

Corps Intermédiaires, Civil Society, and the Art of Association

Jacob T. Levy¹

“Organizations, Civil Society, and the Roots of Development,” NBER, October 2014

I.

This paper traces the shifts in treatments of intermediate groups among some liberal and democratic political theorists in the 18th and 19th centuries. The decades of the late 18th and early 19th centuries are traditionally understood to encompass the emergence of fully liberal political and social theory, and an early version of liberal political practice, in France, the UK, and the US; they have lately been identified by North, Wallis, and Weingast as the decades when those three societies substantially made the transition to “open access” political, economic, and legal orders.² This transition consists in part in the democratization of organizational tools that had previously been open only to members of the elite, such as the shift from specially chartered monopolistic corporations to general incorporation laws, and that from parliamentary oligopolistic party competition to modern parties competing in wide-suffrage elections. Although the early liberal theorists did not fully perceive the changes happening around them, their analyses and reactions can help us see things about the shift to open-access orders that might not be fully visible in retrospect. To varying degrees they looked forward to the possibility of a pluralism without privilege, but they also had doubts about its possibility. They offered some reasons to prefer pluralism *with* privilege to the absence of both.

¹ Tomlinson Professor of Political Theory, McGill University, jtlevy@gmail.com . Portions of this paper are drawn from my *Rationalism, Pluralism, and Freedom*, Oxford University Press, 2014.

² Douglass North, John Wallis, and Barry Weingast, *Violence and Social Orders*, Cambridge: Cambridge University Press, 2009.

I begin with three simplified ways of thinking about intermediate bodies—deliberately stylized and abstract. These do not necessarily describe different types of groups or different legal regimes governing group life; they are styles of analysis, though emphasizing one rather than another can yield different policy outcomes.

First, groups and associations might be thought of as *competitive* with one another, analogously to the competitive character of incorporated firms in an open market under laws of general incorporation. The associations that exist, and their relative success, represent the choices made by members who have the right to form, join, and exit groups relatively easily. Universities and private schools compete for students and teachers; religious denominations under conditions of religious freedom compete for adherents; municipalities compete for residents and capital through Tiebout sorting and as the kind of agents in a polycentric order analyzed by Elinor and Vincent Ostrom; political parties compete for votes and members. Different activist groups devoted to the same issue, or different recreational or fraternal clubs of the same type, might compete with each other as well. Competitive groups are generally conceived of as similar enough and as having members who are similar enough that they are meaningfully rivalrous; a church is not competitive with a municipality in the same way. They are also understood as horizontally organized, each facing its rivals on more or less the same level. This competitive understanding of intermediate groups is congenial to the analysis of the open access order found in North, Wallis, and Weingast; it is also found in Ernest Gellner's account of civil society, an order populated by "modular man" who can leave one group and join another without essential change in his identity or status.³ The competition of course relies in part on the kind of "exit" described by Albert Hirschman, but that feature is easily overstated;

³ Ernest Gellner, *The Conditions of Liberty*, Penguin, 1994.

exit might happen only at the margins and yet exert important disciplining effects on group that are otherwise characterized by a great deal of loyalty and voice.⁴

Second, group life might be thought of as an *integrative* phenomenon. The doctrine of subsidiarity in Catholic social thought emphasizes the importance of local decisions and actions, of local group life, within the context of an organically integrated whole community, whether that be the Church as such or social life more generally. In the service of common and overarching ends, there is value in local participation and the sense of personal agency that comes of being part of a sub-group. Here the analytical emphasis is vertical, not horizontal, and the coexistence of groups of the same kind at the same level is comparatively unimportant. They might not be ruled out; each parish might have its own school and its own poor relief as the instantiation of communal projects of education and charity. Each town in an administratively decentralized unitary state might have its own local officials who implement the centrally-decided policies. But their plurality is not in itself the point; they are only the local, visible, accessible aspect of a larger whole. To take a very different model, the corporations that mediate citizenship in Hegel's *Philosophy of Right* are organized by industry and profession, with no mention of or apparent value in having (say) competing corporations of lawyers. The "deep diversity" advocated by Charles Taylor—at once perhaps the leading living Catholic political philosopher and the leading living Hegelian political philosopher—openly allows for both a mixture of types. Quebec, in Taylor's vision, represents a different mode of belonging to Canada, a substantively different type of membership in the federation, from the other provinces. But that does not mean that the other provinces which lack that distinctiveness should be abolished, only that they do not mediate membership in Canada in the same thick way that Quebec does. In any

⁴ Albert Hirschman, *Exit, Voice, and Loyalty*, Harvard University Press, 1970.

case, the question for everyone is “how do we belong to Canada?”, that is, how do our intermediate groups *mediate* our membership in the larger whole? If there is a political economy analogue of integrative models it is corporatism of various kinds, including the postwar corporatist model in some European countries whereby encompassing organizations representing labor and capital negotiated nationwide agreements with the help of a government concerned with the whole economic system. But there are uses of this analytical style that are neither so metaphysically fraught nor so concerned with organizations actually being organized hierarchically. The so-called neo-Tocquevillean studies of associational life associated with Robert Putnam also emphasize belonging to associations as a way of belonging to a larger social whole, united by bonds of trust and building social capital for the benefit of the whole community.

Third, we might think of group life as *oppositional*. If the competitive model emphasizes horizontal rivalry, and the integrative model emphasizes harmonious non-rivalry, the oppositional model emphasizes *vertical* rivalry: our local or particular or intermediate group offers the possibility of dissent, difference, or resistance. The church provides its members with social norms that meaningfully differ from those of the wider society, and the organizational resources with which to defend their religious liberty against church intrusion. Any type of adversarial federalist theory—the intercession theories of the Kentucky and Virginia Resolutions, the rivalry for loyalties between states and center envisioned in *Federalist #s 45-46*, the Hapsburg-inspired multinational federalism defended in Lord Acton’s *On Nationality*—uses these lenses, emphasizing not that (e.g.) Quebec is *how I belong* to Canada, but rather that it is *how I sometimes do not*, that it is the place where I can stand when I wish to say *no* to Canada. Dissenting churches under religious establishment obviously lend themselves to this kind of

analysis, but orthodox or established churches can too, when they have enough institutional weight to counterbalance decisions made by political elites and state actors. An oppositional stance is relative to another group or set of groups: the medieval walled city might be seen as oppositional relative to the local lord but as in an integrative relationship with the political-economic order of the kingdom as a whole, while the walled university or the church giving sanctuary might be oppositional relative to the city.

With these three models in mind, it would be easy to think of the emergence of liberalism, of civil society in the contemporary sense, and of open-access orders as being a matter of the replacement of integrative and oppositional styles of group relations with a competitive model, or at least of a change in perspective toward competitive analyses. I hope to show that matters were, and remain, more complicated than that.

II.

Although Tocqueville's famous chapters on "the art of association" in *Democracy in America* can invite the reading that he thought he had discovered something completely new and distinctive in America, his analysis there arose out of a long tradition of thinking about associations and organizations in the modern state. The decisive work was Montesquieu's *The Spirit of the Laws*, which famously identified *corps intermédiaires* as the crucial constitutional pillars of a moderate monarchy. Montesquieu treated the defense of (among others) cities', guilds', and the Church's self-government as a part of the defense of limitations on centralized state power. The argument depended on both the quasi-public or public character of the *corps* (their privileges made up part of the constitutional order) and their base in extralegal social facts not susceptible to direct royal intervention (such as the nobility's attachment to their honor).

Montesquieu's was an oppositional pluralism that drew its strength from privilege; drawing on their respective social bases of support and appealing to law, the *corps* could limit monarchies and prevent them from degenerating into despotism.

Montesquieu divided *SL* into six parts, organized into three volumes of two apiece. The first two are concerned with the analysis of regime types: the division between moderate governments and despotism, the secondary division of moderate governments into monarchies and republics (and the subdivision of the latter into democratic and aristocratic), the account of their animating principles and their possible decay, and the application of the typology to such questions as military policy, taxation, and education. The third part offers Montesquieu's arguments about climate and geography, and their effects on social, legal, and political institutions. Part Four concerns commerce, and contains his famous "*doux commerce*" thesis. And Parts Five and Six offer complementary analyses of legal complexity. Part Five discusses both the interaction between and the rightfully separate jurisdictions of religious and civil and political laws. The last part, the longest by far of the six, develops a partly-novel constitutional history of the French kingdom, and of the legal variety that had always characterized it.

