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MONTESQUIEU, JUDICIAL DEGENERACY, AND THE UNITED STATES SUPREME COURT

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I. Introduction

In a 2003 case called *Lawrence v. Texas*,¹ the Supreme Court invalidated a Texas statute that criminalized private acts of homosexual sodomy. The Court found that the statute violated the Due Process Clause of the Fourteenth Amendment, and went on to hold that statutes criminalizing heterosexual sodomy are unconstitutional as well. John O. McGinnis and I have published a detailed critique of this case,² and I want to stress that we believe the Texas statute was a pernicious law. For obvious reasons, any enforcement of the statute was bound to be extremely rare, painfully capricious, and unlikely to accomplish any useful public purpose. But that does not necessarily imply that it was unconstitutional.

Rather than discuss the details of legal doctrine, I want to focus here on the nature of the Court's approach to its judicial task, in part because the first paragraph of Justice Kennedy's majority opinion may be the most

self-consciously philosophic pronouncement the Court has ever issued. This opening paragraph comprises the following six sentences:

[1] Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. [2] In our tradition the State is not omnipresent in the home. [3] And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. [4] Freedom extends beyond spatial bounds. [5] Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. [6] The instant case involves liberty of the person both in its spatial and more transcendent dimensions.³

While this passage is clearly meant to resonate with philosophic profundity, I believe that it is literally incomprehensible.

- Consider the first sentence: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.” Is liberty a divinity, like Nike or Eros? If not, the Court’s reification or personification of liberty accomplishes nothing except to dodge the obligation to say what exactly it is that protects against unwarranted intrusions. Unspecified unwarranted intrusions, I might add.
- Sentence [2] is similarly high flown, and empty: “In our tradition the State is not omnipresent in the home.” Does this mean that the State dwells in some rooms of the house but not others? What would that mean, exactly? And if that is not what the sentence means, what does it mean?

- Sentence [3] says: “And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.” When you look at the previous sentence in light of this one, you might suspect that the author believes that “omnipresent” means “being a dominant presence.” Of course that is not what the word means, and one cannot help wondering whether the author cares more about the sound of words than about their meaning. In any event, it is hard to be sure about much of anything here. Are our lives and our existence two different things, as this third sentence suggests? Who claims that the State should be a “dominant presence” in every sphere of our lives, and what is the point of denying such a far-fetched claim?
- Sentence [4] creates more mysteries when it declares: “Freedom extends beyond spatial bounds.” How exactly does freedom extend beyond spatial bounds? By spreading through space despite some kind of physical obstacles? By spreading beyond space itself into some other dimension? What dimension would that be? Maybe the sentence just means that freedom can entail more than an absence of physical obstacles to physical movement. But who has ever denied such an obvious proposition?
- In sentence [5], we finally seem to get the main point of the paragraph: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” The idea seems to be that there should be limits on governmental intrusions on “freedom of

thought, belief, expression, and certain intimate conduct.” But that is not what the sentence says. Instead, we have “liberty” presuming an “autonomy” that includes certain forms of “freedom.” Does that mean that liberty and freedom are different things, and that both of them are different from autonomy? What would the differences be? As to “an autonomy of self,” is this just a pointless redundancy, or are we meant to contrast autonomy of self with an autonomy of something other than self? What might such a thing be?

- In sentence [6], we are back to what looks like complete gibberish: “The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” “Transcendent dimensions” has a splendiferous ring to it, but the term has no obvious determinate meaning at all in this context. And that difficulty is aggravated by the author’s assumption that there are degrees of transcendence among these transcendent dimensions.

When the United States Supreme Court opens a judicial opinion with a pronouncement whose meaning can only be guessed at, one may be tempted to pass on with a chuckle or an embarrassed sigh. But Justice Kennedy has made that hard to do, for *Lawrence* also repeats a similarly nonsensical flight of rhetoric from the opinion he coauthored in the 1992 *Casey* decision that reaffirmed the right to abortion. Here is the passage he quotes:

These matters [namely, marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁴

The analytical problems here are similar to the problems with *Lawrence's* opening passage. What exactly would be involved, for example, in defining one's own concept of existence, meaning, etc.? Americans surely have a right to define words however they wish, especially if they do not care to communicate with other people. But how would one define one's own "concept" of these things? Perhaps by adopting an opinion that others might not share? People do that all the time, without the Supreme Court's assistance.

In any event, whatever this "heart of liberty" might be, it is difficult to imagine what it has to do with the concluding sentence, which says: "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." If the State could find a way to compel an individual to believe one thing or another about such matters as existence or the universe, we are told that such beliefs could not "define the attributes of personhood." Does this mean that the attributes would be determined in some other way? Or that personhood would then have no

attributes? Or that the person would have no personhood? What is personhood, anyway, and how does it differ from its attributes?

There are three legal, rather than mystical, propositions that the Court might be groping for in this passage, and I agree with them all:

(1) Supreme Court precedents protect the freedom to make certain choices about matters relating to sex;

(2) people are legally free to think whatever they find themselves thinking about existence, meaning, the universe, and the mystery of human life; and

(3) the First Amendment sharply limits the power of government to attempt to compel beliefs about these matters.

But what could propositions (2) and (3) possibly have to do with the legality of governmental restrictions on abortion or sodomy? Aborting a pregnancy is not a thought or a belief, nor is an act of sodomy.

Perhaps the Court has ascended to one of those “more transcendent dimensions” referred to in *Lawrence’s* opening passage, and perhaps such elementary distinctions as that between beliefs and acts have been transcended in that dimension. Unfortunately, there are indications that something like this may well have occurred.

First, *Lawrence* relies on the doctrine of “substantive due process,” which has no basis in the text of the Due Process Clauses, and which the Supreme Court has never even attempted to derive from that text. Second,

the opinion in this case utterly demolishes all of the doctrinal restraints that previous Courts had adopted in an effort to cabin the reach of substantive due process. Third, Justice Kennedy puts forth a series of patently sophistical arguments, and fails to present even a single valid legal argument. Fourth, the case establishes no intelligible legal rule for the future. In *Lawrence*, the Court's jurisprudence is reduced to empty bombast and the naked will of Supreme Court majorities.

Rather than defend these propositions here,⁵ I would like to explore the background of this appalling judicial performance, and offer some suggestions about its significance. Parts II and III briefly discuss the roots of judicial hubris in American constitutional law. Part IV looks for the deeper roots of judicial activism in the political philosophy of Montesquieu and in the practice of the English common law, where it has a defensible theory to support it and a long history of largely benign effects. Part V suggests that the hubristic activism on display in *Lawrence* comes at least in part from a mismatch between Montesquieu's politically moderating judiciary and the novel American device of judicial enforcement of a written constitution. I conclude that the U.S. Supreme Court is neither authorized nor qualified to correct written human law through appeals to higher laws, including the natural moral law.

