

# The Cloaking of **Power**

Montesquieu, Blackstone,  
and the Rise of Judicial Activism

Paul O. Carrese

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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."<sup>50</sup> 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

with the Benthamite argument, predominant since the nineteenth century, for revising laws to achieve a uniform legal code. He traces the essential moderation of monarchy to the complexity of its laws and judicial procedures, known in Anglo-American law as due process, or civil and criminal procedure. The analysis here summarizes themes from earlier books, encapsulating a jurisprudence in a few lines. Monarchies, unlike despotism, must have courts, which give decisions, and "these decisions should be preserved; they should be learned, so that one judges there today as one judged yesterday and so that the property and life of the citizens are as secure and fixed as the very constitution of the State." This is because in monarchies such courts decide "not only about life and goods, but also about honor," and this "requires scrupulous inquiries," such that the "fastidiousness of the judge grows in proportion as he is a greater depository, and as he pronounces upon greater interests." Such states contain, therefore, "so many rules, restrictions, extensions, which multiply particular cases, and seem to make an art of reasoning itself" (6.1, 307). Montesquieu specifies this beneficial complexity of civil laws and adjudication in a properly complex way—by enumerating the different kinds of property, the various laws and customs permitted in different provinces, the occasional need for legislators to correct or make uniform the decisions of different courts, and the numerous issues that arise from the differing privileges and honors of individuals in a monarchy (6.1, 307–9). Such complexities in monarchical judging embody an art of legal reasoning, a description that echoes Coke's definition of English common law and its reasoning. An Aristotelian tradition that refines prudential and moral judgment differs, however, from a social science that views discrete acts and cases as part of a "spirit" of law, a spirit that well may need humane reform. Montesquieu's candid remarks on litigation develop these themes. In despotisms shorn of judicial protections for individual security, the lawyerly sophisms of "disputes and proceedings" are of no use, and "pleaders are mistreated" because "the injustice of their petition appears baldly, being neither hidden, mitigated, nor protected by an infinity of laws" (6.1, 309; see 28.35). Montesquieu harbors no illusions about the character of such litigants or the injustices they perpetrate. These "formalities of justice" pose "difficulties" to the just cause and often deny the victim "satisfaction," and as a matter of justice one would "doubtless find the formalities too many." However, with regard to "the liberty and security of the citizens," one would "often find them too few." In reality, "the penalties, expenses, delays, and even the dangers of justice are the price each citizen pays for liberty" (6.2, 310).

This line of argument redefines justice, perhaps the central concept of politics and political philosophy, just as his 1757 "Notice" to the work indicates his intention to redefine virtue. Justice as right primarily should mean administra-

tion of proper procedures, since these forms and formalities protect the security and tranquillity of individuals.<sup>1</sup> Such criticisms early in the work indicate that, while Montesquieu endorses complex conceptions of judging and law, he does so with open eyes. Such thoughts call to mind recent complaints in America about excessive litigation as "the death of common sense," for impeding commerce and efficiency, but Montesquieu's warnings point to deeper themes in his constitutionalism. They anticipate his praise in books 11 and 12 for a balance between monarchical and republican judging, or complex and simple modes of jurisprudence. A call for balance does not weaken his fundamental praise for a monarchical spirit of judging, but it does suggest doubts about the kind of judge-centered constitutionalism propounded by Oliver Wendell Holmes Jr., and more recently by John Rawls and Ronald Dworkin. For Montesquieu, separation of powers is crucial to avoiding political extremes, and no power can go unchecked if the aim is to preserve moderation and liberty. In this spirit of balance or moderation, he praises the protections for property, honor, and commerce typical of monarchies as a friendly soil for the growth of modern liberal constitutions, while bluntly warning republicanism about juridical simplicity and despotism:

[W]hen a man makes himself more absolute,\* his first thought is to simplify the laws. In these States he begins by being struck more by the particular inconveniences than by the liberty of the subjects, with which he is not concerned.

One can see that there must be at least as many formalities in republics as in monarchies. In both governments, formalities increase in proportion to the importance given to the honor, fortune, life, and liberty of the citizens. (6.2, 310–11)

\* Caesar, Cromwell, and so many others.

Montesquieu amplifies these themes by turning from the simplicity of civil and criminal laws to the form of judgments and then, in the bulk of the book, to the establishment and character of penalties. The complex judging typical of a moderate monarchy, attuned to the false honor of individual interests and claims, is a depository of those formalities of justice that are "the thing in the world most important for men to know" (6.2, 310). Such complexity and moderation in the laws requires an effectively independent judicial power, yet one not so powerful as to pose its own threat to balance and liberty. The rule of law, the bulwark for liberty against despotism, will only exist if judging is separated from the passions of the sovereign and is guided by judgment under law (6.3–8). His first argument in this vein distinguishes judging according to

the letter of the law from judging according to its spirit (6.3). In criminal cases republicanism lies at the extreme of no judicial discretion, and despotism lies at the other of total discretion for the despot; it is monarchy that holds the middle. Monarchies embody a complex relationship with law, for "when it is precise, the judge follows it; when it is not, he seeks its spirit" (6.3, 311). Montesquieu must address, however, the apparent juridical protections for liberty in republics, such as those of ancient Rome and modern England:

In republican government, it is in the nature of the constitution for judges to follow the letter of the law. There is no citizen against whom one can interpret a law, when it is a question of his goods, of his honor, or of his life.

In Rome, judges pronounced only that the accused was guilty of a certain crime, and the penalty was found in the law, as can be seen from various laws that were made. Likewise, in England, the jury decides whether the accused is guilty or not of the deed brought before it; and, if he is declared guilty, the judge pronounces the penalty that the law imposes for this deed: and, for that, he needs only his eyes. (6.3, 311)

By removing the discretion of judges and making them equally subordinate to law, republics maintain the spirit of equality and, by preventing arbitrary judgments, protect security and liberty. By comparing the juridical simplicity in republics and despotisms, however, Montesquieu suggests that, while there is no interpretation *against* citizens in republics, there can be no interpretation *for* them either—no moderating of the law's requirements. Our jurist observes that, in monarchies, "judges assume the manner of arbiters; they deliberate together, they share their thoughts, they come to an agreement; one modifies his opinion to make it like another's; opinions with the least support are incorporated into the two most widely held" (6.4, 312). Such judicial reasoning and discussion "is not in the nature of a republic," for "the people is no jurist [*jurisconsulte*, person learned in the law]"; thus, "the modifications and temperings of arbiters are not for them." In the Roman republic, "the state of the question had to be fixed in order for the people to keep it before their eyes," for otherwise, "in the course of a great lawsuit, the state of the question would continually change, and be no longer recognizable" (312). Genuine judging, which seems "to make an art of reasoning itself," occurs in governments where judges have some independence and discretion—some distinctive learning and status apart from both king and people (6.1). Montesquieu emphasizes this by linking the collegial deliberation and reasoning of monarchical judges with their capacity to moderate the law, to

judge according to the spirit of its letter. Roman judges originally accepted "only the precise suit," but the more learned judges, the praetors, "imagined other maxims or rules for lawsuits, which were called *in good faith*" and in which "the manner of pronouncing was more at the disposition of the judge." This mode was "more in agreement with the spirit of monarchy," and learned French jurists still say, "*In France, all actions are in good faith*" (6.4, 312; emphasis in original, notes omitted).

