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Salus Populi Suprema Lex

The Impact of Three Major European Thinkers on the Constitution of the United States

Submitted by

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Presidential Scholars Senior Thesis

Cedar Falls, Iowa

5 May 1993
Within the context of discussions regarding the Constitution and its forming, great emphasis is given to the history of the ideas which influenced and/or became a part of that document. The general term given to the line of thought of which our Constitution is a part is "natural law" theory, referring to the rights which the founding fathers, or natural law theorists in general, deemed so basic as to be understood. Such a doctrine manifests as the "inalienable rights...life, liberty, and the pursuit of happiness" in the Declaration of Independence, but in a more subdued and practical manner in our Constitution. In discussions of this school of thought, three important works by three major European political philosophers are often the center of the conversation. Jean Jacque Rousseau’s Social Contract, The Spirit of Laws by Charles Louis de Secondat Montesquieu, and John Locke’s Second Treatise on Civil Government provide excellent insight into the school of natural law thought. On the surface, it would appear that all three played a major role in the development of American natural law thought and thus on the formation of the Constitution. In fact, two of the three can be shown to be such an influence. Rousseau, however, is conspicuously absent both in the interaction of the Constitution writers and in the form of the Constitution itself.

In order to better understand the role of the three philosophers in the formation of the Constitution, we will look
at the major works of each, outlining the theories presented. Following that discussion, an exploration of the importance of each of the individuals through the private notes and correspondences of the founders will help to determine the relative prestige each of the theoreticians held within the American intellectual community. With that in mind, the last section will outline the specific points drawn from the philosophical works into the text of the Constitution.

Locke's *Second Treatise on Civil Government* is not long. In fact, Jefferson refers to it as, "Locke's little book on Government."¹ However, it contains a thorough discussion of the basis of government, its relationship to society and individuals, and the source of government's power. "The true original, extent, and end of civil government; as understood by Locke."²

Locke begins his discussion of government by explaining what he believes to be the "state of nature," explained as: "perfect freedom [of men] to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending

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upon the will of any other man." In this state all are equal and have the same rights, which he limits only by disallowing infringement on other's liberty or property and by disallowing the right of people to destroy themselves (which later becomes necessary to the consistency of his theory). In Locke's state of nature, man has only one power over another, which Locke describes in Chapter two: "Each transgression (which he has defined as an infringement on another's liberty or property) may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify other from doing the like." Retribution and punishment—the natural power of one over another in this natural state is limited to punishment.

Thus man has the natural power to preserve life, liberty, and estate from others. However, Locke maintained that in some cases, personal power would be inadequate protection. It is for this reason that governments are formed. To bring this about, people enter into a contract with society which dictates that the burden of that protection fall upon society, in return for which the individual forfeits personal rights to act in retribution or punishment as described above. The right replacing the right to act is that of appeal to the government.

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4Locke, Ch. II Section 12.
for protection. This is the genesis of civil government as Locke described it.

In the government Locke described, every citizen is obligated "to submit to the determination of the majority."¹ Unanimity to Locke was an impossibility to a working government. Our own experience with the Articles of Confederation serves as a working model to support that idea. To Locke, the citizen is obligated to submit to the majority unless that majority threatens the life, liberty or property which protection is its reason for existence. In such a case the contract would be broken by the society, not the individual, and thus the contract would be void.

The ideas outlined in Rousseau's Social Contract also fall under the rubric of natural law thinking. However, very little of his thought regarding government can be classified as original. In fact, upon analysis, it can be seen that a great many of his ideas are very similar to those of Locke nearly 100 years earlier, and Rousseau's thoughts are more theory and less detail than those of either Locke or Montesquieu.

The very basis of Rousseau's thought is also the title of his major work. In his plan for ideal government a social contract would be established whereby each individual would give up his (at this time only males were included) rights for the good of the whole. He writes, "Each of us places in common his

¹Locke, Ch. VIII, Section 97.
person and all his power under the supreme direction of the general will; and as one body we all receive each member as an indivisible part of the whole." Important in this theory is again the idea of a basic state of nature, which existed before and is thus superior to society. In this state of nature, Rousseau explains, each individual has the right to defend himself from the encroachments of others, and to generally follow his own laws. It is because of the weakness of one against another more powerful that civil society is developed as described above. In this process, those natural rights which existed in the state of nature are conceded to the whole in return for civil rights which are granted to individuals by the society. The comparisons to Locke are obvious after reading this description of his ideas.

