

I. The Research Program on Constitutional Design Disappeared for more than a thousand years

- A. Romans continued to be educated in Greece for many centuries, and, thus, even after Greece had ceased to be a major economic and political power, it remained a center of teaching and scholarship for several centuries.
- B. But with replacement of the Roman Republic in the first century BCE by the Roman Empire, interest in representative governmental systems waned.
- i. Indeed, one could be executed for writing and insisting on the principle of representation as Cicero was in 43 BCE.
 - ii. Although the degree of centralization within the Empire increased and decreased several times, which suggests that interest in some aspects of constitutional design remained present, there are no famous political works from the Imperial period.
- C. The rise of Catholicism after the Empire collapsed also discouraged further research on constitutional matters, both because the Church redirected intellectual energy toward matters of faith and biblical interpretation, and because they, like the Imperial Romans, were disinclined to support (or allow) research that might question hierarchical rule.
- i. Indeed, most of the books written by Greek scholars were lost or destroyed in accidental and intentional fires.
 - And, so the Greek philosophical approach to constitutional design essentially disappeared from Western Europe.
 - The ideas did not entirely disappear as some Greek philosophy was incorporated into Christian intellectual traditions--especially that of Plato, through the writings and theology of St. Augustine.
 - ii. There are no famous European works on politics or constitutional design until late in the middle ages, with famous pieces written by Machiavelli (*The Prince*, 1513) and Moore (*Utopia*, 1516).
 - iii. To the extent that the issues raised by Plato and Aristotle continued to be studied, this scholarship was undertaken at Islamic universities, where Arabic translations of Aristotle and Plato continued to be read.
 - iv. Indeed, Aristotle and Plato were only indirectly reintroduced to Europe as an unintentional consequence of bringing Spain back into Christian Europe.

- D. In 1496, Catholic Spain headed by Queen Isabel and King Ferdinand (who had joined the two northern kingdoms of Spain through marriage) finally drove the Moslems back across the straits of Magellan.
- i. The Christians of that time were not, as tolerant as the Moslems of that time and demanded that all believers in other faiths convert to Catholicism or leave.
 - ii. Among those who refused to convert, were a number of Jewish and Greek Orthodox scholars who had worked in the libraries and universities of Islamic Spain.
 - iii. When they left Spain for other parts of Europe, especially Northern Italy and Constantinople, they took translations of Plato, Aristotle, and Roman Law with them.
 - iv. Indeed, the late renaissance benefited enormously from this scholarly migration.
 - The rediscovery of the Greek texts renewed interest in humanistic (as opposed to theistic) sculpture, art, and science.
 - It eventually led to renewed interest in legal theory and social science, although this took a bit longer.
 - Life on earth appeared to be a bit more interesting, and susceptible to analysis than had been thought.
- E. Of course, the rediscovery of Plato and Aristotle were not the only important events of 1500, the New World was recognized as such, Gutenberg's printing press (invented in 1440, perhaps with a bit of luck from Chinese designs) revolutionized information dissemination, and Luther penned his famous theses criticizing corruption within the Catholic Church.
- Together, these stimulated a great increase in literacy as books became far cheaper to acquire,
 - and the new Protestants insisted that their members learn to read the bible for themselves.
 - A new wave of university building began, as new universities were founded, while others were expanded.
- F. The success of Luther's and Calvin's theological reinterpretations led to a great rebellion within the Catholic church as many became interested in reforming the church and church doctrines--and protested against the treatment of Luther and Calvin--while others affirmed the Church as it was.

- i. Indeed, the disagreements were so intense that they, in combination with other political tensions regarding the centralization of power, lead to war.
- ii. Among the more important political consequences of these religious wars was a division of the Church and increased decentralization in the Holy Roman Empire.
 - Essentially, the south remained Catholic, while the North and West broke away from Rome and accepted the revised doctrines--and thus became Protestant.
 - The Holy Roman Empire ceased being Catholic and became more obviously decentralized, as local rulers (princes, barons, counts, etc.) were given the power to determine the religion within their territories.
 - The Dutch Republic seceded from the Hapsburg empire (Spain) in 1575-85, and became a center of both Protestant and liberal thought.
- iii. The Dutch Republic also became a center of republican constitutional experimentation--out of necessity.
 - (Although they invited several kings and queens to assume power, no sovereign power would take them under their wing and bear the expense and risk associated with protecting them from the very powerful Hapsburgs.)