Montesquieu connects these themes to his fundamental constitutional teaching on the separation of powers by examining the relationship between sovereignty and judging (6.5). He cites Socrates, Plato, Cicero, Tacitus, and Machiavelli in the course of arguing that the sovereign power in any government, whether the people or the king, should never judge if it aims to avoid despotism and secure the liberty and tranquillity of each citizen. This marks his only explicit reference in *The Spirit of the Laws* or even the *Considerations on the Romans* to Machiavelli's *Discourses on Livy*, although both of Montesquieu's works are indebted to Machiavelli's treatment of the Romans and, in particular, Roman republican faction.<sup>2</sup> Montesquieu carefully adopts and, for the most part, quietly moderates Machiavelli's bold new teachings, and he also moderates their legacy in earlier liberalism. *The Spirit of the Laws* cautiously accepts what the *Considerations* openly embraced: that factional dispute between the many and the few is both essential to and good for republicanism. The occasion for finally citing the *Discourses* is, however, a dispute with Machiavelli's populist conception of republican judicial power:

Machiavelli\* attributes the loss of liberty in Florence to the fact that the people did not judge as a body, as in Rome, the crimes of high treason committed against them. . . . I would gladly adopt the maxim of this great man; but as in these cases political interest forces, so to speak, civil interest (for it is always a drawback if the people judge themselves their offenses), it is necessary, in order to remedy this, that the laws provide, as much as they can, for the security of individuals. (6.5, 313)

\* *Discourses on the First Decade of Titus-Livy*, bk. 1, ch. 7.

Machiavelli had noted the ill consequences for Florence of the fact that "the multitude was not able to vent its animus in an ordered way against one of its citizens." He defends popular accusations, particularly the accusation and exile of the nobleman Coriolanus, when endorsing republican faction as a means to Rome's imperial expansion.<sup>3</sup> Montesquieu does not reject all of Machiavelli's teachings on faction, but he does moderate them so as to provide greater protection for individual security and tranquillity. The point is so important that,

after disputing Machiavelli, he calls upon a famous cast of ancients for support. He then dramatically invokes "the constitution," a term rarely used before book 11, to underscore his own view:

In despotic States, the prince himself can judge. He cannot judge in monarchies: the constitution would be destroyed, the intermediate dependent powers, annihilated: one would see all the formalities of judgments cease; fear would invade all spirits; one would see pallor on every face; no more trust, no more honor, no more love, no more security, no more monarchy. (6.5, 314)

To inculcate the proper prudence about these themes Montesquieu offers "reflections" on particular practices, and these anticipate further concerns about the need for moderation in the judicial power, especially in books 11, 12, and 29. He echoes his early discussion of the depository of laws by recounting a remonstrance by the Comte de Montrésor, president of a French *parlement*, against a decision by King Louis XIII to personally judge a nobleman. The judgment eventually was changed, and the moral of the story is that "[j]udgments rendered by the prince would be an inexhaustible source of injustices and abuses" (6.5, 315). Another reflection revives a theme from the *Considerations*, that "[s]ome of the Roman emperors had a passion for judging" and that "no reigns stunned the universe more by their injustices" (6.5, 315).<sup>4</sup> He again notes, however, abuses of power and threats to individual security arising from republican judging. The decemvir Appius Claudius effectively ruled the Roman republic as a "single magistrate," making it a "despotic government" (6.7, 316–17; see 11.15). Montesquieu then recommends the "admirable" monarchical institution of public prosecutor as a corrective to accusation by citizens. Whether populist judging is motivated by Machiavellian faction and ambition or by Platonic virtue, he declares it despotic (6.8, 317; see 11.18–20).

Having endorsed the judicial moderation achieved by legal complexity and the separation of judging and sovereignty, Montesquieu turns to reform of penalties and punishments, a subject so close to his spirit that he treats it again in book 12. He contrasts the severity of penalties characteristic in despotisms with the "mildness" that "reigns in moderate governments," the latter being "monarchies and republics" (6.9, 318–19). He also links these moderate states, their mild penalties, and liberty: "[I]n all or nearly all the States of Europe, penalties have decreased or increased in proportion as one has approached or departed from liberty" (318–19). Mild penalties also are just as effective in addressing crime. In "moderate states, love of homeland, shame, and fear of blame are motives that serve as restraints and so can check many crimes"; their

"civil laws will make corrections more easily and will not need as much force." The "good legislator," therefore, "will insist less on punishing crimes than on preventing them; he will apply himself more to giving mores than to inflicting punishments" (318–19). While republics and monarchies share "moderate" penal codes, there is a zealotry in republics that in fact makes them more akin to despotisms. Mediocrity in morals and manners, leading to mild expectations for human conduct and the passions, yields mildness in punishments. He declares such moderation to be most in accord with "human nature," with "moderate government," and with "liberty"—a coincidence of fundamental concepts that drives home his point.

When he suggests that a virtuous people needs few penalties, the implicit premise is his redefinition of virtue as a middling state between the severity of classical virtue and the violence of despotism (6.11, 320; see 11.18). On this basis he formulates a principle of moderate punishment: "Men must not be led by extreme blows; one should manage the means that nature gives us to guide them. . . . Let us follow nature, which has given men shame for their scourge, and let the greatest part of the penalty be the infamy of suffering it" (6.12, 321). Aristotle's more demanding ethics explicitly excluded shame from the moral virtues, since those who have formed proper character would avoid shameful acts.<sup>5</sup> Montesquieu dilutes the meaning of "shame," just as he has "honor," to make it a useful tool for his humane reformation of criminal law. These references to mores once again give new meanings to old and important words, so as to reshape man and politics. He exploits the ambiguity of *moeurs*, which denotes either morals in the sense of morality or manners in the sense of customs, to emphasize not virtue but the middling customs of various peoples. People of proper mores do not need severe punishments because they are not wicked, and—given Montesquieu's readjustment of moral expectations—few people are wicked.<sup>6</sup> This effort to reform not just criminal punishments but also the mores of peoples and their governments extends even to despotisms (see 12.29, "Putting a Little Liberty in Despotic Government"). From the beginning of the work, Montesquieu has indicated his intention to be a modern Solon or Plato, since seeking to "instruct" even despotic rulers is to "practice the general virtue that comprehends love of all" ("Preface," 230). The impotence of Japan's despotic punishments stems from the fact that "almost all crimes are punished by death." Even lying to a magistrate earns this, a penalty "contrary to natural defense" (6.13, 322; see 12.14; 26.3–4). These "opinionated, capricious, determined, eccentric people" are accustomed to, not deterred by, such "atrocious laws." He turns from admonition to remarkable advice about the stealth through which rulers of such a government should work to moderate both laws and mores:

A wise legislator would have sought to lead men's spirits back by a just tempering of penalties and rewards; by maxims of philosophy, of morality, and of religion, matched to this character; by the just application of the rules of honor; by the torment of shame; by the enjoyment of a constant happiness and a mild tranquillity; and, if he had feared that these spirits, accustomed to being checked only by a cruel penalty, could no longer be checked by a mild one, he would have acted\* in a secret and imperceptible manner; he would have, in the most pardonable particular cases, moderated the penalty for the crime, until he could come to modify it in every case. (6.13, 323)

\* Observe this well as a practical maxim in cases where spirits have been corrupted by overly rigorous penalties.

This advice to the wise legislator embodies Montesquieu's fusion of moderation and prudence in *The Spirit of the Laws*. Rarely in the work is he so blunt in teaching about subtle reform. In the immediate sequel, though, he remarks that "despotism does not know these means (*ressorts*); it does not lead in these ways." This advice might be aimed, then, not so much at reformers in despotisms but at those in moderate states who quietly work to improve criminal justice. While the audience appears to be legislators, in fact this is one of Montesquieu's first indications that subtle judges should work to reform criminal justice and thereby the very character of government. In criticizing ignorance of such moderate *ressorts*, he employs a term he usually reserves for the "springs" or activity of a government, but in this context the phrasing alludes to judging and jurisdiction, as in the phrase *en dernier ressort*, a court of last appeal or last resort.<sup>7</sup> A still clearer allusion to judging arises when considering the reforms to be undertaken so imperceptibly. An executive or kingly power might pardon a crime, or equitably moderate an assigned punishment. Such clemency can be scandalous, but if an act of clemency was genuine, then why wouldn't an executive seek some credit for it? A judge better fits this description of imperceptibly determining which cases are most pardonable and then imperceptibly moderating the penalty. Montesquieu never identifies himself in *The Spirit of the Laws* as having been a senior judge who mostly presided in the *Chambre de la Tournelle*, the criminal court, of the Bordeaux Parlement. Still, the work reveals an authority or command on juridical topics unavailable to someone not a jurist, while nonetheless giving no indication that its philosophical teachings aim at anything less than universal truth.

Montesquieu's analysis in book 6 closes as it began, recommending moderation, but now in the form of a just proportion between penalties and crimes, mildness and severity (6.16). He cannot even bring himself to speak of the

cruelty and torture to which "slaves among the Greeks and Romans" were subjected in criminal cases, for he hears "the voice of nature crying out against me" (6.17, 329). In discussing torture in cases of high treason, he explicitly contrasts classical republicanism with "the English nation," a "nation very well policed," which does not use torture in prosecuting any crimes (6.17, 329 and nn. a–b; see 12.18–19; 29.11). A modern republic or constitution that arises out of a moderate monarchy is superior in this crucial respect to Athens and Rome. Similarly, Europe's medieval barbarians are a better model than classical republicans, since "[o]ur fathers the Germans" almost always used mild and monetary penalties, praise that anticipates his arguments about the Gothic origins of European constitutional liberty (6.17, 329 n. b; 6.18, 329–30; see 11.6; 11.8). To better inculcate moderation, he formulates a maxim: "A good legislator takes a golden mean (*un juste milieu*); he does not always order pecuniary penalties; he does not always inflict corporal penalties" (6.18, 330). He then phrases the sequel broadly enough to include executive and judicial roles in reforming both laws and the administration of criminal justice: "But, one will ask, when is one to punish? when to pardon? This is something which is better sensed than prescribed" (6.21, 332). Here and throughout *The Spirit of the Laws* Montesquieu counsels gradual, evolutionary reform of particular political systems to achieve moderation and greater individual security, not revolutionary imposition of a universal blueprint. If he wrote this work "only to prove" that "the spirit of moderation should be that of the legislator," then wise legislators should increase the prominence of judging in politics (29.1). They also should encourage judges to imperceptibly reform the administration of justice, which in turn can reform the whole spirit of politics.

### Constitutionalism and Separation of Powers

Montesquieu presents his liberal constitutionalism in books 11 and 12 of *The Spirit of the Laws*, with the fundamental theme being the liberty and security of individuals. This is more explicitly so in book 12 than it is in the preceding analysis of institutional structures to secure political liberty, but an independent judging power is crucial in both books. This novel institutional teaching arises because of Montesquieu's new definition of liberty. Earlier books praised a depository of the laws for being attentive to individual interests and liberty. The definition of liberty as tranquillity early in his widely read study of England's constitution reaffirms the call for just such a power: "Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security; and in order for him to have this liberty, the government must be such that one citizen cannot fear another citizen" (11.6, 397). Montesquieu's

doctrine of separation or distribution of powers aims to secure this individual tranquillity, and early remarks in book 11 also imply that independent judging is the *sine qua non* of moderate constitutions.<sup>8</sup> He initially offers a terse statement on the separation of powers, one that presupposes the political science elaborated in the preceding ten books (11.4). To prepare for his examination of the only constitution devoted to political liberty, he suggests replacing the classical constitutionalism of virtue, as well as classical political philosophy, with a constitutionalism of liberty, moderation, and separation of powers. Neither democracy nor aristocracy inherently secure freedom; rather, "[p]olitical liberty is found only in moderate governments." Such moderation occurs "only when power is not abused; but it has eternally been observed that any man who has power is led to abuse it." The classical quest for the philosopher king is gravely mistaken: "Who would say it! even virtue has need of limits." These premises yield Montesquieu's classic argument for a distribution of powers: "So that one cannot abuse power, power must check power by the disposition of things. A constitution can be such that no one will be constrained to do things the law does not oblige him to do, or be kept from doing things the law permits him to do" (11.4, 395).