In the typology in Parts I and II, Montesquieu distinguished these two forms, moderate monarchies and immoderate despotisms on the basis of the former's respect for *corps intermediares*. "Intermediate, subordinate, and dependent powers constitute the nature of monarchical government, that is, of the government in which one alone governs by fundamental laws."⁵ The "lords, clergy, nobility, and towns" maintain a monarchy in its proper conceptual form. The most "natural" intermediate power is the nobility as a class, so much so that "nobility is the essence of a monarchy, whose fundamental maxim is: *no monarch, no nobility; no nobility,*

⁵ *SL*, II.4, p. 17.

no monarch; rather, one has a despot.” Even the Church, which he sharply criticizes for intolerance and persecution, has a crucial role to play, and he suggests that ecclesiastical autonomy should be respected and legally firmly established. It provides the final check against despotism when a monarchy has otherwise abolished all of its old laws. Montesquieu’s defense of the *corps intermediares* is a genuine theory of *intermediacy*. The aristocracy in a monarchy defends the laws; aristocratic government without a monarch to overawe the nobles tends toward lawlessness and corruption. Their privileges are "odious in themselves," but instrumentally useful in aligning their honor with the defense of the constitution.⁶

The argument was in part conceptual, in part causal. Montesquieu both claimed that a monarchy could be identified by the presence of intermediate bodies, and that the intermediate bodies help to keep monarchies moderate. The former idea is interesting insofar as it marks an unusual addition to an intellectual tradition as old as Aristotle’s *Politics*. Montesquieu did not disagree with the traditional view that monarchies are law-governed and despotisms lawless and arbitrary. Lawfulness and lawlessness distinguish his moderate regimes as a group from the immoderate category of despotism. But he did not simply hold that monarchies were lawful rule-by-one. He instead suggested that lawful rule-by-one would *necessarily* entail the persistence of intermediate groups.

Moreover, and more fundamentally, he held that monarchies could only *remain* moderate and lawful regimes over time because of the continued existence of the *corps*. As their liberties and privileges diminished, the monarchy would slip farther and farther toward despotism. This was because only the *corps* could have both the motivation and the power to successfully check the urge of monarchs to absolutism. Without them, there is no one to say no to the king, and

⁶ *SL II.11.6*, p. 161.

certainly not to do so in the name of law. Of special importance here are those intermediate bodies he calls the “depositories of the laws” as they will have a special connection with the retention and enforcement of legality and liberties: in France, the *parlements*, which even in their weakened eighteenth-century state “do much good.”⁷

Montesquieu’s interest in the *corps* in Parts I and II is all too often overlooked in the Anglophone literature, which has sometimes been preoccupied with his celebration of the English constitution and sometimes with his effects on the American constitutional debates, through the ideas of a separation of powers and the proper size of republics. But Montesquieu was a skeptic about republicanism in the modern world. The famous analysis of state size in *SL*—the thesis that republics are suited only for small states, and monarchies for states of moderate size, with large states more or less inevitably being despotisms—should be understood in this light.⁸ This is not simply a range of options from which one might choose; small states are not militarily viable in the era of modern states such as France and Britain. Modern states will be large; and large states will not be republics, as Cromwell’s England had convincingly demonstrated.

Montesquieu identified an animating principle for each of his forms of government: *virtue* for democratic republics, understood in roughly the civic republican sense; *moderation* for aristocracies, needed to allow the aristocrats to restrain themselves collectively when there is no outside power to do so; *honor* for monarchies, to which we will return below; and *fear* for despotisms, which govern by lawless terror. Contrary to what his American readers were to believe a generation later, Montesquieu’s insistence that republics were constituted by virtue was

⁷ Montesquieu, *My Thoughts*, Henry C. Clark, trans. and ed. (Indianapolis: Liberty Fund, 2012), p. 192.

⁸ I discuss this farther in “Beyond Publius,” 27(1) *History of Political Thought* 50-90, 2006

an *indictment* of them, since the obsession with monk-like virtue and self-abnegation was anachronistic in an age of commerce. And republics were far from being intrinsically free governments. Freedom depends on, among other things, the separation of powers. “In most kingdoms in Europe, the government is moderate because the prince, who has [the executive and legislative] powers, leaves the exercise of [the judicial power] to his subjects. Among the Turks, where the three powers are united in the person of the sultan, an atrocious despotism reigns. In the Italian republics, where the three powers are united, there is less liberty than in our monarchies.”⁹ Monarchies may slip into despotism—so long as they do not, they seem to be where the most freedom is normally found among modern states.

It is certainly true that Montesquieu admired the British constitution, the subject of extended discussions in II.11 and III.19. But enthusiasm for England’s system was limited precisely by the decline of England’s *corps* since the Civil War. “If you abolish the prerogatives of the lords, clergy, nobility, and towns in a monarchy, you will soon have a popular state or else a despotic state[...] 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,” he drily concludes; “if they were to lose it, they would be one of the most enslaved peoples on earth” because of their abolition of intermediate powers.¹⁰ This perilous state of affairs dates from the days of Cromwell; “the English nobility was buried with Charles I in the debris of the throne.”¹¹

⁹*SL*, II.11.6, p. 157

¹⁰*SL*, II.4, pp. 18-19

¹¹*SL*, VIII.9, p. 118. Montesquieu does not further explain this comment, which is at first glance odd. While the House of Lords was abolished in the immediate aftermath of Charles’ execution, it was restored as part of the Restoration, and in Montesquieu’s own day was not a weak body. It seems to me there are two possibilities, not mutually exclusive. One is that Montesquieu understands the restored Lords not to be a restored *nobility* in his sense. This is plausible, since contemporaneously with the restoration of the House of Lords, feudal land tenures were abolished. The aristocracy’s land ownership became legally indistinct from other forms of

The conviction that the *corps*, including those staffed by a hereditary nobility, are crucial to the maintenance of a lawful and balanced monarchy helps to explain Montesquieu's apparently-odd identification of *honor* as the animating principle of a monarchy (one of many irritants in the book to Voltaire). Aristocratic honor, after all, does not derive directly or solely from the monarch, Hobbes' view to the contrary notwithstanding. For aristocrats who are drawn to court, i.e. Versailles, the monarch has an outsized influence on status and standing. Still, those driven by honor could not be the kinds of subservient flatterers demanded by despots. They could not help but stand up for the dignity of their own offices and authority. Indeed they could not even be counted on to obey direct royal commands; dueling, the "point of honor," had long been illegal but was still fairly common. However poorly-justified a person's view of his own honor might be, it remained *his*, not only outside the direct control of the monarch but sometimes a source of the strength needed to refuse and resist oppression.¹² If the *corps* were needed to affirm and enforce legal limits on royal power and prevent despotism, honor was needed to animate the *corps*, and to keep their members dedicated to their defense. This is why,

ownership—one moment from which one might date the abolition of feudalism in England. The class that remained was titled, but its foundation as a noble class had arguably been kicked away. The second is that, once the House of Commons had shown that it *could* abolish the House of Lords, the restored body was necessarily neutered; it could no longer serve any real oppositional function in an increasingly centralized state. This need not have been true—I do not think it was entirely true in the mid-eighteenth century—to have been Montesquieu's understanding. I think that Montesquieu's phrasing suggests the latter account—it seems to be about 1649 rather than 1660—but the former seems very much like Montesquieu's kind of thought. And, again, the two might be complementary. Perhaps a restored Lords *could* have remained independently powerful, if its members had remained a noble class with respect to land; but with neither individual noble land relations nor clear institutional permanence, it was not.

¹² For discussions of honor as a source of strength for political resistance, though in a more democratic spirit, see Sharon Krause, *Liberalism With Honor* (Cambridge: Harvard University Press, 2002), and Anthony Appiah, *The Honor Code* (New York: W. W. Norton, 2010).

notwithstanding the “ignorance natural to the nobility, its laxity, and its scorn for civil government,”¹³ it is the *sine qua non* of lawful and moderate monarchy.

