princeton, NJ: Princeton University Press, 1980.
- Kingston, Rebecca. *Montesquieu and the Parlement of Bordeaux*. Geneva, Switzerland: Librairie Droz, 1996.
- . "Montesquieu on Religion and the Question of Toleration." In Carrithers et al., eds., *Montesquieu's Science of Politics*, 375-408.

- Kliger, Samuel. *The Goths in England: A Study in Seventeenth and Eighteenth Century Thought*. New York: Octagon Books, 1972.
- . “Emerson and the Usable Anglo-Saxon Past.” *Journal of the History of Ideas* 16, no. 4 (1955): 476-493.
- . “George Perkins Marsh and the Gothic Tradition in America.” *The New England Quarterly* 19, no. 4 (1946): 524-531.
- Klosko, George. “Montesquieu’s Science of Politics: Absolute Values and Ethical Relativism in *L’Esprit des Lois*.” *Studies on Voltaire and the Eighteenth Century* 189 (1980): 153-77.
- Kra, Pauline. “The concept of national character in 18th century France.” *Cromohs* 7 (2002): 1-6, http://www.cromohs.unifi.it/7_2002/kra.html
- Krause, Sharon. “Despotism in *The Spirit of the Laws*.” In Carrithers et al., eds., *Montesquieu’s Science of Politics*, 231-271.
- Krebs, Christopher. *A Most Dangerous Book: Tacitus's Germania from the Roman Empire to the Third Reich*. New York: Norton and Company, 2011.
- Kriesel, Karl M. “Montesquieu: Possibilistic Political Geographer.” *Annals of the Association of American Geographers* 58, no. 3 (1968): 557-574.
- Landes, David. *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor*. New York: W.W. Norton and Co., 1999.
- Larrère, Catherine. “Montesquieu on Economics and Commerce.” In Carrithers et al., eds., *Montesquieu’s Science of Politics*, 335-74.
- Lea, Henry. *The Duel and the Oath*. Philadelphia: University of Pennsylvania Press, 1974.
- . *The Ordeal*. Philadelphia: University of Pennsylvania Press, 1973.
- Leeson, Peter. “Ordeals,” *Journal of Law and Economics* (forthcoming).
- . “Trial by battle.” *Journal of Legal Analysis* 3, no. 1 (2011): 341-375.

- Le Goff, Jacques. *Saint Louis*. Translated by Gareth Gollrad. Notre Dame, ID: University of Notre Dame Press, 2009.
- Locke, John. *Second Treatise on Government*. Edited by Peter Laslett. Cambridge, UK: Cambridge University Press, 1988.
- Lowenthal, David. "Montesquieu." In *History of Political Philosophy*, edited by Leo Strauss and Joseph Cropsey, 513-534. Chicago: University of Chicago Press, 1987.
- Machiavelli, Niccolò. *Discourses on Livy*. Translated by Harvey C. Mansfield and Nathan Tarcov. Chicago, IL: University of Chicago Press, 1996.
- . *The Prince*. Translated by Harvey Mansfield. 2nd ed. Chicago, IL: University of Chicago Press, 1998.
- McDowell, Gary. *The Language of Law and the Foundations of American Constitutionalism*. Cambridge, UK: Cambridge University Press, 2010.
- McEvedy, Colin. *The New Penguin Atlas of Medieval History*. New York: Penguin Books, 1992.
- Maimonides (Moshe ben Maimon), *Mishneh Torah*. Translated by Eliyahu Touger. Brooklyn, NY: Moznaim, 1986-2007.
http://www.chabad.org/library/article_cdo/aid/682956/jewish/Mishneh-Torah.htm
- Malthus, Thomas. *An Essay on the Principle of Population*. New York: Cosimo, 2011.
- Mandeville, Bernard. *The Fable of the Bees or Private Vices, Publick Benefit*. Edited by Frederick B. Kaye. Vols. 1 and 2. Indianapolis: Liberty Fund, 1988.
<http://oll.libertyfund.org/title/1863>
- Manent, Pierre. *The City of Man*. Translated by Marc LePain. Princeton, NJ: Princeton University Press, 1998.
- Mansfield, Harvey. *Taming the Prince*. New York, NY: The Free Press, 1989.
- Mazzolini, Renato G. "Dallo 'spirito nerveo' allo *spirito delle leggi*: un comment alle osservazioni di Montesquieu su una lingua di pecora." In *Enlightenment Essays in Memory of Robert Shackleton*, 205-221. Oxford: The Voltaire Foundation, 1988.

