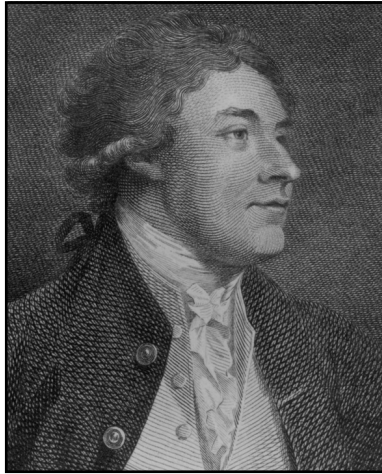


THE CONSTITUTION OF ENGLAND

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

Knud Haakonssen

General Editor



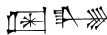
Jean Louis De Lolme

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

*The Constitution
of England; Or,
An Account of the
English Government*

Jean Louis De Lolme

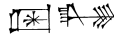
Edited and with an Introduction
by David Lieberman



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INTRODUCTION

Jean Louis De Lolme's *The Constitution of England*, which first appeared in French in 1771, was a major contribution to eighteenth-century constitutional theory and enjoyed wide currency in and beyond the eras of the American and French Revolutions. Its authority and judgment were invoked in parliamentary debate and in partisan political polemic. John Adams, the American revolutionary leader, constitutional advocate, and later president, praised the work as "the best defence of the political balance of three powers that ever was written."¹ Even De Lolme's contemporary critics were forced to acknowledge "a work which has been honored with the public approbation and which certainly possesses great merit."²

Notwithstanding the reputation and influence that *The Constitution of England* earned its author, the details of De Lolme's life remain poorly documented. We rely chiefly on the scanty biographical information provided in his publications and the anecdotal and variable reminiscences assembled by others in the years following his death in 1806.³

1. John Adams, *A Defence on the Constitutions of Government of the United States of America*, 3 vols. (Philadelphia, 1797), 1:70.

2. *Answer to Mr. De Lolme's Observations on the Late National Embarrassment by Neptune* (London, 1789), 10.

3. The most rigorous effort to authenticate the details of De Lolme's life and writings is provided by Edith Ruth in *Jean Louis de Lolme und sein Werk über die Verfassung Englands*, Historische Studien, Heft 240 (Berlin, 1934). Also of importance is Jean-Pierre Machelon, *Les idées politiques de J. L. de Lolme* (Paris, 1969). The article on De Lolme by Adam I. P. Smith in the *Oxford Dictionary of National Biography* (Oxford, 2004) contains less detail than the earlier biography by G. P. Macdonell in the original *Dictionary of National Biography* (Oxford, 1888).

De Lolme's Life and Early Writings

De Lolme was born in Geneva in 1741. The title page of the 1784 edition of *The Constitution of England* distinguished him as a "Member of the Council of the Two Hundred in the Republic of Geneva." Service on this political body placed De Lolme within the ranks of Geneva's most prominent families. By reputation a brilliant student, he followed family tradition and was trained in the law, beginning his professional career in the 1760s, first as a notary and later as an advocate. His customary classical education and more specialized legal learning were plainly of value to his future writing on government and constitutional liberty. But most fateful was the political training De Lolme acquired in his native city in these early years. "As a native of a free Country, I am no stranger to those circumstances which constitute or characterise liberty," he explained to his English readers. The "Republic of which I am a member" was the setting "in which I formed my principles."⁴

In its outward political forms, eighteenth-century Geneva was a republic of self-governing citizens. For the contemporary enthusiasts of republican liberty, Geneva and its independence offered a welcome exception to a European state system dominated by large and potent monarchies. In practice, however, Geneva's government had long been an oligarchy of elite families. Political authority operated through a series of citizen councils. Although sovereignty was formally held by a General Council of all citizens, political rule was effectively exercised by two "small councils"—the Council of the Twenty-Five and the Council of the Two Hundred—under the control of the wealthiest and most powerful families. It was these smaller bodies that in practice determined Geneva's legal and fiscal policies and selected the leading officeholders.