II. Origins of Substantive Due Process

If one wanted to offer a completely noncontroversial example of something that violates the natural moral law, slavery would be a pretty good choice. Indeed, most of us today could say what Abraham Lincoln said: “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel.”⁶ For contemporary Americans, indeed, it may come as some surprise to learn that slavery has until quite recently been a well accepted practice in a great variety of human societies.⁷ To take just one example, I am unaware of any record of any moral objection to slavery by anyone—slave or free—in the ancient Greek and Roman world from which our own civilization descends.

Alexis de Tocqueville offered the following explanation for this seemingly odd fact:

All the great writers of antiquity were a part of the aristocracy of masters, or at least they saw that aristocracy established without dispute before their eyes; their minds, after expanding in several directions, were therefore found limited in this one, and it was necessary that Jesus Christ come to earth to make it understood that all members of the human species are naturally alike and equal.⁸

As Tocqueville was acutely aware, of course, slavery and slave trading were widely practiced in Christendom, and vigorously defended by leading Christians, for many centuries after Jesus lived on earth. Certain Christians eventually did lead a determined effort to abolish slavery, but that effort faced tremendous opposition from non-Christian cultures throughout the

world and from some thoroughly Christian polities as well, including several American states.

The obvious explanation for the establishment and persistence of slavery, at least in the United States, involves economic self interest and the political forces generated by economic interests. Our independent federal judiciary is insulated from such forces by the life tenure given to its members. One might therefore not expect these judges to be directly influenced by the pressures to which elected politicians are always subjected. How then do we explain the behavior of the United States Supreme Court, which created special protections for slavery out of some exceedingly thin constitutional air?

In the 1857 *Dred Scott* decision, the Court held, without any basis in the constitutional text, that black slaves and their descendants could never become American citizens.⁹ In addition, the Court held that an 1820 statute that outlawed slavery in the territories was unconstitutional.¹⁰ This second conclusion was based on the Due Process Clause of the Fifth Amendment, which forbids the federal government to deprive any person of life, liberty, or property, without due process of law. In other words, whenever the government takes away your life, liberty, or property, as it is often entitled to do, it has to give you due process of law first. *Dred Scott* was the first case in which the Supreme Court used the Due Process Clause to protect subs-

tantive rights, and Chief Justice Taney's entire analysis was comprehended in the following exclamation:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.¹¹

In dissent, Justice Curtis explained in considerable detail why Taney had to be wrong. The essence of Curtis's argument was that the right to hold human beings as property is founded entirely on positive law, having no basis in natural law, and that this property right must be lost when the owner voluntarily brings such men within a jurisdiction that does not recognize the right.¹² Taney himself acknowledged that Congress had the authority to legislate for the territories,¹³ and the slave states themselves recognized their own right to forbid the importation of slaves, notwithstanding the due process clauses in their own state constitutions.¹⁴ The Due Process Clause of the Fifth Amendment, whose lineage traced to Magna Charta and which had an analogue in the law of every American state, had never been thought to have any bearing on the right of legislatures to regulate or abolish slavery. Taney gave no reason for suddenly imputing any such substantive effect to the Clause, which would among other things imply that the Fifth Amendment silently withdrew from Congress its unquestioned power to regulate or ban the slave trade.

Dred Scott proved to be a pretty good paradigm for the future development of what came to be called substantive due process. Offering no reason at all to explain how the due process provision of the Constitution could suddenly operate to invalidate a substantive law that was well-established at the time the provision was enacted, Taney must simply have believed that his political and moral judgments were superior to those of the be-nighted legislature.

One might have expected substantive due process to be buried along with *Dred Scott* after the Civil War, especially inasmuch as a new due process clause, applicable to the state governments, was included in the very constitutional amendment that overruled *Dred Scott's* holding on the meaning of citizenship. But that is not what happened. Instead, this doctrine from *Dred Scott* has popped up repeatedly over the years to create new constitutional rights under the Fifth and Fourteenth Amendments. There have been many dissents from these decisions, and there have even been periods when the doctrine had little effect on legal developments. But the doctrine has always come back to life.

The latest phase of rights-creation began in 1965, when the Court created a right of married couples to possess contraceptives.¹⁵ The Justices then created a number of other new rights connected with sexual freedom, the most important of which was the right to abortion in *Roe v. Wade*.¹⁶ This series of decisions was something brand new in America. One might

call it “liberation jurisprudence,” or perhaps the constitutionalization of Hugh Hefner’s Playboy Philosophy.¹⁷

Lawrence is the latest step in the development of that jurisprudence, and the opinion in *Lawrence* puts on full display the Court’s supreme self-confidence in its own moral judgment and in its own intellectual brilliance. Whether one sees in this performance the Wizard of Oz or Hans Christian Andersen’s naked emperor, it is worth asking how we got here.

III. Self Evident Truths

The proximate cause of our contemporary Supreme Court’s moral self-confidence is probably *Brown v. Board of Education*,¹⁸ in which the Justices unanimously overturned half a century of precedent and declared segregated schools unconstitutional. This 1954 decision had two especially salient features. First, the Court’s opinion contained no legal reasoning. It was based instead on pop psychology, of a kind that rather resembles the pop philosophy at the beginning of the *Lawrence* opinion.¹⁹ Second, the Court’s opinion was a tremendous political success insofar as it came to be seen as the first major step in the civil rights revolution that took place about a decade later.

The combination of these two features led to the view, especially prominent in the press and the academy, that the Supreme Court’s most important function is to provide moral guidance to a morally retarded, or at

least morally challenged, nation. This view makes sense only on the highly questionable premise that the Constitution as written permits Jim Crow segregation, and that the *Brown* Court had to look beyond the Constitution in order to reach what our generation now regards as the incontestably right result.

I doubt the validity of the premise. Furthermore, *Brown* may have had less practical effect than we usually attribute to it.²⁰ But the myth of the Supreme Court as the people's moral shepherd took hold nonetheless. The classic statement was offered a few years later by Alexander Bickel of the Yale Law School:

The function of the Justices—and there is no question but what this accords with the great authoritative body of opinion on the subject—is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract “fundamental presuppositions” from their deepest selves, but in fact from the evolving morality of our tradition. No doubt, as the late Zechariah Chafee, Jr. wrote, “the man himself is a part of what he decides.” But, as he concluded, “if law is the will of the Justices,” it is “the will of the Justices trying to do that which is right.”²¹

Leaving aside the obvious echoes of this passage in Justice Kennedy's laughably pompous pseudo-philosophy, and leaving aside Bickel's unsubstantiated allusion to an authoritative body of opinion, I want to focus attention on Bickel's interesting suggestion that “fundamental presuppositions”

can be extracted from a changing tradition, and that judges can find those “presuppositions” within themselves. The idea here seems to be that a certain type of liberal education will enable a lawyer to find unchanging truths within himself through some sort of intellectual intuition.

