

people. In the absence of a more perfect and comprehensive union, he feared that there would soon be no union at all and that the individual states would themselves in time succumb to despotism.

With this in mind, Madison appears to have persuaded the other delegates from his native state to join with him in sketching out a proposal for the establishment of a true national government. In Philadelphia at the end of May, Edmund Randolph, the governor of Virginia, acting on their behalf, presented to the Convention at its opening what came to be called the Virginia Plan. To understand the deliberations that followed and the heated but nonetheless civilized debate that ensued concerning ratification, one must first immerse oneself in the thinking of an analyst rarely studied today. His name was Charles-Louis de Secondat, baron de La Brède et de Montesquieu. His book *The Spirit of Laws* provided late eighteenth-century Americans with an intellectual framework within which to judge the relative propriety of the various political institutions and practices on offer.

#### THE CELEBRATED MONTESQUIEU

This French aristocrat bestrode the second half of the eighteenth century like a colossus. Every major work that he ushered into print quickly found a wide audience. By 1800, his *Persian Letters*, which first appeared in 1721, had been published in ninety-three editions and had been translated into English, Dutch, German, Polish, and Russian. His *Considerations on the Causes of the Greatness of the Romans and their Decline*, which was first published in 1734, had appeared in sixty-two editions and been translated into English, Italian, Dutch, Swedish, Polish, Russian, and Greek. Neither of these bore comparison with Montesquieu's *Spirit of Laws*. This last work was in a self-evident way serious, and it was enormous as well. One purchased it expecting instruction and not diversion – diverting though it might be. And yet, from the moment of its release in the fall of 1748, it sold like hotcakes. By the end of the century, it had been published in 128 editions, and it had been translated into

English, Italian, German, Latin, Danish, Dutch, Polish, and Russian. In the period stretching from 1748 to 1800, these three books were published together in editions of Montesquieu's complete works no fewer than thirty-six times.

*The Spirit of Laws* was a publishing phenomenon, and it was much, much more. As the eventful second half of the eighteenth century began, Montesquieu's great work became the political bible of learned men and would-be statesmen everywhere in Europe, and beyond. In Britain, it shaped the thinking of Edmund Burke, Edward Gibbon, William Blackstone, Adam Smith, Adam Ferguson, John Robertson, John Millar, Lord Kames, and Dugald Stewart, among others. In France, it was the starting point for Jean-Jacques Rousseau and all subsequent political thinkers. In Italy, it had a profound effect on Cesare Beccaria, and, in Germany, it was fundamental for Georg Wilhelm Friedrich Hegel.<sup>2</sup>

In North America, Montesquieu reigned supreme. In the period stretching from 1762 to 1800, no one was as often cited in the political tracts and newspapers as he was.<sup>3</sup> Moreover, when his name was mentioned, was nearly always a generous epithet attached. Letters written in 1763 to newspapers in Boston spoke of him as "a great writer," as "this great writer," and as "the great Montesquieu." They termed him "the admired writer" and "the very justly celebrated author of *The Spirit of the Laws*." They called him the "penetrating Montesquieu."<sup>4</sup> Two years later, in a pamphlet published in Newport, Rhode Island, Martin Howard dubbed him "the admired Secondat."<sup>5</sup> As John Dickinson readily acknowledged in his *Letters from a Farmer in Pennsylvania*, the French *philosophe* was "a very learned author."<sup>6</sup> Dickinson's colleagues in the Continental Congress agreed. In an address to the inhabitants of Quebec which he drafted, they spoke of the Frenchman as "an illustrious author of your nation" and termed him "the immortal Montesquieu." His is they explained, "a name which all Europe reveres," for he is a "truly great man," a renowned "advocate of freedom and humanity."<sup>7</sup>

Similarly, for Carter Braxton, writing in 1776, the author of *The Spirit of Laws* was "the learned Montesquieu."<sup>8</sup> A contributor to the

*Massachusetts Spy* that same year called him "the judicious MONTESQUIEU" and termed him "a great authority."<sup>9</sup> He was, as both James Madison and Alexander Hamilton took occasion to remark in *The Federalist*, "the celebrated Montesquieu" (*Fed.* 47, 324; *Fed.* 78, 523). As such, he was an authority for Federalists and Anti-Federalists alike.<sup>10</sup> He could even be described as an "oracle" (*Fed.* 47, 324).