Throughout the eighteenth century, Geneva's rulers faced organized challenges from excluded groups and, in moments of gravest political crisis, depended upon foreign support, particularly from the French monarchy, to sustain their power. Significant episodes of protest occurred in 1707, 1718, 1734–38, 1763–68, 1770, 1781–82, and 1789. These typically centered

4. See below, *Constitution of England*, introduction, p. 20.

on a program of republican revival that called for the restoration of the sovereignty of the General Council, an enlargement of the number of citizens entitled to serve on the small councils, and a more equitable legal and fiscal treatment of the great number of propertied residents who lacked the benefits of full citizenship. In the period just before De Lolme's birth, these conflicts had led Geneva's government to summon military support from France and the cantons of Berne and Zurich to help "mediate" the political crisis between ruling elite and popular ascendancy. The resulting 1738 Act of Mediation stabilized oligarchic control, notwithstanding a number of political concessions to the authority of the General Council. As De Lolme later explained in *The Constitution of England*, the reforms proved largely cosmetic. By limiting the General Council's legislative role to the formal approval of measures initiated only by the Council of the Twenty-Five, the governing elites easily subverted popular constraints on its rulership. "The Citizens had thus been successively stripped of all their political rights," he observed, "and had little more left to them than the pleasure of being called a Sovereign Assembly."⁵

By the time of De Lolme's early adulthood, Geneva weathered even more serious political instability in the years 1763–68, when the forces of reform, the "Représentants" (or Party of Remonstrance), again challenged patrician rulership, now organized politically as a party of conservative "Négatifs." Geneva's most famous native son, Jean-Jacques Rousseau, whose writings had been condemned by the Council of the Twenty-Five in 1762, entered the controversy with a scathing critique of Geneva's ruling oligarchy published in 1764 as *Lettres de la montagne* (Letters from the mountain). On this occasion, the popular cause proved successful in forcing substantive concessions from the Council of the Twenty-Five, which in 1768 granted the General Council additional powers to control the other governing bodies. "The Citizens," De Lolme enthusiastically recorded, through "an uncommon spirit of union and perseverance . . . succeeded in a great measure to repair the injuries which they had been made to do to themselves."⁶

5. See below, book 2, chapter 5, pp. 174–75, note a.

6. *Ibid.*

Here De Lolme wrote not in his usual capacity as an observer and theorist of government, but as an engaged political participant. He embraced the Représentants' call for reform and republican renewal in several anonymous polemics that contributed to the vibrant public debate that Geneva's rulers found impossible to contain. The most important of these publications was the 1767 *La purification des trois points de droit souillés par un anonyme* (The purification of three soiled points of law by an anonymous author). The unrestrained tone of this attack on the constitutional authority of the ruling Négatifs produced a prompt rebuke from the Genevan government, accompanied by the recommendation that its author quit his native city. Soon after, the banished citizen of Geneva arrived in the foreign land where he was to spend the bulk of his remaining years and whose constitution served as his most important subject matter.

The Constitution of England

De Lolme left no record concerning why he chose England as his destination. But in the major publications that quickly followed his brief career in Genevan politics, he made clear that he had come to perceive in the English constitution a unique system of government in which political liberty was sustained in a manner that sharply contrasted with the experience of other states, not least the city from which he was banished. As De Lolme put the point in 1772 in his first major publication in the English language, "I have studied History and seen most of the Republics of Europe, and I do not hesitate to affirm that there is, or has been, no Government upon Earth where the property, and especially the person, of the Subject, is by far so secure as it is" in England.⁷ The exploration and analysis of this defining theme received its influential rendering in 1775, in *The Constitution of England; or, An Account of the English Government*, a translation and enlargement of the original French edition.

