

Chapter 3: Federalism Day 1

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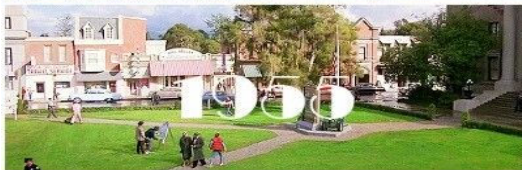
Course: American National Government (GOVT 2305)

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Question

What are some time travel movies you've seen?



Takeaway

- Same place; different attitudes
- “New world. Same constitution” (Youtube URL)

Today's class

- Today's class is about what Montesquieu (1689–1755) meant to the founders
 - Context
 - Historical contingency
 - Montesquieu's influence on the Federalists' argument
 - Federations
 - Checks and balances
 - Independent judiciary

Major works of Montesquieu

- *Persian Letters*, *Considerations on the Romans*, and *Spirit of the Laws*.
- We will discuss the *Spirit of the Laws*.

The Spirit of the Laws

- 31 books
- Montesquieu admits everything he has been writing has led up to this. This is his magnum opus from 20 years of work.
- The books don't seem coherent and systematic, although he claims them to be.

Secondary sources I use in lecture

- Not the same place as Hobbes and Locke!
- Strauss and Cropsey (1987)
- Pangle and Burns (2015)
- Toudic and Spector (2024)

Montesquieu's state of nature

- Blames Hobbes for “attributing to humans, before the establishment of societies that which could not happen to them except after the establishment”
- What happens in the state of nature? Bad things
 - Savage or barbarous based on whether the hunters united into smaller tribes or bigger hordes respectively
 - Slave-taking; cruel punishments for crimes
- How do humans escape it?
 - By forming loose association because there is a desire to do so for self-interested reasons, eg. sex
- What happens once they escape?
 - War! In Hobbes, war is in the state of nature; for Montesquieu, war is after the state of nature.
 - To suppress this war they later create the laws. But these laws are not universal as in Locke/Hobbes.

Rejection of universalism

- Hobbes and followers fail to see two implications of the state of nature
 - Humans can be reshaped a lot by their environment
 - Humans have already been shaped by different things to become highly diverse
- Montesquieu writes, “it is better to say that the government most in conformity with nature is the one whose particular arrangement best relates to the disposition of the people for whom it is established.”
- The differing character of the laws and customs in different cultures is the “spirit of the laws.” We must study each culture to understand what is the best government for that culture.

The overriding tension in Montesquieu

- Reject Aristotelean teleology just like Hobbes and Locke
 - Human necessity matters and not just some pie-in-the-sky idealistic purpose
- But also reject Hobbesian and Lockean universalism
 - Climate, geography, history, and all of this matters
 - All these things affect passions, and politics is to address passions and not out of reason necessarily

Montesquieu's comparison of governments 1

■ Republics

- People govern but delegate their power to some representatives

■ Democratic

- Principle is virtue
- Pro: Citizens are morally superior
- Con: They are all mediocrity and can never strive for excellence

■ Aristocratic

- Requires political and economic inequality between elites and the rest
- Interests of elites and broader population may align, but it is rare

■ Both only feasible in a small republic

- Make a confederacy of small republics for national defense

Montesquieu's comparison of governments 2

- Monarchy
 - One person governs, but intermediate layers between the monarch and the people restrain powers of both: nobility, church, cities, *parlements*
 - Principle is honor
 - Less moral, less just, less stable than a democracy
- Despotisms
 - When monarch combines legislative and executive power
 - Principle is fear

Brutus and the small-republics thesis

- Proposed constitution can't be republic because Montesquieu says we need small size for republics

Hamilton responds in Federalist 9

- “[T]he 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, nor to have adverted to the consequences of the principle to which they subscribe with such ready acquiescence.”

The Constitution's innovation

- Combine “the internal advantages of a republican, together with the external force of a monarchical government” to create a “CONFEDERATE REPUBLIC”
- The confederate republic would “arrive to such a degree of power as to be able to provide for the security of the united body.”

Departures from Montesquieu

- Hamilton made the federal government more than a mere defensive alliance as in Montesquieu, but a new political association
- Hamilton's state of nature: individuals can exit the state of nature by creating a government. But already existing states can also join together to do the same.
 - But if there is an existing state, then hasn't humanity already exited the state of nature?
 - Made the federal government capable of reaching the individual citizens

Anti-Federalists' complaint on separation of powers

- Brutus argued that “this principle, which seems so evidently founded in the reason and nature of things, is confirmed by universal experience. Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty.”
- How will you make something designed for a monarchy (England) work here?
- You can't prevent despotism in such a large territory

Madison responds in the Federalist papers

- In Federalist 47, “The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.”
 - The word “oracle” has to be interpreted with a double meaning here.

Check and balances, not separation per se

- Madison says Montesquieu “did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other.”
- He simply meant that when the “WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.”
- But also in Federalist 48, “It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”

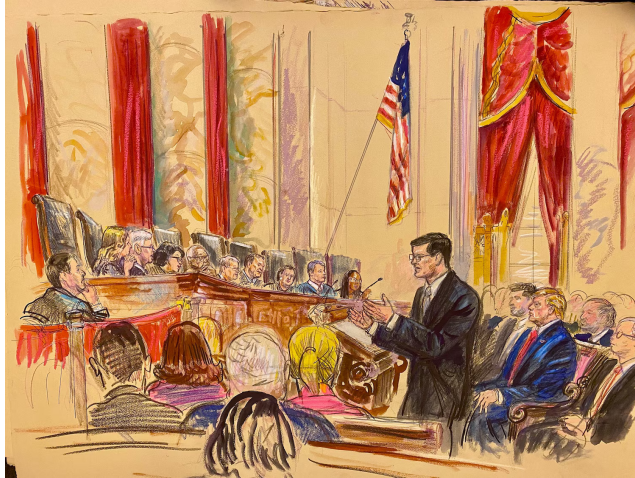
England is not simply a monarchy

- Montesquieu wrote about the British empire, which he admired, “a nation where the republic hides under the form of monarchy.”
- Montesquieu thought it was a nation based on the liberty of individuals to go after their self-interest rather than virtue as in a democratic republic
- Founders did criticize the English but for now adopted many aspects of its government.

A federation as an extra layer of protection

- In Federalist 51, “In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government into distinct and separate departments.”
- “In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”
- “Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.”

Side note: Back to “New world. Same constitution”



Complaint on judicial power

- What if the law is interpreted arbitrarily by the judiciary? What if we end up in a government of judges?
- What if the judiciary ends up becoming legislators in some sense?
 - Brutus writes, “The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.”

Judges as mouthpieces

- Montesquieu writes, “[T]he judges of the nation are, as we have said, only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor.”
- Hamilton writes in Federalist 78, “This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.”
- Hamilton also writes, “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”

The supreme tribunal

- In Federalist 22 Hamilton writes, “To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest – possessing a general superintendence, and authorised to settle and declare in the last resort, a uniform rule of civil justice.”
- Article 6, section 2 makes the supreme court supreme indeed.

Summary

- Today's class is about what Montesquieu (1689–1755) meant to the founders
 - Context: The Spirit of the Laws (SL) has a convoluted organization.
 - Historical contingency: History, climate, geography and culture matter in what pieces of even the natural law apply.
 - Montesquieu's influence on the Federalists' argument: Take SL but innovate
 - Federations: Small republics comes together to become a big confederacy
 - Checks and balances: Not just a separation of powers
 - Independent judiciary: Weak but necessary

References I



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