The similarities between Locke and Rousseau continue in the plan of government vaguely outlined in the Social Contract. Rousseau states that in order to achieve a goal, two things are required: a) the will to acquire, and b) the power to execute that will. For instance, in order for me to walk across a room, first I must want to walk across the room, and secondly I must have the skeletal muscle and motor coordination to physically move my body by taking steps. Similarly, governments must have two parts. The first, the legislative, must be the will of society--it must make decisions. The second part, the executive,

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6Jean Jacque Rousseau. The Social Contract. 15.

7Rousseau, 14
must carry out the will of the society by physically enforcing the rules passed by the legislative. In contrast to Locke, Rousseau felt that the executive should be appointed by the legislative and be answerable to the legislative—no separation of powers.\(^8\) Nevertheless, it is plain to see how much of Rousseau’s thinking is a parallel of the Second Treatise. This appears to be the crucial factor regarding the Constitution writers seemingly ignoring him.

While Rousseau may be accused of unoriginality, the same may be said for many writers on this subject, including Montesquieu. However, whereas Rousseau is vague and highly theoretical in most of his thought, Montesquieu, in *Spirit of Laws* establishes an extremely specific and practical guide for the establishment of government. Additionally, Montesquieu includes three different viable systems of government in his work, comparing the various aspects of republicanism, despotism, and monarchy. While the document as a whole is fascinating, it is the portions which discuss republican government which pertain to this study.

Montesquieu defines republican government as, “that in which the body or only a part of the people is possessed of the supreme power.”\(^9\) He suggests that in democracy, the people are at once the sovereign, which he defines as that body with

\(^8\)Rousseau, 50-51.

absolute power, and subject to that sovereign at the same time. In this system, decisions and laws must be made and executed. In order to carry out such actions, which is truly the function of government, a democracy may be required to choose what Montesquieu called magistrates, or people qualified to be representatives. From this a republic evolves.¹⁰

Montesquieu defined three types of governmental power which were present in all governments, regardless of their fundamental organization. The first of these he called legislative and defined as the power to enact laws. Secondly, executive (a) had the power to decide on peace or declare war, direct other foreign affairs, and ensure public security for society. Executive (b) could punish crimes and settle disputes between parties in society, what we would call judicial power. In each type of government, these power structures would manifest themselves differently. In a republican form of government, "The legislative power is therefore committed to the body of the nobles, and to the body chosen to represent the people."¹¹ Montesquieu had previously endorsed a distinction by class in society (not surprising since he was a baron himself), and this statement reflects his belief in representing not only nobles as was true in Europe at the time, but also the common people, who should have a voice in government. An executive and judicial system are also accounted for in Spirit of Laws, but an important

¹⁰Montesquieu, Book II, Ch. 2.

¹¹Montesquieu, Book XI, Ch. 6.
aspect of defining these three types of power is that, in a republic, Montesquieu believed they should all be separate, echoing Locke. In this way, the people wouldn’t have to fear a tyranny or a usurpation of liberty.\textsuperscript{12} So we can see that Montesquieu was indeed similar to Locke and Rousseau in his thoughts, although his arguments depend less on natural rights than the other two. What cannot be seen from this broad outline, but will become apparent later, is the detail and practicality which made this particular essay so important in the formation of the Constitution.

Locke, Rousseau, and Montesquieu were discussing much of the same material. Government based on the power of the people from natural law. It can be seen that many of the United States’ great leaders of the time were enmeshed with this thinking as well. By studying them we can gain a picture of just how influential these three specific thinkers were to the formation of the thought of the founders.

It is obvious from the correspondence of the American leaders that Locke’s work, as well as that of Montesquieu, was considered required reading for all those considering law or politics as a career. On one occasion, Thomas Jefferson writes to a young man considering law as a career, giving him a list of material which should be read. Included on that list is "Locke

\textsuperscript{12}Ibid.
on Government," as well as Montesquieu.\textsuperscript{13} What is perhaps most interesting in perusing Jefferson’s correspondence is that while Montesquieu was indeed necessary reading, he was also considered somewhat dangerous.

