

Montesquieu and the Constitution

July 6 2023

Visit our media library at constitutioncenter.org/medialibrary to see a list of resources mentioned throughout this program, watch the video, and more.

[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in-person and online. I'm Tanaya Tauber, the senior director of Town Hall Programs.

[00:00:17] Tanaya Tauber: In this episode, we explore the influence of Montesquieu on American democracy, described to the federalist as the celebrated Montesquieu. Montesquieu was cited more often than any other author from 1760 to 1800. In what ways did his writings and ideas help shape the structure of American government and the US Constitution?

[00:00:37] Tanaya Tauber: To explore this question, William B. Allen of Michigan State University, Thomas Pangle of the University of Texas at Austin, Dennis Rasmussen of Syracuse University, and Diana Schaub of the American Enterprise Institute discuss the legacy and political thought of Montesquieu. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates.

[00:01:00] Tanaya Tauber: This program was streamed live on July 6, 2023. Here's Jeff to get the conversation started.

[00:01:11] Jeffrey Rosen: Hello, friends, and welcome to the National Constitution Center and to this evening's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Let's inspire ourselves for the learning ahead by reciting together the National Constitution Center's mission statement. Here we go.

[00:01:30] Jeffrey Rosen: The National Constitution Center is the only institution in American chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a non-partisan basis.

[00:01:43] Jeffrey Rosen: Friends, it's such a pleasure to convene four of America's greatest scholars of Montesquieu to discuss his influence on the founders. I'm so looking forward to learning from them and to sharing their wisdom with you. Thank you so much for joining.

[00:02:03] Jeffrey Rosen: And Professor Schaub, let me begin with you. Our initial goal and our introductory thought is to introduce our audience to Montesquieu's influence on the founders, and you've identified at least two big ideas, where he was central his ideas about federalism and about separation of power. And you've also noted that he was the most cited founder in the founding era. The scholar, Donald Lutz, has counted up the number of times the Founders cited different thinkers, and Montesquieu was absolutely number one on the list. So tell us why Montesquieu was so frequently cited and what his contributions to the Founders was.

[00:02:39] Diana Schaub: Yeah, sure. Montesquieu's masterwork is *The Spirit of the Laws*, and it is a book for legislators. Our Founders were aware of that and the architects of the American Constitution steep themselves in it. Yes, it's true, he is the most quoted authority in the *Federalist Papers*. He's appealed to by Alexander Hamilton in essays nine and 78 and by James Madison in numbers 43 and 47. Remember, they're both writing under the pseudonym, Publius.

[00:03:10] Diana Schaub: There are actual long, distinct quotations from Montesquieu in the *Federalist Papers*. Very rare for them to quote from any other authorities, but there are long passages from Montesquieu. And I think he's actually cited on three different topics. So, you've mentioned two of them. The nature of confederate republics, what we would now call Federalism. So, that's a question about the form of government. And then second the principle or the, Publius calls it a maxim. The maxim of the separation of powers. So, that's really a point about the structure the, the separation of power's checks and balances. And then the third one, I think, is the character of the independent judiciary. This is an innovation that is very much associated with Montesquieu.

[00:03:59] Diana Schaub: So basically, they're... I think, they're reading the whole of *The Spirit of the Laws*, but these three topics come from books nine, 10, 11, 12 really part two of *The Spirit of the Laws*. They described Montesquieu in the most exalted terms. They call him the celebrated Montesquieu. He's elevated even further into the empyrean when he is said to be the oracle who is always consulted and cited.

[00:04:25] Diana Schaub: Oracle, I think, is the right word to describe his status. He's wise but he is also cryptic. And he is so difficult to decipher that he was routinely appealed to by both sides in the ratification debates. So, I mentioned the federalist use of him, but the anti-federalist were using it as well. And in fact, there was a battle going on between federalist and anti-federalist to lay claim to the celebrated Montesquieu.

[00:04:50] Diana Schaub: So maybe just one more point about this and, you know, eventually we can maybe get into some of the details of the differences, but in Federalist Papers 9 and 47, right after giving these long quotations from Montesquieu, Publius presents his interpretation then of those Montesquieu in passages in order to counter what he thought were anti-federalist misreadings, mischaracterizations propounded by anti-federalist writers like Brutus and Cato.

[00:05:18] Diana Schaub: So there really is, it's an ongoing challenge for scholars of Montesquieu to [laughs] you know, to endeavor in the first place, to ascertain Montesquieu's meaning.

[00:05:28] Jeffrey Rosen: So interesting. Thank you so much for summing up so well. Introducing the independent judiciary as a, third crucial influence of Montesquieu, I'm gonna look forward to delving into all of those three influences during our discussion.

[00:05:42] Jeffrey Rosen: Dennis Rasmussen, in your book, *The Pragmatic Enlightenment: Recovering the Liberalism of Hume, Smith, Montesquieu, and Voltaire*, you argued that all, all three had a pragmatic quality as your title suggests. What was distinctive about Montesquieu's vision that made him so influential for the founders?

[00:06:00] Dennis Rasmussen: Well, I think Diana's done a great job of introducing this, the way he's cited on both sides, right? The book of proponents and the critics of the constitution draw on Montesquieu. They both speak of him in such laudatory terms that it's it's sometimes... it's very interesting that they both take it to be a real challenge to wrestle with this very difficult thinker, and they think, you know... They score real political points if they get Montesquieu on their side.