Throughout Parts I and II in particular, Montesquieu critiqued the turn to absolutism and centralization under Louis XIV, albeit always with a slight, politic opacity.¹⁴ The recurring comparisons and contrasts between monarchies and despotisms often come just to the edge of saying that Bourbon France had crossed, or risked crossing, the line between them. The *corps* had been steadily undermined in “a great European state” over the preceding centuries. “In certain European monarchies” the autonomous provinces that govern themselves well and thus thrive are constantly threatened with the loss of “the very government that produces the good,” to better allow them to “pay even more.”¹⁵ This strategy of killing the golden goose is another sign of despotism; “when the savages of Louisiana want fruit, they cut down the tree and gather the fruit. There you have despotic government.”¹⁶

The deliberate effort to draw the aristocracy in to the court at Versailles and cut them off from the provinces likewise concerned Montesquieu. In an essay on “the grandeur of the capital”

¹³*SL*, II.4, p. 19

¹⁴ On Montesquieu’s sensitivity to censorship, see Paul A. Rahe, *Montesquieu and the Logic of Liberty*, especially ch. 1. The fact of *ancien regime* censorship is one source of the interpretive opacity of *SL*, and what Rahe thinks happens behind that opaque barrier is very different from what I suggest here. But Rahe’s discussion of the censorship itself, and of Montesquieu’s concern not to test its limits too aggressively in his mature years, is clear and convincing. It is worth noting, however, that *SL* attracted controversy nonetheless: attacked by Jesuits and Jansenists alike, placed on the Vatican Index, and extensively censured by the Sorbonne. Defending the book against charges of atheism, naturalism about religion, and adherence to Spinoza and Bayle dominated years of his life. This perhaps suggests either that Montesquieu was not quite so concerned with avoiding offense to the established powers as Rahe suggests, or that he was not terribly good at it.

¹⁵*SL*, II.13.12, p. 221. For an account of Montesquieu’s defense of provincial autonomy that amounts to a kind of federalist constitutionalism for monarchies, see Lee Ward, “Montesquieu on Federalism and Anglo-Gothic Constitutionalism,” 37(4) *Publius: The Journal of Federalism* 551-577, 2009.

¹⁶*SL*, I.5.13 p. 59

in his unpublished *Pensées*, he added that criterion to his distinctions among regimes. A great capital would destroy a republic, but was natural to despotism. In a monarchy, as usual, things were complicated and required balance. The growth of London (the capital of "a certain maritime kingdom") was not especially worrisome, as it arose from the attractions of commerce. But a monarchy could also grow in the capital due to onerous taxes in the provinces, or to administrative procedures that demanded a presence in the capital to settle legal questions, or to the sheer attractions in terms of honor of the monarchical court. One way to maintain balance, unsurprisingly, was to "let cases before the provincial courts be settled in those courts and not appealed endlessly" to the tribunals at the center.¹⁷ But Louis XIV had sought to aggravate the imbalance rather than counteract it.

SL contains several allusions to the War of the Spanish Succession and to the illegitimacy of Louis' initial aim of creating a union between the two thrones. In a discussion about altering lines of succession when national well-being calls for it, he says that "a great state that became secondary to another would be weakened and even weaken the principal one."¹⁸ This is a piece of Montesquieu's broader critique of Louis' expansionism. Recall that one of the differences between lawful monarchy and lawless despotism is the size of the state. Large states such as Russia or China cannot but be governed despotically; "a large empire presupposes a despotic authority in the one who governs. Promptness of resolutions must make up for the distance of the places to which they are sent."¹⁹ When a state expands too much through conquest, its domestic freedom will not survive. "An immense conquest presupposes despotism."²⁰ This is the core of Montesquieu's sense of what happened to the Roman republic, laid out at length in an

¹⁷See Daniel Roche, *France in the Enlightenment*, pp. 209-210.

¹⁸*SL* 516.

¹⁹*SL*, I.8.19, p. 126

²⁰*SL*, II.10.16, p. 152.

earlier book on the subject and in abbreviated form in II.11. The governance of distant provinces required despotic power.²¹

This was an even more prominent theme in a work Montesquieu had written to accompany his book on the Romans, but decided not to publish: his *Reflections on Universal Monarchy in Europe*. In the late seventeenth century, Huguenot refugees as well as William of Orange and his allies had maintained that Louis XIV sought “universal monarchy”—the dominion over all of Europe that Holy Roman Emperors had notionally aspired to and that Charles V had seemed on the verge of attaining in the early sixteenth century. The growing conviction that this was true was a key feature of Whig thought in England before and after the Glorious Revolution that tilted England’s foreign policy from an alliance with France to one with the Netherlands; and in the early eighteenth century, the War of the Spanish Succession cemented the idea in many non-French minds. Louis XIV, already commanding the most powerful kingdom on the continent of Europe, aimed to add Spain and its overseas empire to his holdings. Montesquieu connected the aspiration to universal monarchy abroad with the slide toward despotism at home.²² Fortunately for European freedom, the aspiration to universal monarchy was doomed in the modern age; but those who did not understand this could still destroy their own countries’ constitutions in their vain pursuit of military supremacy.

Parts III, IV, and V of *SL* were especially concerned with the existence of a social world autonomous of, and not created by, political rule. Geography and climate, historical and cultural

²¹ While Machiavelli and the republicanism he inspired generally lies beyond the scope of this book, it is worth noting how distant Montesquieu’s view here was from Machiavelli, whom he much admired but frequently disagreed with. Conquest and expansion are the ruin of free governments, not the sign of their triumph.

²² See Paul Rahe, “The Book That Never Was: Montesquieu’s Considerations on the Romans in Historical Context”, 26(1) *History of Political Thought* 43–89, 2005.

change, economic forces, and religion all constrained in various ways what rulers could do—and in different ways in different places. Most of this discussion lies outside an inquiry into pluralism and intermediate groups, but its striking methodological novelty is relevant. In these parts of the book we find a recurring motif of advice to legislators and rulers to notice the particularities of their societies and govern accordingly, rather than in accordance with abstract plans. Such sociological, economic, and historical constraints were more or less invisible to the decision-based logic of seventeenth-century contractarianism, but were crucial from Montesquieu onward. The classical economists' elaboration of an economic world that transcended political boundaries, that operated according to its own discoverable rules, and that partly conditioned and limited politics—the idea, in short, of “the economy” as we now discuss it—stands out here, but it is not the only example. Montesquieu's struggle to understand the world according to differences in geography, in national or cultural or religious spirit, in historical stage, in social customs, and in economic situation was similarly an attempt to describe *societies* rather than simply *polities*.²³ The pervasive eighteenth-century concern with manners and *moeurs* can be seen in the same light; not only Montesquieu but also Voltaire, Hume, Ferguson, and Smith were deeply interested in habits and customs that, to be sure, could be affected by political decisions, but were not simple political enactments and that placed constraints on the range of feasible political choices.

Besides understanding the existence of such social worlds, Montesquieu and those who followed him in this regard sought to understand their plasticity or limits, and the rules according to which they changed and developed. All agreed that the social worlds were not static; manners could become more polished over time, the wealth of nations could grow or decline, agricultural

²³ This is the sense in which Durkheim saw Montesquieu as a founder of sociology, set apart from political philosophy. See also Taylor, “Invoking Civil Society.”

societies could become commercial societies, and so on. But none of these things happened by simple political decree. Governing should usually be done along the grain of such social tendencies and local particularities, occasionally in a way that might counterbalance some undesirable tendency, but never in sheer ignorance of or violence against them. The *moeurs*, manners, and customs of a society create a cultural reality that one may attempt to guide in one direction or another but that cannot be simply ruled. Montesquieu's discussion of Peter the Great's attempts to Europeanize Russia stands out here. He sought to change the "manners" of his people by laws and coercion, and disregarded their legitimate attachment to custom; the results were violence and tyranny.

Parts V and VI defended the pluralism inherited from the ancient constitution in a sense related to but distinct from the support of pluralism of political institutions and *corps* in Parts I and II: the plurality of legal norms and systems that governed modern European kingdoms, to the consternation of absolutists and reformers. "*L'Esprit des lois* was nothing short of a celebration of the diversity between and complexity within legal systems."²⁴ Here we find a remarkable chapter on the idea of uniformity of laws, against which Montesquieu warns the would-be legislator.

"There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognize because it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same

²⁴Sylvana Tomaselli, "Spirit of Nations" p. 31, in Goldie and Wokler, eds. *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2006).

religion in all its parts. But is this always right and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial and the Tartars by theirs; and yet there is no nation in the world that aims so much at tranquility. If the people observe the laws, what signifies it whether these laws are the same?"²⁵

Near the beginning of the book Montesquieu had said that when a ruler "makes himself more absolute, his first thought is to simplify the laws."²⁶ Then, it had appeared as something like a deliberate strategy, as the simplified state would be simpler to rule. But at the end of the book it appears rather as an unjustified taste²⁷ or a psychological affliction of those who hold power or make laws. Shortly before the remarks on uniformity, he wrote that "it seems to me that I have written this work only to prove [...] that the spirit of moderation should be that of the legislator; the political good, like the moral good, is always found between two limits."²⁸ But the spirit of moderation was *not* normally that of the legislator, still less of the philosopher who imagined himself a legislator; Montesquieu names Aristotle, Plato, Machiavelli, More, and Harrington, and identifies in each case some individual preoccupation that contributed to their urge for one complete system or another. "The laws always meet the passions and prejudices of

²⁵Montesquieu, *Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, eds. (Cambridge: Cambridge University Press, 1989[1748]), henceforth *SL*, VI.29.18, p. 617

²⁶*SL*, I.6.2, p. 75

²⁷Montesquieu's entry on aesthetic taste in the *Encyclopedie*, his only direct contribution to that work, criticized the aesthetic vision of uniformity as well. It held that fully-developed taste was attracted to a combination of order, symmetry, and variety as such; "a long uniformity renders any thing insupportable... The soul loves variety." "Essai sur le goût," (1857) in *Montesquieu: Oeuvres Completes*, Daniel Oster, ed. (Macmillan Company, 1964), pp. 846-847, my translation.

