

**Public Opinion in Benjamin Constant's Political Thought**

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This dissertation is submitted for the degree of Doctor of Philosophy

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## **Summary: Public Opinion in Benjamin Constant's Political Thought**

Arthur Ghins

Recent years have witnessed a revival of interest in Benjamin Constant's (1767-1830) political thought. Most contributions have started from the premise that Constant was a 'liberal', despite his own elusive use of the term. As a result, scholars have often interpreted Constant's thought in ways that correspond to later conceptions associated with 'liberalism', sometimes with a not-so-thinly-veiled purpose of defending, through Constant, their own brand of liberalism. This dissertation attempts to avoid retrojections and partisan labelling, by focusing on Constant's own political vocabulary. To this end, it concentrates on Constant's all-pervasive use of the concept of 'public opinion.' The dissertation is divided into three main chapters, which unfold along chronological lines. The first chapter is devoted to the Directory period (1795-1799). The second chapter covers the years of Napoléon's acme, from the fall of the Directory in 1799 to 1813. The third chapter focuses on the restoration period (1814-1830).

This dissertation makes two central claims. It first argues that Constant used the concept of public opinion to offer an original answer to the question of political legitimacy. Rather than relying on the concept of popular sovereignty, as has been assumed, Constant described governments as being underpinned by the people's opinion. When Constant talked about popular sovereignty, it was not to endorse it, but to urge that it should be disposed of in light of Napoléon's rhetorical uses of the concept. According to Constant, both the limits and the source of political authority were set by the people's changing beliefs – what they thought rulers were entitled to do, and on what basis. This sheds light on Constant's shifting views on heredity and elections as the basis of political legitimacy, as well as his much commented-upon endorsement of constitutional monarchy after having championed a republic as the best form of government.

Second, it shows that Constant's understanding of representative government hinged on a specific conceptualization of the people's power as public opinion, which was distinct from either popular sovereignty or national sovereignty. Constant believed that representatives ultimately always had the right to make binding decisions for the community. In order to avoid arbitrary, uninformed or out-of-touch collective decisions, Constant designed representative government as a receptacle of public opinion, understood as the reflection of the people's interests. This sheds new light on Constant's ideas about representation, the legislative mandate, and political liberty, as well as on his theory of the balance of branches of government, through which he planned to guarantee, as far as possible, the conformity between laws and public opinion.

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## Abbreviations

<i>ABC</i>	<i>Annales Benjamin Constant</i> , 1980–, Lausanne: Institut Benjamin Constant
<i>CA</i>	Germaine de Staël, ‘Des circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République en France,’ in <i>Oeuvres complètes, série III. Oeuvres historiques I</i> , ed. Lucia Omacini (Paris, 2009), 287-552.
<i>CF</i>	<i>Commentaire sur l’ouvrage de Filangieri</i> , <i>OCBC</i> , XXVI.
<i>DIP</i>	Germaine de Staël, ‘De l’influence des passions sur le bonheur des individus et des nations,’ in <i>Oeuvres complètes, série I. Oeuvres critiques I</i> , ed. Florence Lotterie (Paris, 2008), 124-314.
<i>DLR</i>	Benjamin Constant, <i>De la religion considérée dans sa source, ses formes et ses développements</i> , ed. Tzvetan Todorov and Etienne Hofmann (Arles, 1999).
<i>DRP</i>	Benjamin Constant, ‘Des réactions politiques,’ in <i>OCBC I</i> , 455-506.
<i>ECU (1<sup>st</sup>)</i>	Benjamin Constant, ‘De l’esprit de conquête et de l’usurpation dans leurs rapports avec la civilisation européenne (texte de la première édition. Janvier 1814),’ in <i>OCBC VIII</i> , 551-683.
<i>ECU (4<sup>th</sup>)</i>	Benjamin Constant, ‘De l’esprit de conquête et de l’usurpation dans leurs rapports avec la civilisation européenne (texte de la quatrième édition. Août 1814),’ in <i>OCBC VIII</i> , 689-822.
<i>FCR</i>	Benjamin Constant, <i>De la possibilité d’une constitution républicaine dans un grand pays. Fragments d’un ouvrage abandonné</i> , <i>OCBC IV</i> .
<i>FGA</i>	Benjamin Constant, ‘De la force du gouvernement actuel et de la nécessité de s’y rallier,’ in <i>OCBC I</i> , 327-379.
<i>LCA</i>	‘Lectures à l’Athénée Royal sur la Constitution anglaise (Décembre 1818 – juin 1819),’ in <i>OCBC XI</i> , 225-361.
<i>OCBC</i>	Benjamin Constant, <i>Oeuvres complètes</i> , ed. Paul Delbouille, Kurt Kloocke et al. (Tübingen, 1993–).
<i>PdP (1806)</i>	Benjamin Constant, <i>Principes de politique applicables à tous les gouvernements représentatifs</i> (1806), <i>OCBC V</i> .
<i>PdP (1815)</i>	Benjamin Constant, ‘Principes de politiques applicables à tous les gouvernements représentatifs et particulièrement à la Constitution actuelle de la France par M. Benjamin Constant, Conseiller d’Etat (3 avril – 31 mai 1815),’ in <i>OCBC IX</i> , 653-858.