Moderation is the key to political liberty, with the key to moderation being the separation and balancing of political powers by an explicit constitution thereof. Virtue is displaced by security as the guide to politics, leaving the way open for a kind of Newtonian equilibrium among competing forces, passions, and reasonable views in politics. Book 11 therefore begins by assessing the various meanings of liberty: "No word has received more different significations and has struck minds in so many ways as has liberty" (11.2, 394).<sup>9</sup> Montesquieu seeks to correct the republican view that "ordinarily places liberty in republics and excludes it from monarchies," as well as the related prejudice for democracy in which "the power of the people has been confused with the liberty of the people" (11.2, 394).<sup>10</sup> He does not state that monarchy is by its nature free, but it alone naturally enjoys the moderation of a complex constitutional order, the essential precondition for liberty. From the first discussion of monarchical moderation in book 2, Montesquieu emphasizes the intermediate political bodies that check the monarch's power, especially the *parlement*, the judicial depository of political and civil laws. A complex constitutionalism thus provides liberty and moderation by mixing features of monarchy and republicanism—specifically, by blending the modern liberal doctrine of separation of powers with the classical notion of a balance of orders. Montesquieu further emphasizes the necessity of law and structure for liberty, and asserts that the natural home of such complex structures is not republicanism but monarchy. Genuine liberty secured by a balanced governmental structure is the aim: "It is true that

in democracies the people seem to do what they want, but political liberty in no way consists in doing what one wants" (11.3, 395). A democratic people's "independence" from the constraint of law, either by sheer strength of numbers or by the passage of new laws to reflect the majority view, does not provide security and tranquillity for individuals: "Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have the same power" (395). Earlier, when Montesquieu diagnosed the kinds of corruption likely in the traditional forms of government, he began his survey of self-inflicted modes of destruction with democracy. Of particular note was the corruption of a professional judicial power through populism. Democracy self-destructs "not only when the spirit of equality is lost but also when the spirit of extreme equality is taken up," when the people "want to do everything themselves: to deliberate for the senate, to execute for the magistrates, and to throw off (*dépouiller*) all the judges" (8.2, 349–50). *Dépouiller* also means "to disrobe," suggesting that extreme equality particularly rejects the nobility of the robe. Such judges, defined by their distinct learning and professional status, characterize monarchy more than republicanism, and Montesquieu again suggests the need to blend elements of the traditional regimes to attain a proper constitutional balance (see 8.3; 8.6). Still, even in his most thematic discussion of judicial power, in book 11, Montesquieu's characteristic moderation avoids the opposite extreme. He never mentions a formal power of constitutional review of the laws, a significant difference from the power of judicial review propounded by Alexander Hamilton and John Marshall. Although Montesquieu's is the most potent judicial power advocated in liberal political philosophy to that point, both in presentation and substance it adheres to the notion that stealth can enhance power.

When Montesquieu turns to study the English constitution, he begins not with England but with a further development of the theory of separation of powers (11.6). He defines the "three sorts of powers" that constitute "every state," and does so with characteristic complexity, offering three versions. The "three powers" initially are "legislative power, executive power about the things depending on the right of nations, and executive power about the things depending on civil right" (11.6, 396). He further defines the latter two and renames them: with the second the prince or magistrate "makes peace or war, sends or receives embassies, establishes security, and prevents invasions," while with the third "he punishes crimes or judges disputes between individuals. The last will be called the power of judging, and the former simply the executive power of the State" (396–97). The sequel defines liberty as tranquillity of spirit about one's security, and stipulates that "there is no liberty" if the legislative

and executive powers are joined, since "one can fear" that "the same monarch or senate" that would make tyrannical rules would "execute them tyrannically." He further stipulates, "Nor is there liberty if the power of judging is not separate" from the legislative and executive powers. If judging were joined to legislating, "the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator," and if it were joined to executing, "the judge could have the force of an oppressor" (397). Montesquieu then refines his formulation a final time, defining the powers as "that of making laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals." Executive power now covers both foreign and domestic "public resolutions," entailing a narrowed definition of judging. Judicial power is now only "judging" crimes or other disputes and not, as in the second definition, "punishing" them.

In this curious unfolding of a separation of powers doctrine, Montesquieu begins with Locke's formulation—legislative, domestic executive, foreign executive—but then reverses the order of the latter two and develops a distinct judging power. Since Locke effectively fuses his executive and federative powers, the only genuine difference between the theories is that Montesquieu separates "judging the crimes or disputes of individuals" from executive power.<sup>11</sup> This emphasizes a role for reason in the constitution and softens the Newtonian quality of the political dynamic. Montesquieu reinforces this prominence for judging in England's constitution when he shifts from general principles to specific examples. His analysis is oddly abstract at first, referring not to England but to "every state," and employing neither proper names nor examples until he mentions "the kingdoms of Europe," "the Turks," and "the Italian republics." These first examples in this important chapter concern the independence of judging from the other two powers, as the key to separation of powers, moderate government, and liberty. He declares that in most European monarchies, "the government is moderate because the prince, who has the first two powers, leaves the exercise of the third to his subjects." The Turks unite all three powers in their sultan, yielding "an atrocious despotism," while in the Italian republics, which also unite the powers, "there is less liberty than in our monarchies." He cites the Venetian use of state informers to prosecute those suspected of sedition, a "means as violent as in the government of the Turks" (11.6, 397). Only monarchies are moderate, for only there is the judging power independent. This qualifies the earlier statements about liberty and separation of powers, weakening the warning about fusing executive and legislative power while strengthening the declaration that there is no liberty without separate judging. Montesquieu fully endorses these qualifications at the chapter's close and in the sequel, stating that he does not want to "disparage other governments"

or say that "this extreme political liberty should mortify those who have only a moderate one" (11.6, 407). He then addresses anew the topic of moderate liberty, arguing that the "monarchies we know" each have a "distribution" of the three powers which, while not identical to England's, nonetheless "more or less approach political liberty"—for "if these did not approach it, the monarchy would degenerate into despotism" (11.7, 408). For Montesquieu, the greatest concern is whether a government is moderate, not whether it has the traditional form of republic or monarchy.

### Judging in the Constitution of Liberal Tranquillity

When Montesquieu finally addresses England itself, the tone of abstraction lingers as he discusses not how the English constitution is but how it "ought to" or "must" be (*devoir, falloir*). He addresses this tone only at the chapter's close: "It is not for me to examine whether at present the English enjoy this liberty or not. It suffices for me to say that it is established by their laws, and I seek no further" (11.6, 407). Still, his work will not emulate James Harrington's utopian *Commonwealth of Oceana* (1656), which Montesquieu criticizes as taking too much "trouble" to find liberty in the English constitution: "If it can be seen where it is, if it has been found, why seek it?" (11.6, 407; see 11.5, 396). This is not his first criticism of the abstractness of earlier liberal philosophy, and his efforts here seek to distinguish his philosophy from modern rationalism. He seeks the nature and "springs" of an actual constitution and their necessary consequences, and he frames this approach by initially examining the purpose of various states. There is "one nation in the world whose constitution has political liberty for its direct purpose" and he will "examine the principles on which this nation founds political liberty" (11.5, 396). For Montesquieu, an analysis of principles grasps the deeper reality of the English constitution, discerning how the constitution ought to be or is likely to be even if current practice diverges from this essence. This is especially relevant in the case of English judging, since he indicates the populist extreme it is capable of reaching.