[00:06:24] Dennis Rasmussen: Diana's right, I think, about the parts of Montesquieu that they emphasized most heavily. I think I'd say that the anti-federalists tend to focus more on the questions of Federalism, what was sometimes called Montesquieu's law of size, as he claims pretty explicitly in, I think, his book at chapter 16. That republican governments need to be small in

order to survive. And of course the anti-federalist like to cite that passage and say, "Well, we need to keep most of the power in the state governments on this more small, local level." And the federalist really felt the need to play defense on that topic; whereas the federalist love to cite Montesquieu's discussion of the Constitution of England and his arguments about the separation of powers, which they saw very much instantiated in the constitution.

[00:07:08] Dennis Rasmussen: So, they're both drawing on Montesquieu, they're trying to pick and emphasize different elements of his thought and, his legacy to further their own political end. But each have, of course, counters to one another on both of these points, but I think that those... I would point to those as the main features that, again, the anti-federalist tend to draw the question of the size, the potential size of republics, whereas the federalist tend to focus more on the question of the separation of powers.

[00:07:36] Jeffrey Rosen: So interesting to know that different focus of the federalist and anti-federalist. Professor Pangle, maybe let's take up the question of the size of the republic 'cause it's the most celebrated debate about Montesquieu. And as Dennis Rasmussen suggested, Montesquieu had suggested that republics could only thrive in small territories, where people knew each other and could deliberate face to face.

[00:08:01] Jeffrey Rosen: David Hume famously flipped that on its head and said that, "Actually, in larger republics factions were less likely to develop, and therefore reason rather than passion can prevail." And Madison famously takes up Hume's response to Montesquieu in Federalist 10. Tell us about that debate and the degree to which Montesquieu is involved on both sides of it.

[00:08:23] Thomas Pangle: Yes. Well Montesquieu is famous for stressing not only that a republic needs to be small, but above all, its animating principle and mainspring must be virtue, which is a very severe civic quasi-Spartan, Roman subordination of individuals to the community although with strong protections for the individuals as citizens. And he juxtaposes that not only with the monarchy that prevailed in France of his own country, but of course the English system which he very highly regarded.

[00:09:04] Thomas Pangle: And he spoke of England in a rather Delphic as a republic that's hiding under the guise of a monarchy. So, he does see in England a new kind of republic, very different from the classical republic and really a republic that is a kind of mixture of monarchy and Republicanism. The most republican feature of England in his view is the jury. The jury is democratic and

he conceives the judiciary in England as pretty much dominated by the jury with the judges really being just kind of referees in the room.

[00:09:46] Thomas Pangle: So, that's quite different from the American judiciary, which Hamilton largely was responsible for designing, which is a kind of combination of what Montesquieu praised in England very strong juries. So, that... For example the anti-federalist appealed to Montesquieu to say that juries should have the final say in law, as well as in the facts of the case. And they warned that under this new constitution, that would cease to be the case.

[00:10:17] Thomas Pangle: The federalists claim, "No, no, no, we don't say anything about the jury." what Montesquieu, what the American judiciary really is is a kind of synthesis of what Montesquieu admired in England, very powerful juries, and what he had admired in France, which is what he called the nobility of the robe, the judiciary as the kind of aristocracy. And that was something that the anti-federalists were very frightened by and opposed to and thought Montesquieu was a helpful indicator of a danger in the United States. Hamilton, of course, defended that very strongly.

[00:10:52] Thomas Pangle: One other important point that I would add into the mix, so to speak, is this. Perhaps the greatest theme of Montesquieu is commerce and commercialism and he is a great exponent of the beneficent effects and civilizing effects and humanizing effects of globalism and global commerce, but also commerce within countries. And he argues very strongly in his book on commerce that commerce, commercial powers naturally are at peace with one another.

[00:11:28] Thomas Pangle: Now, the anti-federalist took that argument up and made it one of their strongest arguments for a much weaker central government. They said, "We're all going to be commercial republics. And we know from Montesquieu, commercial republics more or less automatically remain at peace. So, why do we need such a strong central government to keep us together?"

[00:11:51] Thomas Pangle: Now, in The Federalist Papers, Hamilton attacks that thinking very strongly and argues, "That's just not true." He doesn't mention Montesquieu. He knows very well that he's attacking Montesquieu, but he keeps it completely quiet and acts as if he's just speaking on his own and argues, "No, no, no, commerce does not prevent wars. There are just as many wars between commercial powers and there always will be." And that is indeed something that Montesquieu said, "No, that's simply not true that commercial powers are much more peaceful and there's very little likelihood of war between them."

[00:12:30] Thomas Pangle: So, that was a very big kind of, you know, dispute over a very important issue that Montesquieu took one side of. And the American founders, led by Hamilton, of course, took the other side of, and the anti-federalist gather around Montesquieu.

[00:12:45] Jeffrey Rosen: Fascinating. That was so illuminating that you added to our influences virtue and commerce, and you, you so well wove together the competing influences of France and England and the Founders disagreeing ultimately about how each of those factors would or would not contribute to the success of a Democratic Republic.

[00:13:09] Jeffrey Rosen: Professor Allen, I must begin, first of all, by congratulating you again for completing your new translation. I wanna ask you what you learned from Montesquieu, re- rereading it and, and translating it. What struck you afresh in this great act of scholarship? And then maybe put on the table, the factors Professor Pangle just introduced. And in particular, virtue, what was Montesquieu's notion of virtue and, and how did it influence the Founders?

[00:13:36] William Allen: Well, let me start at the beginning, the question of what struck me. I began my study of Montesquieu by standing in as a referee between the federalist and the anti-federalist, and deciding the question, "Which best interpreted Montesquieu?" I concluded that the federalist had the better read, but that required a number of things that I had to see in order to arrive at that point. And it's not necessarily where I have... I still believe that is true, but something else is supervene since that time with regard to the central themes of *The Spirit of the Laws*.

