

The Cloaking of Power

Montesquieu, Blackstone,
and the Rise of Judicial Activism

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The University of Chicago Press
Chicago and London

he regularly praises "moderation," why he frequently cites poetry and history, why he distrusts abstract "systems" of reasoning (see chapter 4, below). Montesquieu offers such teachings slowly, by indirection, and with great attention to particulars and practical ends, a model for the statesman and statesmanlike judge who undertake liberal reforms. It is no surprise that *The Spirit of the Laws* was most influential in America just when its founders sought prudential advice about how to construct a constitutional order. Its only real rival was the *Commentaries* of his disciple William Blackstone, which further delineated the complex constitutional forms necessary to achieve liberty and political stability and was itself sprinkled with prudential advice about legal reform undertaken by judges.

one

Moderating Liberalism and Common Law: Spirit and Juridical Liberty

Montesquieu introduces *The Spirit of the Laws* as propounding "new ideas" of man and politics, and as "the work of twenty years" of reflection upon an "infinite number of things" ("Notice," 227; "Preface," 229). His bold ideas about politics, jurisprudence, and judging are in the service, paradoxically, of moderation and tranquillity, and throughout he strives to balance practice and theory, experience and reflection. It is widely noted that he restored to political philosophy a concern with prudence and an attention to the diverse particulars of political history and practice not yet seen in modernity, nor even attempted since Aristotle, although Machiavelli is a precursor.¹ This concern with both the realities and potentialities of political life partly explains why Montesquieu does not openly declare the importance of judicial power for his constitutionalism, since both the aims and the novelty of his conception provide reasons for cloaking such a proposal for reform.

This reading of Montesquieu is not shared, however, by most historical studies, which treat his views on judging and French constitutional history as largely representative of eighteenth-century juridical and political debates.² A recent elaboration of this view argues that *The Spirit of the Laws* in fact propounds a political philosophy of historical particularity, rooted in Montesquieu's experience as a provincial judge.³ The paradox here is that, for all the rich details provided about his career as a

senior judge in the *Parlement* of Bordeaux and its influence upon his writings, this approach undervalues the importance of judicial power in his constitutionalism. A more serious study of this dimension of his political philosophy has argued that judicial independence is the key to his constitutionalism, but its Marxist reading traces this to the class bias of a nobleman judge.⁴ A comparative jurist has detected contradictions in Montesquieu's account of judging which suggest his endorsement of something more than a jury-centered power, but then finds such signals incoherent or sporadic.⁵ The French scholar Simone Goyard-Fabre is one of the few to find a genuinely bold teaching about judicial power in Montesquieu's philosophy, arguing that his judicial and constitutional reforms together emphasize "the same *equilibrium* of elements among themselves and on the whole: the just measure, that which is called moderation in politics or justice in a court, expresses the same *right ratio*" or "*juste milieu* [golden mean]."⁶ James Stoner also has discovered "intimations in *The Spirit of the Laws* of a judiciary quietly instructed in reform." Montesquieu's larger aim is a juridical liberalism; books 6 and 12 teach that the "best protection for the individual is a series of judicial procedures, not devised abstractly, but developed through historical change from the manner of judging practiced by the Germanic tribes 'in the woods.' The telling of this tale occupies, on and off, no small part of the remainder of the work." In the spirit of Montesquieu's emphasis on commerce, Stoner finds a teaching that the "security of persons depends upon a kind of commerce in sound judicial practices—with philosophers as merchants and their writings as bills of exchange."⁷

Still, most readers of *The Spirit of the Laws* have not found this distinctive conception of subtle judges and a judicialized liberalism. This intentional cloaking by Montesquieu is less perplexing in light of d'Alembert's defense of the work's confusing style, which reiterates the jurist's own remarks on the complexity of his writings and the careful reading they require. In the Preface to *The Spirit of the Laws*, Montesquieu insists that his tome does have a design, asking that "one not judge, by a moment's reading, a labor of twenty years; that one approve or condemn the whole book, and not some few phrases" (229).⁸ He further encourages reading between his lines by stating that "one must not always so exhaust a subject, that one leaves nothing for a reader to do," since he wants people not only to read his work but to "think" (11.20). Montesquieu's conception of judicial power is one beneficiary of this complicated approach to philosophy, since there are sound reasons for cloaking this proposed transformation of political power. Such a project redefines moderation in order to soften the moral character and standards of political life, through judicial attention to the interests and desires of particular individuals. Such aims would

be considered morally doubtful in Montesquieu's own time and in the light of Western philosophy and Biblical religion—although, given his success and that of liberalism generally, they are less so today. Openly questionable reforms invite controversies that can hinder their reception and their ultimate efficacy. Even with Montesquieu's prudent cloaking of his intentions and teachings, *The Spirit of the Laws* was placed on the Catholic Church's Index of prohibited books in 1751.

Using judicial power to shelter private concerns, even vices, from public authority also involves a shift in political power. The executive and legislative powers and their traditional supporters lose some ground as professional lawyers and judges rise. Montesquieu's indirect presentation of this new teaching seems aimed at fellow jurists, judges, and lawyers, and at those who generally shared his concern to temper political life with the reasonable, measured spirit of courts of law. Blackstone, Hamilton, and Tocqueville indicate their grasp of this larger message in Montesquieu's detailed analyses of judicial procedure, legal forms, and jurisprudential principle. None of this suggests that the complex constitutional government he promotes is anything but genuinely representative, as is evident in the clash of partisan views in his pluralist, liberal, best regime (see 11.6; 19.27). He is less confident, however, than are Machiavelli, Hobbes, and Locke about completely novel founding and artifice, or rational planning by the sovereign, or the adequacy of popular consent alone to justify legislative or executive projects. Such a shift of power, then, must occur imperceptibly. A main advantage of having a judicial, lawyerly body moderate the factional conflict between classes and institutions is that it is less partisan and passionate than the other powers, at least having different kinds of passions and concerns. It certainly is weaker than its rivals, as Hamilton argues by citing Montesquieu in *Federalist* no. 78, and this further entails a quiet, careful growth of influence. Moreover, this approach accords with the larger aim of moderation by judicialization, namely, the security of individuals, defined as lack of fear about their liberty and security. If this requires a learned, quasi-noble judging power, then the latter should keep free of the fray of politics and focus strictly upon judging. A humane natural right, attuned to natural sentiments, points to a discrete judging power and not an omni-competent, fearsome arm of public administration. The moral compromise inherent in such moderation indicates that judges defined by their humanity, tolerance, and mildness are hardly meant to invoke the Biblical notion of Judgment Day.