In another passage, Bickel approvingly quotes Justice Frankfurter’s claim that judges “must have something of the creative artist in them; they must have antennae registering feelings and judgment beyond logical, let alone quantitative, proof.”²² That would certainly be one way to describe Anthony Kennedy. But why in the world would one think that these lawyers have better moral antennae than anyone else? Can such antennae really be developed through the kind of studies that lawyers and judges specialize in (supplemented, of course, with a little philosophy and poetry)? The idea is sufficiently odd, but also sufficiently widespread, at least in legal circles, that I think it deserves serious attention.

The key, I suspect, lies in a notion of self-evident truths accessible to feelings and judgment beyond logical . . . proof.”²³ This may be usefully compared with what I think is the closest thing we have in America to an official statement of a national political philosophy:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these

ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.²⁴

This is all so familiar and so publicly respectable that Americans tend to regard these as self-evident truths indeed. These propositions, moreover, and especially the assertion about inherent and unalienable rights, seem to be the core of what is ordinarily taken for the natural moral law by our Supreme Court. Do these claims hold up to scrutiny?

Self-evident truths certainly do exist. Leaving aside abstract propositions—that the whole is greater than the part, for example—no one of ordinary experience should require a proof that all human beings are animals. But is it really self-evident that every human being is endowed by his creator with rights to life, liberty, and the pursuit of happiness? Our most obviously inherent qualities are the ones we share with other animals, and few of us believe that other animals have such inherent rights. Think for a moment about the films most of us have seen of life among the animals of the Serengeti plain. When a pride of lions attacks a wildebeest, I do not suppose anybody objects that the lions have violated the victim’s “right” to life and liberty. And when a pack of hyenas comes along and drives the lions from their kill, I do not suppose that anyone would seriously maintain that the lions have a “right” to the property they acquired by mixing their labor with the wildebeest’s flesh.

The reason we do not say that beasts have “rights” that are good against other beasts is the same reason that we do not think any of them has a “right” to be safe from lightning strikes. Similarly, we do not think that human beings have a “right” to be spared by a hungry lion, or by a lightning bolt. In ordinary usage, a right implies a correlative obligation to respect that right, and thus at least the possibility of that obligation’s being enforced, and we do not believe that it makes any sense to impute such obligations to beasts or to thunderstorms.

The rights that we actually see enforced—especially but not only legal rights—arise from human institutions. And, of course, countless cultures other than our own have lived for long periods without our notions of inherent rights and natural equality, as Tocqueville has reminded us. None of this disproves the substantive claims in the Declaration of Independence, but it surely suggests that their truth is a long way from being self-evident.

Rights could, of course, be inherent without necessarily being natural in the same sense that our bodies are natural, if they were given to us by God. We find this suggestion in the Declaration of Independence—which holds that we are self-evidently endowed by our Creator with unalienable rights—but that suggestion cannot resolve the difficulty. The language used in the Declaration could be another way of saying that such rights are natural, in which case the reference to the Creator adds nothing at all to the claim that the existence of natural rights is self-evident. Or, it could be a

way of saying that the existence of a God who endows us with unalienable rights is self-evident. This is manifestly false, as one can easily recognize by considering the great difficulty that many people have in maintaining their belief in God even when they strongly desire to keep their faith.

Whether one views these unalienable rights as given by nature or by God—or by what the Declaration ambiguously calls “the Laws of Nature and of Nature’s God”—their existence is hardly self-evident. And no matter how strongly one may wish it were otherwise, I think one must say the same about the Declaration’s claims with respect to the purpose of governments and the provenance of their just powers.

The Declaration, of course, says that “we hold” these truths to be self-evident, which tacitly acknowledges, I think, that they are not self-evident, at least in the ordinary sense of the term: evident of itself without proof.²⁵ One might say: “I hold that man alone among the animals has an immortal soul.” But one would not ordinarily say: “I hold that men must eat in order to live.” Perhaps the Declaration’s paradoxical treatment of the propositions it asserts is merely a way of indicating that a political manifesto is not the place for efforts to prove the truth of fundamental political principles. That would be a sign of unusual philosophic sophistication in what is surely among the greatest of all revolutionary proclamations.

But in that case, we should be able to find the proofs elsewhere, and presumably in the seminal works of liberal political philosophy, such as

Locke's *Second Treatise of Civil Government*. Unfortunately, I think that arguments establishing the truth of the Declaration's assertions cannot be found there either. Instead, what one finds are assertions—that men are “all the workmanship of one omnipotent and infinitely wise Maker,”²⁶ for example—along with arguments in favor of the usefulness of treating such propositions as true, or even as self-evident truths.²⁷

But if utility measures the value of these propositions—and I do not question the utility of proclaiming them in the Declaration of Independence—that opens the possibility that there may be circumstances in which they should not be treated as self-evident truths. And I claim that at least one such circumstance does exist: *The United States Supreme Court should never rely on these propositions, or any other conception of the natural moral law, to declare any statute unconstitutional.*²⁸

My reasons for making this claim are two-fold. First, I think that history demonstrates pretty conclusively—and contrary to Bickel's assertion—that Supreme Court Justices are ill-suited to the task of discovering and applying the natural moral law in opposition to the written law. Second, I think that our political system provides different and better political mechanisms for pursuing this task. The inspired revolutionary spirit of the Declaration of Independence is apt to have sinister effects when indulged by judges charged with enforcing the existing law.

IV. Montesquieu and English Common Law

Although *Brown v. Board of Education* seems to have been the proximate cause of the modern Supreme Court's frequent moral preening, the problematic cause of that development must be sought at a deeper level. The place to begin, I believe, is with Montesquieu.

The Spirit of the Laws, first published in 1748, is the primary philosophic source of a proposition that we take for granted, namely that an independent judiciary is an indispensable element of any free and well-functioning polity. The book from which this proposition emerges is very long, and extremely complex. In discussing it here, I will have to perform a hazardous act of distillation, which carries risks both of error and of oversimplification. That said, let me begin with two brief and striking quotations.

Toward the end of *The Spirit of the Laws*, Montesquieu makes the following announcement:

I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator; the political good, like the moral good, is always found between two limits.²⁹

Although striking, this statement is quite uninformative. Unless you know what the two limits are, and where the appropriate midpoint between those limits lies, you have no way of identifying the political or the moral good. Helpfully, though, Montesquieu provides what he calls an example:

The formalities of justice are necessary to liberty. But, their number could be so great that it would run counter to the end of the very laws establishing them: suits would be interminable; the ownership of goods would remain uncertain; one of the parties would be given the goods of the other without examination, or both would be ruined by the examination.