Of course, those who cited Montesquieu generally did so for rhetorical effect, but a great many appear to have studied him with care as well. In 1763, T. Q. and J., though rival contributors to the Boston press, agreed on one thing: that a proper interpretation of *The Spirit of Laws* was the key to understanding whether multiple office-holding by members of the legislature was a threat to liberty in Massachusetts.<sup>11</sup> When Benjamin Rush argued against slavery in a pamphlet penned a decade later, he displayed a detailed knowledge of Montesquieu's great work.<sup>12</sup> When Worcesteriensis wrote to the *Massachusetts Spy* in September 1776 to oppose religious persecution and yet advocate public support for a religious establishment, he did so as well.<sup>13</sup> The same can be said for the anonymous South Carolinian who published his *Rudiments of Law and Government Deduced from the Law of Nature* in 1783.<sup>14</sup> Even those who found it necessary to disagree with Montesquieu took it for granted that *The Spirit of Laws* was the appropriate starting point for reflection on the political question under consideration. On such occasions, even when his name passes unmentioned, one can often detect his presence.<sup>15</sup> No one did more to shape American thinking with respect to the constitution of liberty in modern times.

For Montesquieu's preeminence, there was an obvious reason. His *Spirit of Laws*, which first appeared in English two years after its publication in French, is arguably the greatest work in constitutional prudence penned in modern times, and almost instantly it was recognized as such. In 1749 David Hume informed its author that his book would be "the wonder of the centuries."<sup>16</sup> Two years later, in his *Enquiry Concerning the Principles of Morals*, he alerted the public to the fact that Montesquieu was "an author of great genius, as well as

extensive learning," and he described *The Spirit of Laws* as "the best system of political knowledge that, perhaps, has ever yet been communicated to the world."<sup>17</sup> In 1750, in his correspondence, Horace Walpole described that work as "the best book that ever was written."<sup>18</sup> Seven years later, in his *Abridgment of English History*, Edmund Burke hailed its author as "the greatest genius, which has enlightened this age."<sup>19</sup> Not since Aristotle composed *The Politics* had anyone so thoroughly surveyed the variety of polities to be found in the known world, examined the conditions under which they thrived, and pondered their virtues, vices, and propensities.<sup>20</sup>

Moreover, Montesquieu took as his principal theme political liberty, understood in terms of the rule of law and the provision for individual security, and the institutions and circumstances conducive to its flourishing, and he singled out as a form of government that had liberty as its direct object the very polity from which the American colonists derived their own institutions. What James Madison said on this subject in *Federalist* 47 was an exaggeration, but there was nonetheless something to the claim:

The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal Bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England, as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered in the form of elementary truths, the several characteristic principles of that particular system.

(*Fed.* 47, 324–25)<sup>21</sup>

Of course, America was not England. It was differently situated. There was no monarch. Not one of the Union's constituent states was endowed with an hereditary aristocracy, and nothing of the sort was likely to emerge. Thanks to the availability of vast tracts of untilled

land on the frontier to the west, there were no great, glaring, enduring disparities of wealth in this corner of the New World and none likely to appear in the foreseeable future. Moreover, as a consequence of their quarrel with their mother country and of the war that followed, Americans had abandoned the sentimental attachment to Britain and its institutions that they had once ostentatiously displayed, and in the process they had developed a marked distaste for monarchy and aristocracy. By the 1780s, the newly independent nation's genius had become, as the greatest American admirers of Britain's constitution readily admitted, republican.

This fact notwithstanding, early on the Americans did imitate those institutions. They had no other model ready to hand. These were the forms and formalities with which they were familiar. As Montesquieu had pointed out in his magnum opus, England had given "to the people of her colonies the form of her own government"; "this government" had brought "with it prosperity"; and, in North America, the New World had witnessed "great peoples take form within the very forests that they" had been dispatched "to inhabit."<sup>22</sup> It made sense that, in the immediate aftermath of their Declaration of Independence, the Americans should adjust and not replace the institutions that they had inherited. Without exception, the states eliminated all reference to Great Britain and the crown; and, where governors and other officials had been appointed, they came to be elected. Two of the states thought it sufficient to amend their colonial charters and leave it at that. In the rest, there was a deliberative process, and new constitutions were adopted. In some states, this happened more than once, as the founding generation wrestled with the challenge of governing themselves.<sup>23</sup>

Looking back on all of this, James Madison was anything but sanguine. Some of the states had done better than others. But in his view and in that of many of his compatriots, all of them had fallen short. Thanks to the multiplicity, mutability, injustice, and impotence of the laws passed in these states, there were grounds for concern regarding "the fundamental principle of republican

Government" – grounds for doubting "that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." If fledgling American republics were to vindicate this principle, their citizens would have to examine "the vices" to which "the political system of the United States" had given rise, and they would have to devise a remedy consistent with the new nation's republican character.