Montesquieu's general preference for quiet and steady reform over revolution, announced at length in the Preface to *The Spirit of the Laws*, also recommends an intricate presentation of this new conception of judicial power. He views with anxiety the doctrinaire republicanism of a Cromwell or a Locke,

and at moments he seems to see a Robespierre ahead.⁹ Knowledge of judicial procedures and attention to the interests and fears of individuals will not foster rationalist theories about the costly but necessary gains of a Hegelian slaughter-bench of history. True, Montesquieu is concerned to show that political communities change and reform over time. For Rousseau, Kant, Hegel, and later moderns, however, these seeds of historical thinking grew into the sort of rationalist, universalistic praise for revolution and progress that the French jurist feared. His attachment to the natural rights inhering in individuals prevented his own adoption of historicism, and Montesquieu instead recommends gradual, imperceptible reform of laws and constitutions. The judging power is eminently more suited to such a strategy than are the powers more animated by passion and more inclined toward grand plans.

A Humane Natural Right and New Jurisprudence

It is only in book 29 of *The Spirit of the Laws* that Montesquieu explains the principle by which the abstract, Enlightenment pronouncements that open the work—on the “invariable laws” that govern all beings in the world (1.1)—fit with his general emphasis on the particularities of politics and law: “I say it, and it seems to me that I have brought forth this work only to prove it: the spirit of moderation ought to be that of the legislator; the political good, like the moral good, is always found between two extremes” (29.1, 865). Throughout the work Montesquieu’s concept of moderation guides both his philosophizing and his political advice, continually seeking to avoid the extremism of adopting any single, rigid dogma. His political philosophy thus blends elements of a Newtonian science of the equilibrium achieved among forces and ideas, a Machiavellian realism about lowered moral aims for politics, and the humane sensibilities of his predecessor as a counselor in the *Parlement* of Bordeaux, Montaigne.¹⁰ The ultimate goal of his new science of politics is liberty, but a modern conception of moderation is for him the prerequisite for liberty. He argues in particular that liberty perishes under any structural imbalance of forces or any stagnation of dynamic activity—that is, under despotism. He will not have man patiently suffer despotism, whether physical, political, or moral, as a good citizen of the city of God. He seeks means for realistically reforming the city of man to make it a more tranquil, hospitable abode, especially through inculcating a proper political and legal prudence. To be sure, his analysis of these fundamental issues in book 1, and later in the work, is indebted in some respects to the modern rationalism of Machiavelli, Hobbes, and Locke.¹¹ Still, the debt generally wanes as one moves farther into the thirty-one books, which emphasize complexity, particularity, and moderation. Upon considering the whole

work, as the Preface directs, one finds it tempering earlier modern attempts to establish an abstract foundation for politics—whether Machiavellian acquisition of glory and rule by one alone, or a Hobbesian, Lockean liberalism of a state of nature and natural rights.¹² Even in book 1, in the passages that bear the strongest imprint of Enlightenment theorizing, Montesquieu suggests his independence even when stating his most general, abstract conception of law, that law governs all dimensions of reality (1.1, 232). He cites Plutarch for the maxim that “law is the king of all, mortal and immortal,” taken from an essay advising a prince about a natural law that stands above human power and directs rulers to be just. Montesquieu refers to a classical moralist and biographer, not a modern Cartesian philosopher, for this fundamental ontological and jurisprudential premise; moreover, Plutarch himself is quoting the poet Pindar.¹³ Unlike Hobbes, Spinoza, and Locke, Montesquieu is more concerned to educate statesmen than to indulge in abstract analysis. Unlike Machiavelli’s education of princes, his own will teach that all rulers are governed by a higher law.

Montesquieu nonetheless is very much a modern, since his ateleological conception of divine law and the law of nature yields only the most minimal of natural laws (1.1–2). In contrast to Aristotle and Thomas Aquinas, who found principles of natural right or natural law in the fabric of the world, placed there by a divine mind that draws us toward itself as our ultimate goal, Montesquieu finds in nature only a general set of physical and psychological laws. His typically moderate stance on these fundamental issues, neither entirely subjective nor universalistic, is evident in the ambiguous character of the natural laws or “relations of equity” which, he argues, pre-date any political order. These indicate, for example, that “supposing that there were societies of men, it would be just to conform to their laws”; or that “if there were intelligent beings that had received some benefit from another being, they ought to have gratitude” (1.1, 233). This conception of natural law anticipates the more explicit discussion of man’s prepolitical nature in the sequel on “the laws of nature” (1.2). When read in light of the whole work, the treatment of human nature in book 1 is not so much a version of earlier state-of-nature theories as an effort to moderate their claims. Montesquieu adopts those elements that accord with his more phenomenological, political analysis of politics while exposing the excesses and difficulties of this favorite method of early liberalism. Especially because the very next usage of *droit naturel* in the work is so distinctly non-Hobbesian (3.10), defining it as the natural affections we hold for family and loved ones, the complicated presentation in book 1 suggests a redefinition of natural right in terms of such humane sentiments. These new ideas inform his new conception of judging as distinct from—indeed, as tempering—any Biblical or Aristotelian notions of moral judgment at the bar of a higher or transcendent

truth. Montesquieu's jurisprudence and new judicial power accord with a basic natural right to individual security and tranquillity even as they moderate the Hobbesian and Lockean conceptions of natural right, with their emphasis upon force and necessity.

