

A

COMMENTARY AND REVIEW

OF

MONTESQUIEU'S SPIRIT OF LAWS.

PREPARED FOR PRESS

FROM

THE ORIGINAL MANUSCRIPT,

IN THE HANDS OF THE PUBLISHER.

TO WHICH ARE ANNEXED,

OBSERVATIONS ON THE THIRTY-FIRST BOOK,

BY THE LATE M. CONDORCET :

AND

TWO LETTERS OF HELVETIUS,

ON THE MERITS OF THE SAME WORK.

Ignorance of the signification of words, which is want of understanding, disposeth men to take on trust, not only the truth they know not, but also the errors, and which is more, the nonsense of them they trust: for neither error nor sense can, without a perfect understanding of words, be detected.

HOBBS' LEVIATHAN, Chap. II.

The most certain means of rendering a people free and happy, is to establish a perfect method of education.

BECCARIA.

PHILADELPHIA....PRINTED BY WILLIAM DUANE.

NO. 28, MARKET STREET.

.....

1811.

CONTENTS.

ANNEXED to the titles of the books in this table, are maxims, being the result of the investigation of the several books, or the principles necessarily resulting from a strict analysis of each.

ADDRESS BY THE AUTHOR.

PRELIMINARY OBSERVATIONS.

| | |
|--|--------------------------|
| BOOK I....OF LAWS IN GENERAL. | <i>Page.</i> 5 |
| Positive laws ought to be consequent of the laws of nature: this is the spirit of laws. MONTESQUIEU'S SPIRIT OF LAWS. | |

| | |
|---|----------|
| BOOK II....OF LAWS ORIGINATING DIRECTLY FROM THE NATURE OF THE GOVERNMENT. | 9 |
| There are only two kinds of government: those founded on the general rights of man, and those founded on particular rights. SPIRIT OF LAWS, BOOK II. | |

| | |
|---|-----------|
| BOOK III....OF THE PRINCIPLES OF THE THREE FORMS OF GOVERNMENT. | 15 |
| Principles of the governments founded on the rights of man and reason. SPIRIT OF LAWS, BOOK III. | |

| | |
|--|-----------|
| BOOK IV....THE LAWS RELATING TO EDUCATION, SHOULD BE CONGENIAL WITH THE PRINCIPLES OF THE GOVERNMENT. | 23 |
| Those governments which are founded on reason, can alone desire that education should be exempt from prejudice...profound and general. SPIRIT OF LAWS, BOOK IV. | |

| | |
|---|-----------|
| BOOK V....LAWS FORMED BY THE LEGISLATURE SHOULD BE CONSISTENT WITH THE PRINCIPLES OF THE GOVERNMENT. | 31 |
| Governments founded on reason, have only to leave nature to act. SPIRIT OF LAWS, BOOK V. | |

BOOK VI...CONSEQUENCES OF THE PRINCIPLES OF DIFFERENT GOVERNMENTS, IN RELATION TO THE SIMPLICITY OF CIVIL AND CRIMINAL LAWS, THE FORMS OF JURIDICAL PROCEEDINGS, AND THE APPORTIONMENT OF PUNISHMENTS. 45

First degree of civilization....**DEMOCRACY...DESPOTISM.**
 Second degree.....**ARISTOCRACY** under several chiefs.
 Third degree.....**REPRESENTATIVE GOVERNMENT**, with one or several chiefs.

Characteristics of the three forms. { Ignorance....force.
 Opinion....religion.
 Reason....philosophy.

Motives of punishment in the three forms. { Human vengeance.
 Divine vengeance.
 Prevention of crimes.

SPIRIT OF LAWS, BOOK VI.

BOOK VII.....CONSEQUENCES OF THE DIFFERENT PRINCIPLES OF THE THREE FORMS OF GOVERNMENT, RELATIVE TO SUMPTUARY LAWS, TO LUXURY, AND TO THE CONDITION OF WOMEN. 56

The effect of luxury, is the employment of industry, in a useless and hurtful manner.

SPIRIT OF LAWS, BOOK VII.

BOOK VIII....OF THE CORRUPTION OF THE PRINCIPLE IN EACH OF THE THREE FORMS OF GOVERNMENT. 73

The proper extent of a state, is where it possesses a sufficient power with the best possible limits; the sea is the best boundary of all.