II. The Dutch Republic, the Enlightenment, and Representative Constitutional Theory

- A. In addition to matters of religion, the Dutch was motivated by concerns about arbitrary and excessive taxation and with the loss of local authority.
- B. The Dutch grappled with the problem of forming a new government, nearly a hundred year before the contract theories of Hobbes (1651) and Locke (1689) were published, and without Montesquieu's (1748) advice regarding the balance of power.
- C. In 1579, the northern provinces signed a treaty that was part defense alliance and part constitution for a new federation (the *Union of Utrecht*).

The *Union of Utrecht* created a weak central government that accommodated the long standing Dutch interest in local autonomy by modifying existing Burgundian institutions.

- i. Article 1 united the seven provinces "as if a single province," but also assured the provinces and cities their historic privileges.
- ii. Article 2 permanently bound the provinces together in a mutual defense alliance. Article 9 affirmed the core procedures of the Grand Privilege, which had been much contested by the Hapsburgs. It specified that all new

taxes and declarations of war and peace required the *unanimous* consent of the provinces. Other national policies would be determined by a majority of provincial votes.

- iii. Article 13 called for religious tolerance in accordance with the pacification of Gent. The provinces were free to regulate religious matters, provided that everyone remained free to exercise their own religion.
- iv. Articles 9, 16, and 21 specified that the stadhouders were to arbitrate differences among the provinces on matters of general interest and on matters of constitutional law (Barker 1906: 99-100; Rietbergen 2002: 84).

D. Negotiations with the Spanish continued to be fruitless, and, thus, on July 26, 1581 the States General adopted a declaration of independence (*Act of Abjuration*).

This document is strikingly similar in spirit to the post enlightenment document crafted by Jefferson and his compatriots in Philadelphia two centuries later, the "American Declaration of Independence."

- i. *The Dutch declaration includes a list of grievances, mentions the natural and ancient rights of man, and also suggests a theory of limited government:*

As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas **God did not create the people slaves to their prince**, to obey his commands, whether right or wrong, **but rather the prince for the sake of the subjects** (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. **And when he does not behave thus**, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, **then he is no longer a prince, but a tyrant**, and the subjects are to consider him in no other view...

All these considerations give us more than **sufficient reason to renounce the King of Spain**, and seek some other powerful and more gracious prince to take us under his protection; and, more especially, as these countries have been for these twenty years abandoned to disturbance and oppression by their king, during which time the inhabitants were not treated as subjects, but enemies, enslaved forcibly by their own governors...

So, having no hope of reconciliation, and finding no other remedy, we have, **agreeable to the law of nature** in our own defense, and **for maintaining the rights, privileges, and liberties of our countrymen, wives, and children**, and latest posterity from being enslaved by the Spaniards, been constrained to

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renounce allegiance to the King of Spain, and pursue such methods as appear to us most likely **to secure our ancient liberties and privileges.**¹

- ii. The second of these three excerpts shows that the Dutch leaders were initially reluctant to form a completely republican government without a Prince or King at the helm.
 - But, fortunately for the history of republicanism, no King or Queen accepted the job—most likely because of the military and economic costs associated with doing so, although possibly out of deference to the norms of royalty.
 - The first and third excerpts develop an **early theory of natural rights and limited governance** more than a hundred years before Locke's *First and Second Treatises* were published in 1689.
 - (Note also the theological basis of the argument, which is quite different than Plato and Aristotle's effort to develop a purely secular theory of government.)

III. The Dutch Republic and the Enlightenment: A Haven for Nonconformists and Early Liberals

- A. The Dutch republic prospered as Protestants from the south and from other parts of Europe brought their talents and capital to this relatively free and tolerant nation.
 - i. Included among its emigrants were the English Puritans as previously mentioned, but many other Protestants and nonconformists also relocated to the United Provinces from the southern provinces and from other parts of Europe.
 - ii. The population of the north grew rapidly, and commerce expanded as innovators, capitalists, craftsmen, and scholars converged on the Netherlands.
 - Amsterdam became a metropolis, and many other towns became cities.
 - A good deal of the immigration was doubtless motivated by the rapidly expanding Dutch economy, which provided greater economic opportunity for its hardworking immigrants and relatively educated population than available elsewhere in Europe.
- B. However, economic prosperity was not the only reason, or perhaps even the principal reason for the influx of persons and capital into the Netherlands.
 - i. If not a liberal democracy, the United Provinces were by the standards of the time a representative federal state and a haven for nonconformist religious and political ideas.