[00:14:13] William Allen: But in the context of resolving that, one of the things that came to light to me that was the most important was that you cannot read Federalist 10 without Federalist 9. Federalist 9 is a necessary introduction to Federalist 10. It sets the theme and the tone and the topic for Federalist 10, and it does so by relying upon Montesquieu. Including the argument about faction and the argument that an extended republic will allow you to deal with the faction, and Federalist 10 proceeds, following that to show how it will deal with it.

[00:14:44] William Allen: So, those will be taken as a piece, which is important because it come from the two different authors, but it also signals the wave in which the two are both one Publius. So, ... What we find in settling the federalist and anti-federalist dispute is a way to see through the constitutional

arguments, which historically in the scholarship, we've taken to be the center of The Spirit of the Laws.

[00:15:07] William Allen: And that leads to the second thing that I discovered in the course of these 50 years of looking at it. I decided the Constitution was not the main theme. And it's true you have to talk about virtue and commerce and religion and a few other factors equally importantly, but I think it is incontestably the case. The main theme is liberty. And that there are abundant evidence throughout the text to demonstrate that, weaving through all these areas of concern that we have put on the table this evening. And which is why I described him as offering a libertarian individualism but is focused on a principle that is really critically important.

[00:15:48] William Allen: And if we go back to Federalist 9 again and we can see where Hamilton quotes The Spirit of the Laws as to what the nature of the confederated republic is. He quotes [inaudible 00:16:31]. That French is, of course, well translated in assembly of societies. But we would do well to take it in the most literal form and say, "One society out of many societies, a pluribus unum." Because there is that dimension to Montesquieu's thought, a dimension which says... And this is the argument of the first nine papers of The Federalist Papers, "Political homogeneity is possible without cultural homogeneity," and that's where commerce become so critically important. Because in talking about commerce, he's not talking merely about material interest, which is why he brings religion into the discussion of commerce.

[00:16:43] William Allen: Yes, it's there in the book 24 in The Spirit of the Laws, but it's also present in this discussion of commerce, because he's talking about the commerce of ideas and he's confronting heredity and challenge. Whether in fact there can be such a thing as a universal religion, whether you can carry on this intercourse of religious ideas to the point of disseminating them, this is all at the heart of The Spirit of the Laws. In that context, and I read the constitutionalism as the instrumentality through which Montesquieu aims to achieve the broader vision that he enunciates in the large work.

[00:17:24] William Allen: Now, to go back to the beginning, I said liberty is the primary theme. That's not only because I've read the work more closely, but I read the first citation in the United States, which was not then the United States but the colonies in 1754 in a freedom of the press case, in which Montesquieu's Spirit of the Laws is a text relied upon to defend the freedom of the press. Liberty. And it continued from there into that period in which it was so frequently cited, as Diana has indicated, by the Founding Fathers.

[00:17:58] William Allen: So, 1754 was only six years after the work was first published in its original language and it's being quoted by an obscure printer in a Boston trial. Someone who's not a Harvard faculty or not someone who is lettered and published in terms of treatises or theoretical accomplishments indicates the depth to which Montesquieu had penetrated quickly. And it only increased thereafter.

[00:18:30] William Allen: So, that, what we're looking at, it seems to me, in talking about Montesquieu and the US Constitution, is a pervading influence that both gives us the key lexical vocabulary for describing our institutions and their relationship with one another. And the deeper vocabulary for describing what it is that it's aimed at through this Republicanism. And what it's aimed at is not the virtue of the small republic, though he certainly give what's sounds like almost a [laughs] hagiographic praise of the virtue of the small republic early on.

[00:19:07] William Allen: But that's not where he comes to rest. And when he closes Book 8, he opens us to the fact that the small republic can't survive in a world of dangers, the world that George Washington describes in the farewell address, where cares, labors, and dangers are your constant partners. And that means he is searching for the alternative to the world of the small republic and the world, therefore, of rigorous virtue or self-renunciation. He's not discrediting virtue altogether, as Tom Pangle has written so well about and know so very well. You can certainly see a little winking going on [laughs] when he talks about virtue and when he distinguishes with political virtue and moral virtue.

[00:19:50] William Allen: But that becomes not the issue at the heart of The Spirit of the Laws. The heart of The Spirit of the Laws is that point I made before, whether you can establish political homogeneity without insisting upon cultural homogeneity. At the end of the day, the work is meant to sustain that vision, and that, I think, is incorporated in what The Federalist Papers had in particular. And Governor Morris far more dramatically understood and applied Montesquieu in that fashion.

[00:20:24] Jeffrey Rosen: Wow. That was superb. Just a magnificent weaving together of Montesquieu's focus on commerce of ideas in making possible of political homogeneity without cultural homogeneity and that central focus on liberty. And how interesting that he was cited as early as 1754 in that press case.

[00:20:48] Jeffrey Rosen: Well, all of you have just done such a magnificent job in weaving together the different strands in Montesquieu's thought. Diana

Schaub, I'll ask you about the separation of powers in particular, because it's the most obvious influence on the American Constitution. It has a long history back to Aristotle and the three types of government but Montesquieu had a distinctive influence about the separation of powers and writing about the British Constitution. What precisely was Montesquieu's vision of the separation of powers that's so influenced the Founders?

[00:21:24] Diana Schaub: I will try to say something about that. Can I just very quickly respond to Bill? Maybe just putting this in a much more simplistic way. If you take a look at The Spirit of the Laws Book 11, Montesquieu says, is about the liberty with respect to the constitution, Book 12 is about liberty with respect to the citizen.