Montesquieu's four "laws of nature" elaborate these principles by defining man as a sentimental animal with a capacity for reason. Peace is "the first natural law"—in terms of historical appearance, it seems—since by nature each man in his timidity "feels himself inferior" and would hardly attack his fellows. Hobbes is explicitly criticized for projecting such a "complex" idea as desire for power and domination upon natural, prepolitical man (1.2, 235). The second law is "nourishment," and the third is man's natural sociability, understood as the "natural entreaty" which people "always make to [one] another" through a blend of our capacities for fear, pleasure, and sexual charm. Montesquieu then shifts from our defining capacity for sentiment to our eventual drive for "knowledge," conceived of not as an end in itself but as another "bond" that other animals lack, making "the desire to live in society" the fourth natural law (236). This complex view of human nature informs his conceptions of politics and judging, since our natural passions or sentiments, which orient us toward peaceful, tranquil sociability, define us more fundamentally than our reason or any higher ambitions.¹⁴ We are neither as naturally sociable nor as naturally selfish as either Aristotle or Hobbes would have it, nor are we as radically historical or malleable as Rousseau later suggests. The genius of a moderate politics—of the spirit of laws properly conceived—is to grasp our nature in all its complexity and constitute laws and institutions that will preserve all its dimensions.

Montesquieu develops these numerous themes throughout the early books of *The Spirit of the Laws*, and in doing so turns from an initial concern with the structures and motivating principles of different forms of government to a more fundamental concern with the distinction between moderate and immoderate governments (see 3.10; 8.8).¹⁵ Only in book 5, after exposing the harshness of despotism but also proposing measures to moderate it, does he explicitly frame the essential problem of politics. Book 1 indicates that the human condition lies between divinity and brute matter, caught between the liberty of intelligence and the necessity of material existence. This middling condition is nowhere more evident than in the fact of despotism, for "despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government" (5.14, 297). This widespread problem and its underlying causes perpetually confront the political philosopher, the political founder, and the prudent reformer. He advises all three, or anyone with the genius to fuse these capacities, to work toward a quasi-Newtonian, moderate solution that

is possible but difficult: "In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterwork of legislation that chance rarely produces and prudence is rarely allowed to produce" (5.14).

Early in the work, long before the core treatment of constitutionalism in books 11 and 12, Montesquieu provides this fundamental rationale for his new conceptions of the separation of powers and of judicial power. His political science argues that liberty can of itself achieve security only if our activities and passions are structured according to the dynamics prescribed by the laws of nature. Since our natural condition is not so low and desperate as Hobbes thinks, there is no *need* for the foundational contract and the absolute Leviathan. However, our natural condition is not so favored as either the Bible or Aristotle indicate, so there is no *warrant* for a moral orientation to politics and laws that would substantially restrict individual liberty. Man need face neither the fearsome judgment of an all-powerful Leviathan nor the troubling prospect of divine judgment or ethical censure. Nature indicates that politics must be structured in terms of multiple powers and perspectives that at once check and facilitate the free movement of political passions and energies. Montesquieu gradually develops his view of the separation of powers on this basis in *The Spirit of the Laws*, culminating in the liberal constitutionalism promulgated in book 11 and the judicialized politics recommended there and in book 12. Nature and human nature indicate the need for independent, nonpartisan judging that secures the tranquillity of each individual's interior motions. The fundamental principles of Montesquieu's new science of politics require, therefore, a new jurisprudence. The outlines of that jurisprudence become clearer when compared with the liberal theory and traditional common-law reasoning of his predecessors, and upon examining even the earliest treatments of law and judging in *The Spirit of the Laws*.

Liberalism, Common Law, and Juridical Tranquillity

The Spirit of the Laws refers to numerous Western jurists and legal texts, ancient, medieval, and modern, and Montesquieu's political science has a distinctly juridical cast. Although he cites Hobbes only once, and Locke and the common-law jurist Coke not at all, Montesquieu's peculiar relation to both England and earlier liberalism raises the question of his relationship to such predecessors. Hobbes and Locke are the leading liberal philosophers against whom Montesquieu either measured himself or now must be measured, and Coke embodies the classic common-law jurisprudence these theorists attacked.¹⁶ His

conception of judging borrows much from classic common law, even though he shares some of the liberal criticisms of common-law prudence, and his published work never mentions such great expositors as Fortescue, Saint Germain, or Coke. This ambiguous relationship to earlier jurisprudence accords with the very character of Montesquieu's judicial power. A consideration of his originality in relation to his predecessors further reveals why the content of his new jurisprudence and judicial power requires such a subtle, complicated presentation.

A safe point of departure for sketching the liberal jurisprudential landscape Montesquieu inhabited is to note that Hobbes and Locke seek to construct a rationally sound, politically stable legal order on a new foundation, man's prepolitical state of nature.¹⁷ For Hobbes, the necessities that define man's natural state are premises from which one derives further principles of civil society and governance. Locke's method is essentially identical, though more deftly presented. Their new foundation for a science of politics requires a sovereign power to constitute and govern civil society, but they disagree as to whether that foundation warrants, or requires, a separation within the sovereign. More to the point, judging is independent in neither of their accounts of the only rational, just political order. Locke follows Machiavelli's republican theory in separating and balancing forces so as to achieve security and prosperity in politics. He agrees with Hobbes, however, that judging must be under the sovereign, even if Locke would divide sovereignty into law-making and law-enforcing powers. The paradoxical explanation of this subordination of judging in both of these early liberal theorists is that judging, once conceived in light of man's prepolitical state of nature, somehow lies behind both legislating and executing. War is the natural human condition precisely because there is no effective judge to settle disputes. This is more evident in Locke than in Hobbes, for Locke makes judging the central metaphor of the state of nature: "[T]hose who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner." Hobbes, in contrast, simply subsumes judging under the establishment of that "common Power" which is the source of making and executing law.¹⁸