De Lolme's subtitle—"An account of the English government in which it is compared both with the Republican form of government and occa-

7. *A Parallel Between the English Constitution and the Former Government of Sweden* (London, 1772), 26.

sionally with the other Monarchies in Europe”—indicates the scope and ambition of the study.⁸ His goal was both to explain how the English constitution produced the liberty for which it was deservedly celebrated and to deploy this information to explain why liberty proved so notoriously vulnerable elsewhere. Having experienced firsthand in Geneva the ease with which political power could be manipulated and abused, he turned to the sharply contrasting case in which “Liberty has at length disclosed her secret to Mankind, and secured an Asylum to herself.”⁹

De Lolme’s famous explanation for this exceptional situation centered on the manner in which public power had been distributed into separate and balanced institutional hands, such that the “freedom of the Constitution” was the product of “an equilibrium between the ruling Powers of the State.”¹⁰ This thesis, presented most compactly in the opening chapters of book 2, dominated all the historical examples and political arrangements he assembled for discussion. In England, executive power had become the exclusive monopoly of a hereditary monarch; legislative power of a bicameral Parliament. Both powers in themselves were formidable. But the executive, being utterly dependent on the legislative power for its funding, was “like a ship completely equipped, but from which the Parliament can at pleasure draw off the water, and leave it aground.”¹¹ The members of the legislature, though able to control the funding of the executive, were equally unable to exercise the executive power itself. They thus created laws always knowing that another power would be enforcing their enactments, even over themselves. “All Men in the State,” De Lolme explained, “whatever may be their rank, wealth, or influence,” recognized “that they must . . . continue to be *Subjects*; and are thus compelled really to love, to defend, and to promote, those laws which secure the liberty of the Subject.”¹²

8. In the fourth edition (1784), De Lolme slightly modified his subtitle by deleting the qualifying phrase “occasionally with.” The change reflected the expansion of his comparative treatment of the European monarchies; see the discussion below on pp. xix–xxi.

9. See below, book 2, chapter 21, p. 342.

10. *Ibid.*, chapter 1, p. 139.

11. See below, book 1, chapter 6, p. 65.

12. See below, book 2, chapter 1, p. 148, note a.

In treating English liberty in these terms, De Lolme followed Montesquieu—“a man of so much genius”¹³—whose 1748 *De l'esprit des lois* likewise presented the English constitution as a unique political form and the generic guide to the nature of political liberty. The account involved a substantial reinterpretation of the institutional components of England's political system.¹⁴ Whereas previous writers related liberty to the relative weakness of the Crown in comparison with the Continent's more absolute monarchs, De Lolme emphasized the remarkable executive capacity of English kings, “sufficient to be as arbitrary as the Kings of France” but for the powerful constraint imposed by “the right of taxation . . . possessed by the People.”¹⁵ England's constitutional balance was conventionally understood in terms of its tripartite legislature, the King-in-Parliament, which combined elements of democracy (House of Commons), aristocracy (House of Lords), and monarchy (king)—a balanced and “mixed constitution” of classical proportions. De Lolme focused on a different equilibrium that balanced legislative capacity against other political power. Similarly, where traditional accounts presented the democratic status of the House of Commons as the linchpin of English liberty, De Lolme again firmly reoriented the discussion. The significance of the Commons' legislative power was its control over “the initiative in legislation.” This reversed the dominant model of ancient and modern republics, whereby the legislative power of the populace was limited to the approval or rejection of measures proposed by the powerful.¹⁶ Furthermore, the most significant democratic elements of the constitution were not parliamentary elections, but the “institution of the Trial by Jury” and “the Liberty of the Press,” which rendered England “a more Democratical State than any other we are acquainted with.”¹⁷

De Lolme also followed Montesquieu concerning the nature of political

13. *Ibid.*, chapter 18, p. 317, note a.

14. I summarize here an interpretation of eighteenth-century constitutional theory set out more fully in my “The Mixed Constitution and the Common Law,” in *The Cambridge History of Eighteenth-Century Political Thought*, ed. Mark Goldie and Robert Wokler (Cambridge: Cambridge University Press, 2006).

15. See below, book 2, chapter 20, p. 329.

16. *Ibid.*, chapter 4, p. 162.