In a letter to Jefferson dated 14 April 1787, a young man interested in political science named Thomas M. Randolph Jr. tells Jefferson he has been reading such works as Montesquieu and Hume. Some time later, Jefferson sends advice back to the man which basically approves of this choice, but displays reservations as well. Jefferson writes, "In the science of government Montesquieu’s Spirit of Laws is generally recommended. It contains a great number of political truths; but almost an equal number of political heresies: so that the reader must be constantly on his guard."\textsuperscript{14} Besides reading Locke and Montesquieu, many of those others recommended by Jefferson are themselves representative of especially Lockean thinking. For example, Blackstone is on the list to the would-be lawyer and wrote,

the principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and


\textsuperscript{14}Thomas Mann Randolph, Jr. letter to Thomas Jefferson 14 April 1787 and Thomas Jefferson, letter to Thomas Mann Randolph, Jr. 30 May 1790, Boyd, Vols. XII, 442 and XVI, 449.
primary end of human laws, is to maintain and regulate these absolute rights of individuals.\textsuperscript{15}

Evidence of Lockean thinking is also evident in the documents of the day. "The Declaration of Independence" is the primary example of this as many of the lines included are almost word for word from Locke's \textit{Second Treatise}.

As monumental a figure as Thomas Jefferson was, he was not directly involved in the main focus of this study, the formation of the Constitution. While it is plain Jefferson's influence is important, the writing and defense of this document was left to men such as James Madison and Alexander Hamilton.

Hamilton was not the stereotypical Lockean thinker, nor was Montesquieu his primary basis of thought. In fact, Clinton Rossiter writes, "he may well be the most unclassifiable man of pronounced views in all the history of American thought and politics."\textsuperscript{16} Despite this, we can see that at the very least he considered both Locke and Montesquieu to be necessary reading, much as did Jefferson. Not usually one to appeal to sources other than reason, he does so in his essay, "A Farmer Refuted," suggesting, "I would recommend for your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui." Hamilton also cites Montesquieu


several other times, including the speech outlining his plan for government at the Constitutional Convention and in several of the Federalist Papers. While these examples show the influence of Montesquieu, other early writings by Hamilton demonstrate a strong Lockean influence. Later writings indicate that he was influenced to a great degree by Hobbes and especially Hume, although he seldom acknowledges any sources of thought in his work. However, Rossiter explains that despite his tendency toward other writers, Hamilton was essentially Lockean: "He, too, for all his leanings toward Toryism, as an American Whig, and thus a willing prisoner of the venerable line of natural law thinkers stretching from Cicero to Locke."18

James Madison, who is sometimes called the "Father of the Constitution," was obviously "...a disciple of Locke, Montesquieu, and Jefferson."19 He is credited with the actual drafting of major portions of the Constitution, and it can be seen that much of that document comes directly from the Virginia Plan, of which Madison was a primary author. In that document, Madison writes that the Articles of Confederation should be changed to accomplish the


18Rossiter, 121.

objects of: "common defence, security of liberty, and general welfare." These tenets come directly from Locke. In fact, Edward Burns explains, "As a disciple of Locke he set up the presumption, first of all, of liberty and property as natural rights which the state, no matter what its organization, cannot invade." Many of these ideas are also found in Montesquieu's writing and it can be seen that while Locke's thinking was indeed important, perhaps Montesquieu's practicality had an even greater effect. An editorial written by Madison for the National Gazette in 1792 indicates his attitude toward both of these philosophers.

Montesquieu was in politics not a Newton or a Locke, who established immortal systems, the one in matter, the other in mind. He was in his particular science what Bacon was in universal science: He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.

Clearly, Madison, Hamilton, and Jefferson, were influenced by the writings of Locke and Montesquieu. What is interesting is that despite the reputation he has gained through scholarly discussions and histories of natural law thinking, Rousseau is very seldom mentioned by any of these three early American leaders. Hamilton acknowledges Rousseau once in a speech

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21 Burns, 63.

defining democracy, but the reference is in passing, as though recognizing his thought on the subject, but not acknowledging any special importance he may have. The only mention either Madison or Jefferson make of Rousseau is in correspondence to one another regarding a visit the European philosopher made to Monticello. It seems from the letters that Rousseau did not much care for Virginia or Jefferson's home. The nature of this correspondence does not lead one to believe that Rousseau's thinking was of major importance to the two Virginians. Indeed, Rousseau is conspicuous by his absence from these papers and the conclusion we must draw is that while he was obviously known, he was equally obviously of little importance to the thoughts of these founders.