SPIRIT OF LAWS, BOOK VIII.

BOOK IX....OF LAWS RELATIVE TO THE DEFENSIVE FORCE. 82

From confederation, there results less strength than from intimate union, but it is better than entire separation.

SPIRIT OF LAWS, BOOK IX.

BOOK X....OF LAWS RELATIVE TO THE OFFENSIVE FORCE. 86

The perfection of the laws of nations, would be their confederation. The right of war, flows from the right of defence, and the right of conquest, from that of war.

SPIRIT OF LAWS, BOOK X.

BOOK XI....OF THE LAWS WHICH ESTABLISH PUBLIC LIBERTY, IN RELATION TO THE CONSTITUTION. . . 94

The problem of the distribution of the power of society, so as to be most favorable to liberty, cannot be solved, so long as too much power is given to a single man.

SPIRIT OF LAWS, BOOK XI.

CHAP. I....Is THE PROBLEM SOLVED, &c.

CHAP. II....HOW CAN THE PROPOSED PROBLEM BE SOLVED? 109

The problem can only be solved by never placing more power in the hands of a single man, than may be taken from him without violence; and by changing every thing with him.

SPIRIT OF LAWS, BOOK XI.

BOOK XII....OF LAWS THAT ESTABLISH POLITICAL LIBERTY IN RELATION TO THE CITIZENS. 142

Political liberty cannot exist without individual liberty, and that of the press...nor this without trial by jury. SPIRIT OF LAWS, BOOK XII.

A REVIEW....OF THE TWELVE FIRST BOOKS OF THE SPIRIT OF LAWS. 146

BOOK XIII....OF THE RELATION WHICH TAXES, AND THE AMOUNT OF THE PUBLIC REVENUE, HAVE TO PUBLIC LIBERTY. 158

Taxes are always an evil: they injure liberty and property in several modes; according to their mode of operation, they affect different classes of citizens in a different manner: to form a proper judgment of their effects, we must consider labor as the source of all our riches, that landed property is in no manner different from other property: and that a plantation may be considered as the machinery of an art or trade.

SPIRIT OF LAWS, BOOK XIII.

BOOK XIV....OF LAWS IN RELATION TO CLIMATE.

BOOK XV....THE MANNER IN WHICH THE LAWS OF CIVIL SLAVERY RELATE TO THE CLIMATE.

BOOK XVI....HOW THE LAWS OF DOMESTIC SLAVERY RELATE TO THE CLIMATE.

BOOK XVII....HOW THE LAWS OF POLITICAL SERVITUDE RELATE TO THE CLIMATE. 194

Certain climates have different inconveniences, for man: institutions and habits may remedy them to a certain point: good laws are those which effect this end.

SPIRIT OF LAWS, BOOK XIV.

BOOK XVIII....OF LAWS IN RELATION TO THE NATURE OF THE SOIL. 197

The progress of wealth and civilization, multiplying the chances of inequality among men...inequality is the cause of servitude, and the source of all the evils and vices of human society. SPIRIT OF LAWS, BOOK XVIII.

- BOOK XIX....OF LAWS IN RELATION TO THE PRINCIPLES WHICH FORM THE GENERAL DISPOSITIONS, MORALS, AND MANNERS OF A NATION.** 201
- For the best laws the mind should be prepared wherefore, the legislative power should be exercised by delegates freely chosen for a limited period, from all parts of the territory. SPIRIT OF LAWS, BOOK XIX.
- BOOK XX....OF LAWS IN RELATION TO COMMERCE, CONSIDERED IN ITS NATURE AND DIFFERENT FORMS.**
- BOOK XXI....OF LAWS IN RELATION TO COMMERCE, CONSIDERED WITH REFERENCE TO THE REVOLUTIONS IT HAS UNDERGONE.** 204
- Merchants are the agents of certain exchanges; money is the instrument employed to effect it; but this is not commerce, which really consists in simple exchanges. Commerce is society itself...it is an attribute of man...it is the source of all human good...its principal use is in stimulating industry...it is thus it has civilized the world: it weakens the spirit of devastation. The pretended balance of commerce is illusive and trifling.
- BOOK XXII....OF LAWS IN RELATION TO THE USE OF MONEY.** 235
- Silver has a natural value, for which reason it is the measure of other values; which paper could not be, as it is only the sign of value. When silver has an impression stamp upon it, attesting the quantity and quality, it is then money...but two metals cannot both be the fundamental money.
- The possessor of money, may consume or keep it, give or lend it, in the same way as other riches.
- The business of exchange and banks, consists in converting one kind of money into another, by discounting notes or bills of exchange not yet due.
- The large companies which are formed for this purpose, are always dangerous, or their success of little importance.
- Public debts encrease the interest of money.
- SPIRIT OF LAWS, BOOK XXII.
- BOOK XXIII....OF LAWS IN RELATION TO POPULATION.** 245
- Population is stopt among savages, by want of the abundant means of subsistence...among civilized people, by a pernicious distribution of the means possessed. In every place where there is sufficiency, liberty, equality, and correct information, population encreases: still it is not the encrease of mankind that is so desirable as their happiness.
- SPIRIT OF LAWS, BOOK XXIII.
- BOOK XXIV....OF LAWS IN RELATION TO A RELIGIOUS ESTABLISHMENT, ITS PRACTICAL OPERATION, AND DOCTRINES.**