- Meek, Ronald. *Social Science and the Ignoble Savage*. New York: Cambridge University Press, 1976.
- Meyer, Marvin. *The Jacksonian Persuasion: Politics and Belief*. Stanford, CA: Stanford University Press, 1957.
- Mercier, Roger. "La théorie des climats des *Réflexions Critiques* à *L'Esprit des lois*." *Revue d'histoire littéraire de la France* 53 (1953): 17-37, 159-174.
- Merry, Henry. *Montesquieu's System of Natural Government*. West Lafayette, IN: Purdue Research Foundation, 1970.
- Moll, Herman. *Atlas minor: or a new and curious set of sixty-two maps, in which are shewn all the empires, kingdoms, countries, states, in all the known parts of the earth; with their bounds, divisions, chief cities & towns, the whole composed & laid down agreeable to modern history*. 3rd ed. London: Thos. Bowles and John Bowles, 1736. <http://www.davidrumsey.com/maps4540.html>.
- Montesquieu, Charles-Louis, Baron de Secondat. *Considerations on the Causes of the Greatness of the Romans and Their Decline*. Translated by David Lowenthal. Indianapolis: Hackett Publishing, 1965.
- . *Correspondance de Montesquieu*. Edited by F. Gebelin and A. Morize. Vol. 2. Paris: Champion, 1914. <http://artfl-project.uchicago.edu>
- . "An Essay on the Causes that May Affect Men's Minds and Characters." Translated by Melvin Richter. *Political Theory* 4, no. 2 (1976), 139-162.
- . *Œuvres Complètes*. Edited by Roger Callois. Vols. 1 and 2. Paris: Librairie Gallimard, 1951.
- . *Œuvres et écrits divers*. Edited by Pierre Rétat. Vol. 9 in *Œuvres Complètes de Montesquieu*. Oxford: Voltaire Foundation, 2006.
- . *Persian Letters*. Translated by C. J. Betts. London: Penguin Books, 2004.
- . *The Spirit of the Laws*. Translated by Anne Cohler, Basia C. Miller, and Harold S. Stone. Cambridge, UK: Cambridge University Press, 1989.

- Moore, James. "Montesquieu and the Scottish Enlightenment." In *Montesquieu and His Legacy*, edited by Rebecca E. Kingston, 179-98. Albany, NY: State University of New York, 2008.
- Mosher, Michael. "Monarchy's Paradox: Honor in the Face of Sovereign Power." In Carrithers et al., eds., *Montesquieu's Science of Politics*, 159-229.
- Mousseau, Michael, Håvard Hegre and John Oneal. "How the Wealth of Nations Conditions the Liberal Peace." *European Journal of International Relations* 9 (2003), no. 4: 277-314. doi: 10.1177/1354066103009002005
- Navara, Kristen. "Humans at tropical latitudes produce more females." *Biology Letters* 5: 524-27. doi: 10.1098/rsbl.2009.0069
- Noonan, John, Jr. *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching*. South Bend, IN: University of Notre Dame Press, 2005.
- Nyland, Chris. "Biology and Environment: Montesquieu's Relativist Analysis of Gender Behavior." *History of Political Economy* 29, no. 3 (1997): 391-412.
- Pangle, Thomas. *Montesquieu's Philosophy of Liberalism*. Chicago: University of Chicago Press, 1973.
- . *The Theological Basis of Liberal Modernity in Montesquieu's "Spirit of the Laws."* Chicago, IL: University of Chicago Press, 2010.
- Parsons, Reuben. *Some Lies and Errors of History*. Notre Dame, Indiana: The Ave Maria, 1893.
- Pascal, Blaise. *Pensées*. Brunschvig, 1897 ed. <http://www.pascalpense.org>
- Polsby, Nelson. *How Congress Evolves: social bases of institutional change*. New York: Oxford University Press, 2004.
- Rahe, Paul. *Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate, Terrain, Technology, Uneasiness of Mind, The Spirit of Political Vigilance, & The Foundations of the Modern Republic*. New Haven, CT: Yale University Press, 2009.
- . *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect*. New Haven, CT: Yale University Press, 2009.

Richter, Melvin. "An Introduction to Montesquieu's 'An Essay on the Causes That May Affect Men's Minds and Characters.'" *Political Theory* 4, no. 2 (1976): 132-38.

Rives, J.B. Introduction to *Tacitus' Germania*, 1-74. Oxford: Clarendon Press, 1999.

Rousseau, Jean-Jacques, *The Discourses and other early writings*. Translated and edited by Victor Gourevitch. Cambridge, UK: Cambridge University Press, 1997.

———. *Emile*. Translated by Allan Bloom. New York: Basic Books, 1979.

———. *Essay on the Origin of Languages and Writings Related to Music*. Translated and edited by John Scott. Vol. 7 of *The Collected Writings of Rousseau*, edited by Roger Masters and Christopher Kelly. Hanover, NH: University Press of New England, 1998.