- ii. The magnitude and breadth of the religious emigration indicates that the conditions within the Dutch republic were relatively tolerant and well known throughout Europe.
- iii. The well-known names of many of its intellectual emigrants demonstrates that the Netherlands also provided a haven for controversial political and philosophical ideas.
 - Although, the *Union of Utrecht* called for religious tolerance, as did many of the Republic's early political leaders, it was not widely accepted by provincial and urban governments.
 - However, the decentralized nature of Dutch governance meant that among the many Dutch cities, towns, and villages, most believers, and perhaps a few atheists, could find a congenial place of contemplation.
 - And, if Catholics were not free to worship in all their former places, a blind eye was turned toward their gatherings in “secret” churches, which allowed them to worship in private for three centuries.
- iv. Consequently, not all the nonconforming emigrants to the Netherlands made the trip for religious reasons.
 - The controversial French philosopher and mathematician, **René Descartes**, spent more than twenty years living and writing in the Netherlands.
 - Included among its political refugees were Lord Shaftesbury, the organizer of the first political campaign in England (against the accession of James II), and his protégé, **John Locke**, whose natural rights-based social contract theories influenced American and French political thought and action a century later.
- v. In cases, in which the controversial persons themselves did not seek refuge in the Netherlands, their books often were often anonymously published in the Netherlands rather than at home.
 - Among well-known political philosophers, **Montesquieu**, **Voltaire**, and **Rousseau** all at one time or another found it necessary to publish their work in the Dutch republic (Dunthorne 2004).
 - **Hobbes**, who chose refuge in France rather than the Netherlands during the English civil war, found on his return to England that several of his last books could only be published at Dutch presses (Macpherson 1985:21-2).
 - The pattern of emigration and publication during the first century or of the Dutch Republic also suggests that the ideas of limited government, tolerance, and natural rights were already present in Dutch institutions and policies well before Locke sought refuge there in 1683.

¹ This translation is taken from Thatcher (1907:189-197) as modified by Jerome S. Arkenberg. It is available on the web at: <http://www.fordham.edu/halsall/mod/1581dutch.html>.

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- vi. Locke's radicalization after 1760, and his influential theories of the state, doubtless owe much to his six years in the Netherlands where many of his ideas were already more than speculative theories.
- The first and second treatises were finalized during Locke's exile in the Dutch republic as was his work on tolerance, a long-standing Dutch concern (Dunthorne 2004; Goldie 1997: xii; Schwoerer 1990).
 - At the very least, the refuge provided by the Dutch republic indirectly contributed to Locke's fame after the Glorious Revolution, insofar as his most well-known work only found its way into print *after* his safe return from the Netherlands in 1689, some of it **anonymously**.
- C. However, partly because of the success of the Dutch Republic, which was founded by a contract (the Treaty of Utrecht) and partly for other reasons, the ideas of social contracts were in the "air," although they were not carefully stated until Hobbes.

IV. Two Other Real World Contracts of the Seventeenth Century

- A. Mayflower Compact of 1620, was signed by the Puritan colonists to what became Massachusetts.
- It is one of the clearest examples of a social contract, although in the end a relatively totalitarian one. In some ways, the Plymouth colony could be regarded as a Puritan version of Plato's Republic.
- B. Mayflower Compact (from ThisNation.com)
- i. *Agreement Between the Settlers at New Plymouth, 1620*
- IN THE NAME OF GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honor of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid:
- And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

IN WITNESS whereof we have hereunto subscribed our names at Cape-Cod the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland the fifty-fourth, Anno Domini; 1620.