²⁸*SL*, VI.29.1, p. 602.

the legislator. Sometimes they pass through and are colored; sometimes they remain, and are incorporated.”²⁹

These statements of purpose accompany, indeed interrupt, a long study of the problems of Roman, Germanic, and feudal law in the French legal order. This large part of *SL* is frequently obscure to the modern Anglophone reader; indeed it was obscure to some contemporaneous French readers. But they are less obscure when read in light of the preceding two centuries’ debate about the ancient constitution.

There were three primary theses about the French traditional constitution. The royal thesis saw a more or less seamless transition from Roman rule to the French kingdom, with no essential element of Frankishness introduced. The Protestant and monarchomach German thesis was one of primordial freedom and an original contract. And the view influentially put forward by the Comte de Boullainvilliers a generation before *SL* was one of Frankish conquest yielding absolute rule over the conquered, and Germanic parity between the nobles and their king.

In Part VI of *SL* Montesquieu is clearly engaged in some of the same inquiries that Boullainvilliers had made two decades before, and sometimes the two are lumped together; both, after all, were broadly supportive of the nobility, and critical of absolutism. Neither shared the later-eighteenth century enthusiasm for democratic republicanism. But Montesquieu was both a member of the *noblesse de la robe*, and a supporter of *parlements* that were filled with others in the same category—a group for which Boullainvilliers had undisguised contempt. They were, in his view, *arrivistes* whose claims to titles were no more than two centuries old. Montesquieu’s support is for the balanced monarchy that respects *corps intermediares* and the nobility, not for

²⁹*SL*, VI.29.19, p. 618. He added a complementary argument in his unpublished *Pensees*, warning against large and sudden changes in a state because, “by eliminating the respect one ought to have for the established things,” such changes “serve as an example and authorize the fantasy of someone who wants to overturn everything.” *My Thoughts*, p. 65.

aristocracies as such—the least-discussed of his types of government. And he kept his predecessor at a careful distance:

“As work his is penned with no art, and as he speaks with the simplicity, frankness, and innocence of the old nobility from which he came [the same nobility Montesquieu had called ‘ignorant’ in Part I], everyone is able to judge both the fine things he says and the errors into which he falls... [H]e had more spirit than enlightenment and more enlightenment than knowledge.”³⁰

The Germanist account of popular government—which Montesquieu engages through the foil of the Abbé Dubos, never naming the incendiary *Francogallia*—is paired with Boulainvilliers’ aristocratic thesis as comparable mistakes, one privileging the Third Estate and one the nobility, both unduly.³¹ Moderation between these historical accounts is Montesquieu’s watchword; the history of France is many things, not one thing. The Romanist historical thesis of Renaissance absolutism is, on Montesquieu’s telling, simply false, not even gaining the kind of partial truth attributed to Boulainvilliers and Dubos.

Montesquieu takes a sharply unconventional approach to the disputes as to the foundations of French law. In the first place, it is directly concerned with what Montesquieu terms “civil” rather than “political” law—in our terms, mainly private and criminal law rather than constitutional public law. It offers a history of laws under the French monarchy, not a history of the founding of that monarchy or of its aristocracy. The Salic Law was not a constitutional enactment; it was simply the then-extant law of inheritance of fiefs applied to the case of royal inheritance. Civil law generated political law.

³⁰*SL*, XXX.10, p. 627

³¹Sylvana Tomaselli, “The Spirit of Nations,” section 7: “The spirit of the laws: the Gothic constitution”

Secondly, it declines to adopt any of the traditional sides in the constitutional dispute, neither the Romanist Gallic account of continuity with the fallen empire nor the Germanist Frankish story of primeval liberty. (By contrast, he said that English liberty was Gothic and primeval in origin.) Rather, he stressed, the civil laws in France had always been diverse and pluralistic. Insofar as the law was of barbarian Germanic origin, it was not simply Frankish law imposed—for, as he stresses here and elsewhere, the idea that conquerors should be legislators and replace the laws and customs of the conquered is a modern one. Instead, it was the laws of the Ripuarian and the Salic Franks and the Saxons, and elsewhere the relatively Romanized barbarian codes of the Burgundians and Visigoths and Lombards and so on. Roman law was retained for Romans; gradually only the clergy retained it, as others opted into one or another of the surrounding legal codes. The independence of canon law thus appears as a foundational fact about French law. So, too, does legal pluralism more generally.

But then Montesquieu depicts a rupture in the post-Carolingian generations—one that places *both* the Salic Law and the Roman Law on the other side of a historical divide. In place of either barbarian codes or Roman codes, the law of those outside the churches came to be primarily customary and regional. He takes care to insist that the distinction between written law and unwritten custom was *not* that between German and Roman; the barbarian written codes, like the Roman law, made reference to the ability of custom to govern where the law was silent. And all the written barbarian codes fell into disuse just as the written Roman law did from the ninth through the twelfth centuries. What took their place was a variety of territorial, regional, and eventually provincial customs. These were inflected, to be sure, with local inheritances from the old codes (Frankish, Gothic, and so on) but became detached from the old personal identities. The recovered *corpus* of Justinian was received in relatively Romanized provinces as written

law, as it formalized existing practice; elsewhere, it was admitted only as *ratio scripta*. This re-writtenness of the Roman law was paralleled by a newfound writtenness of customary law in other provinces.

The rise of feudalism is acknowledged as important by Montesquieu, but not as the introduction of a unified feudal conquering race à la Bouvainvilliers; rather, it is just another source of pluralism, in which each lord can hold court in his own manner. The early Middle Ages appear as a time of "prodigious diversity" in law—not indeed the same diversity which had characterized early medieval France under the barbarian codes, but such that (as he approvingly quotes Beaumanoir as saying) no two lordships had entirely the same civil law in all of France.

And finally, Montesquieu attempts to show that this situation was not interrupted in the thirteenth century by the so-called Establishments of St. Louis (King Louis IX), a document that was sometimes appealed to as being the foundation of a unified civil code, but that he said.

"was never made to serve as law for the whole kingdom... Now, at a time when each town, borough, or village had its own custom, to give a general body of civil laws [would have been] to reverse in a moment all the particular laws under which men had lived everywhere in the kingdom. To make a general custom of all the particular customs would be rash, even in these times... For, if it is true that one must not alter things when the resulting drawbacks equal the advantages, so much less must one alter them when the advantages are small and the drawbacks immense... [T]o undertake to change the accepted laws and usages everywhere was something that could not enter the minds of those who governed."³²

Citations to the *corpus* pervade *SL* but are almost always in the service of a description of what "the Romans" did, not as an account of the development of French law. The Romans' law

³²*SL*, VI.28.37, p. 589.

is perhaps the most frequently used example in Montesquieu's comparative jurisprudence; but it is still only an example to be compared with other examples. It is their law, not *the* law. The constant consideration of laws "in their relation to" climate, form of government, *esprit*, type of commerce, religion, and so on emphasizes the fitting of laws to local time and place. And toward the end of the book Montesquieu is explicit that "laws must not be separated from the circumstances in which they are made"³³ and that one should not "transfer a civil law from one nation to another" without examining "whether they both have the same institutions and the same political right." He mentions a Cretan law on robbery that was transferred to the Lacedemonians and then to the Romans, but made no sense in the Roman context; the implication for the relevance of Roman law to modern contexts was clear, and the claims of legal continuity between Roman Gaul and modern France were dismissed.