The first topic of Montesquieu's analysis of England is, oddly, judging: "The power of judging (*la puissance de juger*) ought not to be given to a permanent senate" (11.6, 398). In all the preceding remarks he describes judging as the third power, and this shift compounds the further oddity that throughout the chapter he adopts a distinctive lexicon for this power. Much later he uses an adjectival form, as he always does with "legislative" and "executive" powers, referring to "the judicial order" (*l'ordre judiciaire*) and "judicial forms" (e.g., 28.23; 28.39). In book 11 and earlier, however, it is "the power of judging."<sup>12</sup> The reason for this becomes evident as the initial analysis of English judging unfolds:



The power of judging ought not to be given to a permanent senate, but ought to be exercised by persons drawn from the body of the people,\* at certain times of the year, in the manner prescribed by law, to form a tribunal which lasts only as long as necessity requires.

In this fashion, the power of judging, so terrible among men, being attached neither to a certain estate, nor to a certain profession, becomes, so to speak, invisible and null. People do not continually have judges present to their view; and they fear the magistracy, not the magistrates. (11.6, 398)

\* As in Athens.

If the distinctive aspect of Montesquieu's separation of powers and constitutionalism is the independence of the judging power, then that power's distinctive aspect, initially, is that it should be invisible and null. The terrible aspect of being judged might connote the Judgment Day or moral censure, although the context suggests the trauma of being hauled into court and losing life, liberty, or property. Either way, judgment can entail loss of the defining aspect of liberty for Montesquieu's political science—the tranquillity arising from a sense of one's security (11.6, 397). In a constitution devoted to liberty, only an independent yet invisible and null judging power ensures tranquillity by first ensuring moderation, rule of law, and separation of powers. Each individual must *feel* that he is being judged by law and offices, not by men and officers, since a particular estate or profession may be thought to have particular prejudices or biases. The second distinctive aspect of these initial remarks on English judging thus is its quite democratic mode. Judging ought to be performed by juries of citizens, “[a]s in Athens,” not by a professional or noble judiciary.<sup>13</sup> Given Montesquieu's earlier discussions of judging, this suggests an English judging power more republican than monarchical. He avoids the words “judiciary” and “court,” since both imply professional bodies and monarchical forms of judging, which in turn raise the terrifying possibility of abusive power. By selecting terminology that fits the supposed diffuseness of this third power, Montesquieu avoids the connotations so evident in Blackstone's description of the same constitution only two decades later. The paradox is that the *Commentaries on the Laws of England* is deeply indebted to Montesquieu, even while its account of English judging is more factually accurate than this emphatic portrayal of a juror-based power.

Montesquieu's putative justification for this democratic account is England's concern for individual security. His final analysis, however, is unflattering: “[T]his extreme political liberty should not mortify those who have only a moderate one. How could I say that, I who believe that the excess even of reason

is not always desirable; and that men almost always accommodate themselves better to middles than to extremities?” (11.6, 407). His complete analysis of judging here and throughout book 11 in fact endorses a much less popular conception of judging, in accord with his critical remarks on popular judging in earlier books. In light of such passages, and his repeated pronouncements on moderation, Montesquieu appears to use juries not only to cloak the judging power but also to cloak professional judges. He prefers that subtle judges quietly persist in and shape liberal constitutions, just as Blackstone depicts them as doing in his less obscure, though hardly stentorian, treatment. Juries are, for Montesquieu, a kind of cloaking device.<sup>14</sup> Invisibility long has been understood as enhancing power, as is evident from Glaucon's tale of the ring of Gyges in Plato's *Republic*, and from its precursor in the *Persian Wars* of Herodotus. For Plato and Herodotus, these episodes bespeak the injustices that men will attempt when no one is looking.<sup>15</sup> Montesquieu, however, seeks to use the freedom of invisibility to achieve a justice defined by humane and tranquil ends, since such judges will imperceptibly mitigate the severity of the law. A cloaking of power quietly reforms the severe moral standards of either classical or Biblical justice.

After equating judging and juries, Montesquieu states that “in great accusations” the accused must pick the “judges” or at least have recourse to what Anglo-American jurisprudence terms a jury strike (11.6, 398). This example of due process confirms the necessity of juries: “The two other powers may rather be given to magistrates or to permanent bodies, because they are not exercised upon any one individual; the one being only the general will of the State, and the other, the execution of that general will” (399). These references to the general will while insisting upon trial by popular juries suggest a more complicated issue than first meets the eye. In his dispute with Machiavelli, Montesquieu criticizes partisan judging that is a tool of faction (6.5). The proper equilibrium of the passions in politics and the quasi-Newtonian balancing of governmental powers will not occur if people continually fear such a prospect. His analysis of the constitution of liberty initially stipulates rotating jurors, because the powers that form the general will and execute it should not be directed at individuals. An intermediate power, the judicial power that lies between arresting and punishing, can protect the individual will from the general will. The difficulty is that the people themselves represent a willful faction, as Machiavelli knew, and when judging an individual some animus can motivate them, as Machiavelli both knew and praised. Immediately after remarking that politics and governance are matters of will, Montesquieu indicates the first limits that should be placed on popular judging. If “the tribunals ought not to be fixed,” the judgments certainly should be, so that “they are never anything but a precise text of

the law." Judgments cannot be "the individual opinion of a judge," for then one would not know "precisely what engagements one has contracted." Similarly, judges must be "peers" of the accused, "so that it cannot get into his mind (*esprit*) that he has fallen into the hands of people inclined to do him violence" (11.6, 399).

This concern with mind or spirit reminds us that Montesquieu's political science speaks not of the classical or Biblical "soul," nor of spirit as divine inspiration, but of mind or spirit understood through scientific analysis of motions and relations.<sup>16</sup> In his constitutionalism the desire for tranquillity leads to the new notion of "self," which accords with a judicializing of politics that more adequately protects tranquillity. In his second analysis of England he reiterates that a constitutionalism of liberty entails the free motion and conflict of individuals, given the freedom of the passions there (19.27). In such a politics it is essential that these interactions be moderate, so that each can achieve as much security and tranquillity as possible. This requires a judging power equal to and independent of the visible powers, one diffusely, invisibly exercised in juries. It also requires, however, that the people as a faction not be able to burst the bounds of law.