Citizens would lose their liberty and their security; accusers would no longer have the means to convict nor the accused, a means to vindicate themselves.³⁰

Montesquieu's illustration of the spirit of moderation is taken from the realm of judicial procedure, perhaps because legal formalities are quintessentially "moderating" devices: as the etymology of the word "moderation" suggests, they reduce conflicts by regulating and controlling them. But Montesquieu's point here is that you can have too much moderation: an excess of legal formalities can actually prevent conflicts from being resolved.

As I mentioned, this somewhat paradoxical passage comes near the end of *The Spirit of the Laws*. Near the beginning of the book, Montesquieu says the following:

[I]t seems that human nature would rise up incessantly against despotic government. But, despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government. This is easy to understand. 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 masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce. By contrast, a despotic

government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that.³¹

Montesquieu claims to be stating the obvious. And it may sound obvious, especially to those of us who have been raised in a culture that celebrates checks and balances, and the separation of powers. But is it really true that passions alone are enough to establish a despotic government, and that anyone can do it? That does not seem obvious at all. And even if we assume that it is true, why does Montesquieu assert that moderate governments can be produced either by prudence or by chance? If it is so easy to establish despotism, while the alternative is so complex and delicately balanced, how could chance ever produce anything except despotism?

Montesquieu's response to this last question seems to come in his detailed analysis of the constitution of England, where he says that liberty will appear as in a mirror.³² Although Montesquieu does not mention the fact, the English constitution has no identifiable founder. There is no English Lycurgus or Moses, not even a James Madison or George Washington, and so this constitution may appear as a masterpiece of legislation produced by chance.

Before looking more closely at Montesquieu's discussion of the English constitution, let us pause to notice one more feature of the two passages I have quoted. In each one, "moderation" is offered as the appropriate goal for legislators, while "liberty" is presented as the goal of citizens. "Liberty"

is a word with tremendous political appeal, which may help to explain why it is the very first word in Justice Kennedy's *Lawrence* opinion. But what, exactly, does it mean? Montesquieu begins with several examples of what "liberty" has meant to various people.³³ Some of the examples make intuitive sense. For instance, some people have thought that liberty is "the faculty of electing the one whom they were to obey." Others seem faintly ridiculous, such as "the usage of wearing a long beard."

The variety of examples may suggest that people's ideas of liberty are generally just a reflection of their prejudices. But then Montesquieu offers a very edifying definition of his own: "[I]n a society where there are laws," he says, "liberty can consist only in having the power to do what one should want to do and in no way being constrained to do what one should not want to do."³⁴ He then immediately replaces this formulation with a different one, namely that "Liberty is the right to do everything the laws permit." Unlike the previous definition, which seems to imply the centrality of duty or obligation, this one seems bereft of any moral implications. Similarly bereft of moral content is Montesquieu's very striking statement a little later: "Philosophical liberty consists in the exercise of one's will or, at least (if all systems must be mentioned), in one's opinion that one exerts one's will."³⁵

Perhaps these formulations are not necessarily inconsistent. But even on the assumption that they are consistent with each other, they beg the essential moral questions. What *should* one want to do? Or, what

should the laws permit? Rather than answer these questions, Montesquieu makes a seemingly unrelated claim, saying that political liberty “is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”³⁶

And then, amazingly, Montesquieu adds the following remark: “Who would think it! Even virtue has need of limits.”³⁷ The implication here seems to be that what one should want to do is something other than to be virtuous. With his use of the exclamation point, Montesquieu fairly shouts out that this is a surprising proposition, but he does not explain why it follows from the “eternal” observation that everyone with power is led to abuse it.

At this point, Montesquieu enters into a long discussion of how the abuse of power can be prevented. Reduced to its simplest possible terms, his answer is what we call checks and balances, or the separation of powers. This answer is presented primarily through what purports to be a description of the constitution of England. Several closely related features of this description are particularly important.

First, we suddenly get yet another new definition of liberty. “Political liberty in a citizen,” says Montesquieu, “is that tranquility 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.”³⁸ This is the bourgeois understanding of the purpose of

politics, expressed most vividly by Hobbes about a hundred years earlier. Montesquieu presents no argument in favor of this understanding. Instead, he offers a picture of one nation whose constitution has political liberty in this sense as its direct purpose, namely England. The implication seems to be that we can look at England and see why this is the proper definition of political liberty.

Second, Montesquieu asserts that when legislative power and executive power are joined in the same hands, there can be no liberty because “one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”³⁹ This is the same point made by Locke—against Hobbes—when he argued that the legislative and executive powers ought to be separated in order to guard against the temptation to turn the law to the private advantage of the rulers.⁴⁰ Montesquieu’s understanding of the separation of powers, however, turns out to be different from Locke’s. Montesquieu implicitly contends that the bifurcation of powers that we find in Locke is deficient. Why? Because the power of judging must be separated from both the legislative and executive powers.

Much, though not all, of the ensuing description of the constitution of England focuses on the significance of this separated power of judging. Contrary to what we might expect, however, Montesquieu never even mentions what we Americans would think of as the independent judiciary. Instead, he claims that the power of judging in England lies entirely with juries,

namely *ad hoc* groups of citizens chosen temporarily, and partly by the parties themselves, to decide particular cases. “In this fashion,” says Montesquieu, “the power of judging, so terrible among men, being attached neither to a certain state nor to a certain profession, becomes, so to speak invisible and null.”⁴¹ The claim here seems to be that the institution of the English jury completely removes the power of judging from politics. No political faction can get control of juries because the government does not choose their members. And, because they are evanescent bodies, they cannot acquire political interests or agendas of their own.

As a description of English legal practice, this is quite misleading. England had an enormously influential body of professional judges. Although appointed by the Crown, they had acquired over the course of history considerable independence and a profound power to shape the law. Judges, moreover, were generally uninhibited in pushing juries to arrive at the verdict favored by the judge, and some courts made no use of juries at all. In addition, the most senior judges had significant political positions (such as seats in the House of Lords) that went along with their judicial positions. In Montesquieu’s presentation of the constitution of England, these judges are literally “invisible and null,” for he gives virtually no hint of their existence.

But Montesquieu must have known about this prominent cadre of professional judges. He was himself a senior judge in Bordeaux, and he

spent two years in England shortly before he began to compose *The Spirit of the Laws*. During this visit, he spent most of his time studying the English constitution, according to the biographer of his friend Lord Chesterfield.⁴² The idea that a visiting judge from France, who was trying to learn about the English legal system, would have somehow not found out about his English counterparts is much too far-fetched to be given any credit.⁴³

There is another reason to think that Montesquieu was not just ill-informed. *The Spirit of the Laws* became extremely influential among people who were themselves intimately familiar with the operation of the English legal system. The greatest example is William Blackstone, but we must also include the framers of the American Constitution. Montesquieu was one of the most frequently cited authors in American literature during the founding period.⁴⁴ And, although several philosophers are mentioned in the *Federalist Papers*, he is the only one invoked as an authority on the construction of constitutions. Indeed, in *The Federalist Papers*, Publius actually quotes Montesquieu for the proposition that judging must be separated from the legislative and executive powers, and for the proposition that of these three powers the judiciary is next to nothing.⁴⁵ Accordingly, I think we have to look for some explanation of Montesquieu's misrepresentation of English legal practice, without assuming that he was foolish or uninformed.

