

**Jack Venrick**

**From:** "Jack Venrick" <jacksranch@skynetbb.com>  
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FYI

**Jack Venrick**  
**Rural But Not Natural**  
**Enumclaw, WA**

Issues analysis

**The *natural* lawyers, Part 2**

The influence of Baron Charles Secondat de Montesquieu

February 1, 2006  
 Steven Voigt  
 RenewAmerica analyst



Montesquieu

I continue the journey of illustrating the importance of three natural law scholars--three among many influential such scholars--to the development of American law and governance, and I now turn to Baron Charles Secondat de Montesquieu. Such was the influence of Montesquieu on our nation's birth that *without him, it is quite possible we would be living in a very different United States of America.*

Montesquieu was born in 1689 in La Brede, France, into a noble family. He was a lawyer, a businessman, a politician, and a scholar. His greatest written work is titled *The Spirit of the Laws*. Montesquieu labored on this book, researching and writing, for nearly twenty years before he finally completed it.

The central theme in *The Spirit of the Laws* is the nature of governance. James Madison succinctly articulated the book's conclusions when he penned, "Montesquieu has resolved the great operative principles of government into fear, honor, and virtue, applying the first to pure despotisms, the second to regular monarchies, and the third to republics."<sup>[1]</sup>

**Three branches**

Montesquieu's crowning influence on our nation was his assertion of a need for a separation of powers in government. In Book 11 of *The Spirit of the Laws*, which is titled "On the laws that form political liberty in its relation with the constitution," Montesquieu cautioned:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.



White House

U.S. Capitol

U.S. Supreme Court

The founding fathers extensively debated the number of branches of federal government and the powers of each, but for the final product, they looked to Montesquieu and settled on three distinct branches: a legislative branch, an executive branch, and a judicial branch. In *The Federalist No. 47*, Madison--referring to Montesquieu as an "oracle" on this subject--penned:

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.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying, and recommending it most effectually to the attention of mankind.

Thirteen years earlier, in 1775, John Adams similarly wrote:

A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.<sup>[2]</sup>



John Adams

### Other guiding principles

Beyond our tripartite system of governance, Montesquieu's writing influenced various other elements of the Constitution. For example, in *The Federalist No. 43*, Madison argued that Montesquieu's theories support Article IV Section 4 of the Constitution, which guarantees a republican form of government to each state. Relying on examples from Montesquieu's writings where he illustrated that confederations of the past dissolved when there existed disparities in structure and power, Madison wrote, "Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature."

Beyond the fundamental structure of our government, Montesquieu's writing influenced portions of the Bill of Rights. For example, the Sixth Amendment, which protects a defendant's right to be confronted by adverse witnesses, finds precedent in Book 12 of *The Spirit of the Laws*, where Montesquieu wrote, "[w]e cannot suspect a man who has no accuser although he does not lack enemies."

As with Blackstone, Montesquieu also discussed the basic truths which lie at the core of all of criminal and tort law. Montesquieu asserted that there are certain absolute natural laws which govern men, and that beyond these absolutes, fairness and reasonableness dictate. In Book 1, he wrote:

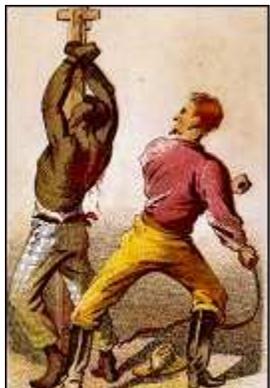
[O]ne must admit that there are relations of fairness prior to the positive law that establishes them, so that, for example, assuming that there were societies of men, it would be just to conform to their laws. . . .

Man, as a physical being, is governed by invariable laws like other bodies. As an intelligent being, he constantly violates the laws God has established and changes those he himself establishes[--being imperfect]; he must guide himself, and yet he is a limited being; he is subject to ignorance and error, as are all finite intelligences; he loses even the imperfect knowledge he has. As a feeling creature, he falls subject to a thousand passions. Such a being could at any moment forget his Creator; God has called him back to him by the laws of religion. Such a being could at any moment forget himself; philosophers have reminded him of himself by the laws of morality. Made for living in society, he could forget his fellows; legislators have returned him to his duties by political and civil laws.

### Serious flaw

For all of Montesquieu's greatness, however, his terrible failure was an attempt to rationalize the existence of slavery in some nations. While Montesquieu did comment in Book 15 that in democracies, "slaves are contrary to the spirit of the constitution; they serve only to give citizens a power and a luxury they should not have," in subsequent essays, he posited that slavery could be tolerated in some societies as long as it is not widespread.

There is no way past the uncomfortable feeling arising from this strange dichotomy. How could this man expound profound ideas in one essay and yet in the next writing, profess such utter inhumanity? Some would posit that Montesquieu was merely a product of his time, but in my mind, this approach is wrong and certainly seems to only minimize the negative.



There is no escaping Montesquieu's Jekyll-and-Hyde penmanship. I believe that when we come across instances of this in history, we do well to consider it and not to simply mumble our way past until we reach words that are appealing and comfortable. History has given us examples of good and evil in all of mankind, but also often this contrast appears before us in the same individual. We must remember that all of mankind is flawed and that injustice and atrocity await us when we lessen our vigilance against evil.

**NOTES:**

[1] James Madison, *Spirit of Governments*, National Gazette (Feb. 20, 1792).

[2] John Adams quotation (available in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes, and Illustrations*, Vol. IV, p.186 (Boston, Charles C. Little and James Brown 1850)).

➤ See Part 1: [Me promote theocracy? Hardly!](#)

➤ See also: [How I learned about the root of law...but not in law school](#)

*RenewAmerica analyst [Steven Voigt](#) also writes a column for RenewAmerica.*

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