It is Locke's definition of "Political Society" that precipitates his break with Hobbes on the separation of powers, even as it transforms judging from a natural to a strictly positive power: "[T]here only is *Political Society*, where . . . all private judgment of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties."¹⁹ These teachings reflect and reinforce the liberal theory that there is no natural law in the ancient or medieval sense, no natural reason that discerns a morally substantive natural right.²⁰ Hobbes concludes *The Elements of Law* by

declaring that "right reason is not existent," since there is no "such thing to be found or known in *rerum natura*." Locke, too, rejects premodern natural law, if more subtly, suggesting that we are "ignorant for want of study of it" and that it is "unwritten, and so nowhere to be found but in the minds of Men." He is more candid when stating that nature in itself provides no practically meaningful guide for resolving conflict. Regardless of what natural justice means in the state of nature, men, once in society, "through Passion or Interest" will "mis-cite, or misapply it." Moreover, they "cannot so easily be convinced of their mistake where there is no established Judge."²¹ Locke's modern law of reason requires elaboration and, more definitively, enforcement. For liberal philosophy, it is man who posits all genuine law, and any particular positive law can appeal only to the posited legal order as a whole or to individually inhering natural rights. This constructed order, built on the solid ground of necessity, is amenable neither to premodern natural law nor to a traditional common-law understanding of custom and precedent.²² Only the natural rights of individuals are real and distinct, since their bases are the passions of an individual afraid to lose life, liberty, or property. The difficulty with this view of human nature and politics is that naturally apolitical people might not easily forfeit their rights in order to construct a positively binding contract on so shifting a ground as their own interests.

The lesson Hobbes draws from the problematic authority or legitimacy of positive law is that sovereignty must not be divided, and the sovereign must be the final judge of all subjects. Of course, subordinate magistrates are necessary, but the sovereign stands over them as appellate judge, able to revise or reverse as needed.²³ Locke's disagreement with Hobbes regarding the judging power stems not, then, from any influence of the common-law tradition but from the different conclusion he draws from his premises about the state of nature. Locke's doctrine of the separation of powers in effect turns the positivist conception of law and judging in Hobbes against the very idea of super-sovereignty. Hobbes addresses the problematic authority of posited law by setting up a person beyond judgment; for Locke, however, this is to think that "Men are so foolish that they care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*."²⁴ Locke prefers the polecats of the factional conflict entailed by a separation of powers, in which the legislature judges the executive and stands judged by it, while both powers and all the citizens supposedly can appeal to a neutral judge on earth. That is, the legislative power is "Supream," but one can appeal over it to the posited legal order as a whole, and Locke's rules for appeal are delineated in a strikingly tripartite form: political society is "bound to govern by establish'd *standing Laws*, promulgated and known to the people," by "indifferent

and upright Judges, who are to decide Controversies by those Laws," and by an executive power which can be used only "in the Execution of such Laws."²⁵

Polecats and foxes, however, remain. Locke later formulates in the *Second Treatise* both an executive prerogative that occasionally transcends law to cope with necessity, and a right of revolution. As to prerogative, the people and legislature might agree with such action after the fact, but there is "no Judge on Earth" who can declare an instance of it right or wrong by a natural, reasonable standard. This by itself raises the prospect of revolution, in which "[t]he People shall be Judge" after all, but this puts everyone back in the state of nature.²⁶ His criticism of Hobbes thus turns back upon his own account, since political stability and individual security rest on grounds potentially turbulent or less-than-civil. Hobbes and Locke never mention a separate judiciary because of the challenge such an independent source of judgment would pose to sovereignty. While Locke occasionally employs the language of tripartite powers, his judges could be independent of the sovereign only if they could appeal to something above the sovereign, if they could check the sovereign in an ultra-political way.²⁷ These early liberal theorists deny that there is any such appeal, seeing only the dangers to peace and security of appeals to divine law or divinely supported natural law. They deny that judging at law is ultimately based on nature or right reason, or that there is reasonableness in legal custom understood in a traditional, Scholastic sense. This is evident not only from their rejection of natural law but from their retention of only three of the four elements of Thomas Aquinas's definition of law. To Hobbes and Locke, law is for the common weal; it is promulgated; and it issues from the authorized power. Both philosophers drop precisely the fourth element, reason, which Aquinas lists first.²⁸ The instrumental reason of modern natural right cannot appeal to an ultimate, natural reason—to something other than self-interested force or will—for even if such a thing exists, its primary manifestation is in the claimed rights of individuals. Such rights are what is being contested in political disputes, not what settles them. Locke implicitly admits that his laws of reason and self-preservation, which govern legislators and by which they are judged, are as prone to being miscited and misapplied as all the other laws of nature. Judges, just like legislators, would do so when gripped by their passions, and Locke clearly authorizes revolution against legislators. Independent judges, then, would be just other predators running around, and for Locke, two are enough for keeping each other in line with the posited legal order. One is plenty for Hobbes.