[00:21:46] Diana Schaub: And you could actually say that that point about liberty in the constitution, that is separation of powers and the teaching about the separation of powers. That's about the structure. The liberty of the citizen of Book 12 turns out to be an influence not on the original constitution, but on our Bill of Rights. In other words it is particularly concerned with the criminal law. Things like due process rights of speech, rights of press opposition to cruel and unusual punishment the mildness and proportionality of punishment. All of those things you can find in Book 12 on the liberty with respect to the citizen.

[00:22:26] Diana Schaub: Yes, so then to go to the point about structure and Book 11, and that especially means Book 11, chapter six, on the constitution of England and what Montesquieu draws from his study of that constitution. Publius is a good guide here. Publius says that "this maxim or political truth is traceable to Montesquieu." That quote, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

[00:23:03] Diana Schaub: Now, what the anti-federalists were charging is that this new constitution was guilty of that, guilty of too much consolidation, somehow violating the separation of powers. So, Montesquieu publius has to explain how that is not so. And he finds that this maxim does not mean that the branches of government have to be utterly separate. They don't have to be completely non-touching, no overlapping, no blending of any kind. Instead, it turns out that to preserve the separation of powers in practice, certain departures from a purely functional separation of powers must be introduced.

[00:23:47] Diana Schaub: So, this is easy enough to illustrate. Take the executive as created by our founders. They give the executive a share in the

legislative power through the executive veto. That is an artificial fortification of executive power. It is a violation of a very strict, functional separation of powers, right? The executive is just to administer. Why are you giving him a hand in the in the look the final look of legislation?

[00:24:18] Diana Schaub: But our founders argued that you have to artificially fortify the executive power to make it a match so that it can stand up to the naturally strong legislative power. In any republican order in a popular form of government, the legislature is naturally the most powerful branch. So, we call that checks and balances.

[00:24:37] Diana Schaub: So, separation of powers and checks and balances are not the same thing. Checks and balances are a kind of addition or even a departure from a strict separation of powers in order to preserve it in practice. These ingenious devices preserve the dynamic equilibrium of the separation of powers. So, Publius, throughout these essays insists that a mere paper separation... In, order words, one that you just declare on the paper of the constitution itself, that's insufficient to actually preserve the separation of powers.

[00:25:11] Diana Schaub: So, the constitution has to be such that you are structuring the behavior of the officeholders by means of the structure and powers of the various branches. So, you strengthen the power of the executive by giving the executive a veto. You'll attract more ambitious individuals to that office. And as Montesquieu first said, power must check power by the arrangement of things. And Publius paraphrases that and says, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

[00:25:54] Jeffrey Rosen: Great. Now, I understand that it wasn't just the separation of powers. It was Montesquieu's central contribution, but the checks and balances, as you said. What an amazing connection of that famous-

[00:26:04] Diana Schaub: Yeah. although I do wanna give our founders some credit here. Some of those checks and balances are of their own devising but it seems to me infidelity to their understanding of the separation of powers and, and what's requisite to it. So, that shows that, you know, they turn to Montesquieu for these principles, for these maxims and then they use their own prudence to find what those mechanisms would look like in our particular order.

[00:26:35] Jeffrey Rosen: Superb. Dennis Rasmussen, any further thoughts about the separation of powers based on what you've heard? And then I would

love you to connect Montesquieu's writings on virtue with the amazing conclusion of your book on the Founders and their pessimism at the end of their lives. In many cases, about the future of the American experiment, you say... I'm gonna read this passage from your book because it sums this crucial point up so well.

[00:27:05] Jeffrey Rosen: You write, "Washington had become disillusioned because of the rise of parties and partisanship; Hamilton because he felt the federal government was not sufficiently vigorous or energetic; Adams because he believed the American people lack the requisite civic virtue for Republican government; and Jefferson because of sectional divisions that were laid bare by the conflict over the spread of slavery."

[00:27:26] Jeffrey Rosen: This is a big question, but Montesquieu had a particular vision of virtue of the Founders. What did the Founders learn from Montesquieu about virtue and how did they reach different conclusions about, at the end of their lives, about whether or not the American people had sufficient virtue to sustain the republic?

[00:27:42] Dennis Rasmussen: Right. So Montesquieu says that virtue, it has to be the animating principle of Republican government. This tended to be more conducive to the anti-federalist vision who wanted, again, the government working on the smaller, more local level. People would be very public-spirited dedicated to their community. I don't think the federalist wanted to throw virtue aside entirely. I don't think they did see the constitution as a machine that would run off itself. There's just no need for civic virtue, but they place less weight on it, I think, than the anti-federalist did.

[00:28:13] Dennis Rasmussen: I think the anti-federalist saw it more, civic virtue, as almost an end in itself. This is how you measure... Is it a good political order? Do the people exhibit this kind of public-spiritedness? Whereas I think the federalist tended to see it more as an ends to mean... Sorry, a means to an end. Right? That you need these public-spirited citizens at least to be vigilant enough about their liberties, to elect good people, to allow the system to run.

[00:28:37] Dennis Rasmussen: In the book, I suggest that Adams was of the major founders who we tend to think of in the pantheon of the great founders. Had the greatest concern for civic virtue from the very beginning to the very end of his career. He very much echoed Montesquieu on this score, saying no, no government can last, no Republican government can last without sufficient virtue.

[00:28:58] Dennis Rasmussen: In a monarchy, it's not as necessary. It's not the people who are governing after all. But if the people are self-governing, then you need them to be virtuous. Adams was never sure that the people have the requisite virtue. He had, you know, certain hopes from time to time, including right around the time of the drafting of the constitution. It's in England not in Philadelphia, of course but he seemed to have a kind of moment of hope right around 1787, '88. But, really, for much of his career, he thought the American people weren't up to the task.