17. *Ibid.*, chapter 17, p. 280, note a.

liberty itself. Many “writers of the present age”—not least his fellow countryman Rousseau—identified liberty with the power to participate in lawmaking and therefore located political liberty in the institutions of republican self-government. In contrast, De Lolme identified liberty with personal security under law: “in a state where the laws are equal for all, and sure to be executed.”¹⁸ It was this emphasis on the legally preserved security of the subject that made the operations of law and the constitutional structuring of “the judicial power” so central to the analysis of political freedom. De Lolme, admittedly, did not include judicial power within the key constitutional equilibrium between legislative and executive authority. Nonetheless, *The Constitution of England* devoted lavish attention to the role of legal process and independent courts in England’s political development. Many of these topics concerned matters that De Lolme acknowledged to fall outside those specifically constitutional arrangements by which “the Powers that concur to form the Government constantly balance each other.”¹⁹ But they were fundamental to the analysis of constitutional freedom, since so much of England’s liberty depended not only on those “very extensive” laws that defined the subject’s liberties, but equally on “the manner in which they are executed.”²⁰

Having revealed the logic of England’s political order, De Lolme was equipped to explain why liberty had proved so precarious in other governments. No target was so momentous as republican Rome, often in early modern political theory the very model of political achievement and public freedom. Ancient Rome figured as the ever-present negative counterpoint to De Lolme’s treatment of England. Despite the numerous expedients and violent conflicts that characterized Rome’s efforts to preserve its liberty, none had succeeded in protecting the citizenry from the abuses and manipulations of the politically powerful. Their failure could not be understood in the common terms of corruption through imperial growth, commercial luxury, or, later, the excessive ambitions of its leaders. The problems were structural and foundational. The liberty of the citizen was

18. *Ibid.*, chapter 5, p. 170.

19. See below, book 1, chapter 12, p. 115.

20. See below, book 2, chapter 16, p. 231.

violated because public power always combined those legislative and executive capacities which needed separation and balance.

So extensive was De Lolme's critique of the rival model of republican liberty that he feared his study might be misunderstood as an endorsement of "every kind of Monarchy."²¹ Instead, the analysis of England's constitutional logic also disclosed the structural defects of the European monarchies and the failings of alternative strategies for combining royal prerogatives and political freedom. England's constitution ensured that the power of an English king operated "by means totally different" from that of other monarchs, who enjoyed both legislative and executive authority.²² Elsewhere, the effort to prevent the abuse of royal power typically involved a strategy of taking powers from the king and distributing them to the nobility or "the Representatives of the People."²³ But this simply replaced one institutional mixture of legislative and executive authority with another, and thus substituted royal tyranny with tyranny from other sites of power. "It may be laid down as a maxim," De Lolme maintained, "that Power, under any form of Government, must exist, and be trusted somewhere."²⁴ It was the now-revealed secret of *The Constitution of England* to show how vast executive power could be concentrated in a single monarchic hand, where it could be vigilantly watched and balanced by a no less potent legislature.

Later Writings

De Lolme lived for well over thirty years after the original publication of *Constitution de l'Angleterre*. But there is a distinct sense of anticlimax attending his later literary productions. He produced one more large-scale work that attracted critical notice and enjoyed frequent reprinting, the splendidly titled *The History of the Flagellants; or, the advantages of the Discipline; being a Paraphrase and Commentary on the Historia Flagellantium of the Abbé Boileau, Doctor of the Sorbonne, Canon of the Holy Chapel etc.*

21. *Ibid.*, chapter 17, p. 260.

22. *Ibid.*, p. 302.

23. See below, book 2, chapter 19, p. 322.

24. *Ibid.*, p. 320.

by somebody who is not Doctor of the Sorbonne, published in London in 1777. This narrative reworking of materials assembled in Jacques Boileau's 1700 *Historia flagellantium* offered a case study in the pathologies of religious extremism, showing how the sectarian practice of self-mortification in fact violated the Christian teaching its adherents believed themselves to be serving. The combination of the work's familiar Enlightenment themes and provocative subject matter ensured healthy sales. *The History of the Flagellants* reached its fourth edition in 1783, at which stage De Lolme revised and relaunched the publication as *Memorials of Human Superstition*, which appeared in successive editions in 1784 and 1785.