| | |
|---|------------|
| BOOK XXV....OF LAWS IN RELATION TO A RELIGIOUS ESTABLISHMENT, AND ITS EFFECTS ON EXTERNAL POLICY. | 252 |
| The less power religious ideas possess in the political concerns of a country, the more virtuous, happy, free, and peaceable the people will be. | |
| BOOK XXVI....OF LAWS IN RELATION TO THE NATURE OF THINGS UPON WHICH THEY DECIDE. . . | 255 |
| BOOK XXVII....OF THE ORIGIN AND REVOLUTIONS OF THE ROMAN LAWS ON SUCCESSION. | |
| BOOK XXVIII....OF THE ORIGIN AND REVOLUTIONS OF CIVIL LAW AMONG THE FRANKS. | 256 |
| These two books being purely historical, I shall not examine them. | |
| BOOK XXIX....OF THE MANNER IN WHICH LAWS SHOULD BE COMPOSED. | 257 |
| There is nothing instructive here, excepting what arises out of the manner in which Condorcet has criticised this book, or rather new modeled it. | |
| BOOK XXX....THEORY OF THE FEUDAL LAWS AMONG THE FRANKS, RELATIVE TO THE ESTABLISHMENT OF MONARCHY. | |
| BOOK XXXI....THEORY OF FEUDAL LAWS, RELATIVE TO THE REVOLUTIONS OF MONARCHY. | 259 |
| These two books are also purely historical. Notwithstanding all its faults, the Spirit of Laws, when it appeared, merited the attacks of all the enemies of information and humanity, and the support of all their friends. | |

APPENDIX.

| | |
|---|------------|
| OBSERVATIONS....ON THE TWENTY-NINTH BOOK OF THE SPIRIT OF LAWS....BY THE LATE M. CONDORCET. | |
| BOOK XXIX....OF THE MANNER OF FORMING LAWS. | |
| CHAP. I.....Of the spirit of the legislator. | |
| CHAP. II.....Continuation of the same subject. | 261 |
| CHAP. III....That laws which appear to deviate from the intentions of the legislator, are often conformable thereto. | 262 |
| CHAP. IV....Of laws which clash with the views of the legislator. | 263 |
| CHAP. V....Continuation of the same subject. | |

| | |
|---|-----|
| CHAP. VI.... <i>Laws which appear to be the same have not uniformly the same effect.</i> | |
| CHAP. VII.... <i>Continuation of the same subject. The necessity of composing laws in a proper manner.</i> | 264 |
| CHAP. VIII.... <i>Laws which appear the same have not always been established on the same motives.</i> | |
| CHAP. IX.... <i>The Greek and Roman laws punished suicide from different motives.</i> | 265 |
| CHAP. X.... <i>Laws which appear contradictory, sometimes originate in the same spirit.</i> | 266 |
| CHAP. XI.... <i>How shall we be able to compare and judge between two laws.</i> | 267 |
| CHAP. XII.... <i>Laws which appear the same, are sometimes really different.</i> | |
| CHAP. XIII.... <i>We should not separate the laws from the purposes for which they were established: of the Roman laws against theft.</i> | 268 |
| CHAP. XIV.... <i>Laws should not be separated from the circumstances in which they were established.</i> | 269 |
| CHAP. XV.... <i>It is sometimes proper that the law shall correct itself.</i> | 270 |
| CHAP. XVI.... <i>Matters to be observed in composing laws.</i> | 271 |
| CHAP. XVII.... <i>Bad manner of enacting laws.</i> | 272 |
| CHAP. XVIII.... <i>Of ideas of uniformity.</i> | 273 |
| CHAP. XIX.... <i>Of legislators.</i> | 277 |