[00:29:26] Dennis Rasmussen: I will say the, the federalists... One aspect of Montesquieu that we haven't yet touched on much, but I do think is related to this question of virtue, is the question of moderation. So, Montesquieu says at one point very late in *The Spirit of the Laws* that he wrote the entire book to teach the legislators a spirit of moderation. He, wants to moderate people's passion through moderate radical changes. He encourages people to move slowly and gradually.

[00:29:53] Dennis Rasmussen: This, too, is something that the anti-federalist thought they were on Montesquieu's side with. Right? They say, "We want to reform the articles of confederation, certainly." Most of them did, but they didn't want this radical overhaul with the constitution. Whereas, the federalist had to... Again, they're playing defense a little bit on this. They proudly don the mantle of innovators, rather than being these kind of moderate conservative figures that many of the anti-federalist were.

[00:30:20] Dennis Rasmussen: So, they appealed once again to another part of Montesquieu. The book is, of course, not called on the Law, on *The Spirit of the Laws* and, that means many different things. But he briefly emphasizes all the different factors, you know, history, custom, religion, climate, terrain, all the different factors that affect what the laws will be like and what the laws should be like, partly to teach this lesson of moderation. We shouldn't tinker too much with the political system because we don't know how all the different factors are gonna influence one another. There could be unintended consequences.

[00:30:52] Dennis Rasmussen: But the federalist often appealed to what they called the genius or the character of the spirit of the American people, which they thought would allow this new constitution to work. That, you could form a larger republic, which had never been done in the history of the world because of the special spirit or character of the American people. And so that, too, I think, related to their sense of the American people's virtue or capacity for virtue.

[00:31:16] Jeffrey Rosen: So interesting. And what a central point about Montesquieu teaching the spirit of moderation in the context of talking about virtue. Professor Pangle you've written about Montesquieu and the Roman influence in the Cambridge Companion. You write about his consideration on the causes and greatness of the Romans and their decline. Describe the different conceptions of virtue.

[00:31:41] Jeffrey Rosen: There's a Roman conception of using reason to master passion and achieving self-mastery a Christian conception, which invoked natural law and conscience and authority to achieve virtue. And then this enlightenment vision, which emphasized commerce and interest as something that would allow passion to be the slave of reasons, as Hume famously said, and put less of an influence on civic obligation. Help us put it in context. What was Montesquieu's take on virtue and how did it influence the Founders?

[00:32:16] Thomas Pangle: Well, his great stress as Dennis pointed out, I think, very well, was on a very severe communal anti-commercial, anti-individualist civic virtue, as he saw in, in the great Greek and Roman cities. But there's a fascinating passage sort of in the midst of his hagiography, as Dennis put it, to the ancients, in which he says "Commerce brings its own virtues." And he list a whole bunch of them: order, moderation, frugality reasonableness, and so on. And he says that once commerce is in the spirit of the people, it takes over everything.

[00:33:01] Thomas Pangle: So, I think he quietly indicates there's a kind of balance or tension, if you will, between commerce, between virtue as it has predominated in history, and as he salutes it and had great admiration for it. And another kind of virtue, which I think you were sort of adumbrating and suggesting in your question, that he sees operative more and more in England and in other you know, parts of Europe, and that I think he has some hopes for as a kind of self-interest rightly understood.

[00:33:37] Thomas Pangle: He used Tocqueville's famous phrase. A kind of enlightened and moderated competitive commercial self-interest that he thinks can provide a not very moralistic or high but very solid support for cooperation and patriotism and people understanding that their longterm interest is in supporting one another in a large commercial society with a rule of law and so on.

[00:34:08] Jeffrey Rosen: So interesting and putting it that way in terms of enlightened, moderated commercial self-interest. Right? I understood it ties it to Tocqueville and helps us distinguish it from a classical vision.

[00:34:20] Jeffrey Rosen: Professor Allen, what do you want to tell us about what was distinctive about Montesquieu's vision of virtue? You used that amazing phrase, the commerce of ideas which Madison, I think, invoked a version of in talking about the literati as a way of uniting public opinion. You've written about the influence of French thinkers of public opinion on Madison. And tell us about how this aspect of Montesquieu influenced Madison and the Founders.

[00:34:54] William Allen: It's less clear that Montesquieu's response to this particular issue influenced Madison, only because Madison himself distances himself from Montesquieu in his party press essays. When he says, "we can't turn to Montesquieu's example, because he never lived in a republic," that's essentially what Madison said.

[00:35:15] William Allen: And so we're not sure that we can trace Madison's views to Montesquieu, but we do know that in the essay on property 1792. When Madison lays out the comprehensive definition of property, he says man not only has a right to his property but a property in his rights. And those rights include the right to conscience. He is there embracing the broader conception in the context of which we recognize the parameters of virtue moral obligation.

[00:35:45] William Allen: Now, we can see how this might resonate Montesquieu by returning again to Book 11, chapter six, towards the end of which he makes perhaps the most extraordinary statement in the entire book. He says, "Every man thought to have a free soul ought to be self-governing." Those are the very words he uses. This, description there for the free soul as a self-governing soul comes closer to describing what Montesquieu takes to be virtue, not in the sense of self-renunciation, but in the broader sense in which the human soul is capable of moderation of self-government.

[00:36:26] William Allen: So that what we can say is that he has given us a broad range of principles that require to be, in some sense, coordinated in order to arrive at a clear constitutional argument. And I can illustrate this by going back to separation of powers for a moment, because I commit a great heresy in my commentary and translation of *The Spirit of the Laws*. And I depart from the usual language, separation of powers.