It can thus be seen that many of the major thinkers of the time were either partially or wholly influenced by John Locke and Charles Louis Montesquieu, and especially by the theories set forth in The Second Treatise on Civil Government and The Spirit of Laws including, but not only, the major writer of the Constitution, James Madison, as well as the two major proponents of the Constitution after its drafting, Madison and Alexander Hamilton. What is fascinating is that this influence was not merely and abstract bias which subtly pressured the Constitution in a certain direction. These documents were of primary guiding importance in the structure of the new government.

As discussed above, the ideal government according to


Locke was to be based on the contract between individuals and society, and while Montesquieu does not make that explicit, he does indicate that in a republic the people as a whole are sovereign, holding total power. The individual forfeits natural rights of action which would be used to protect the rights of life, liberty, and property. In return, the government, with the cooperation of society, protects those rights. Individuals then gain secondary rights, which are appeal to government for arbitration of grievances, and retribution and punishment for transgressions against that individual's rights. It was these rights which Montesquieu call "civil." Therefore, according to Locke or Montesquieu, government consists of making laws to protect the rights of life, liberty, and property from other members of the society or from an outside aggressor, enforcing those laws, and adjudicating grievances between parties of the society.

This explanation of the goals and justification for the existence of government is contained in the Preamble to the Constitution. To "establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." Establishment of justice and insurance of domestic tranquility refer to the duty of government to settle internal disputes of its members, including punishment and retribution if necessary. Provision for common defence and promotion of general welfare establishes government's duty to

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protect its citizens from outside force, and security of the blessings of liberty makes explicit the responsibility of government to protect life, liberty, and property.

Locke envisioned a government where supreme power lay in the legislative body, to form "an established, settled, known law by common consent." Arising from that body, or perhaps elected separately, he called for an executive to carry out the laws passed by the legislative body, with "power to back and support the sentence when right and to give it due execution." Locke did feel it necessary that the executive be from outside of the legislative body to prevent one naturally corruptible person from gathering too much power unto him/herself "whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage." Additionally, Locke provided for a judicial branch of government, "in the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to established law." Montesquieu, as discussed before, also believed that a republican government should divide the three

26Locke, Ch. IX, Section 124.

27Locke, Ch. IX, Section 126.

28Locke, Ch. XII, Section 144.

29Locke, Ch. IX, Section 125.
types of power into separate branches. He suggests, "When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty." Further he writes, "Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers."\(^{30}\)

This provides the model upon which our government was developed. Madison, Hamilton, and others wrote and then defended the idea of three separate branches of government. The Constitution provides in Article I for a legislative body, namely our Congress, in Article II for an executive branch headed by the President, and in Article III for a judicial branch separate from the other two and headed by the Supreme Court.\(^{31}\)

Locke wrote, "...and all of this to be directed to no other end but the peace, safety, and public good of the people." And further, that the government can have no power or "right to destroy, enslave, or designedly to impoverish the subjects."\(^{32}\)

However, the original Constitution, despite claiming to be for the purpose of "securing the Blessings of Liberty" provided no method for this security. Madison was entirely aware of that situation and with the help of others rectified it by adding the Bill of

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\(^{30}\)Montesquieu, Book XI, Ch.6.

\(^{31}\)Constitution of the United States of America, Articles I, II, and III.

\(^{32}\)Locke, Ch. IX, Section 131, Ch. XI, Section 135.
Rights as the first ten amendments to the Constitution. In most cases, the Constitution was ratified only with their inclusion. These ten articles secure the personal liberties of speech, religion, assembly, and petition of government for settlement of grievances, rights which the original of the Constitution ignored. Especially important to Locke was the right to control one's own property. He wrote, "the supreme power cannot take from any man any part of his property without his own consent." This became important to Madison and the writers. The fifth amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." This due process is in effect the law made by the majority and applied evenly to all, which is how Locke defines consent in a civil society.

Just as Locke emphasized specific ideas which were then infused into the Constitution, many other parts of that document are derived directly from Spirit of Laws. For instance, in Book IX, Montesquieu develops the idea that in order for a republican government to work, it must represent a small number of people and land or else succumb to what he called "internal imperfection." Unfortunately, a small state would easily be overrun by its enemies because of a lack of people and economic strength to defend itself. His answer to this quandry was what he called a Confederate

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37 Locke, Ch. XI, Section 138.