LETTERS OF HELVETIUS....ADDRESSED TO PRESIDENT MONTESQUIEU AND M. SAURIN, ON PERUSING THE MANUSCRIPT OF THE SPIRIT OF LAWS.

| | |
|--|-----|
| ADVERTISEMENT. | 283 |
| LETTER I....FROM HELVETIUS TO PRESIDENT MONTESQUIEU. | 285 |
| LETTER II....FROM HELVETIUS TO M. SAURIN. | 296 |

BOOK XI.

OF THE LAWS WHICH ESTABLISH PUBLIC LIBERTY, IN RELATION TO THE CONSTITUTION.

The problem of the distribution of the power of a society, so as to be most favorable to liberty, cannot be solved so long as too much power is given to a single man.

SPIRIT OF LAWS, BOOK XI.

I have thought proper to divide my commentary on this book, into two chapters. The first alone bears directly upon the work of Montesquieu ; the second only flows out of the first : but Montesquieu has not gone so far into the subject in his enquiry.

CHAP. I.

IS THE PROBLEM SOLVED, AS TO THE BEST MEANS OF DISTRIBUTING THE POWER OF SOCIETY, SO AS TO BE MOST FAVORABLE TO LIBERTY ?

IN this book, the title of which does not present an idea sufficiently distinct, the degree of liberty which may be enjoyed under each constitution of government is examined; that is to say....the effects produced on the liberties of the citizens by the laws forming the constitution of the state. Such laws are those only which regulate the distribution of political power; for the constitution of a society is nothing more than the collection of rules determining the nature, extent, and limits, of the authorities ruling it; so that when these rules are to be united into a single body of laws, serving as the bond of the political edifice, the first precaution to be taken, is not to admit any thing irreconcilable with the objects proposed to be

secured ; without which precaution it is not exactly a *constitution*, but an expedient, calculated for a greater or a less considerable portion of the general body of the nation.

To know what influence the organization of society has on the liberty of its members, we should perfectly understand what is meant by liberty. The word liberty, like all others intended to express abstract ideas of a very general nature, is often taken in a multitude of different acceptations, which are so many particular parts of its comprehensive signification ; thus we say, a man has become free, when he has finished an enterprise, in which he had been wholly occupied ; when he has given up a slavish office ; when he has renounced a station, which imposed responsible duties on him ; when he has broken the yoke of certain passions, or connexions, which kept him in subjection ; when he has escaped from a prison ; when he has withdrawn himself from the dominions of a tyrannical government : we likewise say, the liberty of thinking, speaking, acting, writing ; that his speech, respiration, and all his movements are free, when nothing constrains him in these respects : then all these particular faculties of liberty are ranged into classes, forming different groups according to their several natures ; such as physical, moral, natural, civil, and political liberty ; whence it happens, that when forming a general idea of liberty, every one composes it of that kind of liberty, to which he attaches the greatest importance, of a freedom from those constraints against which he is the most prejudiced, and which appear to him the most insupportable ; some make it to consist in virtue, in indifference, or in a kind of impassibility, like those stoics who pretended that their sages remained free, even when in chains ; others place it in society ; others in competency and ease, or in a state unconnected with and independent of any social ties ; others again pretend, that to be free is to live under certain forms of government, or generally under one that is moderate and enlight-

ened. All these opinions are just, according to the sense in which liberty is understood; but in none is it seen in all its forms, nor is its proper character embraced in any of their definitions. Let us examine what these different kinds of liberty possess in common, and in what they severally resemble each other; for it is in this way only we can approach the general ideas, abstracted from all the particular ideas which are comprehended therein.

If we consider it attentively, we shall perceive that one property common to all descriptions of liberty, is that it procures for the individual enjoying it, the exercise of his will in a greater extent than if deprived of that enjoyment; therefore, the idea of liberty, in its most abstract form, as well as in its greatest extent, is nothing more than the idea of the power to do that which the mind wills; and in general, to be free is to be enabled to do what we please.