When discussing legislative power, he again declares judging invisible but simultaneously provides it with a second, more institutional depository for its moderating functions. In a constitution of liberty there "ought to be" and "will be" a bifurcation of legislative power into a body for the people and a body for the nobles, since in any state "there are always some people who are distinguished by birth, *wealth*, or honors." This quietly echoes earlier remarks that favor a more republican, commercial aristocracy through the selling of noble offices, a practice Montesquieu himself undertook (11.6, 400–401; emphasis added; see also 5.19; 20.22). While justifying an upper house, he seems to replace the judging power with the nobles' legislative power as the third power in the system. This is the first clear sign of Montesquieu's shift from a modern view of the separation of powers to that of the classical mixed regime or balanced constitution: "Among the three powers of which we have spoken, that of judging is in some fashion null. There remain only two; and, as they need a power whose regulations temper them, that part of the legislative body composed of the nobles is quite appropriate for producing this effect" (11.6, 401). He reiterates this movement between modern and ancient versions of the "three powers" when summarizing "the fundamental constitution" of England: "As its legislative body is composed of two parts, the one will be chained to the other by their reciprocal faculty of vetoing. The two will be bound by the executive power, which will itself be bound by the legislative power." Such opposing structures might yield only gridlock, but since "by the necessary motion of

things, they are constrained to move, they will be forced to move in concert" (11.6, 405). This necessary motion, which draws in part upon Newtonian law and Machiavellian necessity, dictates a constitutionalism of moderate faction. His subsequent remarks on the "concert" or "harmony" among the three powers therefore blend the ancient and modern definitions of these powers, denoting both functions and rival claims to rule (e.g., 11.8, 409; 11.12, 412–13; 11.19, 428). The apparent eclipse of the judging power by the legislature's upper house is one part of this complex treatment of constitutionally balanced powers.

After describing an executive power that contains several exceptions to the separation of legislative and executive powers, Montesquieu describes "three exceptions" to the separation of judging from legislative power, each founded on "the particular interests of" the accused (11.6, 404). There is no talk of judicial review, but these passages clearly endorse a skilled, prudent judging power. The putatively noble house of the legislature should judge in order to protect against popular faction and to exercise a greater discretion than is possible with juries. This strongly qualifies the republican conception of English judging he initially presented, blending republican with monarchical modes. This blending occurs in part through the implicit openness of a "noble" house whose members sell their offices and titles, thereby republicanizing a decrepit, hereditary body and injecting the energy and ideas of a new commercial class.<sup>17</sup> These three exceptions are striking, not least because the opening statement about judging in this constitution declared that it should not be given to a permanent senate (11.6, 398). The first exception develops the stipulation about judgment by peers, here called "the privilege of the least citizens of a free state" (399, 404). Nobles must be judged by the upper house of the legislature because "[g]reat men are always exposed to envy; and if they were judged by the people, they could be endangered" (404). The third exception also ensures such protection, since in popular accusations the people are an "interested party" represented by the lower house of the legislature, who will feel that someone has violated "the rights of the people" and committed "crimes" (404). These two restrictions on popular judging are Montesquieu's constitutional response to the Machiavellism of making the people prosecutor, judge, and jury. Posing these points in a series of rhetorical questions, Montesquieu's verdict brings to bear the power of his style: "No: it is necessary, in order to preserve the dignity of the people and the security of the individual" that the popular house prosecute before the jury of the upper house, since the latter "have neither the same interests nor the same passions" (404).

Montesquieu's full analysis of judicial power in England recommends, then, a mixture of the popular with the professional or "noble." Rotating juries make it both less terrible to the people and seemingly prevent its domination

by any one faction in this active, partisan constitution. Still, if liberty requires such popular judging, it must be limited so as not to endanger that very liberty. Having begun this analysis by citing Athens as a model of rotating juries, his final words on judging here sound the opposite note. The third exceptional exercise of judging by the upper house marks "the advantage of this government over most of the ancient republics," for it avoids the "abuse" that "the people were at the same time both judge and accuser" (11.6, 398 n. a, 404). The second, or middle, exception confirms that republican judging must be modified in the direction of medieval and modern monarchy to secure liberty and peace of mind for all: the upper house must have a broad, largely undefined power of equity. The law, by definition both "clairvoyant and blind," might be "too rigorous" in certain cases. Since citizen jurors are "but the mouth which pronounces the words of the law," able to "moderate neither its force nor its rigor," the upper house is "a necessary tribunal" once again: "it is for its supreme authority to moderate the law in favor of the law itself, by pronouncing less rigorously than the law" (11.6, 404). Montesquieu prescribes few bounds for this "supreme authority," and even these vague limits imply judicial discretion as to compliance itself. They do suggest a passive power confined to particular cases, and his other discussions of criminal law and judicial procedure imply further constraints on this equity power, such as the legislature's power to pass a bill of attainder overriding a judgment. Even so, this second exception establishes an appellate judging power for discretionary interpretation of the law, to be exercised largely at the discretion of the upper house whenever a case is appealed to it. This is a further crucial exception to the republican mode of judging initially presented in the chapter, for it establishes a characteristically monarchical capacity to judge according to the "spirit" of the law. The equity power termed "necessary" in the English constitution seems greater, in fact, than what Montesquieu earlier ascribed to monarchical judges, who follow the law "when it is precise" and seek its spirit only when it is not. Here, he accords the upper house supreme authority to judge in a way that moderates all laws, precise or not, by finding the law's moderate spirit (6.3, 311; 11.6, 404).

The monarchical character imparted to judging in the constitution of liberty by these three exceptional grants, especially the central one, does not fit easily with Montesquieu's initial treatment of English judging. This difficulty calls to mind the very first discussion of judging in *The Spirit of the Laws*, which remarks that England has transformed itself from a monarchy to a republic by abolishing "the prerogatives of the lords, clergy, nobility, and towns," thus removing "all the intermediate powers that formed their monarchy" (2.4, 247-48). Because the later discussion of a judicial power in the upper house restores what England was said to have removed, and given the many discussions of the

advantages for individual security of a complex, moderating, judicial depository of laws, Montesquieu's earliest discussion of judging seems to constitute a warning. The loss of monarchical judging in England could make it "a popular state or else a despotic state," and subsequent remarks on Caesar, Cromwell, and Machiavelli—and about "throwing off" independent judges—indicate that, for Montesquieu, purely popular governments are at least potentially despotic. The early analysis of judicial power is the first of many warnings about the danger of despotism stemming from those efforts to "favor liberty" that strip away all non-egalitarian powers or privileges (2.4, 248). Montesquieu uses the phrase "to favor liberty" (*pour favoriser la liberté*) again when discussing Roman judging (11.18). In both cases it warns against abolition of a distinct, noble judicial order. Without the exceptional grants of judicial power to England's upper house—the most important of which the English had supposedly abolished—its constitutionalism might be even more "extreme" than Montesquieu ultimately declares it to be (11.6, 407).