[00:36:55] William Allen: I introduced the language separation of authorities, because nothing is clearer than that Montesquieu distinguishes between power and the authority. The authority, the officeholder. And there are two words in French which accommodate him. The word *pouvoir*, which is simply power, and the word *puissance*, which we often translate power but also means authority.

[00:37:18] William Allen: And in the critical passages in that Book 11, chapter six, the terms in which he uses *puissance* rather than *pouvoir* are absolutely critical to understand what he's talking about. So that what we're going to do is precisely control power by separating the authorities. Hence, we're not blending the powers. We're blending the authorities, which allows him to say, "Therefore, in this arrangement, nothing can be done at all unless they all do it together. No one of the branches or authorities is capable of accomplishing anything without the cooperation of the others." And that's how we got to checks and balances that's implicit in his account of the separation of authorities.

[00:38:05] William Allen: Now, in all of this, what I'm trying to underscore is a simple proposition. The problem is power. The solution is a constraint upon power. The constraint upon power engages institutional architecture. It also engages reliance upon individual capacities; thus, liberty is of critical importance. In that Book 12, when we're talking about the liberty of the citizen, he makes it perfectly clear there could be no such thing as a thoughtcrime. That really goes to the heart of all the distinctions he's making there. No such thing as a thoughtcrime, which means, of course, that the individual retains the capacity of judgment and ought to retain a correlative capacity to act upon that judgment.

[00:38:56] William Allen: Well, acting upon one's judgment as a self-governing soul requires that one act with appropriate prudence. And that may be enough to characterize what is demanded in the way of virtue in a political society, i.e., it is not the Folsom concept of moral virtue that we might want to import from Aristotle or the Christian tradition. But it is such a concept of virtue as it provide some confidence with human beings being able to conduct themselves with an ordinary sense of justice.

[00:39:33] William Allen: And that's why he emphasizes that so powerfully and that's why, at the heart of the book, the center of the book, he is four-square, announces an opposition to slavery, the subjection of women, and political servitude. That's the very center of the book. So, we know where he's going, what he's trying to accomplish, and we must see these other principles in light of that goal.

[00:40:00] Jeffrey Rosen: Wow. Well, you just introduced these crucial distinctions. What, an illuminating one between controlling power and separating authorities and how important to learn about the connection between Montesquieu of thoughtcrimes and freedom of conscience and the idea that prudence rather than Roman virtue is, is enough. And, then you now introduced his opposition to slavery and the subjugation of women in political equality, which I must ask you about, Diana Schaub.

[00:40:30] Jeffrey Rosen: There's, so much to tie together but I know you, each of you can do it. This may be the last round of interventions in this remarkable discussion, but I would love your thoughts about the connection between Montesquieu on separation of powers and the independent judiciary, which was the other big institution that you put on the table.

[00:40:51] Jeffrey Rosen: Such a crucial insight in the history of political theory that you need an independent judiciary to enforce separation of powers. What was Montesquieu's unique contribution on that score? And if you can help us understand how that connected to his thoughts about equality, opposition to slavery, and the subjugation of women, so much better.

[00:41:12] Diana Schaub: That is too big a question for me.

[00:41:15] Jeffrey Rosen: [laughs]

[00:41:15] Diana Schaub: Can I take just a slightly different track

[00:41:17] Jeffrey Rosen: Please. And whatever you think is better.

[00:41:18] Diana Schaub: ... maybe come around to it? I'm just you know, struggling with the fact that I can't say separation of powers anymore. I have to say separation of authority.

[00:41:25] Jeffrey Rosen: [laughs]

[00:41:26] Diana Schaub: So I'm gonna try to do that. So, this begins as a response to Dennis who I think has really explained how and why the anti-federalist you know would lay claim to Montesquieu. But I wanna sort of sharpen that criticism that the federalist make of the anti-federalist. They criticize the opponents of the constitution for reading Montesquieu as a defender of that small virtuous republic, and they ignore his recommendation of confederations.

[00:41:55] Diana Schaub: I mean, if you really took Montesquieu seriously as a proponent or as holding to the view that only small republics can preserve liberty, you would actually have to break apart the existing states because all of them at the time of the founding ... At the time of the writing of the constitution, we're already well beyond the dimension of a Greek Polis. We would, Publius says, have to split ourselves into an infinity of little jealous clashing tumultuous commonwealths, the wretched nurseries of unceasing discord and miserable objects of universal pity and contempt.

[00:42:30] Diana Schaub: So, this is gonna bring me to Tocqueville. I noticed there was a question about Tocqueville in the Q&A posted by some of the listeners. Tocqueville is really interesting here, because he is the greatest fan of localism. You know, he writes beautifully about the spirit of the township you know, Puritan New England local government, local self-government. At the same time, he is a great admirer of the drafters of the constitution. He was no anti-federalist. He, in fact, thought that the states were a potential threat as they turned out to be in the Civil War to the maintenance of the union.

[00:43:12] Diana Schaub: So I think we could see then that the Founders themselves, like Tocqueville, are not unconcerned with the character of citizens, but they expected it to be supported, you might say, extra-constitutionally. In other words, at the level of the township, family, church, neighborhood you know active participation by citizens in self-government at the township level. And that might be [laughs] the way to get the point about women and the liberty of women.

[00:43:47] Diana Schaub: It's certainly true that Montesquieu is one of the great advocates for women. I wrote initially on the Persian Letters, which is sort of all about women and their role in the liberalization of political orders. Tocqueville says in the end, to what would he attribute the great success of the American Republic it is to the superiority of its women.