Hence we perceive that liberty is applicable only to beings endowed with will: and when we say of water that it runs more freely when the obstacles opposed to its passage are taken away, or that a wheel turns more freely when the friction retarding it is diminished; it is by comparison we express ourselves, because we presuppose that the water inclines or possesses a quality which disposes it to run, and the wheel a like disposition to turn; or that such is the necessary effect in given circumstances.

For the same reason, this question so much debated... *Is our will free?* should never be urged, for it is an abuse of terms; liberty only relates to the will when formed, and not before the will exists: what has given rise to an enquiry of this kind is, that on particular occasions the motives acting upon us are so powerful, that they determine us immediately to will one thing in preference to or rather than another, and then it is said, we will irresistibly or are necessitated to will; while in other

circumstances, the motives not being so strong, or acting with less impulsion, leave us the power of deliberation, to reflect on and weigh them in our minds; in this state, we think we possess the power either to resist or to obey those impulses, and to take one determination in preference to another, solely because we will it; but this is an illusion, for however weak a motive may be, it necessarily determines our will, unless it be balanced by a more powerful motive, and then this is as necessarily determined as the other would have been, if alone; we will or we do not will, but we cannot will to will; and if we could, there would yet be an antecedent cause of this will, and this cause would be beyond the range of the will, as are all those which cause it; and therefore we must conclude that liberty exists only after the will, and in consequence of its unrestrained exercise; or that liberty is no more than the power of executing the will. I ask the reader's pardon, for this metaphysical discussion on the nature of liberty, but it will soon be perceived, that it is neither inappropriate nor useless. It is impossible to speak intelligibly on the interests of men without a previous and due understanding of their faculties; if there be any thing more materially deficient than another, in the writings of the great man on which I comment, it is particularly in this preliminary study, and we may perceive how vague the ideas are which he presents to us of liberty, although he had devoted three chapters to that particular subject. We have made nearly the same exceptions to his idea of the word law, in the first book.

Liberty, in the most general acceptation of the word, is nothing else than the power of executing the will, and accomplishing our desires; now the nature of every being endowed with will, is such that this faculty of willing causes his happiness or unhappiness; he is happy when his desires are accomplished, and unhappy when they are not; and happiness or misery are proportioned in

him according to the degree of his gratification or disappointment. It follows that his liberty and happiness are the same thing. He would always be completely happy if he had always the power of executing his will, and the degree of his happiness is always proportionate to the degree of his power.

This remark explains why men, even without suspecting it, are all so passionately fond of liberty; for they could not be otherwise, since whenever there exists a desire, under whatever name it may appear, the possibility of accomplishing that desire is implied, and willed or wished; it is always the possession of a portion of power, or the removal of some constraint, which constitutes a certain portion of happiness. The exclamation...“ O if I could!” comprehends the desire of accomplishing all our wishes; every wish would be gratified if we could effect it by willing it: all powerful, or what is the same thing, entire liberty, is inseparable from perfect happiness.

This remark conducts us farther, and explains to us why men have formed to themselves different ideas of liberty, according to their different ideas of happiness. They must always have attached the idea of liberty in an eminent degree, to the power of doing what they please, and of which satisfaction is the attribute. Montesquieu, in his second chapter, appears to be astonished that many people should entertain false ideas of liberty, making it consist in things foreign to their solid interests, or at least not essential thereto; but he should have first considered that men have often placed their happiness and satisfaction in the enjoyment of unimportant or even hurtful things: the first fault committed, the second follows as a consequence. A Russian in the time of Peter the great, placed his greatest interest in his long beard, which was in fact of no use, or an incumbrance, or very ridiculous. The native of Poland was passionately attached to his *liberum veto*, which was the great source

of affliction to his country. Both Russians and Poles would have deemed themselves subjected to the greatest tyranny, if obliged to part with either; and their subjection was certainly great, when they were deprived thereof, for their strongest desires were frustrated. Montesquieu answers himself by adding this remarkable phrase....“ In fine, every one has called that government “ free, which was most conformable to his inclinations ;” which is unquestionably true, it could not be otherwise, and each has so expressed himself reasonably, because every one is truly free when all his wishes are gratified, and we cannot be free in any other manner.