Signatures

- ii. [As you read through the social contract theories of Hobbes, Locke and Rousseau--and fellow travelers Montesquieu and Kant--notice the similarity between this real compact and their theoretical ones.]
- The compact includes a general consensus of all men on board the Mayflower, who signed the compact.
 - It specifies that laws will be adopted for "the general Good of the Colony."
 - It uses the term "civil Body Politic" about three decades before Hobbes' Leviathan adopted similar language, about seven decades before Locke's social contract theory, and well over a century before Rousseau would describe the "general will."
 - Note also, that this compact is not a constitution, it does not describe the subsequent government of the colony.
 -
- C. In addition to the Mayflower Compact, a group known as the Levelers circulated an "Agreement of the People" throughout England during the first half of the English Civil War, from 1640-1650, which called for, among other things:
- Universal male suffrage
 - Regular elections for parliament
 - The end of trade restrictions within England
 -
 - Essentially they were in favor of privileges of birth and title.
 -
 - Their proposed policies were, of course, not adopted for another two centuries.

V. Enlightenment Constitutional Theorists: the Seventeenth Century

A. The rebirth of political theory can be said to begin with Thomas Hobbes, a Scottishman, who published a widely read book called the Leviathan in 1651, during the midst of the English Civil War.

(Hobbes spent the first half of the English Civil War safely in Paris, where he could work in relative peace. As his work seemed to have little impact on the English, he returned in 1651. His defense of absolute sovereignty was rewarded by Charles II with a public pension.)

B. Hobbes' work was criticized and advanced by an Englishman, an Oxford Don, John Locke who published his first and second Treatises on Government in 1689.

(Locke finished writing the Treatises in the Netherlands, where he was on the run from agents of the restored English crown. He returned shortly after the "Glorious Revolution" was concluded with William the III in power, a Dutchman.)

C. Although these essentially secular theories of the state were controversial, and were widely debated and criticized, they had the effect of changing the center of the debate.

- Perhaps existing institutions might be imperfect after all
- Perhaps governance ultimately rests on popular assent rather than divine providence.

D. **Both men had clearly read the classics, and so were very familiar with both Plato and Aristotle's theory of government. Their theories borrow a good deal from these Greek pioneers, and where they disagree with them, their criticisms are also clear. For example:**

- i. **Both Hobbes and Locke see the government as arising out of a desire to advance common objectives, as in Aristotle.**
- ii. **In the case of Hobbes the principle objective, however is peace rather than happiness by means of virtue.**

THE final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves, in which we see them live in Commonwealths, is the foresight of their own preservation, and of a more contented life thereby.

- That is to say, of getting themselves out from that miserable condition of war which is necessarily consequent, as hath been shown, to the natural passions of men when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature set down in the fourteenth and fifteenth chapters.

iii. **In the case of Locke, it is assuring the preservation and security of person and property that is the principle objective.**

If man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he give up this empire and subject himself to the dominion and control of any other power?

To which it is obvious to answer, that though in the state of nature he has such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition which however free is full of fears and continual dangers.

- The great and chief end therefore of men uniting into a commonwealth is the preservation of their property. To which in the state of nature there are many things wanting.

Thus mankind, notwithstanding all of the privileges of the state of nature, being but in an ill condition, while they remain in it are quickly drawn into society

E. **Neither man pays much attention to the extent to which a government may be able to improve "men" per se, as emphasized in Plato and Aristotle, but rather takes "man" as given.**

i. **Hobbes:**

Good and evil are names that signify our appetites and aversions, **which in different tempers, customs, and doctrines of men are different:** and diverse men differ not only in their judgment on the senses of what is pleasant and unpleasant to the taste, smell, hearing, touch, and sight; but also of what is conformable or disagreeable to reason in the actions of common life. Nay, the same man, in diverse times, differs from himself; and one time praiseth, that is, calleth good, what another time he dispraiseth, and calleth evil: from whence arise disputes, controversies, and at last war.

ii. **Locke:**

But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require;

yet it being only with an intention in everyone the better to preserve himself, his liberty, and property (**for no rational creature can be supposed to change his condition with an intention to be worse**) the power of the society or legislative constituted by them, can never be supposed to extend farther than the **common good**

F. Hobbes and Locke also accepted the classification of governmental schemes of Plato and Aristotle: Monarchy, Aristocracy, Democracy, etc., and are in essential agreement about what constitutes a good government, namely advancing common interests.

i. Hobbes

A COMMONWEALTH is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that **to whatsoever man, or assembly of men**, shall be given by the major part the right to present the person of them all, that is to say, to **be their representative**; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgments of that man, or assembly of men, in the same manner as if they were his own, **to the end to live peaceably amongst themselves**, and be protected against other men.