Montesquieu departs in important ways from Hobbes and Locke, and these divergences are crucial both for his new constitutionalism and for the distinctive role that judging plays within it. *The Spirit of the Laws* suggests that the geometrically sound structures that Hobbes and Locke have built on their state-

of-nature foundation in fact yield little tranquillity for individuals. Montesquieu thus applies Locke's criticism of Hobbes to Locke himself. If citizens fear their government and view politics with anxiety, who cares about the precise number or size of the predators? His own liberal solution appeals only weakly to natural reason or natural law, even though the opening book of *The Spirit of the Laws* seems to emphasize such an approach. Alternately, Montesquieu's conception of judging and constitutionalism does rest upon the low necessities of fear and tranquillity, although less exclusively and starkly than did the liberalism of his predecessors.²⁹ Locke had begun the moderating trend, tempering the stark sovereignty of Hobbes with reasonable customs for the many and reasonable thinking for the few. Montesquieu further argues that the very structure of politics can determine affairs safely, if constituted so that decisions are made both as necessity requires and in accord with a moderate, humane conception of natural right. His analysis of the separation of powers in the English constitution observes that the "three powers ought to form a repose," but since "by the necessary motion of things, they are constrained to move, they will be forced to move in concert" (11.6, 405). The crucial innovation is adding a third power, of a distinctly nonpredatory and more reasonable character, to provide the individual security that his liberal predecessors seek, without their constant worry about regression into war. A judicialized constitution builds the safety valve into the everyday system, in accord with the actual judicial practices and legal customs developed in many European countries through a "Gothic" common law and court system (see books 6, 12, and 28). This secures the liberal advantages of positivist legal theory more effectively than either super-sovereignty or an unstable cocktail of consent, revolution, faction, and prerogative. A crucial dimension of this innovative constitutionalism is that judges focus not upon "political law" or public law but "civil law," the criminal and civil law that directly affects individuals (1.3). Montesquieu's judges, even in his most developed account of constitutionalism in books 11 and 12, therefore lack a power of judicial review. His judicial power, informed by a moderate natural right, employs the advantages of premodern conceptions of judging without claiming the traditional foundation in natural law or right reason.

Montesquieu's disagreement with Hobbes and Locke on judging does not cancel his debt regarding the orientation and structure of modern constitutionalism. His dissent from these predecessors as well as the monarchical or aristocratic character of his independent judging power together raise the question of the English common law that Hobbes so severely criticized for its Scholastic and Aristotelian provenance. Montesquieu's relationship to the classic common law is as ambiguous as his relation to these liberal philosophers, and for a similar reason. He takes from the common law what seems reasonable according

to man's natural right to liberty and humane tranquillity, and excludes those elements deemed extreme for their threat to individual security and a moderate constitution. In this Montesquieu follows Bacon, who advanced a reformulated common law that would protect man's real interests and thereby complement—and moderate—the realistic sovereign or state. In doing so, Bacon implied the deficiencies of the great expositor of traditional English common-law reasoning in his own era, Sir Edward Coke.

Classic common-law jurists such as Coke claimed that reason can refine immemorial custom and that judgments at law can reconcile the requirements of positive law with natural law or right reason. For Aristotle, justice requires both law and equitable judgment to interpret and apply the law in difficult cases, and laws based upon custom are more authoritative than written laws.³⁰ The English common-law jurist and Lord Chancellor Sir John Fortescue (d. 1476) cites mainly the authority of Aristotle, as well as St. Thomas Aquinas, in his *De laudibus legum Anglie* (*In Praise of the Laws of England*, c. 1471). Fortescue instructs young Prince Edward, in exile in France, on the superiority of England's common law and mixed constitution to France's civil law and absolute monarchy.³¹ J. G. A. Pocock's widely noted study of "the common law mind" and "the ancient constitution" in seventeenth-century England emphasizes the deeply historical, insular quality of Coke's thought, but Coke often blends Scholastic principle with historical particularity in his jurisprudence, both implicitly and explicitly.³² Even though the classic common law is not fond of abstractions or theories, its Aristotelian provenance helps in formulating the theory behind its reasoning. The common-law judge works from precedent cases and maxims to exercise a judgment informed by both particulars and generalities. Coke defined this judgment as an "artificial perfection of reason gotten by long studie, observation and experience," a reason "fined and refined by an infinite number of grave and learned men."³³ Hobbes's *Dialogue between a Philosopher and a Student of the Common Laws of England* seeks to supplant the traditional explication of common law provided in Christopher Saint Germain's *The Doctor and Student, or Dialogues between a Doctor of Divinity and a Student in the Laws of England*. As such, it is the most thematic development of the Baconian strain permeating Hobbes's major works. Only a more rational, and less Christian and customary, conception of law and sovereignty, more scientific than the vague concepts of legal judgment or prudence, could achieve a more enlightened politics.³⁴ Locke's critique of the common law is subtler, in part because it works largely by giving Coke the silent treatment, but the implications for common-law courts are evident in his theorizing and his constitutionalism.³⁵

Montesquieu's silence about the English common law is puzzling, given

that he is a jurist who presents his liberal constitutionalism through an analysis of the English constitution, and that he places judging at the center of his political science of moderation. He never mentions the common law or its great jurists Bracton, Fortescue, Saint Germain, or Coke in *The Spirit of the Laws*, a work otherwise brimming with citations. Professional common-law judges all but disappear in the analyses of England in books 11 and 19. These omissions are curious, since he practically paraphrases Coke's description of common-law reasoning when praising juridical complexity in monarchies—which have "so many rules, restrictions, extensions, which multiply particular cases, and seem to make an art of reasoning itself" (6.1, 307).³⁶ More curious still is the fact that Coke's life and jurisprudence combined to oppose absolute monarchy. This makes him a splendid example of the moderating force available in judges and "intermediate bodies," the embodiment of the complex, balanced constitutionalism Montesquieu propounds.³⁷ Finally, while it is not clear what knowledge of English courts and jurisprudence he gained during his stay in England from 1729 to 1731—his travel journal was lost or destroyed—it is known that he later met and regularly corresponded with Charles Yorke, son of the then Lord Chancellor and later Chancellor himself. Montesquieu's notebooks contain important remarks on what he discussed with this "very celebrated barrister" about courts, law, and lawyers, apparently during a visit by Yorke after publication of *The Spirit of the Laws*:

M. Yorke tells me that a foreigner could not understand a single word in milord Cook and in Littleton; I tell him that I have observed that, with regard to the feudal laws and ancient laws of England, they do not seem to me very difficult to understand, no more than those of all the other nations, because, all the laws of Europe are gothic, they all have the same origin and are of the same nature; that on the contrary modern laws and jurisprudence are difficult to understand, because the times and circumstances of things have changed the gothic law in each country, and because that law everywhere takes the measure of one country and has changed like the political laws. He agrees with this.³⁸

Montesquieu's extensive examination of the origins and evolutions of Franco-German law in the final books of *The Spirit of the Laws* confirms this private notation on the Gothic root shared by English common law and French law. Nonetheless, his published references to the feudal laws and ancient laws of England are rare. He does cite Coke's predecessor Littleton (d. 1481) in the penultimate chapter of *The Spirit of the Laws* (31.33, 993 n. b). However, the reference is to a lesser-known work, not to Littleton's treatise on feudal tenures,

the basic work of the English common law of property, known as the *Tenures nouelli*; Coke's commentary on this, known even to the American founders as "Coke-Littleton," begins Coke's own classic work, the *Institutes*. In two other unpublished notations, Montesquieu records his intention to purchase classic common-law treatises by Bracton (d. 1268) and Fortescue, including *In Praise of the Laws of England*.³⁹ A fuller understanding of why Montesquieu's jurisprudence seemingly approximates but largely ignores the common law requires examination of his treatment of Franco-Germanic laws and of a juridical prudence in the closing books of *The Spirit of the Laws*, but a brief comparison with Hobbes and Locke prompts some conjectures by itself. In his conversation with Yorke, he characteristically suggests that Gothic law transforms itself in each particular country, taking on a new, ever-developing spirit and bewildering variety among each people. This hardly seems justification for overlooking English common law, since Montesquieu seems to make good on his announcement in the Preface of the work's "infinite" scope, given his citations to peoples and laws spanning the available literature on diverse continents and centuries. The suitability of common-law judging to Montesquieu's purposes, his private recognition of a shared Gothic root, and his earlier travels to England and friendship with a future Lord Chancellor suggest a silence more deliberate than accidental. The provenance of the common law is, after all, partly Scholastic and Aristotelian. Beyond Fortescue's *In Praise of the Laws of England*, this is evident in the text targeted by Hobbes, Saint Germain's *Doctor and Student*, which opens by paraphrasing Aquinas's fourfold classification of divine, eternal, natural, and positive law.⁴⁰ The "artificial reason," the developed prudence or judgment, exercised by the common-law mind ultimately understands itself both as customary and as rooted in natural truth or justice, even though English common law distinguishes itself from Scholastic natural law.⁴¹ Common law seeks right reason and natural justice through the common-law mode of refining customs and precedents and by discerning right in particular cases. Its attention to particulars and precedents, so different from the code of Roman or civil law, suits Montesquieu. However, neither a root in natural law nor a prudence understood as the legal perfection of nature's right reason fits the spirit of his modern, liberal science.

Montesquieu departs from the classic common law because of his moderately liberal notions of nature and human nature, which in turn inform his distinctive jurisprudence and constitutionalism. His humane, softer conceptions of moderation and natural right directly guide his new versions of constitutionalism, jurisprudence, and judging. Nonetheless, his serious investigation of nature as the basis for understanding people and politics distinguishes him from later liberal political philosophers, certainly from the recent liberal theory

of Rawls and Dworkin. This orientation by nature explains the fundamental importance of constitutionalism and the separation of powers in his liberalism, and it precludes the possibility that his project to elevate judicial power sought to have it replace the others. For Montesquieu, the idea that any power, even judging, could rule absolutely does not square with our nature.

Similarly, his new conception of moderation marries institutional with moral aims. The moderating of moral and political expectations in this new jurisprudence is evident in his advice for reform about suicide, which English common law flatly condemned. In climates that dispose men toward such remedies for their personal ills, the laws should stop moralizing and simply leave people alone (14.12–13). While Coke and his predecessors employ an Aristotelian practical science, Montesquieu originates the efforts by modern social science to achieve a neutral, objective understanding of any particular phenomena, even if only of its contextual meaning and social import.⁴² On the basis of his liberal conception of human nature, Montesquieu would use the moderating influences of independent judging and juridical complexity to secure both individual tranquillity and a peaceful sociability. The natural desire, and right, to tranquillity requires a judging power attuned to our sentiments and attachments, paring from the law any frightful implications of a legal prudence informed by classical and medieval moral philosophy. Montesquieu's distinctive conception of the judging power is both a standard for and quiet engine of his transition from the theory and practice of both ancient and early modern politics to his more complex, moderate liberalism.

The Moderation of Monarchy and a Judicial Depository of the Laws

A fundamental concern of *The Spirit of the Laws* is that political extremes had often dominated the great European powers during the seventeenth and eighteenth centuries—from the republican absolutism of Cromwell that Montesquieu saw just beneath the surface in England to the monarchical absolutism of the French Bourbons. One of Montesquieu's favored models for restoring a moderate constitutional politics in Europe was France's *parlements*, the regional bodies of nobles who exercised judicial and administrative functions even after feudalism ended. He knew their strengths and weaknesses intimately, and thought their independence and legal prudence could check either the populist extreme within republicanism or the autocratic extreme within monarchy. To Montesquieu, these extremes tended to reinforce each other, swinging the scale of authority from one lopsided position to the other, while the independent, moderating role of courts and a legal profession were mostly overlooked.

Republican voices in France associated the *parlements* with the monarchy and unjust privilege, temporarily replacing them just prior to the French Revolution and abolishing them after 1789. Monarchical voices in both France and England, on the other hand, suspected independent courts of weakening a central administrative authority. Montesquieu's own view is closer to that of the noble, parliamentary revolt against monarchical absolutism in seventeenth-century France known as the Fronde, and to the judicial independence from both crown and parliament asserted by Coke in seventeenth-century England. His failure to associate himself explicitly with either the Fronde or Coke thus seems deliberate. He seeks the advantages of independent courts without a moralizing jurisprudence, and a check upon the monarchy without defending other, less defensible noble privileges. The liberal spirit of Montesquieu's political science uses these traditional judicial institutions both to analyze and to moderate despotic rule of all kinds, whether classical political philosophy or a pure republicanism, Biblical judgment or Bourbon absolutism.