Montesquieu's description of the role of juries in the English constitution focuses entirely on criminal cases. This is consistent with a theme

that runs throughout *The Spirit of the Laws* about the political importance of the criminal law. Indeed, at one point, Montesquieu goes so far as to say that “the citizen’s liberty depends principally on the goodness of the criminal laws.”⁴⁶ It is therefore worth noting that English judges played a relatively smaller role in the field of criminal law than they did in what we call civil litigation, such as suits about debts or monetary compensation for injuries. And it is also true that there was a right to trial by jury in all of the most serious criminal cases. For that reason, one might argue that Montesquieu’s exaggeration of the role of juries is not as egregious as it might at first appear.

But this defense of Montesquieu simply leads to a different problem. There are many indications in *The Spirit of the Laws* that Montesquieu is fully aware of the political importance of the non-criminal law, and in some places he clearly includes this form of law in discussions of the power of judging. I will give just one example. In a discussion of Roman law, Montesquieu describes a practice that he expressly likens to the English use of juries.⁴⁷ At that time, the Romans employed this device only for civil cases, not for criminal cases, and Montesquieu points out that the Romans restricted these jury-like tribunals to decisions about matters of fact. Questions of law or right were decided by specialists who were more analogous to the English judges who are left out of Montesquieu’s discussion of the English constitution.⁴⁸

The key to understanding what Montesquieu is up to, I would like to suggest, lies in his insight that *it is both necessary and impossible to depoliticize the power of judging*.

Think for a moment about what the function or power of judging is, especially in criminal cases. In the simplest possible terms, it is the power to decide whether the force of the government will be used to punish an individual because that individual engaged in some forbidden conduct. Again in the simplest possible terms, there are two kinds of mistakes that can occur. First, the government can forbid conduct that it should permit. In my opinion, this is what happened when the state of Texas outlawed homosexual sodomy. (And perhaps I should mention that Montesquieu argued against the criminalization of homosexual conduct.⁴⁹) The second kind of mistake occurs when an individual is improperly convicted of engaging in conduct that the law makes criminal. (Interestingly, there is good reason to believe that this happened in the *Lawrence* case as well. There is considerable circumstantial evidence, which was never presented to any of the courts that heard the case, suggesting that the defendants were prosecuted on the basis of false testimony by the police.⁵⁰)

With respect to the second problem, any disinterested observer would agree that those who make judgments about guilt and innocence should be unbiased, with nothing to gain from a wrongful verdict. This seems to be the point of the English jury system as it was used in the eighteenth cen-

tury, and Montesquieu presents the English jury as the model of de-politicized judging.⁵¹

But what about the first problem, namely misguided laws like the Texas sodomy statute? English juries did have some power to moderate the effects of such laws, by refusing to return guilty verdicts even when the evidence showed that the defendant had violated the law. But this power of jury nullification seldom had significant or systematic manifestations. A much more important moderating force arose from the activities of those professional judges whom Montesquieu leaves out of the picture.

At this point, perhaps it will be useful to briefly describe the peculiar nature of English law. I mentioned earlier that the English constitution has no identifiable founder. The same is true of English law more generally. The primary source of the laws applied by the English courts of Montesquieu's time lay in ancient, unwritten customs. Through a gradual and extraordinarily complex historical process, this ancient customary law became the basis for a body of law peculiar to England. We call this the common law, and it is found primarily in a great stock of judicial opinions explaining how the law was applied in particular cases.

As time went on, judges increasingly began to look at prior decisions by other judges for evidence of what the ancient law required. And they began to reason about new legal problems from starting points found in these

judicial precedents. As one can imagine, there was thus an inherent tendency for the common law to change over time as it was subjected to the incessant pressure of judicial reasoning and changing social conditions. But these changes occurred almost imperceptibly, and many lawyers and judges in this common law tradition have believed that the most important elements of the common law never change at all (though some judicial decisions may have stated the law erroneously).

There was, of course, a second source of English law, namely statutes, which by the eighteenth century were enacted by the joint consent of Parliament and the King. In principle, it was permissible for the legislature to change the common law by enacting a statute inconsistent with the decisions of the judges, and this principle put very real limits on the power of common law courts to impose their own policies on a reluctant nation. In practice, however, English judges had a strong tendency to interpret statutes so as to minimize conflicts with the existing common law. Thus, statutes underwent a gradual and largely unacknowledged interpretive evolution, just as the common law itself did.

I want to say that this evolution of law under the pressure of judicial reasoning is the political element in the power of judging in the English constitution. Whereas the decisions of juries really can be said to be “invisible and null” because they are unexplained and without precedential effects, the decisions of judges are more visible (because they are memoria-

lized in reasoned opinions) and more influential (because they receive deference from future judges). To the extent that these decisions changed the law, I think we have to call them political acts. But because these legal changes were so gradual, and so disguised by their appearance as interpretations required in the resolution of particular disputes, their moderating effects can look like the work of a completely de-politicized judiciary.

As Paul O. Carrese has shown in a detailed study of *The Spirit of the Laws*, the separated and obscured power of judging seems to be the key element in Montesquieu's understanding of political moderation.⁵² Montesquieu deliberately chose to hide the English judges in his description of the English constitution because he quite reasonably believed that the beneficence of their political activities depended on those activities being largely unacknowledged by the judges, and largely unrecognized by the overtly political elements of English society.

If that understanding of Montesquieu is correct, it produces the following difficult interpretive problem. How, and to what extent, did Montesquieu believe that it was desirable—or even possible—for other nations to adopt the English model of judging? The difficulty arises from the fact that the English model appears to have grown up un-self-consciously, and so to speak by chance. Can prudence replicate this achievement elsewhere? Or would the transplantation of the English model require philosophers to rule

as judges, or those called judges genuinely and adequately to philosophize?⁵⁴

In order to illustrate the problem, let us take a very brief look at what would seem to be the most favorable conditions under which the English model could be adapted to a different country. The example, of course, is America.

V. Montesquieu and American Judicial Review

The American legal system is in many ways a direct descendant of the eighteenth century English legal system that Montesquieu purported to describe. Our use of juries is one obvious example. But even the common law that is still evolving in our state courts is built on the English law that the colonists brought with them to these shores. After our war of independence, lawyers and courts continued to rely primarily on English common law precedents. And they still do so on occasion, though this has naturally become much less frequent as we have developed our own evolving body of common law decisions. The really big changes in America came at the constitutional level, and I want to focus on two changes that I think were particularly significant in altering the nature of our courts.