From this institution of a Commonwealth are derived all the rights and faculties of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.

ii. Locke

The majority having, as has been shown, upon a men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time and executing those laws by officers of their own appointing;

and **then the form of the government is a perfect democracy**, or else into the hands of one man, and **then it is a monarchy**, if to him and his heirs it is an hereditary monarchy, and if only for life, but upon his death the power of nominating a successor to return to them, and elective monarchy.

And so, according of these the community may make compounded and mixed forms of government as they think good. [This is a point of disagreement between Locke and Hobbes.]

And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and **then the supreme power to revert to them again. When it is so reverted, the community may dispose of**

it again anew into what hands they please, and to constitute a new form of government.

G. These legitimate governments of a Commonwealth are not designed by philosophers or great kings but are products of negotiation and agreement among those governed.

H. The concepts of "contract" and emphasis on "popular sovereignty" are new, and have a profound effect upon the manner in which even "elites" have to think about constitutional design.

I. [I emphasize the new secular theories to the exclusion of religion based theories, in part because they are more open to analysis and criticism, and in part because, in the long run they were more influential among constitutional designers and political theorists.]

J. Among the innovations of Hobbes and Locke was a somewhat deeper analysis of the reasons why states emerge. This lead both to focus attention on the initial "state of nature," which neither develops at length, but each uses as a point of departure.

- i. Hobbes' statement of the "state of nature," prior to the formation of society and government is justly famous, and continues to be used today by many contemporary political theorists in the rational choice tradition:
- Hereby it is manifest that during the time men live without a common power to keep them all in awe, **they are in that condition which is called war**; and such a war as is of every man against every man.
 - For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. All other time is peace.
 - **Whatsoever therefore is consequent to a time of war, where every man is enemy to every man**, the same consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. **In such condition** there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no

society; and **which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.**

ii. Locke (quoted again)

- If man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he give up this empire and subject himself to the dominion and control of any other power?
- To which it is obvious to answer, that though in the state of nature he has such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition which however free is full of fears and continual dangers.

K. It is the unpleasant nature of the setting without government, that induces men (and women) to delegate some natural rights to the community and its government.

i. **Hobbes:** The "oath" taken to conclude a Social Contract [from ch. 17]

- **I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition;** that thou give up, thy right to him, and authorize all his actions in like manner.
- This done, the multitude so united in one person is called a COMMONWEALTH; in Latin, CIVITAS.

This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defense.

ii. **Locke**

- It is this [*insecurity*] makes them willing to **give up every one of his single power of punishing**, to be exercised by such alone as shall be appointed to it among them, and by such rules as the community, or those authorized by them to that purpose, **shall agree on**. And in this we have the original right and rise of both the legislative and executive power as well as the governments and societies themselves...

The first **power**, viz. of doing whatsoever be thought for the preservation of himself, and the rest of mankind, **he gives up** to be regulated by laws made by society so far forth as the preservation of himself and the rest of the society shall require which laws of the society in many things confined the liberty that he had by the **law of nature**.

L. Of Course, Locke and Hobbes disagree about many details, but also profoundly about the nature of Sovereignty.

i. **For Hobbes, the transfer of sovereignty, whether to a king or parliament, is irrevocable and unlimited (because it can not be limited, given the former).**

Once a commonwealth is created, it can not be cast off, nor can the sovereign (whether a single man or representative assembly) be bound by a covenant.

First, because they covenant, it is to be understood they are not obliged by former covenant to anything repugnant hereunto. And consequently they that have already instituted a Commonwealth, being thereby bound by covenant to own the actions and judgments of one, cannot lawfully make a new covenant amongst themselves to be obedient to any other, in anything whatsoever, without his permission.

And therefore, they that are subjects to a monarch cannot without his leave cast off monarchy and return to the confusion of a disunited multitude; nor transfer their person from him that beareth it to another man, other assembly of men: for they are bound, every man to every man, to own and be reputed author of all that already is their sovereign shall do and judge fit to be done; so that any one man dissenting, all the rest should break their covenant made to that man, which is injustice: and they have also every man given the sovereignty to him that beareth their person; and therefore if they depose him, they take from him that which is his own, and so again it is injustice.

ii. **For Locke, the transfer of sovereignty is conditional, limited, and temporary. And, it reverts to the people at moments of transition.**

And so, according of these the community may make compounded and mixed forms of government as they think good.