The only preparation in this analysis of the English constitution for the equity power granted to such quasi-noble judges is the initial praise for monarchies in contrast to despotisms and republics, which affirms that most European kingdoms are moderate because the prince leaves the judging power to his subjects (11.6, 397). These subjects, it turns out, are not only the jurors but also the professional judges in these monarchies, such as those in the *parlements*. One lesson of this analysis is that Montesquieu's support for the selling of noble offices would make a monarchical judiciary more republican. Conversely, security for liberty requires that judging in republics, especially those hiding under the form of monarchy, should become more monarchical—though in the properly moderated mode of an only quasi-aristocratic judicial class. Such a power must be cloaked so as to secure the tranquillity of the accused and to protect judges from those jealous of, or opposed to, their moderating power. This does not mean that judging is to dominate, plainly or imperceptibly, the legislative or executive powers. To allow it to do so, or to attempt to, would violate Montesquieu's principle of distribution of powers and squander the distinctively moderating capacity of judging. In the remainder of his study of constitutional liberty in book 11, Montesquieu examines the historical antecedents of such a judicial power, the disadvantages of its absence, and the prudent measures a humane spirit might take to judicialize politics.

### Gothic Jurisprudence, the Decline of Rome, and Liberty

Montesquieu's political philosophy is not Anglophilia writ large, for in the bulk of this book on constitutionalism, he develops his conceptions of the separation

of powers and of judicial power by examining the medieval Germans and the ancient Greeks and Romans. His political science differs from its liberal predecessors by observing the particular phenomena of diverse governments and peoples, and by favoring prudent adaptation of principles to circumstances rather than the imposition of a theoretical blueprint. Certain principles and practices nonetheless are better, and even best, either for all people or in given circumstances, and by making the reader sort through these matters Montesquieu hopes to inculcate a prudence true to the realities of politics. In the sequels to his analysis of English constitutionalism, he explores how moderate constitutions are achieved or lost among various peoples and circumstances, from medieval and modern Europeans in monarchies or mixed regimes to ancient Greeks and Romans in republics or despotisms. Amid this messy discussion of examples ancient, medieval, and modern—and not in the analysis of England—Montesquieu defines the best form of government. He continues with the themes of moderate government, separation of powers, and a judicial depository of laws after the long analysis of England, defending the moderate approximations of liberty that are suited to moderate monarchies (11.7). Such monarchies aim not at liberty but at “the glory of the citizens, the state, the prince,” fostering a “spirit of liberty that can, in these states, produce equally great things and can perhaps contribute as much to happiness as liberty itself” (11.7, 408). His humane liberalism avoids not only the extreme of overt despotism but also its opposite, the morally perfect happiness of Aristotle or the Bible. This plea for moderation sets the stage for the usually neglected analysis of constitutionalism in the remainder of book 11. Montesquieu consolidates his earlier teachings about balanced and complex constitutions into clear statements of philosophic judgment, with judicial power at the heart of the discussion. These remarks also prepare for his prudential advice on judging and due process in the sequel, his book on individual liberty.

Montesquieu turns to criticizing the classical conception of monarchy so as to drive home his argument that a complex political order that gradually evolves toward liberty is the best-tempered government (11.8). England's Cromwellian tendencies are problematic, but the ancient republics are no better, since they had “no clear idea” of the mixed, moderate government that constitutes a proper monarchy. This analysis of the origins of Europe's moderate monarchies echoes earlier themes, including the claim that if one “reads the admirable work by Tacitus, *On the Mores of the Germans*, one will see that the English have taken their ideas of political government from the Germans. This fine system was found in the forests” (11.8, 408–9; 11.6, 407). This “Gothic government” stems from a spirit of freedom among the early Germans that established certain laws or institutions and then informed their gradual evolution. Montesquieu announces

his discovery of the seed of the separation of powers and moderate government, and foreshadows the “historical” jurisprudence about the evolution of laws in the closing books of the work:

Here is the origin of Gothic government among us. . . . it was a good government that had within itself the capacity to become better . . . soon the civil liberty of the people, the prerogatives of the nobility and of the clergy, and the power of the kings found themselves in such concert, that I believe there has never been a government on earth as well tempered as that of each part of Europe during the time that this government continued to exist; and it is remarkable that the corruption of the government of a conquering people should have formed the best kind of government men have been able to imagine. (11.8, 409)

The best government is not the child of philosophy, ancient or modern, but of rustic Germans gradually corrupting their government to moderate it. This declaration swiftly leads to verdicts on other failed candidates, theoretical and practical. Classical Western philosophers, such as Aristotle, have fundamentally misunderstood monarchy. The Germans achieved a government better than any imagined one, no matter the efforts of Plato or More, Machiavelli or Locke (11.9–10; see 29.19).

Having defined the best government, Montesquieu returns to the theme of judging through a discussion of kingship in heroic Greece (11.11). If the medieval Germans had read old books, they might have learned from Greek errors about judging, thereby improving their Gothic constitution and their liberty—although, as the closing books indicate, the Germans stumbled upon the right organization over several centuries. He cites Aristotle three times in discussing early Greek monarchy, along with Thucydides and Plutarch, though none of these ancients grasped that the crucial flaw of the heroic constitution was its misplaced judging power. Of “the three powers,” the people had the legislative, while the king had both executive and judging, whereas in the superior, modern “monarchies we know,” the “prince has the executive and the legislative power” but “does not judge” (11.11, 410–11; see 11.7; 11.6). The heroic Greek monarchy self-destructed because it “badly distributed” the three powers, for when an executive with the judging power “became terrible,” he was attacked by the people and their legislative power. “It had not yet been discovered that the prince's true function was to establish judges and not to judge,” and neither statesmen nor philosophers among the Greeks “imagin[e]d the true distribution of the three powers in the government of one alone” (11.11, 411). Throughout *The Spirit of the Laws* Montesquieu suggests that while the Romans enjoyed this

intermittently, it is the medieval Germans who slowly developed this best form of government and enjoyed such moderating benefits as due process and mild penalties. If Montesquieu considers the Germans to be "our fathers" on this point (6.18), his political philosophy obviously amounts to more than Gothic romanticism. It is Montesquieu who defines this complexity and independent judging as the key to a humane constitutionalism and who discerns that its principle can and should be communicated to all peoples, places, and times: "Among a free people who have legislative power . . . the masterwork of legislation is to know how to place well the power of judging" (11.11, 411). The elided phrase suggests that this maxim concerns only peoples "enclosed within a town," but its broader significance becomes clearer when we recognize that this is one of three places in the work where Montesquieu designates a *chef d'œuvre de la législation*. He first employed such praise, in this work devoted to educating legislators, when adumbrating the sort of moderate constitutional order he formulates in book 11: "In order to form a moderate government, one must combine powers, regulate them, temper them . . . this is a masterwork of legislation that chance rarely produces and prudence is rarely allowed to produce" (5.14, 297). The one subsequent use of the phrase praises the constitutional reform of judicial power in thirteenth-century France by King Louis IX as "a masterwork of legislation" (28.39, 855). Two of the three references to masterworks of constitutional founding or reform in *The Spirit of the Laws* concern judging, and only the proper placement of this power is termed "the" masterstroke.