In sum, Montesquieu's distinctive legal history in Parts V and VI rejects Romanist accounts of French constitutional origins while substantially modifying their Germanist rivals. He determinedly does not identify any particular founding moment that normatively defines the kingdom thenceforth. His ancient constitutionalism was thus more thoroughly pluralist, and further from images of original contracts, than the Gothic contractarianism sometimes found in the monarchomachs. He denies that France was simply Roman or simply Frankish, tracing instead the ebb and flow of different types of law and rules governing choice of law. The Salic Law had some pride of place, to be sure; it was the territorial law of the royal demesne. But Montesquieu refuses to indulge the fiction that this made it the law of the kingdom. He maintains that the French legal order had *always* been a pluralistic one in which different rules coexisted; and that pluralism itself evolved over time, as rules of personal jurisdiction gave way

³³*SL*, VI.29.14, p. 611

to provincial territorial jurisdiction, as the Roman law was recovered, as feudalism developed, as persons opted into one court system or another for their own various reasons. The aspiration to legal uniformity was thus at odds with the kingdom's whole history. The variety of provincial laws upheld by the provincial *parlements*, the coexistence of civil and canon law, of urban and seigniorial law—these were the complex fabric of French law, and the contemporary legislative reformer must not pretend otherwise.

While Montesquieu's view was highly influential through the eighteenth century, two rivals to it were as well. One, the civic republican suspicion of factions, was associated with Rousseau, Mably, and Sièyes as well as with important strands in the American and French Revolutions. The elevation of extralegal social pluralism into a public constitutional fact became identified with both intolerable privilege and illegitimate disunity. The other, a rationalistic individualism, looked forward to the use of modernized state power to check or abolish the *corps*, not backward toward imagined pasts of uncorrupted unity. It is in principle distinguishable from the civic republican view, most prominently by its greater enthusiasm for commerce but also by its greater tolerance for associational pluralism provided that privilege was stripped away. The gradual shift from a civic republican suspicion of all factions in politics to a pluralist view that competitive factions (and, later, parties) might be attractive and necessary features of republican politics is well-known.

III.

Although it is surely not a coincidence that one of the first powerful analyses of associations as competitors was written by Adam Smith in *The Wealth of Nations*, his treatment of vibrant competition among churches for members in Book V is really very little like his

examinations of marketplace behavior in Books I and II. His is not a model of parishoners casually shopping from one church to another at arm's length, but of believers being provided with community, structure, and meaning by sects that might counteract the anonymity and alienation of modern urban life. That there are many such sects will limit the political dangers they pose, and will moderate them to some degree, but Smith *agrees* with Hume that passionate and enthusiastic churches will have a competitive advantage over their distant, indolent, bureaucratic counterparts. (He argues against Hume's wry preference for the indolent church, and for the socially partially-redeeming value of that enthusiasm if it is widely divided among competing sects, but not against Hume's basic insight that competition will result in more energetic churches propagating more fervent beliefs.) Believers will tend to behave like members of, not like shoppers among, religious denominations, however important competition is at the margin in shaping them all.

Smith's views on pluralism and privilege were complex, and not all of his thought on associational life can be captured by the competitive model. He was, it is true, a sharp critic of the guild system and of the associations of masters and merchants to be found in the guild hall. His famous comment that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in some conspiracy against the publick, or in some contrivance to raise prices"³⁴ was made in precisely that context; that is, the "merriment and diversion" was not a *reductio* but the actual circumstance in which men of the same trade *routinely* meet together in their associational life. But his indictment of the "man of system" in the final edition of *The Theory of Moral Sentiments*—published during, and generally presumed to be a comment on, the early stages of the French Revolution—push in a very different

³⁴ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Campbell, Skinner, and Todd, eds. (Indianapolis: Liberty Fund, 1981 [1776]), p. 145.

direction. The passage is worth quoting at length. Its best-known lines have sometimes been read as if they were criticisms of centralized economic planning and therefore strongly aligned with the economic theory of *WN*; in fact, they concern constitutional reform and privilege, and Smith's vision of the man of system bears more than a little resemblance to Montesquieu's legislator of uniformity.

Amidst the turbulence and disorder of faction, a certain spirit of system is apt to mix itself with that public spirit which is founded upon the love of humanity, upon a real fellow-feeling with the inconveniencies and distresses to which some of our fellow-citizens may be exposed. This spirit of system commonly takes the direction of that more gentle public spirit; always animates it, and often inflames it even to the madness of fanaticism. The leaders of the discontented party seldom fail to hold out some plausible plan of reformation which, they pretend, will not only remove the inconveniencies and relieve the distresses immediately complained of, but will prevent, in all time coming, any return of the like inconveniencies and distresses. They often propose, upon this account, to new-model the constitution, and to alter, in some of its most essential parts, that system of government under which the subjects of a great empire have enjoyed, perhaps, peace, security, and even glory, during the course of several centuries together. The great body of the party are commonly intoxicated with the imaginary beauty of this ideal system, of which they have no experience, but which has been represented to them in all the most dazzling colours in which the eloquence of their leaders could paint it. Those leaders themselves, though they originally may have meant nothing but their own aggrandisement, become many of them in time the dupes of their own sophistry, and are as eager for this great reformation as the weakest and foolishlest of their followers. Even though the leaders should have preserved their own heads, as indeed they commonly do,

free from this fanaticism, yet they dare not always disappoint the expectation of their followers; but are often obliged, though contrary to their principle and their conscience, to act as if they were under the common delusion. The violence of the party, refusing all palliatives, all temperaments, all reasonable accommodations, by requiring too much frequently obtains nothing; and those inconveniencies and distresses which, with a little moderation, might in a great measure have been removed and relieved, are left altogether without the hope of a remedy.

The man whose public spirit is prompted altogether by humanity and benevolence, will respect the established powers and privileges even of individuals, and still more those of the great orders and societies, into which the state is divided. Though he should consider some of them as in some measure abusive, he will content himself with moderating, what he often cannot annihilate without great violence. When he cannot conquer the rooted prejudices of the people by reason and persuasion, he will not attempt to subdue them by force; but will religiously observe what, by Cicero, is justly called the divine maxim of Plato, never to use violence to his country no more than to his parents. He will accommodate, as well as he can, his public arrangements to the confirmed habits and prejudices of the people; and will remedy as well as he can, the inconveniencies which may flow from the want of those regulations which the people are averse to submit to. When he cannot establish the right, he will not disdain to ameliorate the wrong; but like Solon, when he cannot establish the best system of laws, he will endeavour to establish the best that the people can bear.

The man of system, on the contrary, is apt to be very wise in his own conceit; and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in

all its parts, without any regard either to the great interests, or to the strong prejudices which may oppose it. He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.

Some general, and even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist upon establishing, and upon establishing all at once, and in spite of all opposition, every thing which that idea may seem to require, must often be the highest degree of arrogance. It is to erect his own judgment into the supreme standard of right and wrong. It is to fancy himself the only wise and worthy man in the commonwealth, and that his fellow-citizens should accommodate themselves to him and not he to them. It is upon this account, that of all political speculators, sovereign princes are by far the most dangerous. This arrogance is perfectly familiar to them. They entertain no doubt of the immense superiority of their own judgment. When such imperial and royal reformers, therefore, condescend to contemplate the constitution of the country which is committed to their government, they seldom see any thing so wrong in it as the obstructions which it may sometimes oppose to the execution of their own will. They hold in contempt the divine maxim of Plato, and consider the state as made for themselves, not

themselves for the state. The great object of their reformation, therefore, is to remove those obstructions; to reduce the authority of the nobility; to take away the privileges of cities and provinces, and to render both the greatest individuals and the greatest orders of the state, as incapable of opposing their commands, as the weakest and most insignificant.³⁵

In moments of constitutional reform, the man of system (or the party of system) refuses to respect prejudices and privileges, aims to do away with the rights of the nobility, the cities, the provinces, and generally of the “great orders and societies” into which the society is divided, divisions that check and limit the reformist sovereign will. While the privileges may indeed be abusive (recall Montesquieu, “odious in themselves”), overthrowing them all at once rather than mitigating their worst abuses suggests the desire to impose symmetry and to increase power, not the desire to genuinely alleviate the abuses. In short, the path of wisdom and humanity is to accept the corporate privileges of the *ancien regime* rather than to abolish pluralism.

IV.