[This is a point allowing for a division of sovereignty is another point of disagreement between Locke and Hobbes.]

And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and then the supreme power to revert to them again. When it is so reverted, the community may dispose of it again anew into what hands they please, and to constitute a new form of government.

... By commonwealth, I must be understood to mean, not a democracy or any form of government, but any independent community

iii. **These disagreements play an important role in future debates among those with real power but for whom arguments in defense of that power matters.**

M. **Note that neither man proposes an ideal form of government, in part, because doing so might lead to their being tried for treason.**

This indirectly indicates how much freer scholars were in Greek times than in 16th century Europe.

Their failure to analyze governmental types may also be a result of the relatively homogeneous state in which European governance was at that time.

Apart from the Dutch Republic and perhaps the Swiss confederation, monarchies with weak parliaments (in greater or lesser forms) were essentially the only form of government in Europe.

There was much more variety in the golden age of Greece in 360 BCE than in 1650 AD.

N. Among such ideas might be included their thoughts on natural equality, at a time when society was very much hierarchical--with levels of nobility, and commoners.

i. Hobbes:

NATURE hath **made men so equal** in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he.

ii. Locke

But though men, when they enter into society, **give up the equality**, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in everyone the better to preserve himself

VI. Enlightenment Constitutional Theorists: the Eighteenth Century

A. Of course, the theories of Hobbes and Locke did not end the development of constitutional theory or of the science of constitutions.

i. Rather, they reestablished secular lines of reasoning and provided philosophical underpinnings for ideas that were already "in the air" and, indeed, in practice.

ii. Their analyses, however, had a lasting effect on the way that political theorists thought about the state, as their writings helped redirect the debate about constitutional design toward issues involved with popular sovereignty rather than national honor or glory.

B. Their ideas, and those of the Dutch and Levelers that preceded them, continued to grow in influence until they helped launch two revolutions that attempted to replace royal rule with systems of government based on popular sovereignty.

i. In these events, it is clear that the efforts of talented politicians and popularizers were more influential than those of philosophers.

ii. Here you may choose your own favorite popularizers, Voltaire, Diderot, Condorcet, Franklin, Jefferson, Paine, etc.

iii. For the purposes of this course, however, it is the scholars who had the greater impact on ideas about constitutional design.

C. Three of the most influential of the next generations of scholars were Montesquieu, Rousseau, and Kant, all of whom accepted the "contractarian" analytical device of the social contract.

◦ Of these, Montesquieu was the greatest scholar;

◦ Rousseau the most influential,

◦ and Kant the most profound philosopher.

D. **Charles de Montesquieu** can be regarded as Aristotle's successor in political science.

i. He combined a far reaching interest in political ideas with an empiricist's interest in evidence from the real world.

ii. He probes much more deeply into the various connections between the law, human nature, and constitutional design than other theorists from this period, and makes far greater use of historical examples.

E. Although there are many significant differences among them, they all accept the idea that a commonwealth is based on popular sovereignty.

i. **Charles de Montesquieu** the *Spirit of the Laws (1748)*

Man in a state of nature would have the faculty of knowing, before he had acquired any knowledge. Plain it is that his first ideas would not be of a speculative nature; he would think of the preservation of his being, before he would investigate its origin. Such a man would feel nothing in himself at first but impotency and weakness; his fears and apprehensions would be excessive; as appears from instances (were there any necessity of proving it) of savages found in forests,[2] trembling at the motion of a leaf, and flying from every shadow.

In this state every man, instead of being sensible of his equality, would fancy himself inferior. There would therefore be no danger of their attacking one another; **peace would be the first law of nature.**

Hobbes[3] inquires, "For what reason go men armed, and have locks and keys to fasten their doors, if they be not naturally in a state of war?" But is it not obvious that he attributes to mankind before the establishment of society **what can happen but in consequence of this establishment**, which furnishes them with motives for hostile attacks and self-defense?

Next to a sense of his weakness man would soon find that of his wants. Hence **another law of nature would prompt him to seek for nourishment.**

Fear, I have observed, would induce men to shun one another; but the marks of **this fear being reciprocal, would soon engage them to associate.** Besides, this association would quickly follow from the very pleasure one animal feels at the approach of another of the same species. Again, the attraction arising from the difference of sexes would enhance this pleasure, and the natural inclination they have for each other would form **a third law.** ...