34 Constitution of the United States of America, Amendment V.
Republic, in which a number of different smaller republics give up some sovereignty to each other for their mutual protection and well-being—in effect an extension of the social contract to states. Interestingly, our government follows that very plan. Each individual state gives up some of its rights to the whole (just how many of those rights was not determined until the Civil War), in return for the benefits a large country can offer.

Other, more specific, ideas are also offered by Montesquieu. As discussed before, he believed that a democratic government should choose qualified people to run the government and thus become a republic. He later discusses the need for those representatives to be answerable to a specific set of people, so that this representative should be chosen locally. In this manner, the people could keep the legislative power in their own hands (at least in theory). This is indeed what was established in the lower house of Congress. Article I Section I states, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Montesquieu also conceived of a bicameral legislature, with both an upper and a lower chamber, such as provided in Article I of the Constitution.

Just as Locke, Montesquieu was also concerned about individual's rights. Particularly prevalent are ideas about the rights of those accused of a crime. He proposes that in republican

35 Montesquieu, Book IX, Ch. 1.

36 Montesquieu, Book XI, Ch. 6; Constitution of the United States of America, Article I, Section I.
government, those accused of a crime must face the decision of a
group of persons drawn from the body of the people in general, not
from the legislature, and that the accused should have the right to
dismiss jury members he or she believes prejudiced in the case.
Montesquieu also states that a person arrested should be taken to
answer for the crime "without delay." Again, the Constitution
provides for these suggestions. The sixth amendment states, "the
accused shall enjoy the right to a speedy and public trial by an
impartial jury."

Neither Locke nor Montesquieu was physically present at
the Constitutional convention, nor was Rousseau. However, it can
plainly be seen that while Rousseau had at best a minimal impact on
that body, Locke and Montesquieu both played a major part in the
formation of the Constitution. Most of what they wrote was
theoretical rather than practical in nature, but much of their work
was directly applicable to the convention and its goals. They did
outline the basis of governmental power, its responsibilities, and
even the three-branched model of government for the founders to
follow. However, the details were left to the writers to develop
themselves. "The Declaration of Independence" is as much theory
and rhetoric as is Locke’s treatise, but the Constitution, the
phoenix from the ashes of the Articles of Confederation, was
necessarily much more. Arthur O. Lovejoy, in his Reflections on
Human Nature, pays tribute to the writers:

37 Montesquieu, Book XI, Ch.6.

38 Constitution of the United States of America, Amendment VI.
...well aware that their task...was not to lay down abstract principles of political philosophy, not to rest the system they were constructing simply upon theorems about the ‘natural rights’ of men or of the States, though they postulated such rights. Their problem was not chiefly one of political ethics but of practical psychology, a need not so much to preach to American about what they ought to do, as to predict what they would do.³⁹

John Patrick Diggins, in his essay "Theory and the American Founding", adds, "...they were realists who translated the data of history into the problem of power and its control."⁴⁰

Locke’s Second Treatise on Civil Government is certainly not perfect, nor was Montesquieu’s Spirit of Laws. They WERE theoretical rather than practical. Nevertheless, they were self-evidently of major importance in the drafting and defense of the Constitution. It is also true that they were not the only political philosopher with an impact on the times. It has been stated that Hamilton was very familiar with Hume and Hobbes, sometimes even labeled "the American Hobbes,"⁴¹ but Burns explains


⁴¹Throughout his life it is apparent that Hamilton viewed the British political system favorably, and Hobbes’ Leviathan is and was considered by many to be an apology of that system. Nevertheless, Rossiter rejects this label: "...and Hamilton was not a Hobbes any more than Jefferson was a Locke...America has never produced a man who could be assigned without hesitation to the company of famous political theorists." From Rossiter, 183.
the situation well: "American legal theory in colonial times represented and accumulation of ideas that ran all the way back to Cicero and the Stoics and included the contributions of the medievalists, of Bracton, of Coke, and most of all, of Locke"\textsuperscript{42} Credit is certainly due the writers and defenders of our Constitution. Madison, Hamilton, and others deserve their honored place in history, but credit must also be given to the ideas of John Locke and Charles Louis Montesquieu. Though not American, their ideas were as important and influential as any of the founders.

\textsuperscript{42}Burns, 175.
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