From this last observation flows many consequences; the first which presents itself is....that a nation should be considered truly free as long as it continues satisfied with its government, even if in its nature the government should be less conformable to the principles of liberty than another which displeases him. It is often mentioned that *Solon* said....“ *I have not given to the Athenians, the best possible laws that they could receive,*”....that is, the best they were worthy of. I do not believe that *Solon* said so; such contemptuous boasting would have been very ill placed in the mouth of one who had adapted his laws so injudiciously to the character of the nation, that they did not last his life time. But I believe he did say....“ *I have given them the best laws they would receive.*” This might have been true, and justifies him under the circumstances of his want of success; and it necessarily must have been so, because as he did not impose his laws by force, he was necessitated to give them as they would be received; now the Athenians, in adopting such imperfect laws, were certainly ill advised; but they were very free; while in modern times a great part of France, in receiving their constitution of the year three, (1795) however free it might be in its form, were really slaves, since it was established in opposition to their will; hence we may conclude, that institutions can be amelio-

rated only in proportion to the increase of information among the people at large, and even those which are the best absolutely are not always so relatively; for the better they are, the more they are opposed to false ideas, and if they are disagreeable to too great a number, they cannot be maintained without using forcible means, after which there could be no more liberty, no more happiness, no more security; this may serve as an apology for many institutions bad in themselves, which may have been at one period well adapted to the circumstances in which they existed, but furnishes no argument for our preserving them when they are found to be pernicious...and it may also serve to explain the causes of failure of many good institutions, and will not prevent us from adopting them at a more favorable time.

The second consequence of the observation which we have made above is, that the government under which the greatest liberty is enjoyed, whatever may be its form, is that which governs the best, for in it the greatest number of people are the happiest; and when we are as happy as we can be, our desires are accomplished as much as possible. If the most despotic prince should administer public affairs in a perfect manner, we should enjoy the greatest possible happiness under his rule, which is the same thing as *liberty*. It is not then the form of government in itself, that is so important; it would indeed be a very weak argument in its favor, that it was in form more agreeable to reason, because it is not mere speculation or theory, which constitute the happiness of mankind in society, but practical good and beneficial results; or it concerns individuals who possess the faculties of life, and are sensible of good and evil, not ideal or abstract beings. Those, who in the political convulsions of our times, said...“I do not care about being free, all I desire is to be happy,” uttered a sentiment contradictory in itself...being both very sensible and very insignificant: sensible, in as much as

happiness is the only object worthy of our attention; insignificant, in as much as happiness is really true liberty. For the same reason, those enthusiasts, who said that happiness is not to be taken into consideration, when liberty is in question, are guilty of the same absurdity; for if happiness could be separated from liberty, it should without hesitation be preferred: but we are not happy when we are not free, for certainly suffering is not doing as we wish. The only circumstance, therefore, which renders any one social organization preferable to another, is its being better adapted to render the members of society happy; and if in general it be desired, that the social constitution should leave to the people a great facility to make known their wishes, it is then more probable that under a government which secures this power, they are governed as they desire.

Let us examine, with Montesquieu, which are the principal conditions to be fulfilled in order to accomplish this end; and like him, let us only occupy ourselves on the question generally, without respect to any local or particular conjuncture.

This justly celebrated philosopher has remarked, in the first place, that public functions may be reduced to three principles: that of making laws....that of conducting internal and external affairs. according to the intention of the laws....and, that of passing judgment on private or civil differences, as well as on accusations of private and public offences: that is to say, in other words....that social action is comprised in *willing, executing, and judging.*

Then it may be easily perceived that these three great functions, or even two of them, could not be united in the same person or persons, without the greatest danger to the rest of the citizens; for if the same man, or body of men, were at the same time; authorised to will and to execute, the single person or the body of men, would be too powerful for any to interpose or form a judgment, and consequently

would be obliged to submit. If the one only who made the law also judged, it is probable that he would soon rule the one entrusted with the execution of the law; and in short, this last person who executes, being always the most to be feared, on account of the physical force entrusted to him; if he should be invested with the function of judging, there can be no doubt that he would soon so arrange the means of authority, that the legislating power must enact such laws only as he should please.