First, we adopted written constitutions, at the state level and then at the national level. Whereas Montesquieu was able to suggest that England was a republic hiding under the form of monarchy,⁵⁵ we threw off that form completely, and adopted the doctrine of the sovereignty of the people. That

change had many important effects, but the one that is most relevant here has to do with the political character of courts.

The courts were now given a new kind of law to interpret and apply, and it seems to have been assumed that our traditional common law courts should and would continue to apply this new law in the same way that they applied ordinary statutes. There was, however, this difference. Because the new constitutions were a form of law superior to acts of the legislature, we now had the possibility that courts would directly and openly invalidate laws enacted by the people's representatives, using a power that we call "judicial review." This dramatically increased the potential for American courts to become visibly powerful, and potentially very controversial, participants in serious political disputes.

In the *Federalist Papers*, proponents of the new federal constitution argued at length that the United States Supreme Court would not be able to usurp the legislative function of Congress, notwithstanding the Court's authority to declare congressional statutes void when they were inconsistent with the Constitution.⁵⁶ In that argument, Publius was responding to a straightforward objection from those who opposed the new Constitution. According to that objection, the power of judicial review would make unelected federal judges a kind of oligarchy, contrary to the principle of popular sovereignty. Why? Because whoever gets the last word is the effectual supreme ruler.

The core of the response in the *Federalist Papers* is that somebody always has to have the last word, and that the natural weakness and timidity of the judiciary makes it the safest repository of final decisions about the meaning of the Constitution. In support of his claims about the weakness of the judiciary, Publius twice invokes the authority of Montesquieu,⁵⁷ but this seems quite inapt when we recall that Montesquieu was talking about evanescent juries rather than life-tenured professional judges.

Whether or not Publius recognized that he was mis-citing Montesquieu on this point,⁵⁸ there are indications that he was quite comfortable with what I am calling a politicized judiciary. At one point in his discussion, for example, Publius argues that an independent judiciary is valuable because the judges will “mitigate the severity and confine the operation” of unjust laws.⁵⁹ He does not explain just how they will do this, but he twice uses the Montesquieuan term “moderation,” and the tenor of the passage suggests that this moderating activity is familiar to his readers from the long Anglo-American tradition of the common law.

Looking back from a distance of two centuries, I think it is fair to wonder whether Publius—and the American framing generation generally—sufficiently appreciated the tension between the traditional moderating techniques of common law judges and the new power of judicial review. But I also think that Publius may not have given sufficient attention to a feature of the new Constitution that made a powerful and self-confident Su-

preme Court especially desirable. The feature to which I am referring is dual federalism, which is the most truly novel feature in American constitutionalism.

The traditional federalist structure, discussed by Montesquieu and exemplified by our own Articles of Confederation, essentially involved alliances among small republics for the purpose of making a common defense against external threats.⁶⁰ The traditional balanced constitution, exemplified by England, involved an institutionalized sharing of political power among different orders of citizens, such as the commoners, the nobles, and a king.

America is different. We have two distinct governments, state and federal, each enacting and executing its own laws directly on the citizenry in various aspects of life. Noting that this arrangement was so novel that there was no word to describe it, Tocqueville called what we have here an “incomplete national government.”⁶¹ The separation of powers between the state and national governments turns out, I think, to be no less important than the separation of powers among the legislature, the executive, and the judiciary. And especially with respect to the legal regulation of public morals.

Under the Constitution’s original design, the federal government possessed only limited powers, leaving the states with most of the responsi-

bility for setting social policy. Representative legislatures throughout the country made the hard decisions about the proper line between liberty and license, and these legislatures were generally left free by the Constitution to draw the line in light of the natural moral law as they understood it. The Constitution certainly did not assume, any more than it could possibly assure, that these judgments would be infallible. Unlike the Supreme Court, however, these legislatures are subjected to considerable market discipline because constitutional law protects the free movement of citizens and the free flow of information among the states.

Individuals can and do take advantage of this freedom, and state governments respond both to changing views among their citizens and to the threat of emigration. As the costs of transportation and information have fallen, moreover, geographic mobility has increased. Far from being an eighteenth century anachronism, federalism has become an ever more effective device for promoting the kind of interjurisdictional competition that can promote the appropriate expansion of human liberty.⁶²

There are, of course, no guarantees, but the genius of this kind of market competition is that the worst excesses, either in a libertine direction or its opposite, will tend to be self-correcting. Not always, as the examples of slavery and Jim Crow remind us. But even there the most effective responses have always come through the political processes rather than from the federal courts.⁶³

There is, however, another aspect of competitive federalism that throws a different light on the federal courts. The division of powers between the state and national governments is a legal division created entirely by a written document. It is therefore fundamentally different from the division of powers in a mixed regime like England's. Whereas there is a kind of natural (though imperfect) support for the balance among different orders of citizens, based on their distinct and common group interests, the balance entailed in our system of dual federalism was established by a legal fiat.

As Tocqueville recognized very clearly, this division is not a natural one, and political pressures will inevitably operate to upset the balance established by the Constitution. For that reason, he rightly stresses the importance of the U.S. Supreme Court in preventing the state and federal governments from encroaching on each other's jurisdiction.⁶⁴ I would add that this may be our Supreme Court's most important function. Not only is the maintenance of this allocation of powers a central feature of our constitutional order, no other institution is suited to protecting this allocation consistently and reliably.⁶⁵

Over the course of our history, the federal government has proved to be the far more successful encroacher. Somewhat contrary to the expectations of Publius and Tocqueville alike, the Supreme Court has been quite rigorous and successful in stopping the states from exceeding the powers

reserved to them by the federal Constitution. But the Court has been very lax about congressional usurpations against the states. And the Court itself has lately become a powerful usurping force in its own right.

The full story of those developments is long and complicated. I will close by using *Lawrence* to illustrate why I think we should be extremely skeptical about our Supreme Court's practice of substituting its moral or philosophic judgments for the more pedestrian task of applying the written law of the Constitution.

When one reads the *Lawrence* opinion, it appears that the Court may have created a constitutional right, not just to engage in sodomy, but to enjoy the government's respect for engaging in sodomy. This is the most obvious way to explain the opinion's reference to "the due process right to demand respect for conduct protected by the substantive guarantee of liberty."⁶⁶

What would it mean to have a constitutional right to "demand respect" for protected conduct like sodomy? If the Court meant this seriously, it may presage a new jurisprudence in which governments are forbidden from doing anything that might convey disapproval of any sexual practices that five judges believe are somehow connected with efforts "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁶⁷

That would probably mean the abolition of all laws denying any of the benefits of marriage, including the dignitary benefits associated with the term “marriage,” to homosexual couples. It would also seem to point toward the abolition of all laws that limit the number of people who can simultaneously be married to one another—so polygamy would become a constitutional right. And it is hard to see why laws against prostitution should survive, since this may be the only sexual outlet through which some people wish to, or even can, exercise “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

Of course, there are other ways to interpret the sloppy, self-indulgent language in the *Lawrence* opinion. Some of them are much less radical than this, but some are perhaps even more radical. Nowhere in the *Lawrence* opinion, for example, does the Court so much as entertain the possibility that state legislatures could have any valid reason for proscribing sodomy in general or homosexual sodomy in particular. Furthermore, the Court comes very close to implying that one obvious basis for such proscriptions—a desire to discourage behavior considered immoral by the majority—is inherently improper.