The first significant discussion of judging comes early in *The Spirit of the Laws*, in the first treatment of monarchy, and Montesquieu uses the occasion to plant essential themes for the work. Monarchy is constituted not by royal power but by "[i]ntermediate, subordinate, and dependent powers," a government in which "one alone governs by fundamental laws" (2.4, 247). If it were governed by "the momentary and capricious will of one alone," it would be a despotism, for in such a case "nothing can be fixed and consequently there is no fundamental law" (2.4, 247; 2.1, 239). The "most natural intermediate, subordinate power" in a monarchy is, therefore, the nobility, the power or order that is "the essence of a monarchy" by ensuring royal obedience to law (2.4, 247). In this early discussion of separation of powers, the only function ascribed to the nobles is their judicial power, "the justices of the lords," understood as both the feudal right and the institution whereby nobles judged certain crimes and disputes apart from royal power (see 30.20, 919). He observes that, if England has abolished such noble privileges, as well as ecclesiastical and local ones, then it is essentially a republic. When a monarchy abolishes such privileges, "you will soon have a popular state or else a despotic state." The English have "removed all the intermediate powers that formed their monarchy" so as to "favor liberty," and they are "quite right to preserve that liberty," or "they would be one of the most enslaved peoples of the earth" (2.4, 247-48). Only later in the work does he indicate the extremism of such changes. England is "a nation where the republic hides under the form of a monarchy," and there one "would often see the form of an absolute government over the foundation of a free government." It is, indeed, the "one nation in the world whose constitution has political liberty for its direct purpose" (5.19, 304; 19.27, 580; 11.5, 396). His initial remark,

however, is only that they are right to preserve that liberty, not that abolition of noble judging is the correct means. When later discussing the legal simplicity that defines despotism, he lists Cromwell's England alongside Caesar's Rome (6.2, 310). This distinction between England and traditional monarchies is part of Montesquieu's persistent effort to bring moderation to politics, given his concern with the revolutionary bent of doctrinaire republicanism. Monarchic absolutism thus is bad both in its own right and because of the violent reaction it provokes. He also warns, about an unnamed monarchy, that for "several centuries" royal magistrates have been unjustly attacking the traditional noble and ecclesiastical courts, and he wonders "to what extent the constitution can be changed in this way" (2.4, 247-48). This foreshadows the closing argument of the work—that complex, moderate government arose naturally, so to speak, over many centuries in France, making Bourbon absolutism the historical novelty (books 28, 30, 31). A separation and balancing of powers in a constitutional equilibrium is, given the right conditions or necessities, the most natural or historically prevalent form of government for certain peoples, especially in Europe. Throughout the work Montesquieu suggests that the judicial power is, over time, an important agent in this process of separating and balancing, and that it is the crucial institution for maintaining such a constitutionalism.

The early parts of *The Spirit of the Laws* establish a pattern for the work that links the themes of moderation, judging, separated powers, and prevention of despotism. Montesquieu anticipates the doctrine of the separation of powers famously discussed in book 11 in his early discussions of monarchies, and in a series of warnings about the need for intermediate orders or bodies to keep monarchy from sliding toward despotism (8.6-9). This makes separation of powers, not republicanism, the essential corollary of moderate government, which in turn is the key to liberty. His first discussion of judging establishes these themes by defending the *parlements* (2.4). The *Parlement de Paris*, the greatest of these French assemblies of nobles, began in the twelfth and thirteenth centuries as a royal court and particularly as a court of appeal. Until 1790 it remained the central law court of the monarchy.⁴³ Montesquieu emphasizes both its negative, oppositional nature and its long historical development by initially referring to "intermediate, subordinate, and dependent powers," and then eventually calling them "intermediate ranks" and "political bodies." The thrust of his discussion clearly becomes the role of independent judging, and he declares that "[i]t is not enough to have intermediate ranks in a monarchy; there must also be a depository of laws" (2.4, 247, 249; emphasis added). He develops this theme of judges as a *dépôt de lois* in books 3, 5, 6, 20, and 28, making this a defining aspect of his judicial power and of *The Spirit of the Laws*

itself. His analysis of the judging functions given to the upper legislative house in England's constitution also indicates that he does not confine this judicial role to monarchies strictly or traditionally understood (see 11.6, 404). William Blackstone later paraphrases Montesquieu by terming an independent judiciary a "depository of the laws" and a bulwark of individual rights, and Blackstone's importance for American jurisprudence suggests that Montesquieu plants a seed of judicial review. Still, it is telling that the French jurist never explicitly contemplates such a power for judges. The initial account of judging in the work never questions the political limitations on its power, defining it as a legal depository in those "political bodies" independent of the king that "announce the laws when they are made" and "recall them when they are forgotten" (2.4, 249). In light of his historical inquiries into these matters later in the work, this clearly refers to *parlements* and to their rights of *enregistrement* and *remonstrance* (see 28.39, 855; 28.45, 864). *Parlements* could refuse to register a royal edict, and they could petition the king in objection to an edict.⁴⁴ Montesquieu provides numerous justifications for this institution, specifically for why it must be independent of the monarchy and why a distinct legal corps is needed within the nobility. He eventually defines this body and function as the depository of the *fundamental* laws. The stakes are high, since in "despotic states, where there are no fundamental laws, neither is there a depository of the laws," and his list of justifications grows lengthy:

The ignorance natural to the nobility, its laxity, and its scorn for civil government require a body that without ceasing brings the laws out of the dust in which they would be buried. The prince's council is not a suitable depository. By its nature it is the depository of the momentary will of the prince who executes, and not the depository of the fundamental laws. Moreover, the monarch's council constantly changes; it is not permanent; it cannot be large; it does not sufficiently have the people's trust: therefore, it is not in a position to enlighten them in difficult times or to return them to obedience. (2.4, 249)⁴⁵

These are properly judicial and not legislative duties, since they are passive and reactive limitations on sovereign power. While the depository function has some of the characteristics of the later American development of judicial review, it is not as institutionalized, regular, and bold as that power has become. Montesquieu further implies that a written constitution in itself is no panacea; for it is crucial to have the right qualities in those jurists who can and must interpret the law. This fundamental principle of a separation of distinct types of powers in constitutionalism distinguishes his jurisprudence from later conceptions of law,

such as that of Oliver Wendell Holmes Jr., which fuse judging and legislating, law and raw politics.