Montesquieu's example was much on the mind of Benjamin Constant as he composed his political writings in exile from Napoleon—the manuscript that comes to us as *Fragments of an Abandoned Work on the Possibility of a Republican Constitution in a Large Country* as well as

³⁵ *TMS* VI.II.40-43. I think that the common reading of this 1790 passage as a response to the abolition of feudalism and privilege in France in 1789 is the right one, but much of it could also be read as a criticism of Cromwell. It is perfectly plausible that Smith might have deliberately written it to encompass both.

the writings that would become the *Principes de Politique* of 1806-1810, which together provide the substance (and most of the words) of Constant's later political writings. (The two were originally envisioned as one *Spirit of the Laws*- style opus.) As he read Montesquieu while trying to write his own work, he wrote in his journal "What a keen and profound eye! All that he said, even in the smallest things, proves true every day."³⁶

Constant modestly suggests that there is little point in adding to Montesquieu's own writings on uniformity. But his two arguments on the subject— developed in the *Principes* text and published in a chapter of his anti-Napoleonic 1814 pamphlet, *The Spirit of Conquest and Usurpation* (henceforth: SCU) and then a second chapter added to subsequent editions— arguably surpass Montesquieu's brief pages on the subject in their clarity and the quality of their argument. While he gives weight to people's attachments to custom and tradition, he insists that time can never help to sanctify abuses such as slavery. He freely admits that some kinds of local diversity may be irrational on their face and would never be constructed deliberately. But he maintains that this is not an appropriate standard of evaluation when deciding what to do with already-existing diversity.

He argues both against the spirit of system that accompanies and initiates governors' desire to rationalize, and in defense of the sentiments that attach people to their local traditions and rules. He embraces the idea of change and progress, but insists that it should be allowed to come in its own time and by free choice. An irrational winding road might prompt the construction of a straight one, but there is no need for a concomitant ban on the use of the former.

³⁶Constant, *Journaux Intimes* January 28 1804, in *Oeuvres*, Roulin, ed. (Paris: Gallimard, 1957).

Constant offers an argument that goes a crucial step beyond either Smith's "man of system" or Montesquieu's chapter on uniformity. The desire to create order and rationality in society need not be destructive in itself; but it is too-easily joined with force. "The spirit of system was first entranced by symmetry. The love of power soon discovered what immense advantages symmetry could procure for it."³⁷ A kind of philosophical aesthetic motivated benevolent legislators in the first instance; but the desire for uniformity led to the destruction of non-state institutions, enhancing the relative power of the center and creating a dynamic that outraced that initial public-spirited impulse.

With Montesquieu, he held that the provincial variety of legal customs in the old regime was not a fault worth correcting. "When I see the indignation that Voltaire and so many other writers affect to feel in the face of those numerous and opposed customs which coexisted in France, I wonder at the errors to which they were led by their love of symmetry. 'What,' they cry out, 'two portions of the same empire are subjected to different laws because they are separated by a hill or a stream of water! Is justice not the same on the two sides of a hill, or on the two banks of a stream of water?' But laws are not justice: they were merely forms to administer it..."³⁸

Even in a post-Revolutionary world, Constant saw that there was a strong connection between pluralist freedom and traditions and customs. He rejected the impulse to constitutionally make the world anew, saying that it would make no sense to create provincial variety in laws on a blank slate but denying that that told us anything about maintaining such pluralism where it existed.

³⁷Constant, "On Uniformity," in *The Spirit of Conquest and Usurpation and Their Relation to European Civilization*, (1814) in *Political Writings*, Fontana, ed. (Cambridge: Cambridge University Press, 1988), p. 74

³⁸Constant, *Conquest and Usurpation*, in *Political Writings*, p. 154.

Constant defended the proliferation of sects and denominations as a positive good, and as in any case inevitable wherever persons cared about religious questions enough to think about them, rather than mindlessly following empty rituals. Schism and proliferation tended to improve the moral purity of all sects, as the Reformation improved a previously-corrupt Catholicism; and it also conduced to civil peace. Likewise, but more profoundly for understanding Constant: his religious sensibility was a romantic Protestant individualism.³⁹ He was instinctively unsympathetic to Catholicism and skeptical of all sacerdotal corporations: organized churches, a privileged priesthood, monastic orders. The religion to which he was so concerned to preserve free access was a religion of individual spirituality that develops the soul and the mind.

Yet he recognized that for many people their religious sentiments came to be tied up in external “forms,” and that this was a reason for freedom of religious practice with respect to those forms—a freedom which had been violated under the Revolution. He supported the liberty to form and live in sacerdotal corporations such as monasteries. Provided that freedom of exit was protected, life within such corporations was an option legitimately open to free persons. “There are two ways of suppressing monasteries; you may open their doors; or you may drive out their occupants. If you adopt the first solution, you do something good without causing any harm; you break chains without violating refuges. If you adopt the second, you upset calculations based upon public faith; you insult old age, which you drag languishing and unarmed into an unknown world; you violate an incontestable right of all individuals in the

³⁹ For Constant on religion, see Helena Rosenblatt, *Liberal Values: Benjamin Constant and the Politics of Religion*; Bryan Garsten, “Constant on the Religious Spirit of Liberalism,” in *The Cambridge Companion to Constant*, Rosenblatt, ed. (Cambridge: Cambridge University Press, 2009); Garsten, “Religion and the Case Against Ancient Liberty: Benjamin Constant’s Other Lectures,” 38 *Political Theory* 4-33, 2010.

social state, the right to choose their own way of life, to hold their property in common, to gather in order to profess the same doctrine, to enjoy the same leisure, to savour the same rest.”⁴⁰

These religious cases were of central importance to Constant, and they offer reason to think that he might have viewed group life competitively: break the chains, let the sects proliferate, let believers choose. (Certainly he opposed the integrative style of thinking of the Catholic Church as providing believers with their way of belonging to *France*.) But, like Smith, Constant drew on the oppositional style found in Montesquieu when it came to pluralism in the constitutional order.

In *Principes (1810)* and elsewhere he indicts the tendencies toward uniformity of centralized and metropolitan legislatures. The members of the latter tend to acquire an *esprit de corps*, identifying with each other and with the capital. So they “lose sight of the usages, needs, and way of life of their constituents. They lend themselves to general ideas of leveling, symmetry, uniformity, mass changes, and universal recasting, bringing upset, disorder, and confusion to distant regions. It is this disposition we must combat, because it is on particular memories, habits, and regional laws that the happiness and peace of a province rest. National assemblies are scornful and careless with these things.”⁴¹ The better course is to allow the cities and provinces to keep their natural hold on our affections. “The interests and memories that arise from local customs contain a germ of resistance that authority is reluctant to tolerate and

⁴⁰ “On innovation, reform, and the uniformity and stability of institutions;” chapter 1 of the material added to the fourth edition of *Conquest and Usurpation*; in *Political Writings*, p. 153.

⁴¹ Constant, Book XV ch. 4, “Application of This Principle to the Composition of Representative Assemblies,” in *Principles of Politics Applicable to All Governments*, Dennis O’Keeffe, trans. (Indianapolis: Liberty Fund, 2003), p. 328.

that it is anxious to eradicate. It can deal more easily with individuals; it rolls its heavy body effortlessly over them as if they were sand.”⁴²

One of Constant’s ur-texts from his years of writing in exile comes to us as the *Fragments of an abandoned work on the possibility of a republican constitution in a large state*, a possibility Montesquieu famously denied and one that Constant was at pains to establish.⁴³ This work, dedicated to refuting one of the best-known of Montesquieu’s arguments, is nonetheless steeped in Montesquieu’s intellectual style and ideas. Constant understood that Montesquieu’s skepticism was not aimed at the idea of *freedom* in a large state but at the idea of freedom in a *republic*. He thought that Montesquieu had looked at the virtuous, anti-commercial, unfree republics of antiquity and attributed those features to *republics*, when they were better attributed to the ancient era.⁴⁴

This was Constant’s position throughout his life: that freedom was possible in a large and extended republic, and that much that Montesquieu attributed to the spirit of a nation or of its laws is in fact attributable to the spirit of the age. Constant’s political agenda never included the recreation of the ancient constitution of Montesquieu’s time. But he sympathized with Montesquieu’s defense of that constitution and tried to draw appropriate lessons from it; he did not view it as a defense of local tyranny and arbitrariness. On the central claim that intermediate bodies, a hereditary class, and corporations were essential for freedom, Montesquieu had been right to see them as the bulwarks of freedom against the king of his era. Their irrationality and

⁴² *SCU*, p. 74

⁴³ The “Fragments” belong to the same era as the initial *Principes de Politique*—roughly 1806-1810—and were written alongside them. Constant at first planned to write one work encompassing both. I find no evidence that Constant knew of Madison’s argument in *Federalist* #10 about the possibility of an extended republic, but there are strong affinities between Constant’s ideas and Madison’s.