[00:44:08] Diana Schaub: So, somehow, what happens, you know, at the level of the family that domestic realm there's some connection between domestic politics and politics proper. And that might also be a teaching that the Founders learned from, from Montesquieu. It's certainly a point that he makes in The Spirit of the Laws.

[00:44:30] Jeffrey Rosen: Just great connection between his localism and his devotion to women's equality.

[00:44:39] Jeffrey Rosen: Dennis Rasmussen, might you say another word about Montesquieu and the big, small republic debate? 'Cause it's so central and because it was Hume who was responding to Montesquieu about a large or small republic. I'll ask you also cause your book treats both Hume and Montesquieu. What differences there were among... about their visions of commerce and virtue?

[00:45:08] Jeffrey Rosen: Hume so famously also talks about interest in commerce as being a substitute for classical virtue. I wonder about similarities and differences between the two.

[00:45:18] Dennis Rasmussen: Well, Hume and Montesquieu both see commerce as an overwhelmingly beneficial thing. I think it... Much of what they say fits very well with the argument. We all know some Federalist 10, about the way commerce can increase the number of factions, and then thereby help to solve the... If not solve the problem of faction, at least ameliorate the problem of faction.

[00:45:38] Dennis Rasmussen: That, too, of course, is part of this larger debate that we've touched on a number of times by now, about the large and small republic. Right? How can a large republic work? Well, we need the large size and the heterogeneity to solve the problem of faction.

[00:45:51] Dennis Rasmussen: Let me back up. We've touched on this a number of times. What it is about the ... Why is small size seem to be so important? So, Brutus who was, to my mind, the most powerful writer among the anti-federalists, cites Montesquieu, quotes him at length in his first paper about why we need small... why Republican government can only work in a small-sized territory, largely homogenous territory.

[00:46:17] Dennis Rasmussen: The idea was if people are close together and very much like one another and they'll identify with one another strongly, they'll identify more with their coming government, they'll be more dedicated to that coming government. The representatives will be able to truly know and represent the interest, the will of the people. They won't feel themselves to be above the populist the way they might in a big, large, grand commercial republic.

[00:46:40] Dennis Rasmussen: And so the federalists feel the need to take this, meet this argument head on. As Bill Allen has very nicely said in two answers ago, Hamilton tries to do this in Federalist 9. He says, as Diana just said, well, you, you can't be reading Montesquieu very carefully if you say, "Well, we

wanna keep government in mostly at the state level." And that satisfies Montesquieu's argument about size. Because even Rhode Island and Delaware bigger than, let's say, Athens or Wisconsin, much less, you know, Pennsylvania or Virginia or something.

[00:47:13] Dennis Rasmussen: But he also says in, this, too, I think we've touched on. He says, "Keep reading." Right? So Montesquieu seems to say you need a small republic in Book 8, but then keep reading, keep reading *The Spirit of the Laws*. In Book 9, he says a confederated republic is a way to deal with these problems of small republics, both external threats and internal problems.

[00:47:33] Dennis Rasmussen: And since this might be my last chance to say something here, let me just say how remarkable it is that they're engaging in this very serious way, this very difficult thinker. All of my co-panelist have written brilliantly and spoken brilliantly on Montesquieu, but it takes real scholarly work. I mean, it's not a easy text to pick up and read and you know exactly what he's saying.

[00:47:57] Dennis Rasmussen: The fact that these, you know, very engaged political actors. Right? They're not political theory professors. They're engaged political actors... Are engaging in a very serious way with this very difficult thinker. It's just remarkable... you kind of think of an analog today. You think of members of Congress pouring over the details of John Rawls's *Theory of Justice* or something. It's almost impossible to imagine. So, it is... I'm not often one to engage in the kind of Founders worship and so forth, but I do think this is... It shows something really important about the kind of level of the discourse of the day.

[00:48:34] Jeffrey Rosen: Absolutely. Bravo. It's such an important point to emphasize. The, Founders read deeply and they engaged with their reading. And this remarkable discussion shows how closely we have to engage with the text in order to understand it. I'm so grateful to be sharing this discussion with all the great listeners who are having such enthusiastic responses in the chat about how incredibly brilliant and illuminating this conversation is.

[00:49:02] Jeffrey Rosen: And Dennis Rasmussen, you remind us that this is the level of discourse of philosophical and political that the Founders themselves engaged in.

[00:49:10] Jeffrey Rosen: Thomas Pangle, you know, bring us home as you think best. But among the questions, I'd love to hear your thoughts on our, Montesquieu's vision of human nature and how it influenced the Founders. And

I must ask 'cause you've just... You have a book on Rousseau who was so much more optimistic about democracy than Hume. And the Founders divided so closely on the question of their own optimism about democracy based on their own vision of human nature. Where does Montesquieu's vision of human nature fall? How does that influence his vision on democracy and kind of how that influenced the Founders?

[00:49:52] Thomas Pangle: Well, he is very emphatically a state of nature theorist. He begins *The Spirit of the Laws* by insisting that, by nature, human beings are not social. Although they need society because of their nature is very impoverished. And this goes with a very strong tendency in Montesquieu to see most of our humanity as constructed by cultural history and, therefore, as highly diverse.

[00:50:22] Thomas Pangle: And so he is very pessimistic about the idea of spreading liberal constitutionalism across the globe. I think he makes it clear that it is almost impossible that it's likely to spread into Africa or Asia. I think he's very doubtful about South America. It's a very rare breed, partly because humans are not, by nature very well directed towards much of anything, according to Montesquieu.

[00:50:48] Thomas Pangle: And therefore, most of political life is an attempt to repair or overcome or supplement the impoverishment of human nature. So, he's very much in the tradition of Hobbes and Locke and the other state of nature theorists, and to some extent, Rousseau, in that regard. And, that of course, is something that is extremely controversial.