In the early books of *The Spirit of the Laws*, leading up to the constitutionalism fully presented in books 11 and 12, Montesquieu continues this praise for the moderating power of monarchical judging. It becomes clear that this pillar of his constitutionalism also is a weapon in his critique not only of autocratic despotism but of the moral despotism in classical republican virtue and classical political philosophy. A judicial depository of laws, in tempering monarchical executive power, embodies the balance and complexity that are "the excellence" of monarchy (5.10). Monarchies can avoid the cycle of despotism and popular revolution only through such "intermediate dependent powers," and he cites Cicero's comparison of them to Tribunes of the people who, in revolutionary moments, possess the "prudence and authority" to propose compromises and restore the rule of law (5.11, 290–91). Such moderate government has a good civil order or *police*, milder than the republicanism of Plato or Lycurgus, because it respects the everyday passions and ambitions characteristic of commercial monarchies (4.5–8).⁴⁶ Montesquieu describes a despotism not only of fear but also of virtue, which paves the way for his moderate alternative, a constitutional, commercial monarchy that mixes aristocratic and republican elements. A judicial depository of laws in such a regime can best protect each individual's natural feelings for security and tranquil sociability, a theme he develops early in the work through his liberal redefinition of honor, the principle or motivating passion of monarchy. For Montesquieu honor actually is "ambition," a demand for "preferences and distinctions," and therefore, "[s]peaking philosophically," it is a "false honor."⁴⁷ It animates politics by freeing all the passions, but "like the system of the universe," the action and reaction of competing passions keeps the whole order in balance. This argument, that "each person works for the common good, believing he works for his individual interest," anticipates Adam Smith's theories of a spontaneous moral order (3.7, 257).⁴⁸ Montesquieu tempers the brutal moral realism of Machiavelli with the milder, more scientific views of Bernard de Mandeville on mutually beneficial selfishness, in order to teach that such private vices can become public virtues.⁴⁹ A politics of enlightened self-interest cloaked as honor accords best with nature, since the opposing despotisms of fear and virtue exact too great a toll upon human nature and individual security.

Shortly after these remarks Montesquieu affirms his new conception of natural right, thereby tempering the Hobbesian and Lockean emphasis on self-preservation and natural liberty. These are legitimate in themselves, but they should also be means for securing "natural feelings" such as "respect for a father, tenderness for one's children and women, laws of honor, or the state of one's

health" (3.10, 260). Such a natural right is neither as base and harsh as that of Hobbes, nor as high and rational as that of classical and medieval political philosophy. It concerns the propriety of providing for our basic passions and interests—neither our lowest nor highest, but rather our humane, middling ones—in as mutually beneficial a manner as possible. A political philosophy of moderation points to a cloaking of power, since the institution discussed above all others as a moderating influence is the judicial depository of laws. Holmes noted that these themes from *The Spirit of the Laws* already characterized the *Persian Letters*, and he cites the definition there of the "government most conformed to reason" and "most perfect" as one that "attains its goal with the least friction," thereby "lead[ing] men along paths most agreeable to their interests and inclinations."⁵⁰ It is fitting that Montesquieu closes the subsequent discussion of how all the laws "should be" and prepares for his extended analysis of judging in book 6 by arguing that even such seemingly corrupt practices in monarchies as selling of offices can promote individual tranquillity and liberty (5.19). A hereditary nobility is not suited for a judicial role if it is not artificially invigorated by the fresh talent made available through advancement of the ambitious *nouveaux riches*. These arguments effectively defend the French *parlements* and their mixed hereditary lordships, some anciently held and some recently purchased. Later in the work he heaps praise upon just such a *noblesse de robe* in his first book on commerce, since the pattern in which merchants come to wealth and purchase these offices is among the best consequences of a mercantile civilization (20.22). As the argument of *The Spirit of the Laws* advances, Montesquieu develops his constitutionalism of separated powers more through such praise of juridical complexity than through any other theme in his analysis of humankind and politics.

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Moderate and Juridical Government: The Spirit of Constitutional Liberty

Montesquieu's efforts early in *The Spirit of the Laws* to redefine honor and natural right and to quietly elevate judicial power point to a complex constitutionalism that elevates civil law in relation to political law. In properly moderate regimes, the civil and criminal laws affecting individuals should have equal status with the public law of governmental powers and interests. A complex judging power becomes the crux of his moderate constitutionalism because its rules and procedures stymie excesses of raw power, or of high idealism, that could damage individual interests and tranquillity. The first extended analysis of judicial power in the work, in book 6, argues that the power most attuned to individual interests helps to keep all power operating along the lines of mutual self-interest and self-restraint. The full exposition of his constitutionalism, presented in and around his analysis of the English constitution in book 11, develops these seeds. For Montesquieu, judging is not so much a potent mechanism in itself as a safety valve, the key to avoiding political extremes. This invisible power and the moderation it helps to achieve lie at the heart of his constitutionalism and new spirit of laws.

Due Process, Complexity, and Juridical Liberty

Montesquieu's exhaustive analysis in book 6 of the relative complexity of civil and criminal laws in various governments contrasts