The majority of De Lolme's literary productions, however, comprised more ephemeral and less ambitious writings in which he exploited his established reputation as a scholar of English government and history to comment on issues of the moment. In 1786 he composed a historical survey of the political relations between England and Scotland up to the period of the 1707 Union of the Parliaments of the two kingdoms, along with a companion account of the relations between England and Ireland that urged similar constitutional unification. The *Essay Containing a few strictures on the Union of Scotland with England; and on the present situation of Ireland* first served as an introduction to a new edition of Daniel Defoe's *History of the Union* and was reissued the following year as the freestanding work *The British Empire in Europe*. In 1788 he published a series of brief tracts condemning parliamentary taxes on windows, shops, and peddlers and offering proposals "for the Improvement of the Metropolis." That same year, he attracted greater attention for his contribution to the partisan debate over the Regency Crisis that followed in the wake of George III's mental collapse in 1788–89. De Lolme's *The Present National Embarrassment Considered* was twice printed and sustained vituperative criticism from "Neptune" in the 1789 *Answer to Mr. De Lolme's Observations on the Late National Embarrassment*.

For De Lolme's early-nineteenth-century editors and admirers, this corpus of political writing seemed a poor return on the talent and erudition displayed in *The Constitution of England*. Why had De Lolme not achieved more? In the substantial advertisement that first appeared in the 1781 edition of *The Constitution of England*, De Lolme himself explained his disap-

pointments at the outset of his literary career in London. An English translation of the French text was ready for publication several years prior to its 1775 first edition. The delay resulted from De Lolme's failure to find a patron for the work or a sympathetic bookseller, notwithstanding the book's "favourable reception" and "successive editions" on "the Continent."²⁵ Instead, De Lolme was forced to publish by subscription, an expedient that further postponed any significant financial reward for the undertaking. These frustrations and privations, it was proposed, readily explained his later career. "The fact is mortifying to record," Isaac Disraeli concluded in 1812, "that the author who wanted every aid, received less encouragement than if he had solicited subscriptions for a raving novel or an idle poem. De Lolme . . . became so disgusted with authorship that he . . . ceased almost to write."²⁶ Others attributed his chronic indebtedness and inability to secure regular patronage to darker defects of character and propriety. His political adversary Neptune reported that "he is even supposed to pride himself in a contempt of all decency in private life," while more approving observers acknowledged his secrecy and evasiveness and the frequency with which he appeared "slovenly to a degree that indicated indigence."²⁷

Whatever the accuracy of these assessments, De Lolme's English career mostly reflects the common harshness and insecurity of the eighteenth-century literary market for any author who lived by his pen without the benefit of settled party connection or a prosperous patron. In this respect, the later career of the "English Montesquieu," as Isaac Disraeli styled him, shared a fate common to London's political scribes of this period. De Lolme's own writings, as well as the biographical anecdotes supplied by others, contain frequent reference to plans for books and journals that were never realized. At the same time, there is no reason to suppose that all of De Lolme's writing appeared under his own name or that we can definitively determine the extent of his literary corpus. One important discovery,

25. See below, Advertisement, p. 9.

26. Isaac Disraeli, *The Calamities and Quarrels of Authors* (1st ed., 1812; London, 1867), 200–201.

27. *Answer to Mr. De Lolme's Observations*, 14; Thomas Busby, *Arguments and Facts Demonstrating that the Letters of Junius were written by John Lewis De Lolme, LL.D. Advocate . . .* (London, 1816), 13.