Even if we leave aside other possible rationales for the Texas statute, such as public health and promoting the institution of marriage, how is the desire to discourage putatively immoral behavior really different in any

way marked out by the Constitution from the paternalistic desire to discourage other forms of putatively dangerous or self-destructive behavior?

When the government outlaws conduct that it regards as risky or unhealthy—such as the recreational use of drugs, or driving a motorcycle without a helmet—it is making a moral decision that assigns a higher value to health and physical safety than to the spiritual insights that some people have said they get from hallucinogens, or to the mystical exhilaration of flirting with danger on the open road. Unless the Court were to distinguish without any guidance from the Constitution between the different moral judgments reflected in different forms of paternalistic legislation, it is hard to see how any regulatory statute could survive unless it is demonstrably necessary to prevent immediate injuries to people other than those who want to engage in the conduct.

I should stress that I do not believe the Court has actually embraced any such radically libertarian interpretation of the Constitution. In the end, the *Lawrence* opinion is so sloppy and lawless that it does not actually tell us much of anything about what the Court will decide in the future. Whatever new rights the Court may find, or refuse to find, among what Justice Kennedy calls “the components of liberty in its manifold possibilities”⁶⁸ (whatever that might mean), *Lawrence* will stand primarily for the proposition that due process jurisprudence has transcended the bounds of rational

discourse. It is as though some Justices think that their role is to reveal hitherto unrecognized self-evident truths.

I do not believe it is entirely due to chance that when our Supreme Court Justices took upon themselves the role of philosopher-kings, they created a world in which morals regulation is deemed immoral, and philosophy—an activity now divorced by the Justices from reasoning—becomes the handmaiden of sodomy, abortion, and judicial self satisfaction. Whether this Court is seen as the enforcer of its vision of the natural moral law or as an opponent of any enforcement of such a law, it is not too soon to declare that our philosopher-judges have been failures both as philosophers and as judges.

VI. Conclusion

St. Thomas argues that any human law that deviates from the natural law is to the extent of the divergence a perversion of law, and therefore not law.⁶⁹ The statutes enacted by our American legislatures are no doubt filled with provisions that are in this sense not law, and we will no doubt always have such statutes. Our Supreme Court has a long history of invalidating statutes that it regards as violations of the natural law, or of some other higher law, though it has almost always purported to appeal to the human law embodied in the U.S. Constitution. Some of the invalidated statutes may well have violated the natural law, and others almost certainly did not. In neither set of cases, I maintain, has the Court been justified in

overriding the Constitution's requirement that it limit itself to enforcing human law.⁷⁰

Our deeply rooted common law tradition, in which courts quietly moderated and updated the existing law, was an effective institutional device for addressing two problems that St. Thomas identified. First, reason sometimes suggests appropriate corrections to imperfect laws, and changed circumstances sometimes demand revisions in response to such changes.⁷¹ Second, caution must be exercised lest the frequency and visibility of changes, even those salutary in themselves, undermine respect for the law.⁷² One reason that this common law tradition worked reasonably well was that legislatures were always free to override the decisions of common law courts. When Supreme Court Justices arrogated to themselves the privilege of overriding legislatures without a warrant in the Constitution, this crucial safeguard was lost. Too often, the Justices have assumed that their own mutable and imperfect human reason,⁷³ or their mere intuition, is more reliable than the judgments reflected in the Constitution and statutes adopted by the people's elected representatives. The rancid and flaccid pseudo-philosophy on display in recent judicial opinions dealing with sodomy and abortion confirms that these Justices cannot be trusted to discover and correct discrepancies between the natural law and the human laws they are charged with enforcing. They should stop trying.

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¹ 539 U.S. 558 (2003).

² Nelson Lund and John O. McGinnis, “*Lawrence v. Texas* and Judicial Hubris,” *Michigan Law Review*, 102 (June 2004): 1555-1614. Much of my discussion of the *Lawrence* decision here is drawn from this article.

³ 539 U.S., p. 562 (bracketed sentence numbers added).

⁴ *Ibid.*, 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

⁵ All of these propositions are defended in detail in Lund and McGinnis, “*Lawrence v. Texas* and Judicial Hubris” (full citation in note 2 above).

⁶ Abraham Lincoln to A.G. Hodges, 4 April 1864, *Collected Works of Abraham Lincoln*, (New Brunswick, N.J.: Rutgers University Press, 1953), 7: 282.

⁷ For a brief and useful summary, see Thomas Sowell, *Black Rednecks and White Liberals* (San Francisco: Encounter Books, 2005), 111-57.

⁸ Alexis de Tocqueville, *Democracy in America*, Vol. II, Part 1, Ch. 3, Harvey C. Mansfield & Delba Winthrop, trans., (Chicago: University of Chicago Press 2000), 413.

⁹ *Scott v. Sandford*, 60 U.S. (10 How.) 393, 406 (1857).

¹⁰ *Ibid.*, 452-53.

¹¹ *Ibid.*, 450.

¹² *Ibid.*, 624-26 (Curtis, J., dissenting).

¹³ *Ibid.*, 446-49 (opinion of the Court).

¹⁴ *Ibid.*, 627 (Curtis, J., dissenting).

¹⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶ 410 U.S. 113 (1973).

¹⁷ This “philosophy” was set out in an ambitious series of essays in Hefner’s *Playboy* magazine in the 1960’s. The essays have been collected at: <http://www.playboy.com/worldofplayboy/hmh/philosophy/>.

¹⁸ 347 U.S. 483 (1954).

¹⁹ For more detail, see Nelson Lund, “The Constitution, the Supreme Court, and Racial Politics,” *Georgia State University Law Review*, 12 (June 1996): 1129-50.

²⁰ For an introduction to the debate over the nature and extent of *Brown*’s practical effects, compare Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press 1991), 9-174, with Neal Devins, “Judicial Matters,” *California Law Review* 80 (1992): 1027, 1039-46.

²¹ Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill 1962), 236.

²² *Ibid.*, 239.

²³ *Ibid.*

²⁴ The Declaration of Independence of 1776.