These dangers are too palpable to attach any merit to their discovery; the great difficulty appears to be, how to devise the means of avoiding them. Montesquieu spares himself the trouble of such an enquiry, by persuading himself that they are already found: he even blames Harrington for occupying himself with the subject. "We may say of him," says Montesquieu, "that he has only sought liberty, after stumbling upon it without knowing it; that he looked for Chalcedon with the coast of Byzantium in his view." He is so well satisfied of the problem being solved, that he says in another place.... "To discover political liberty in the constitution, does not require so much trouble, if we can possess it where it is; if we have found it, why seek it:" and he immediately presents the form of the English government, as he imagined it to exist in its administration. It is true, that at the period in which he wrote, England was a very flourishing and celebrated state; its government was, of those till then known, that which produced, or appeared to produce, the most flattering results in every respect. However, this superiority, partly real, partly apparent, but in a greater measure the effect of causes wholly foreign, should not have prepossessed so strong a mind as Montesquieu, or induced him to suppress the errors of the theory, or to insinuate that it leaves nothing more to be desired.

This prepossession in favor of English institutions and ideas, led him in the first place to forget, that the

legislative, executive, and judicial functions, are properly only delegated trusts, functions which may indeed confer power and credit, on the persons invested with them, but are not therefore self-existent in the persons who exercise them. There is by *right*, only one power in society, and that is the will of the nation or society, from which all authority flows; and in fact there is not any other change, than that of the authority delegated to the man, or body of men, of the several functions by which they disburse the necessary expences, and exercise all the physical force of the society. Montesquieu does not deny this, he is only unmindful of it; he is entirely taken up with his triple powers, his legislative, executive, and judiciary, considering them as rivals, and as powers independent of each other; and that it is only necessary to reconcile or restrain them, each by the other, in order to make every thing go on well, without taking any notice, whatever, of the natural power from which they are derived, and upon which they depend.

By not perceiving that his executive power is the only real one in fact, and that it influences all the others, he concedes, without consideration or enquiry, this power to an individual, and even makes it hereditary in that individual's family, and for no other reason than because one man is better calculated for action than many: if this principle were well founded, it would have been yet worth enquiry, whether if an individual be so much better fitted for action, he would suffer any other free action to exist round him; and moreover, whether this individual, chosen at hazard, is so likely to be competent to the exercise of that wise deliberation which should precede every action.

He also approves of the legislative power, being confided to the legislators, freely elected by the people for a limited period, and from all parts of the nation; but what is still more extraordinary, he approves of the existence of the privileged hereditary body in the nation,

and that this body should compose of itself, by right, a part of the legislative body, distinct and separate from that elected by the people, and that it should possess the right of a negative upon the resolves of the elected representatives! His reasons are curious; it is, he says, "because their prerogatives are *odious in themselves*, "and they should be enabled to defend them;" it would seem a more natural conclusion, we should think, that being odious they should rather be abolished.

He also thinks, that this second section of the legislative body is very useful, because there can be placed therein, all that is really important in the judiciary authority, the passing of judgment on crimes against the state; so that, as he says, it becomes the *regulating power*, of which both the executive and legislative powers stand in need to mutually temper them. He does not look to facts in the history of England, nor perceive what it attests, that the house of lords is any thing else, rather than an independent and regulating power; that it is, in fact, only an appendage to the court, the advanced guard of the executive power, whose fortunes it has always followed; and that giving this irresponsible body a negative in legislation and a high judiciary function, is only investing the court with an additional force, and rendering the punishment of state criminals a matter of mere discretion with the executive, or rendering it impossible to punish whenever it is not the pleasure of the court.

Notwithstanding these advantages, and the great power which the executive has at its disposal, he does not think the right of a negative upon the laws necessary to the executive; nor that of convoking, nor of proroguing, nor of dissolving them; and he imagines that the popular representatives possess a sufficient defence, in their precautionary power of voting the supplies only for one year, as if they must not renew them every year, or witness a dissolution of the government; and that this

power is further augmented by their having it in their discretion to prohibit or permit the raising of a military force, or the establishment of camps, barracks, or fortified places; as if they must not be forced into the establishment of either, whenever a necessity shall call for it.... a necessity which the executive can at any time create.