recently made by Michael Sletcher of Yale University, is De Lolme's editorship of two British reprints of the documentary collection *The Constitutions of the Several Independent States of America; The Declaration of Independence; The Articles of Confederation . . .* and related materials. The editions, apparently unknown to earlier scholars, were published in London in 1782 and in 1783 and contained what De Lolme described as "the Magna Charta of the United American States . . . the code of their fundamental laws."²⁸ On the other hand, modern scholarship has firmly put to rest one long-standing and contested attribution of authorship: the claim that De Lolme secretly authored the famous "Letters of Junius" that appeared in London's *Public Advertiser* between 1769 and 1772 and which De Lolme cited approvingly in *The Constitution of England*.²⁹ The case for authorship was presented at exhaustive length by Thomas Busby in 1816 and more quickly dispatched by John Cannon in 1978.³⁰

De Lolme's final years were spent in his native Geneva. As with so much of his biography, the details of his departure from England are not known. He received an inheritance that enabled him to pay his creditors and to return to the setting that first inspired his influential political speculations. He died on July 13, 1806, and was buried in Seewen-sur-le-Ruffiberg in the Swiss Canton of Schwitz.

Editions of *The Constitution of England*

For the preparation of this edition, Åsa Söderman completed a detailed survey of the principal English editions of *The Constitution of England* published in De Lolme's lifetime. Her research revealed for the first time

28. *The Constitutions of the Several Independent States of America; The Declaration of Independence; The Articles of Confederation . . . with an Advertisement by J. L. De Lolme* (London, 1783), v. The original version of this collection of documents was published in Philadelphia "by Order of Congress." The London editions of 1782 and 1783 contain the identical editorial advertisement by De Lolme; however, De Lolme's authorship is identified only in the 1783 edition. I am indebted to Michael Sletcher for his generosity in sharing this discovery with me and in allowing me to publicize it in these pages.

29. See below, book I, chapter 13, p. 127, note a.

30. See Thomas Busby, *Arguments and Facts demonstrating that the letters of Junius were written by John Lewis De Lolme* (London, 1816); and John Cannon, *The Letters of Junius* (Oxford, England: Clarendon Press, 1978), 540–41, 546.

the extensive changes to the text De Lolme made in the ten-year period from 1775 to 1784.

De Lolme's study was first published as *Constitution de l'Angleterre ou État du gouvernement anglais comparé avec la forme républicaine et avec les autres monarchies de l'Europe* in Amsterdam in 1771. Later French-language editions appeared in Amsterdam (1774, 1778), London (1785), Geneva (1787, 1788, 1789, 1790), Breslau (1791), and Paris (1819, 1822).

The original 1775 English edition, published in London as *The Constitution of England; or, an Account of the English Government; in which it is compared with the Republican Form of Government and occasionally with the Other Monarchies in Europe*, comprised more than a translation of the earlier French version. De Lolme reorganized some of the chapter divisions and introduced three substantial chapters to book 2 (chapters 15–17). These additions extended the treatment of England's constitutional development and legal system and reinforced De Lolme's central thesis concerning the many beneficial consequences of the crown's monopoly of executive power.

Three further editions of the English text were published in London during De Lolme's lifetime (1777, 1781, and 1784), along with pirate printings in Dublin (1776 and 1777). These publications became the vehicle through which De Lolme further revised and expanded his discussion. Major changes to the later French editions (Geneva, 1788, and Breslau, 1791), for example, included translations and insertions of the new material added previously to the English editions. De Lolme updated his study in a variety of ways, responding critically to recent political events, such as the restoration of royal absolutism in Sweden in 1772 (book 2, chapter 17, p. 258, note c) and the French military intervention in Geneva in 1782 (book 2, chapter 5, pp. 174–75, note a), and to important recent publications, such as Adam Smith's 1776 *An Inquiry into the Nature and Causes of the Wealth of Nations* (book 2, chapter 17, pp. 288–89). He was especially diligent in refining the language of the text. No section of the book was overlooked in the effort to clarify the argument through changes of expression and wording.

In addition to these frequent and often minor alterations, De Lolme introduced major revisions to the third (1781) and fourth (1784) editions.