#### A REPUBLIC ON AN EXTENDED TERRITORY?

The fundamental question that Madison and his colleagues at the Philadelphia Convention had to tackle was the one posed by Montesquieu: Could a republic be sustained on an extended territory? The French philosopher had devoted the first of the six parts into which he divided his *Spirit of Laws* to the articulation of a novel typology of the various forms of government, supplemented with a description of each and an analysis of its propensities and prerequisites. The account he provided was systematic and comprehensive. It was in this context that he addressed the constraints imposed by different geographical configurations.

Where Aristotle and others had discussed the virtuous and vicious rule of the one, the few, and the many, Montesquieu eschewed moral distinctions and emphasized institutional structures and political psychology. In his estimation, monarchies were distinguished from despotisms by the presence of a hereditary nobility and other intermediary powers. In them, the existence of a complex, entrenched hierarchy gave rise to a sense of pride and propriety and a passion for honor inconsistent with the ethos of abject terror inspired by one-man rule in the absence of a system of ranks and orders; and, though whimsical and arbitrary, the ethos of honor that bound the monarch and his minions was conducive to regularity and the rule of law.

In Montesquieu's opinion, the passions that distinguished the two species of one-man rule and set each in motion were a natural and inevitable product of the structure of each. One could build, as they did, on vanity and fear. They were a reliable part of the human make-up.

The same could not, however, be said regarding "the principle" or passion that set democratic republics in motion. The Frenchman eschewed moral analysis for a reason. He thought man by nature a social but not a political animal. In his judgment, public-spiritedness did not arise in human beings naturally. Nor was it a completion or perfection of human nature. Its exercise was never for human beings a genuine pleasure. The self-sacrifice required was from start to finish a source of pain. Political virtue, the love of equality and the laws, was not, then, as a "principle" an easily acquired taste – off-putting, perhaps, in the beginning, but soon enjoyable and almost addictive. Its acquisition required a distortion of human nature akin to masochism. Republican citizens he compared with monks. If they loved the rules and regulations that imposed on them severe constraints, it was because these constraints left them no pleasures apart from the observance of these same rules and regulations. The most successful of the ancient republics relied on singular institutions, which set their citizens sharply apart in their mores and manners from all outsiders and instilled in them a pride and a xenophobia that powerfully reinforced the sense of fellow-feeling that underpinned the fierce patriotism and the courage for which they were famous.<sup>24</sup>

Montesquieu treated each form of government as a coherent, elaborate system. Over time, each tended to articulate mores, manners, laws, and institutions reflective of its nature and of the political psychology that it inspired or inculcated. It had to do so if it was to survive. He also concerned himself with the preconditions for the flourishing of each of the three political regimes. He devoted the eighth and final book of the first part of his *Spirit of Laws* to a study of what was likely to produce "corruption" in the principle of each of these regimes and thereby, in time, cause its collapse. The fifteenth chapter of this book, which is focused on the preservation "of the three principles," consists of a single sentence: "I shall not be able to make myself understood until the next four chapters have been read."

In these chapters, Montesquieu's chief purpose was to issue a salutary warning to the king of France and his subjects and to the

rulers of Europe's other great monarchies and those whom they ruled. To endure, he intimated, monarchies must be of "middling magnitude." If small, such a polity would turn into a republic. If it became "extended to a great degree," the leading men would be out of sight and out of mind; and, if not cowed, they would cease to obey. To survive, therefore, "a great empire" would have to presuppose "in the one who governs a despotic authority."

Promptness in decision-making is required to compensate for the distance of the places to which orders are sent; fear is required to prevent negligence on the part of the governor or magistrate operating at a great distance; the law must be lodged in a single head; and it must change unceasingly like the accidents, which always multiply within a state in proportion to its magnitude.