⁴⁴ Constant, “Liberty of the Ancients Compared with that of the Moderns” in *Political Writings*.

inegalitarianism did not condemn them out of hand; uniformity under a tyrannical law was, for Constant as for Montesquieu, no virtue. The task for republican and post-Revolutionary thought was, in part, to find ways to recapture the pluralistic benefits without the abusive privilege.

Constant criticized the idea of hereditary rights of rule and the existence of a hereditary principle in a constitution. But his understanding of Montesquieu's defense of such things was that under an "abusive" government, "heredity can be useful; where rights have disappeared, privileges offer asylum and defense. In spite of its inconveniences, heredity is better than the absence of any neutral power. The hereditary interest... creates a sort of neutrality."⁴⁵ In order to dispose of heredity, it is necessary to have an excellent constitution. Montesquieu knew this; under the pressure of despotism there is a terrible leveling equality."⁴⁶

Constant agreed that a monarchy depended on an aristocracy in order to protect freedom; he differed from Montesquieu in insisting that the reverse was also true (a monarch might check the local tyranny of lords) and in maintaining that this provided an argument against monarchy altogether. He thought that the benefits of the ancient constitution's division of powers and classes could be simulated in an extended and federal republic; but he certainly agreed with Montesquieu that there had been such benefits. In the defenses of provincial and *parlementaire* rights and privileges, the *ancien regime* French conducted debates and engaged in struggles in which "everyone's heads were filled with the principles of liberty."⁴⁷

⁴⁵ The supposed neutrality of the aristocratic class was closely linked with their judicial role in the House of Lords and the *parlements*. Generating a neutral power that could take the place of the hereditary class was a long-term preoccupation of Constant's constitutional thought.

⁴⁶Constant, *Fragments*, Henri Grange ed. (Paris: Aubier, 1991 [1810]), p. 118.

⁴⁷Constant, *Fragments*, p. 208.

Constant agrees with Montesquieu that too much tranquility in a large polity, too little factional strife, is a sign that freedom is absent. He of course disagrees with Montesquieu about whether an aristocracy or hereditary group can provide the desirable sort of disharmony; Constant thinks that a permanent and hereditary division of that sort provides a "seed of destruction"⁴⁸ in the state. But the civic republican hostility to pluralism as such is not to be found in Constant, who instead embraces a Hume- or Publius-like account of faction. "If each [representative] is partial to his electors, the partiality of each, combined, will have all the advantages of the partiality of all."

When Constant advised Bonaparte on the creation of a new constitution during the Hundred Days, he argued (against Bonaparte) in favor of a hereditary aristocracy. Bonaparte did not wish to be challenged, and in any event had no suitable candidates—the traditional aristocrats were his enemies. Constant however called a hereditary aristocracy "indispensable" for a constitutional monarchy. He would certainly have rather had a republic with no hereditary distinctions; but after the republic fell, there was a need for an aristocracy. He hoped to prevent the reemergence of feudal privileges, but to create a hereditary house parallel to the House of Lords.

In the *Memoirs sur les Cent-Jours* (published during the Restoration at a time when the returned nobility had largely joined the Right), there is a passage that begins much the same way, reporting the same arguments of Bonaparte against an aristocracy. But now Constant says that his longstanding doubts about a monarchy without an aristocracy had likely arisen because he, like Montesquieu, was "seduced" by the example of the British constitution. Here Constant himself criticizes the creation of a new, imperial, aristocracy—but not on rationalist or

⁴⁸Constant, *Fragments*, p. 143.

egalitarian grounds. Instead, he maintains that "nothing is created by artifice" in politics. "The creative force in politics, like the vital force in the physical world, cannot be supplemented by any act of will or by any act of law;"⁴⁹ rather, the spirit of the age and of a people would in some important way shape political developments and institutions. This is a Montesquieuan critique of one of Montesquieu's doctrines, and returned Constant to one of the themes of *SCU*—Bonaparte's status as a usurper, the inability to create new bloodlines and institutions and traditions from scratch that would have the same legitimacy as those that had come before. It moreover recalls the comment that it would be irrational to deliberately *create* the diversity in local laws, weights, measures, and so on that Constant defended in his chapter on uniformity.

In other words, Constant was torn between two Montesquieuan impulses. He perceived the need for an intermediate and independent body of aristocrats to balance the Emperor; but such a body would be a deliberate and artificial creation, out of keeping with the spirit of the nation and of the age. In his later writings and political work under the Restoration it seems to me that we can see the same dynamic. The social background, the spirit of the society in which Constant lived, was one that had been shaped by the Revolution and what followed it. Counter-revolution no more appealed to him in the 1820s than it had in the 1790s⁵⁰—and in both decades one of his arguments against counter-revolution was that it would be at odds with changes in social character that had taken place. The argument in *Conquest and Usurpation* that political reforms should not outpace social change and that customs should be allowed to evolve freely is no anomaly; it meshes perfectly with the view that political reactions should not attempt to undo social change that has already taken place.

⁴⁹Tracy, *The Commentary*, p. 317

⁵⁰Constant, "Des Réactions Politiques" (1797) in *Oeuvres Politiques*, Charles Louandre, ed. (Paris: Charpentier et Cie, 1874).

And, while Constant did later change his mind about some elements of *Conquest and Usurpation*, even in “The Liberty of the Ancients Compared With That Of the Moderns” he held to the view that “the changes brought by the centuries require from the authorities greater respect for customs, for affections, for the independence of individuals.”⁵¹ Habits and affections are a crucial part of a free person’s happiness and, therefore, of his or her interests. In social life, particularly but not only in religion, the liberty of the moderns was closely tied to pluralism. Free people, not joined together by ancient republican devotion to the public, would not be socially homogenous.

Constant was no contractarian when it came to constitutions, which “are seldom made by the will of men. Time makes them. They are introduced gradually and in an almost imperceptible way. Yet there are circumstances in which it becomes indispensable to make a constitution. But then do only what is indispensable. Leave room for time and experience, so that these two reforming powers may direct your already constituted powers in the improvement of what has been done and the completion of what is still to be done.”⁵²

None of this is to say that Constant endorsed all of the group privileges of the ancient constitution. He admired Montesquieu deeply but always saw him from across a deep Revolutionary break, and did not wish to return to the *ancien regime*. He was keenly aware of the costs to individual freedom of state-sanctioned group privileges. For example, he wrote against the guild system and chartered monopolistic corporations with a concentrated fury not

⁵¹ Constant, “Liberty of the Ancients Compared with that of the Moderns” (1819) in *Political Writings*, p. 324.

⁵² *Principles of Politics* (1815), in *Political Writings* p. 172, fn 1.

seen even in Smith, whose arguments he relied upon and cited freely.⁵³ Constant moralized Smith's "system of natural liberty" to a stronger degree than did Smith himself; for Constant, the economic arguments for freedom of trade dovetailed with the natural right of persons to engage in commercial activity.

Constant's pluralism had to differ from Montesquieu's; the post-revolutionary world he inhabited differed too greatly from the *ancien régime*. But it is a reasonable assessment to say that "Montesquieu's dread of uniformity resonated in the writings of his nineteenth-century followers, especially Benjamin Constant, in response to the imposition of the Code Napoleon, and Alexis de Tocqueville, in the face of what he perceived to be increased political centralisation."⁵⁴

V.

According to popular understanding, it is in Tocqueville above all that we might expect to find an appreciation of a pluralism that arises out of freely-formed voluntary associations. He was, after all, the theorist of the "art of associating," the one who saw and appreciated the Americans' ability and eagerness to be "freely and constantly forming associations" both in political life and in the pursuit of their various social ends. He witnessed phenomena in American society that one might think solved the problem of pluralism without privilege: a social sphere of free and open associational creation, entry, and exit. As Tocqueville understood it, the associational world he found among the Americans differed from *ancien régime* pluralism among the *corps* not only by its equality but also by its fluidity. The *corps* were longstanding;

⁵³"Of Privileges and Prohibition," in Book XII: On Government Jurisdiction over Economic Activity and Population, in *Principles of Politics Applicable to All Governments*, Dennis O'Keefe trans. (Indianapolis: Liberty Fund, 2003).

⁵⁴Tomaselli, "Spirit of Nations," pp. 30-31

Americans had mastered the art of associating *anew*, creating new associations easily, almost casually, for reasons great or small.