Montesquieu terminates this long detail, by a sentence obscure and embarrassed....“This is the fundamental constitution of the government of which we speak; the legislative body being composed of two parts, each of them constrains the other, by their mutual preventive faculty; both are restrained by the executive, which will itself be restrained by the legislative:” and to this he adds this singular reflection: “These three powers should naturally form a state of repose or inaction; but as in the nature of things they must move, they are under the necessity of acting in concert.” I must acknowledge, that I do not perceive the absolute necessity of this conclusion; on the contrary, it appears evident, that where every thing is constituted, so as to constrain or impede motion, nothing can be perfectly accomplished. If the king were not effectively master of the parliament, and if he did not consequently lead them, I can see nothing in this weak fabric of government that could prevent him; neither can I perceive any thing in favor of such an organization....which is in my opinion very imperfect....but a circumstance which belongs to it rather than forming a part of it, and which has not been noticed....that is, the constancy with which the nation wills that it should so subsist. But as at the same time, they are wisely attached to the maintenance of personal liberty and the freedom of the press, the power is always preserved of making the public opinion known; so that when the king abuses his power, of which he really possesses too much, he is subject to be opposed by a general movement in favor of those who resist his oppression; as has been twice exemplified in the seven-

teenth century, and which is always very easy in an island, where there can be no motives, consistent with the principles of the government, for maintaining a large standing army. This is in fact the only effective *relo*, which is to be found under the English constitution, compared with which all the rest are nothing.

The great point in the English constitution is, that the nation six or seven times deposed its kings: but then it must be remarked, that this is not a constitutional expedient; it is rather an insurrection arising out of necessity, as it was formerly said to be according to the laws of Crete. Legislative deposition, to my great astonishment, Montesquieu praises in another part of his book, notwithstanding it is certain that this remedy is so cruel, that a sensible people would endure great evils, before they could resort to it; and though it may happen that they defer redress so long, that if the usurpation be conducted with address, the people may insensibly acquire the habit of slavery so inveterately, as no longer to feel the desire, or may cease to possess the capacity, of breaking their chains by any means.

What very much characterises the warmth of Montesquieu's imagination, is, that on the faith of three lines from Tacitus, which would require a copious commentary, he has persuaded himself, that he found among the savages of ancient Germany, the model and the spirit of the government, which he considers as a masterpiece of human reason; in the excess of his admiration, he thus exclaims....“ This excellent system was discovered “ in the woods :” and a little after he adds....“ It does “ not belong to me to examine whether the English “ actually enjoy liberty or not, it is sufficient to say, it “ is established by their laws.” Nevertheless, I am of opinion, that the first point was well worthy of examination, were it only to assure himself, that he had a just knowledge of the second; because if he had bestowed more attention on *their laws*, he would have discovered

that among the English, there exists really no more than *two* powers instead of three; that these two powers exist only when both are present, because one has all the real force and no public attachment, while the other possesses no force, but enjoys all the public confidence, until it manifests a disposition to overpower its rival, and sometimes even then: that these two powers, by uniting, are legally competent to the change of the public established laws, and even those which determine their relations and their existence, for no law obstructs them, and they have exercised this power on various occasions: so that, in fact, liberty is not truly established by their political laws; and if the English really enjoy liberty to a certain extent, it originates in the causes which I have explained, and has reference to certain received usages in their civil and criminal proceedings, rather than to positive laws; as, in fact, it is altogether without law established.

The great problem, therefore, of the distribution of the powers of society, so that neither of them may trespass on the authority of the other, or the limits assigned them by the general interests; and that it may always be easy to keep them within bounds, or to bring them back by peaceable and legal means, is not, I conceive, resolved in that country: I would rather claim this honor for the United States of America, the constitution of which determines what should be done when the executive, or when the legislative, or when both together, go beyond their legitimate powers, or are in opposition to each other; and when it becomes necessary to change the constitutional act of a state, or of the confederation itself. But it may be objected, that in case of such regulations, the great difficulty lies in their execution; that the Americans, when the authorities of a particular state are in question, are guaranteed by the force of the superior authority of the confederation; and that when it becomes a question of guarantee, it resolves itself

into the union of the several confederated states, acting for one state; and that in this view of the facts, we have rather eluded than solved it, by the aid of the confederative system; and that it therefore remains to be explained, how the same end could be obtained, where the established government is an indivisible body or unity.

Such a subject requires to be treated of in the manner of a theory, rather than historically; I shall therefore endeavor to establish *à priori*, the principles of a truly free, legal, and peaceable constitution; for which purpose we must take a fair point of view, from ground a little more retired and elevated.