[00:51:15] Thomas Pangle: But one other thing I'd like to talk about since we're on now a more general level is this fact. Montesquieu's idea of the separation of powers has not worked well in history. Almost no successful republic in Western Europe, here in Canada, in the British Empire, in India, in England itself has followed the separation of powers. Instead, what has been much more successful is the parliamentary system or the Westminster system as it's called, which depends very strongly on parties competing.

[00:51:50] Thomas Pangle: And political parties are something that the Founders simply don't know anything about. They're shocked by them. As someone has mentioned here, they're very pessimistic. Good heavens, we have political parties. This looks terrible. Jefferson hope very strongly when he was inaugurated that that would be the end of it, that there would no longer be political parties. And that very much comes to some extent out of the hopes they had for the separation of powers.

[00:52:16] Thomas Pangle: And what actually happened in most of Western history, starting in England, which abandoned the separation of powers almost, you know, soon after... Starting almost soon after Montesquieu died and shifted to party government, the two-party system. And the idea that real checks and balances comes from competing political parties and all of the passions and the interest come from that, not from this institutional attempt to split up the powers or authorities of government and make them somehow the you know, the real engines of checks and balances.

[00:52:55] Thomas Pangle: So, there's an important way in which the Parliamentary system goes back more to Aristotle and the classical philosophies, who also had no separation of authorities but were very interested in the conflicts among classes and political parties gathered around classes.

[00:53:13] Thomas Pangle: So, I think that broader picture is an important one to keep in mind that really, it's only in the United States that the separation of powers has been very successful. And of course, it's only been successful because it's had this massive supplement that was not foreseen by the Founders and even horrified them, the two-party system. And to some extent, other parties but usually minority parties, you know, don't work out.

[00:53:41] Thomas Pangle: And that has been the real engine to some extent or to a large extent... And some would argue much more than the separation of powers of protecting our liberties and our, our political light. So, there's a very important argument there that has to be kept in mind in the background here.

[00:53:58] Jeffrey Rosen: Thank you so much for helping us understand Montesquieu within the natural rights tradition of Locke. And, you put Rousseau in that tradition as well and also emphasizing the relationship between parties and the separation of powers.

[00:54:14] Jeffrey Rosen: Professor Allen, the last word in this remarkable discussion is to you. I don't know if you wanna say another word about the separation of authorities and, and Montesquieu's relation to it, but I'll just end by asking you to sum up, as you think best, about what the Founders learned from Montesquieu and why our listeners should care about his legacy today.

[00:54:38] William Allen: Well, the best way for me to handle that is to resume the discussion about natural human nature, natural rights. The very first sentence in my commentary, which is both coming, is a sentence that remarks the silence in *The Spirit of the Laws* on John Locke, which requires explanation.

[00:54:56] William Allen: And I go on to explain it, because he is not a natural rights or state of nature theorist. He is really quite... He explicitly, of course, criticizes Hobbes in *The Spirit of the Laws* for that very posture. But he recognizes the deficiencies of human circumstance, deficiencies that result from the interruption of their sociality. And I don't mean sociality in the sense of communities formed from the beginning. I mean socialities in the sense of people naturally attracted to one another and forming societies. That's how he describes it.

[00:55:34] William Allen: But he also describes what we might think of as a cancer, at the heart of that initial instinct. And that cancer is power. And so all of the discussion of human society is, in his eyes, a discussion of how to deal with the cancer of power, which interrupts, in fact, human sociality.

[00:55:57] William Allen: Now, looking at it from that perspective, everything that we have talked about is a further development of that initial position that Montesquieu lays out with great clarity in the first book of *The Spirit of the Laws*. Now, I also refer to him as relying upon some Lockean in the course of the commentary. And so the reason he's silent about Locke... He seems to have less to do with any antipathy to Lockean Liberalism, which I don't at all maintain he has, as to his refusal to stand on the foundation of Hobbes and Locke in order to achieve that objective.

[00:56:33] William Allen: And so it takes a very subtle reading to see that what Montesquieu is doing is engaging us in reflections that are not captured by historical developments. But rather, captured by a sense of the precariousness of human sociality and the need, therefore, to think through how we're going to deal with that. You can't extirpate the cancer, but you can potentially control it. And *The Spirit of the Laws* is about how to control the cancer of power.

[00:57:06] Jeffrey Rosen: Bravo. The response to this panel in the Q&A box is overwhelmingly enthusiastic. Cheers for assembling such a marvelously well-spoken and thoughtful panel. A friend, Tim Gardens, has a great panel. What are next steps for continuing to learn? And I know that everyone who's a part of this discussion will feel lucky to have spent the past hour learning from such brilliant scholars in such a spirit of seeking the truth about the crucial influence of Montesquieu on the Founders and his relevance today.

[00:57:45] Jeffrey Rosen: The next step is to reassemble this group for further learning about the thinkers who influenced the Founders who are in our Founders Library. And I can't wait to find the best opportunity to do that soon. In the meantime, thanks to all of you, Professor Diana Schaub, Dennis

Rasmussen, Thomas Pangle, and William Allen for a discussion that none of us who were lucky enough to be a part of or will ever forget. Thanks to all of you. Thanks to our friends for joining and good night.

[00:58:22] Tanaya Tauber: This episode was produced by John Guerra, Llano Urich, Bill Pollock, and me, Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Research was provided by our wonderful content team.

[00:58:36] Tanaya Tauber: Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and subscribe to live at the National Constitution Center on Apple Podcast or follow us on Spotify.

[00:59:01] Tanaya Tauber: On behalf of the National Constitution Center, I'm Tanaya Tauber.