²⁵ There is a sense in which one might say that a proposition is self-evident if it is demonstrably true. Socrates’ playful exhibition with Meno’s slave boy could be taken as an illustration—or exploration—of this possibility. Alternatively, one might say, with St. Thomas, that a proposition about a certain kind of being will be self-evident to those who understand what that being is, so that, for example, one who knew that an angel is not a body would know that an angel is not circumscriptively in a place. *Summa Theologica*, I-II: Q. 94, art. 2. Ultimately, of course, it may be that all true propositions are self-evident to one who possesses perfect knowledge, and that one who lacked perfect knowledge could therefore “hold” that a proposition is self-evidently true if he holds that it is true. Because this eliminates the distinction between truths and self-evident truths, however, I do not believe it makes a helpful contribution to understanding the Declaration of Independence or to understanding the place of natural moral law in our political tradition.

²⁶ *Second Treatise of Civil Government* § 6.

²⁷ See Nelson Lund, “Rousseau and Direct Democracy (with a Note on the Supreme Court’s *Term Limits* Decision),” *Journal of Contemporary Legal Issues* 13 (2004): 459, 466-74. The discussion of self-evident truths above is largely drawn from this article.

²⁸ As Philip Hamburger has shown with rich historical evidence, the revolutionary generation believed that natural law should guide the writing of constitutions and other laws, but that it could not imply the precise content of those laws. Philip A. Hamburger, “Natural Rights, Natural Law, and American Constitutions,” *Yale Law Journal* 102 (January 1993): 907-60. This should make us very chary of supposing that they expected judges to correct “mistakes” in the written law by appealing to natural law.

²⁹ *Spirit of the Laws*, Book 29, Ch. 1, Kohler, Miller & Stone, ed. & trans. (Cambridge: Cambridge University Press, 1989), 602.

³⁰ *Ibid.*

³¹ *Ibid.*, Book 5, ch. 14, p. 63.

³² *Ibid.*, Book 11, Ch. 5, p. 156.

³³ *Ibid.*, Book 11, Ch. 2.

³⁴ *Ibid.*, Book 11, Ch. 3, p. 155.

³⁵ *Ibid.*, Book 12, Ch. 2, p. 188.

³⁶ *Ibid.*, Book 11, Ch. 4, p. 155.

³⁷ *Ibid.*

³⁸ *Ibid.* Book 11, Ch. 6, p. 157.

³⁹ *Ibid.*

⁴⁰ John Locke, *Second Treatise of Civil Government*, ch. 12, § 143.

⁴¹ *Spirit of the Laws*, Book 11, Ch. 6, p. 158.

⁴² Robert Shackleton, *Montesquieu: A Critical Biography* (London: Oxford University Press, 1961), 125.

⁴³ Some commentators have nonetheless thought that Montesquieu was unaware of the significant role of judicial magistrates in England. See, e.g., Laurence Claus, "Montesquieu's Mistakes and the True Meaning of Separation," *Oxford Journal of Legal Studies*, 25 (Autumn 2005): 419-51.

⁴⁴ Donald Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, 78 (March 1984), table 3, p. 194.

⁴⁵ *The Federalist No. 78*, Clinton Rossiter ed. (New York: Mentor Books, 1961), 466.

⁴⁶ *Spirit of the Laws*, Book 12, Ch. 2, p. 188.

⁴⁷ *Ibid.*, Book 11, Ch. 18, p. 179.

⁴⁸ And, at another point, in the context of a discussion of kingship in the heroic period in Greece, he says that "the masterwork of legislation is to know where properly to place the power of judging." *Ibid.*, Book 11, Ch. 11, p. 169. In context, there seems to be no distinction between civil and criminal matters.

⁴⁹ *Ibid.*, Book 12, Ch. 6.

⁵⁰ See Dale Carpenter, "The Unknown Past of *Lawrence v. Texas*," *Michigan Law Review*, 102 (June 2004): 1464-1527.

⁵¹ The sense in which I am using the term "de-politicized" can be illustrated by contrasting the English jury with an example that Montesquieu later uses to show the horrible effects of putting the power to judge in a politically inappropriate place. At a certain point in Roman history, the power of judging was transferred to the class of people who were responsible for collecting taxes. The result, says Montesquieu, was that "they were rapacious, they heaped misfortune on misfortune and made public needs rise from public needs. Far from giving such people the power of judging, they should continually have been watched by judges." *Spirit of the Laws*, Book 6, Ch. 18, p. 183.

⁵² Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003).

⁵⁴ Cf. Plato, *Republic*, 473c-d.

⁵⁵ *Spirit of the Laws*, Book 5, Ch. 19, p. 70.

⁵⁶ *Federalist Nos. 78-81*.

⁵⁷ *Federalist No. 78*, 465-66.

⁵⁸ *Federalist No. 78* was written by Alexander Hamilton, who also wrote *Federalist No. 9*. The latter paper reflects a very careful and subtle reading of Montesquieu. I therefore think it unlikely that the miscitation of Montesquieu in *No. 78* was inadvertent.

⁵⁹ *Ibid.*, 470.

⁶⁰ *Spirit of the Laws*, Book 9, Chs. 1-3.

⁶¹ *Democracy in America*, Vol. I, Part 1, Ch. 8, p. 149.

⁶² For further detail, see Nelson Lund, "Federalism and Civil Liberties," *University of Kansas Law Review*, 45 (July 1997): 1045-73; Lund and McGinnis, "*Lawrence v. Texas* and Judicial Hubris" (full citation in note 2 above). Interjurisdictional competition was apparently not an *intended* effect of the federalist structure. With respect to this effect, one might therefore say that our Constitution, like England's, is what Montesquieu would call a masterpiece of legislation produced by chance.

⁶³ See, e.g., Nelson Lund, *Reforming Affirmative Action: How to Restore the Law of Equal Treatment*, Heritage Foundation Report to Congress (August 2, 1995) [available at <http://mason.gmu.edu/~nlund/Pubs/HeritageAffirmativeAction.pdf>].

⁶⁴ *Democracy in America*, Vol. I, Part 1, Ch. 8, p. 108.

⁶⁵ See John O. McGinnis and Ilya Somin, "Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System," *Northwestern Law Review*, 99 (Fall 2004): 89-130.

⁶⁶ 539 U.S., p. 575 (emphasis added).

⁶⁷ *Ibid.*, 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

⁶⁸ *Ibid.*, 578.

⁶⁹ *Summa Theologica*, I-II: Q. 95, art. 2.

⁷⁰ For purposes of this essay, I leave aside a substantial academic debate in which some have argued the Ninth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment enjoins the courts to strike down statutes on the basis of some sort of unwritten higher law. If that conclusion could be established, I agree that the courts would be bound to obey the mandate, but I have not yet seen persuasive arguments or evidence this is the correct interpretation of those provisions. In any event, the Supreme Court has neither argued nor concluded that these constitutional provisions should be read this way, so its behavior cannot be explained by reference to such an interpretation.

⁷¹ *Ibid.*, Q. 97, art. 1.

⁷² *Ibid.*, art. 2.

⁷³ See *ibid.*, art. 1, *reply obj.* 1.