

Chapter 5

Montesquieu on Pluralism

Traditional political theories often focused on unity and uniformity as key aspects of a well-governed society. Difference, disagreement, and division were at best problems to manage, and at worst signs that there was no true community at all. From ancient Greece onward, political thought was marked by such metaphors as *the ship of state*, a ship on which we must all row in the same direction, one chosen by a captain we all obey, if we are to get anywhere; and *the body politic*, a body that acts as one, trying to preserve itself under the direction of a single mind.

Montesquieu turned this presumption on its head. Despotism was characterized by centralized and uniform rule over a large country; liberty was better protected by pluralism of many kinds. In his discussion of the difference between monarchies and despotisms early in *The Spirit of the Laws*, he focused attention on the *corps intermediaires*, the intermediate bodies that fill a political system between the individual subject and the monarch: cities, provinces, the established church or churches, and the nobility. A monarch respects their rights; a despot destroys them and governs without them. They in turn help to keep the monarch lawful and moderate; they are powerful enough to limit him, they stand up for the rule of law in order to preserve their rights, and they stand on their status—their *honour*, the animating principle of a monarchy—rather than submitting to despotism and servitude. Montesquieu's support for confederation among small republics, as in the Netherlands and in Switzerland—relied upon, with many citations, in the new United States a few decades later—seems related to his support for intermediate levels of government in a monarchy, in one case building decentralization into a top-down system, in the other building shared authority into an already-decentralized bottom-up system, in both cases seeing the advantage of multilevel governance over unitary authority. He distrusted not

only great monarchs who tried to destroy the intermediate bodies and levels of rule within their society, but also democratic republics that were so small and homogenous that they couldn't generate much internal pluralism at all. And the separation of powers, discussed in the previous chapter, is pluralism of a different kind: a kind of procedural pluralism that requires different steps in a process such as a criminal conviction to be handled by distinct institutions.

But Montesquieu went further than this: a plurality of classes, cultural traditions, interests, and even legal codes within one society helped keep it moderate and law-governed. In the concluding sections of *The Spirit of the Laws*, Parts V and VI, he turned especially to what we might call legal pluralism: the coexistence of multiple legal systems side by side within the same society. Legal pluralism had been pervasive in medieval Europe where the Catholic Church's internal legal system, the so-called canon law, not only had exclusive authority over priests, monks, and church buildings (think here of the tradition of seeking sanctuary from the criminal law inside a church) but also governed marriage, inheritance, and much of property law. Systems of law governed by kings, feudal lords, provincial courts, and cities sat alongside canon law, and while there were a variety of rules governing which courts might decide which cases, these were never perfectly seamless. In much of Europe the complexity was multiplied by the very different ultimate sources of the different legal systems: in different ways, both canon law and the civil law of cities and commerce derived from ancient Roman law, whereas feudal rules derived from traditions of the Germanic tribes that brought Rome down and that had a very different understanding of, for example, land ownership. The details were different in England, where the local common law stood in place of the Roman-derived civil law, but the pattern was the same.

Early modern states governed by increasingly centralized and absolutist monarchs such as Henry VIII or James I in England, Louis XIV in France, and Ferdinand and Isabella in Spain generally tried to limit this complexity and the autonomy of legal systems besides those that derived directly from royal authority. In political philosophy, a supporter of absolute monarchy like Thomas Hobbes would also be a supporter of a unified system of law, and Hobbes insisted that only the will of the sovereign—not common law precedents or Church rules or old Roman texts or principles of justice—made genuine law. Perhaps more surprisingly, critics of absolute monarchy such as John Locke in England or the Protestant resistance theorists in France

who were referred to collectively as *monarchomachs* also ultimately argued for unified systems of law: the only legitimate foundation of law, on their account, was the state created by the social contract of the unified people. Transnational law like that of the Church, or ancient law like that of the Romans, or local or regional law like that of a city or a province, ultimately couldn't be legitimate. Canon law in general and the self-governing jurisdiction of the Catholic Society of Jesus (Jesuits) in particular were objects of criticism from Protestant, Catholic, and irreligious political philosophers alike.

Montesquieu stood almost alone among important political theorists of early modern Europe in defending legal pluralism. Part VI of *The Spirit of the Laws* is devoted to an unconventional constitutional history of France that shows how pluralistic its legal system had always been. This history undermines all of the popular histories of constitutional founding in French thought of the era: French kings who had been given the power of the Roman Emperor when the Empire fell, or who gained sole authority over the kingdom by descent from Charlemagne; a French nobility that ruled the whole kingdom by right of conquest, as the descendants of the victorious Franks who had defeated the Gauls in the early Middle Ages; the original social contract of the whole people imagined by the *monarchomachs*. Each of these stories of foundings identified one legitimate ruler or ruling class, one legitimate source of law. In fact, Montesquieu maintained, jurisdictional multiplicity had *always* characterized France; it had not been founded, but had evolved from many different and overlapping institutions over the course of centuries. Against each of these different attempts to show that only unified and absolute authority—whether of the king, of the nobility, or of the whole people of the nation—had legitimate roots, he insisted that they were all distortions of a more complicated, more moderate, truth.

His most substantial treatment of religion in *The Spirit of the Laws* came in the form of an extended discussion of religious laws and their relationship to civil laws in Part V. While he called for important limitations on religious authority, defended legal toleration of different religions, and rejected any attempt to use legal force to coerce religion (singling out the Spanish Inquisition in particular for criticism), he did not follow his contemporaries in seeking to replace religious law altogether. Instead, he distinguished various aspects of life—politics, family, commerce—and various virtues and vices a society might be concerned with, and discussed the advantages each kind

of law might have in addressing them. The details of how he recommended dividing up jurisdictions are probably not of much enduring interest; what is striking is that he argued for preserving an autonomous space for religion at all, against the main currents of both the politics and the philosophy of his day—and against the direction of French history, since a few decades later the French Revolution would destroy church autonomy altogether and seek to subordinate religious belief to support for the state, even on the part of priests.

In two brief chapters near the very end of *The Spirit of the Laws*, Montesquieu drew his ideas about laws together into a critique of both political philosophers who set themselves up as legislators of imagined societies—Plato, Aristotle, Thomas More (author of *Utopia*), and so on—and of those political rulers who tried to impose uniformity on their societies: “the same laws in the state, the same religion in all its parts.” He suggested that the costs of legal innovation and change are often greater than the costs of leaving things alone, and that the kind of “perfection” rulers look for when they impose uniformity isn’t suited to law and politics. “When the people observe the laws,” he concludes, “what does it matter if they observe the same ones?” (SL 6.29.18.617).