Besides the law of nations relating to all societies, **there is a polity or civil constitution for each particularly considered.** No society can subsist without a form of government. "The united strength of individuals," as Gravina[4] well observes, "constitutes what we call the body politic."

ii. **Jean Jacques Rousseau:** The Social Contract (1762)

I SUPPOSE men to have reached the point at which the obstacles in the way of their preservation in the state of nature show their power of resistance to be greater than the resources at the disposal of each individual for his maintenance in that state. **That primitive condition can then subsist no longer; and the human race would perish unless it changed its manner of existence.**

But, as men cannot engender new forces, but only unite and direct existing ones, they have no other means of preserving themselves than the formation, by aggregation, of a sum of forces great enough to overcome the resistance. **These they have to bring into play by means of a single motive power, and cause to act in concert.** This sum of forces can arise only where several persons come together:

but, as the force and liberty of each man are the chief instruments of his self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes to himself? This difficulty, in its bearing on my present subject, may be stated in the following terms:

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.

iii. **Immanuel Kant** (1793) "On the Relationship of Theory to Practice in Political Right (Against Hobbes)"

Among all the contracts by which a large group of men unites to form a society, **the contract establishing a civil constitution is of an exceptional nature.** For while, so far as its execution is concerned, it has much in common with all others that are likewise directed towards a chosen end to be pursued by joint effort, it is essentially different from all others in the principle of its constitution.

In all social contracts, we find a union of many individuals for some common end which they all share. But a union as an end in itself which they all ought to share and which is thus an absolute and primary duty in all external relationships whatsoever among human beings (who cannot avoid mutually influencing one another), is only found in a society insofar as it constitutes a civil state, i. e. a commonwealth.

- Since every restriction of freedom through the arbitrary will of another party is termed coercion, it follows that a civil constitution is a relationship among free men who are subject to coercive laws, while they retain their freedom within the general union with their fellows.
- F. These three theorists take more from Locke and Aristotle than Plato and Hobbes, insofar as they also support representative forms of government (at least at the constitutional level) over systems of pure monarchy --although Rousseau is a bit difficult to pin down on this point.
- i. **Indeed Montesquieu makes divided government the centerpiece of his analysis of the institutional devices for assuring liberty.**

ii. **Montesquieu:**

- **Political liberty is to be found only in moderate governments;** and even in these it is not always found. It is there only when there is no abuse of power.

But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.

Is it not strange, though true, to say that **virtue itself has need of limits.**

- To prevent this abuse, it is necessary from the very nature of things **that power should be a check to power.** (Book 11)

iii. Rousseau distinguishes between sovereignty--by which he means the "general will" or common interest and government, although he does not recommend a specific form of government.

- (Book 3, Ch. 9) THE question "**What absolutely is the best government?**" is **unanswerable** as well as indeterminate; or rather, there are as many good answers as there are possible combinations in the absolute and relative situations of all nations.

WHAT we have just said confirms Chapter 16, and makes it clear that the **institution of government is not a contract, but a law.**

- **The depositaries of the executive power are not the people's masters, but its officers;** that it can set them up and pull them down when it likes; that for them there is no question of contract, but of obedience and that in taking charge of the functions the State imposes on them they are doing no more than fulfilling their duty as citizens, without having the remotest right to argue about the conditions.

When therefore the people sets up **an hereditary government,** whether it be monarchical and confined to one family, or aristocratic and confined to a class, what it enters into is not an undertaking; **the administration is given a provisional form, until the people chooses to order it otherwise.**

- **THE moment the people is legitimately assembled as a sovereign body, the jurisdiction of the government wholly lapses,** the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate; for in the presence of the person represented, representatives no longer exist.

iv. Kant

Those who possess this right to vote must agree unanimously to the law of public justice, or else a legal contention would arise between those who agree and those who disagree, and it would require yet another hither legal principle to resolve it.

An entire people cannot, however, be expected to reach unanimity, but only to show a majority of votes (and not even of direct votes, but simply of the votes of those **delegated** in a large nation to represent the people).

Thus the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established.