———. *Social Contract, Discourse on the Virtue Most Necessary for a Hero, Political Fragments, and Geneva Manuscript*. Translated and edited by Judith Bush, Roger Masters, and Christopher Kelly. Vol. 4 of *The Collected Writings of Rousseau*, edited by Roger Masters and Christopher Kelly. Hanover, NH: University Press of New England, 1994.

Schaub, Diana. "Montesquieu on Slavery." *Perspectives on Political Science* 34, no. 2 (2005), 70-78.

———. *Erotic Liberalism: Women and Revolution in Montesquieu's "Persian Letters."* Lanham, MD: Rowman & Littlefield Publishers, 1995.

Scott, James C. *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*. New Haven, CT: Yale University Press, 2009.

Scott, John. "Climate, causation, and the power of music in Montesquieu and Rousseau." *Studies on Voltaire and the Eighteenth Century*, no. 8 (2004): 51-61.

Shackleton, Robert. *Montesquieu: A Critical Biography*. Oxford: Oxford University Press, 1961.

———. "Asia as Seen by the French Enlightenment." In *Essays on Montesquieu and the Enlightenment*, edited David Gilson, and Martin Smith, 231-42. Oxford, UK: Voltaire Foundation at the Taylor Institute, 1988.

———. “The Evolution of Montesquieu’s Theory of Climate.” *Revue Internationale de Philosophie* 33-34, no. 3-4 (1955), 320-329.

Shepard, William. *Historical Atlas*. New York: Henry Holt and Company, 1923.
http://www.lib.utexas.edu/maps/historical/history_shepherd_1923.html

Shklar, Judith N. *Montesquieu*. Oxford: Oxford University Press, 1987.

Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edited by Roy Campbell and Andrew Skinner. Vols. 1 and 2. Indianapolis, IN: Liberty Fund, 1981.

Smith, C.U.M. “Brain and Mind in the ‘Long’ Eighteenth Century.” In *Brain, Mind, and Medicine: Essays in Eighteenth-Century Neuroscience*, edited by Harry Whitaker, C.U.M. Smith, and Stanley Finger, 15-28. New York: Springer Science + Business Media, 2007.

Tacitus. *Agricola and Germany*. Translated and edited by Andrew R. Birley. New York: Oxford University Press, 1999.

Talmud Bavli (Babylonian), Schottenstein Edition. Tractates *Sanhedrin*, *Ketubot*, *Makkot*, and *Chullin*. Vols. 29, 47-49, 50, 63. 2nd ed. Full-sized ed. Brooklyn, NY: ArtScroll Mesorah Publications, 2005.

The Tanakh. Philadelphia, PA: The Jewish Publication Society, 1985.

Tocqueville, Alexis de. *Democracy in America*. Translated and edited by Harvey Mansfield and Delba Winthrop. Chicago: University of Chicago, 2000.

———. *The Old Regime and the French Revolution*, Translated by Stuart Gilbert. New York: Anchor Books, 1983.

Todorov, Tzvetan. *On Human Diversity: Nationalism, Racism, and Exoticism in French Thought*. Translated by Catherine Porter. Cambridge, MA: Harvard University Press, 1993.

Tooley, Marian. “Bodin and the Mediaeval Theory of Climate.” *Speculum* 28, no. 1 (1953): 64-83.

Vila, Anna. *Enlightenment and Pathology: Sensibility in the Literature and Medicine of Eighteenth-Century France*. Baltimore, MD: Johns Hopkins University, 1998.

Volpilhac-Auger, Catherine. “Sur quelques sources prétendues du livre XIV de *L’Esprit des lois*: De l’*Essai sur les causes* à *L’Esprit des lois* : la théorie des climats existe-t-elle?” <http://montesquieu.ens-lyon.fr/spip.php?article872>

- . “Mémoire de la critique.” In *Montesquieu*, edited by Catherine Volpilhac-Augier, 97-187. Paris: Presses universitaires de la Sorbonne, 2003.
- Waddicor, Mark. *Montesquieu and the Philosophy of Natural Law*. The Hague: Martinus Nijhoff, 1970.
- Ward, Lee. “Montesquieu on Federalism and Anglo-Gothic Constitutionalism.” *Publius: The Journal of Federalism* 37, no. 4 (2007): 551-577. doi: 10.1093/publius/pjm018
- Williams, Elizabeth. *The Physical and the Moral: Anthropology, Physiology, and Philosophical Medicine in France, 1750-1850*. Cambridge, UK: Cambridge University Press, 1994.
- Wright, Johnson Kent. “Historical Writing in the Enlightenment World.” In *The Enlightenment World*, edited by Martin Fitzpatrick, Peter Jones, Christa Knellwolf, and Iain McCalman. 207-16. New York: Routledge, 2004.
- Wurthmann, William. “The Council of Ten and the Scuole Grandi in early Renaissance Venice.” *Studi veneziani*, no. 18 (1989): 15-66.