It was what he had to say about republics in the first of these four critical chapters that initially arrested the attention of the founding generation in America:

It is in the nature of a republic that it have a small territory; without that it can hardly subsist. In a large republic, there are great fortunes and, in consequence, little in the way of a moderation of spirit; there are trusts [*depôts*] too great to be placed in the hands of a single citizen. Interests become particular; a man senses that he can be happy, great, and glorious without his fatherland, and soon that he can be great solely on the ruins of his fatherland.

In a large republic, the common good is sacrificed to a thousand considerations; it is subordinated to the exceptions; it depends on accidents. In a small republic, the public good is more fully felt, better known, closer to each citizen. The abuses there are less extensive and, in consequence, less well protected.<sup>25</sup>

The Americans knew something about the quality that Montesquieu called "political virtue." They had just fought a war. It was a heady time. They had warmed to the courage and generosity of some. They had witnessed the cowardice and greed of others. Instinctively, they

knew a great deal about the relationship between public-spiritedness and self-sacrifice, on the one hand, and fellow-feeling, on the other. Their experience taught or reconfirmed for them that the requisite ethos could without great difficulty be sustained in a face-to-face community of people closely familiar with one another, and that it could not be sustained in a large society composed of strangers.

The American Union was sizable. By 1787, it was already a great empire, and it promised to be one greater still. Everyone in North America understood as much – which is why Montesquieu's argument had such purchase. The republics of ancient Greece and the early Roman republic fit Montesquieu's description. Because they were small and at odds with one another, the former had succumbed when challenged by Phillip of Macedon; and, although the latter did not give way to a foreign challenger, when it grew into a great empire instead, republican government proved unsustainable and a despotism replaced it via an inexorable process that Montesquieu had traced in detail in his *Considerations on the Causes of the Greatness of the Romans and their Decline*. The question that Madison and his colleagues at the Federal Convention wrestled with, once they admitted to themselves the necessity that America be made a more perfect union, was how to avoid the fate reserved for the Greek *póleis* without incurring that reserved for the Roman *civitas*.

#### FEDERALISM

With regard to this dilemma, Montesquieu had something to offer. His *Spirit of Laws* was composed as a dialogue of sorts. Each of the parts, subsequent to the first, was a response to and partial correction of what came before. The four chapters in the eighth book of the first part that the French philosopher singled out as central to his argument were by no means his last word on the subject. In the first three chapters of the second part of that work, for example, he takes up the question of self-defense. When viewed from this angle, as he readily admits, monarchies of middling size have a distinct advantage when matched against diminutive republics. But, as he goes on to point out,

republics confederated in a league can project power in the manner of a monarchy while retaining their character as republics, avoiding the corruption attendant on territorial extension, and guarding one another against decay. In antiquity, the Lycians had done this, as had the Swiss, the Germans, and the Dutch in modern times.<sup>26</sup>

This, too, astute Americans had noticed. Early in 1786, after he had begun to despair regarding the viability of the Union established under the Articles of Confederation, James Madison had undertaken a study of ancient and modern confederacies. It is telling that, in the extensive notes that he took, the first author mentioned is Montesquieu, whom he may have first encountered while a child under the tutelage of Donald Robertson and whom he had almost certainly read with care while a student at the College of New Jersey, where it was on a list of works recommended by the institution's president John Witherspoon.<sup>27</sup> Alexander Hamilton had also read with care the pertinent chapters in *The Spirit of Laws*, and he rang changes upon them in *Federalist* 9:

The utility of a confederacy, as well to suppress faction and to guard the internal tranquillity of States, as to increase their external force and security, is in reality not a new idea. It has been practiced upon in different countries and ages, and has received the sanction of the most applauded writers, on the subjects of politics. The opponents of the PLAN proposed have with great assiduity cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government. But they seem not to have been apprised of the sentiments of that great man expressed in another part of his work.

[*Fed.* 9, 52]

To his credit, Hamilton pointed out another defect fatal to the argument of the Anti-Federalists that was no less damaging to his rhetorical appropriation of Montesquieu's defense of republican confederacies. As he intimated, the new Constitution's opponents had failed to consider fully the consequences of "the principle to which they subscribe":