G. **Both Montesquieu and Kant characterize voting rules and some of the institutions of government, in this they attempt to address contemporary issues in real constitutional design as well as philosophical principles for characterizing a proper commonwealth.**

- i. Montesquieu (Book 10) goes into substantial detail, mentions advantages of federal states such as Holland, but essentially favors the British system (perhaps a bit idealized) as a method of preserving liberty:

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. **In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.**

- To prevent this abuse, it is necessary from the very nature of things **that power should be a check to power.** (Book 11)
 - When the legislative and executive powers are united in the same person, or in the same body of magistrates, there **can be no liberty;** because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
 - Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
- As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the **legislative power should reside in the whole body of the people.**
 - But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.
- The **executive power** ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

Theoretical and Practical Origins of Modern Constitutional Design: the Enlightenment Literature on Constitutions

- All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own. [Universal Suffrage]
- The judiciary power ought not to be given to a standing senate; it should be exercised **by persons taken from the body of the people**[7] at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires. [e.g. trial by jury]

ii. Kant

Any one who has the right to vote on this legislation is a citizen, i.e. citizen of a state, not bourgeois or citizen of a town.

[Again Kant uses the term citizen used as in Aristotle, but now he is going to suggest an extension of the franchise.]

The only qualification required by a citizen (apart, of course, of being an adult male) is that he must be his own master (sui iuris) and must have some property (which can include any skill, trade, fine art or science) to support himself.

In cases where he must earn his living from others, he must earn it only by selling that which is his, and not by allowing others to make use of him; for he must in the true sense of the word serve no one but the commonwealth.

In this sense, artisans and large or small landowners are all equal, and **each is entitled to one vote only**. ... the number of those entitled to vote on matters of legislation must be calculated purely from the number of property owners not from the size of their properties.

H. Of course, there were serious disagreements among these three, as well as differences in purpose.

i. Kant, for example, follows Hobbes in rejecting the legitimacy of revolt:

For if the law is such that a whole people could not possibly agree to it (for example, if it stated that a certain class of subjects must be privileged as a hereditary ruling class) it is unjust; but if it is at least possible that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.

But this restriction obviously applies only to the judgment of the legislator, not that of a subject.

Thus, if a people, under some existing legislation, were asked to make a judgment which in all probability would prejudice its happiness what should it do? ... The only possible answer is that they can do nothing but obey.

ii. Rousseau also seems to follow Hobbes on this point, not because delegation is absolute, but because sovereignty is defined to be the "general will" or "common interest" which cannot by definition be delegated:

Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility.

The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. **Every law the people has not ratified in person is null and void ù is, in fact, not a law.**

iii. Rousseau also differs with Locke over the importance of private property that would emerge under a social contract, indeed in some respects he sounds closer to Plato than to Aristotle on this issue:

(Social Contract, ch 8) THE passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.

(from ch. 15) **The better the constitution of a State** is, the more do public affairs encroach on private in the minds of the citizens. Private affairs are even of much less importance, because the aggregate of the common happiness furnishes a greater proportion of that of each individual, so that there is less for him to seek in particular cares.

iv. Montesquieu as an applied political theorist is less interested in such questions than how the three types of laws (international, constitutional, and civil) can be adjusted to suit the natures of the people being governed, and, moreover, are in fact influenced by the nature of the people governed, the soil, and the climate.

VII. On the Impact of Ideas

A. **For a philosopher, the development of coherent convincing arguments and solutions to long-standing problems are "ends" in their own rights.**

B. **Thus, whether ideas influence the real world or not may be judged a secondary matter, or at least not crucial to the significance of an idea or argument.**

- C. **However, in the case of the Enlightenment thinkers, their ideas eventually and indirectly changed much about Western political reality, as well as its principle mode of thinking.**
- D. **One important case of influence that emerged at about the same time as these later writings was the American Revolution.**
- E. **Consider the effects of the Greek and enlightenment scholars on America's initial "Declaration of Independence"**

F. The US Declaration of Independence (1776)

The Unanimous Declaration of the Thirteen United States of America

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable rights, that among these are life, liberty and the pursuit of happiness**. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. -- Such has been the patient sufferance of these colonies;

and such is now the necessity which constrains them to alter their former systems of government.

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

[Note the influence of social contract theory, the parallels with the earlier Dutch declaration of independence, and the return to Plato and Aristotle's "happiness seeking society" as opposed to peace (Hobbes), property (Locke), or the General Will (Rousseau)]