Tocqueville identified one root of this art in the American inheritance from English dissenting Protestantism, but perhaps overlooked others in the new American models of economy and law. Eighteenth and early nineteenth uses of the phrase “civil society” referred mainly to the development of what was also called *commercial society*, and also to the modern unified legal system that underlay commercial society. Civil society replaced the world of privilege—including trading companies with monopolistic privilege, churches with ecclesiastical jurisdictional privilege, and nobles with status privilege— with a unified free and equal legal system. This system importantly laws governing commercial exchange, such that Hegel identified “civil society” with the open market and Marx dismissed it as *bourgeois* civil society. It was just such an open access legal regime—associated with the move toward a democratized law of commercial incorporation—that allowed for the associational world Tocqueville saw, the associational world to which we most often reserve the phrase “civil society” today.

Yet, as with Smith and Constant, matters are not so simple, and Tocqueville cannot simply be read as celebrating an order of competitive associational life. The animating concern of Tocqueville’s two greatest works is that the conjoined historical movements toward equality and centralization will leave despotism impossible to resist and freedom impossible to defend. He was clear in *DA* (though the American canonization of Tocqueville is prone to overlook this) that his concerns were either European or universal, not narrowly American. In the penultimate chapter of volume 1 he refers to both the mores that once kept government limited, and to the institutions that did so such as “the prerogatives of the nobility, of the authority of sovereign courts, of the rights of corporations, or of provincial privileges, all things which softened the

blows of authority and maintained a spirit of resistance in the nation... political institutions which, though often opposed to the freedom of individuals, nevertheless served to keep the love of liberty alive in men's souls with obviously valuable results... When towns and provinces form so many different nations within the common motherland, each of them has a particularist spirit opposed to the general spirit of servitude; but now that all parts of a single empire have lost their franchises, usages, prejudices, and even their memories and names and have grown accustomed to obey the same laws, it is no longer more difficult to oppress them all together than to do this to each separately.”⁵⁵

Here we see not only a *precis* for his study of the French old regime decades later; we also find by implication the animating questions of *DA*. Have the Anglo-Americans so far avoided this descent into servility? If so, how, and what can be learned from them about how to maintain liberty in a democratic age? In old regime France he saw the gradual erosion of intermediate bodies by a centralizing and homogenizing power that became almost irresistible as it aligned with the world-historical force of democratization. In the France of his own day he saw what he took to be the direction of the modern world: democratic equality and statist centralization reinforcing each other and grinding down freedom, distinctiveness, and accomplishment. In contemporaneous America he saw a democratic society that was resisting these trends, in part thanks to local government and to voluntary associations. But in the American future he saw the possibility of "soft despotism" of homogeneous mediocrity and centralized bureaucratic paternalism.

⁵⁵Toqueville, *Democracy in America*. J.P Mayer ed. (New York: Harper & Row Publishers, 1969[1835/1840]), henceforth *DA*, pp. 312-313.

While both works offer famously complex and multi-causal accounts, group life and decentralized government figure prominently in each. The Americans benefited from their institutions of local self-government and from their mania for forming voluntary associations. And the French old regime, by the time of the Revolution, was ready to collapse into a democracy that eventually yielded Bonaparte's despotism in large part because the Bourbon kings had centralized the state so dramatically, undermining urban liberty, provincial liberty, and the privileges of the *corps intermédiaires* so effectively.

Tocqueville openly committed himself to ancient constitutionalist historiography. Medieval Europe was everywhere much the same, with provincial liberties and urban self-government coexisting with feudal privileges and assemblies of the Estates. But—and this is the central thesis of the book—that shared order was eroded and replaced by a centralized state gradually over the course of early modernity, not suddenly by the Revolution. By the eighteenth century, "the ancient constitution of Europe" was "half-ruined everywhere"⁵⁶ and no longer able to check absolutist monarchs. At the highest level of abstraction, Tocqueville attributes this to the increasing equality of condition over the later Middle Ages and early modernity, a change in historical stage from feudal inequality to democratic equality. "The nobles were already beaten down and the people had not yet risen; the former were too low and the latter not high enough to hinder the movements of power."⁵⁷ Germanic customary law had been supplanted by Roman civil law, a "law of servitude," opportunistically deployed across the continent by monarchs set on establishing their "absolute power" "on the ruins of the old liberties of Europe."⁵⁸ Tocqueville offers a history of royal suppression of provincial liberties, of urban self-

⁵⁶ *ORR*, p. 103

⁵⁷ *ORR*, p. 259

⁵⁸ *ORR*, p. 258.

government, and of guild and corps privileges, as well as of the deliberate Bourbon undermining of the social role of the nobility.

The decayed institutions of the eighteenth century created a paradoxical situation for the old regime. On the one hand, they were unloved, indeed often detested. A nobility that no longer had any useful purpose in the countryside retained feudal privileges and immunity from taxation, and the wealthy urban classes naturally resented them for it. Moreover, they served to divide people against each other. While all were becoming more alike in social fact, they remained sharply legally and politically differentiated, and mutual antagonism resulted. But such freedoms as remained, such limits on royal absolutism as still existed, were thanks to these unloved institutions. They "preserved the spirit of independence among a great number of subjects, and inclined them to stiffen their necks against abuses of authority"⁵⁹.

And so Tocqueville emphasized the role of the prerevolutionary *corps intermédiaires*, at the same time that he described the inevitability of their decline. Like Montesquieu and Constant before him, he acknowledged their privileges and prerogatives to have been often "odious in themselves," and he thought that they became progressively more intolerable as French society became leveled and homogenized. The *esprit de corps* found in the nobility, the clergy, the lawyers, and each city's bourgeoisie, their commitment to the group's privileges and rights of self-rule, provided them with both the motive and the means to resist royal despotism.

About the *parlements* in particular, Tocqueville thought much as Constant had; their role in government "was a great evil which limited a greater one." Tocqueville wrote admiringly about the *parlementaires*' resolve during the dissolution of the *Parlement* of Paris in 1771. All of them accepted their loss of status "without a single one of them personally surrendering to the

⁵⁹ *ORR*, p. 172

royal will," inspiring other judges and lawyers to stand with them and refuse to cooperate with this suspension of legality. However socially unjust their position was, the *parlementaires* proved themselves to be courageous and committed defenders of liberty and the rule of law: "I know of nothing greater in the history of free nations than what happened on this occasion."⁶⁰

VI.

"Modular man," Ernest Gellner wrote of his ideal-typical inhabitant of civil society, "is capable of combining into effective associations and institutions, *without* these being total, multi-stranded, underwritten by ritual and made stable through being linked to a whole inside set of relationships, all of these being tied in with each other and so immobilized. He can combine into specific-purpose, *ad-hoc*, limited associations, without binding himself by some blood ritual."⁶¹

Gellner insists that the organizational triumph of the modern state over its medieval predecessors was one *precondition* for the emergence of a truly civil society, one in which group ties may be changed "without shame or stigma... without formalities, ritual, trauma, or treason. This was not so in days of clans and lineages. The total national community is still very significant—or rather, it is more significant than it has ever been before—but its sub-units have lost their potency."⁶² Only when group life becomes irrelevant for political and military power, because the state has trumped all substate competitors, can man become truly modular, able to enter, form, and leave group associations as a free agent.⁶³ Gellner's unified account depicts a

⁶⁰ *ORR*, p. 178

⁶¹ Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (New York: Penguin, 1994), p. 99.

⁶² Gellner, *Conditions of Liberty*, p. 88.

⁶³ This argument connects directly with his more famous account of nationalism. The modern industrial economy demands modular workers rather than traditional craftsmen, workers who can shift locale, sector, and job in response to changing economic conditions. This in turn requires

social world of liberal agents creating new voluntary associations as easily, and with the same rules, as they create economic firms or political parties.

Tocqueville, like Smith and Constant before him, hoped that pluralism could be recovered without privilege. They regarded the republican terror of faction and disunity as pathological, and appreciated Montesquieu's diagnosis of centralization's evils, but saw that the *corps* could not and should not survive in a democratic age. But the kinds of pluralism they both sought to legitimize rested more than is often appreciated on *ancien régime* foundations. The more liberal freedom of association, religious freedom, and local government they hoped could replace the *corps* still depended on extra-legal social pluralism for its energy. Competitive organizational life might rest on free, equal, and open access to associations, but sometimes we need organizations to be oppositional as well, in the face of state power. And the abolition of privilege, the democratization and opening of organizational life, the shift from nobles defending their honor or lawyers standing on their guild rights to "modular man" putting on and taking off associational identities, may make that oppositional energy hard to come by.

modular, all-purpose schooling rather than specialized apprenticeships. And so there is tremendous pressure for literacy in homogenized and centralized languages, in place of an older world of constantly varying spoken regional dialects; this engenders a kind of competitive scramble to identify and demarcate whole languages that can be the foundations of whole political-economic-educational orders. See Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983).