After this climactic teaching, his final analyses of judging and constitutional liberty concern Rome. His task in the remainder of the book is to examine how the principles discerned in studying England, modern Europe, medieval Germany, and ancient Greece might be clarified by this most famous of governments, since "[o]ne can never leave the Romans" (11.13, 414). Judging plays no small part in this examination of liberty and constitution, and not only because the second longest chapter in the book concerns judging in Rome. Montesquieu turned to Rome early in his philosophical career and never left it, from his earliest extant work, "The Policy of the Romans in Religion" (1716), to the *Considerations on the Romans* (1734), to his masterwork. He grappled not only with republican and imperial Rome but also with St. Augustine's criticism of Roman pride, since his own humane philosophy seeks a new City of Man and not a City of God. The *Considerations* clearly shows a debt to Machiavelli, although *The Spirit of the Laws* shows less of an agreement with the *Discourses*. Even the *Considerations*, though, rejects Machiavelli's endorsement of Roman populism and his animus toward the nobles, and that disagreement informs this last section of book 11.<sup>18</sup> The theme here is the downfall of Roman

government, both its imperfect but moderate monarchy and its republic, due to imbalances of power. A weakening of the Roman senate and other intermediate powers was always the price paid for strengthening the power of the people, and this populism ultimately brought tyranny. Montesquieu employs "the three powers" in dual senses here, as in the analysis of England. The most moderate and stable yet dynamic constitution is one that separates the three political powers—legislative, executive, judging—while blending this with recognition of three claims to rule—those of the one, the few, and the many. In describing the tragedy of this decline into Roman populism and the reactionary lurch to tyranny, he terms the people's decimation of the middling, senatorial power "a frenzy of liberty" (11.16, 419). Throughout the account, he links the senate and judging, suggesting that the latter power must always be kept away from the dominant or extreme powers, whatever they may be. He includes England in some early "general reflections" on Roman government, when describing the straining of its "springs" (11.13). Montesquieu hopes that England will maintain the kind of balanced constitution, with a preponderant middling power, that Rome failed to keep. Modern liberal constitutionalism should comprise a perpetual struggle of factions and powers, the constitution always in search of itself, always moderately moving within a certain balance of action and reaction. States "often are more flourishing during the imperceptible shift from one constitution to another than they are under either constitution." In such a moment "all the springs of the government are stretched," and there arises "a noble rivalry between those who defend the declining constitution and those who put forward the one that prevails" (11.13, 415; see 5.1, 273; 19.27, 576).

Montesquieu closes the book on constitutional liberty by describing how the Romans could not hold this middle way, oscillating instead between populism and tyranny (11.14–19). Judging is at the center of this tale, either as a football contested by rival factions or an instrument of popular tyranny. He concludes with separate chapters on each of the three powers in Rome, understood in modern, separation-of-powers terms, and a final chapter on the provinces. His examination of legislative and executive powers reinforces his theme that a popular "frenzy of liberty" caused a decline to despotism (11.16–17). Rome's nadir, however, concerns its judicial power, and his extensive examination of it provides the occasion for announcing fundamental lessons (11.18). This remarkable discussion compares Roman, English, and French judicial practices, and in doing so clarifies the relationship between the topics of books 11 and 12, constitutional liberty and individual liberty. Montesquieu analyzes several stages in the history of both civil and criminal judging in Rome, noting how each jurisdiction was distributed among the competing orders, and the specific rules shaping administration of justice. He commends the professional

judges of the patrician, senatorial class known as praetors, who established a temporary pool of jurors each year and formed a jury for each suit, remarking that the "English practice is quite similar." Indeed, praetors selected jurors "with the consent of both parties," a practice "very favorable to liberty" and similar to jury strikes in civil suits "in England today" (11.18, 422). Of five historical stages of criminal judging the third, which established the tribunes of the plebs, brought the long process of reducing patrician judging power to a populist extreme. The "affair of Coriolanus," a constitutional crisis as serious as any other clash between patricians and plebs, saw the tribunes judging him in the archetype of "public accusation" that Machiavelli praised in the *Discourses* and which Montesquieu criticized (see 6.5).<sup>19</sup> He declares that the tribunes' judging could be "odious," which anticipates his later judgment that their very establishment pulled Rome toward popular despotism. He praises the balance later achieved between the senatorial class of judges and temporary juries, recalling that "[o]ne has seen, in chapter six of this Book," that such juries are "favorable to liberty in certain governments" (11.18, 425). He then reinforces the link between liberty and complex, professional judging by lamenting the populist judicial reforms of the brothers Gracchi, tribunes of the people in the second century B.C. This episode prompts the only thematic statement in this book on the crucial relationship between constitutional liberty and citizen liberty. He observes that "the three powers may be well distributed in relation to the liberty of the constitution, though they are not so well distributed in their relation with the liberty of the citizen." In Rome, the only way that the senate could balance the people, who held by then some or most of all three powers, was to retain its traditional part of the judicial power, and "it had a part when judges were chosen from among the senators." A spirit of extreme democracy upset this balance: "When the Gracchi deprived the senators of the power of judging, the senate could no longer resist the people. Therefore, they struck at the liberty of the constitution, in order to favor the liberty of the citizen; but the latter was lost along with the former. Infinite ills resulted . . . and the chain of the constitution was broken" (11.18, 425-26).

Montesquieu's political science of moderation counsels that constitutional changes which theoretically advance individual liberty in fact can cause its decline. The liberty embodied by a complex constitution is indispensable to the liberty of the individual, a lesson that holds true especially for judicial power. From book 2 to the end of book 11, Montesquieu steadily warns that constitutional changes that directly or quickly seek individual liberty often backfire, a warning usually made in reference to judging. The error of the Gracchi prompts him to praise "the ancient French laws" about judging, since their practices were informed by "distrust" about "men of [public] affairs" (11.18, 426). The Gothic

separation of powers achieves moderation and liberty, especially by separating judging from factional politics through a judicial depository of the laws. The sequel reinforces the idea that the worst imbalance of power is misplaced judging by highlighting the judicial abuses in provincial governments where a single magistrate was neither legally learned nor balanced by juries (11.19, 428-30).

Montesquieu closes his book on constitutional liberty by reinforcing the link between moderation, separation of powers, and degrees of possible liberty (11.20). He explains that he has not studied this link "in all the moderate governments we know," so that there will be "thinking" left for the reader to do (11.20, 430). For the philosopher, thinking is a kind of doing in itself. For this philosopher, thinking is meant also to instruct political doing. A crucial if imperceptible purpose in the remainder of *The Spirit of the Laws* is to educate judges and constitutional legislators about the cloaking of power, both its benefits and the means to achieve it. By instructing, and instructing about, the subtle judge, Montesquieu seeks to place into circulation the coin of a universal commerce in the rules and formalities of judging, toward the end of achieving humane, moderate government.