- RsC (1814)* Benjamin Constant, 'Réflexions sur les constitutions, la distribution des pouvoirs et les garanties, dans une monarchie constitutionnelle (Texte de la première édition. Mai 1814),' in *OCBC VIII*, 951-1064.
- RsC (1818)* Benjamin Constant, 'Réflexions sur les constitutions et les garanties; publiées le 24 mai 1814, avec une esquisse de constitution (Texte de la deuxième édition, 1817-1818),' in *OCBC VIII*, 1065-1284.

## Introduction

### I. Constant's Growing Cult

'On ne lit guère les écrits politiques Constant' deplored Marcel Gauchet in the preface to his 1980 edition of Benjamin Constant's political writings. In his foreword to a reissued edition in 1997, reconsidering his essay, Gauchet heartily declared that the last two decades had proved him wrong: 'beaucoup de choses ont changé depuis. On s'est mis à lire Constant.'<sup>1</sup> From then on, a steadily increasing number of Constant publications has seen the light of day, leading scholars to write fervently about a 'Constant revival.'<sup>2</sup> As Michael Behrent has observed, enthusiasm about Constant has been so pronounced that he 'has become the object of something approaching a cult among intellectual historians and historians of political thought.'<sup>3</sup>

This cult, despite all its merits, has blinding effects. A first remarkable element about Constant scholarship is the clear purpose of rehabilitation that has driven it from an early stage. Soon after he passed away, Constant was attacked for his purported opportunism as well as his political ideas. Critiques derided him as the harbinger of a merely oppositional doctrine or a narrow-minded type of creed, obsessed with negative liberty and the preservation of property rights.<sup>4</sup> Either forgotten or intentionally entombed, Constant has been perceived as in need of repair. Depending on the context, the restoration of Constant's standing has taken on various forms, but its fundamental intention is still making itself felt. In 1992, George Armstrong Kelly observed that 'even today, Constant requires a certain structure of apologetics.'<sup>5</sup> In a concluding piece to the *Cambridge Companion to Constant* – the culmination of the 'Constant revival' in 2009 – Helena Rosenblatt introduced her analysis of Constant's reception with some critical remarks about how often his thought had been

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<sup>1</sup> Marcel Gauchet, 'Benjamin Constant: l'illusion lucide du libéralisme,' in *Benjamin Constant. Ecrits politiques*, ed. Marcel Gauchet, (Paris, 1997), 11-12. An abridged version of this essay has been translated as

<sup>2</sup> Helena Rosenblatt, 'Why Constant? A Critical Overview of the Constant Revival,' *Modern Intellectual History*, 1/3 (2004), 439-453. See also Rosenblatt, 'Eclipses and Revivals: The Reception of Constant in France and America 1830-2007,' in *Cambridge Companion to Constant*, 351-378.

<sup>3</sup> Michael Behrent, 'Liberal Dispositions: Recent Scholarship on French Liberalism,' *Modern Intellectual History*, 13/2 (2016), 461.

<sup>4</sup> François Guizot was amongst the first to lead the charge, describing Constant in his *Mémoires* as a 'sophiste sceptique et moqueur, sans conviction.' Later in the nineteenth century, Marx ironically described Constant, alongside Guizot, as a mere mouthpiece of the bourgeoisie. Throughout the twentieth century, in France, socialist political historians continued to depict Constant as the harbinger of an exclusively 'negative' doctrine obsessed with class-interests. For references, see Rosenblatt, 'Eclipses,' 357, 371.

<sup>5</sup> George Armstrong Kelly, *The Humane Comedy. Constant, Tocqueville and French Liberalism*, (Cambridge, 1992), 7.

misinterpreted and caricatured, expressing the hope ‘that future uses of his ideas might be better informed.’<sup>6</sup>

A second striking element is that most scholars have started from the premise that Constant was a ‘liberal’ who defended a certain type of ‘liberalism.’ Yet associating Constant with ‘liberalism’ is not obvious – and misleading – for at least two reasons. First, Constant never used the term ‘liberalism.’ If he did sometimes used ‘liberal’ as an adjective, he did not seem to grant special theoretical import to the expression, usually associating it with some form of vaguely defined generosity – the prevalent meaning associated with the term until at least 1815. French historian Guillaume de Bertier de Sauvigny has shown that ‘liberal’ in France became associated with a specific political stance only under the second restoration (1815-1830), i.e. at a time when Constant had already reached his intellectual maturity.<sup>7</sup> Up until at least 1800, Constant usually identified with the republican center. Under the Consulate and the Empire, he saw himself as part of a group of ‘amis de la liberté’ united in their fight against Napoléon. This expression resonated as a call to arms to a vaguely identified enlightened elite. During the second restoration, Constant appeared as a defender of the Charter, and a supporter of constitutional monarchy. He did rally the ‘parti des Indépendants’, also sometimes referred to as the ‘liberal party’ by contemporaries. But as Robert Alexander has argued, the ‘liberal’ epithet cannot – and should not – be taken as suggestive of doctrinal coherence, which is nowhere to be found in a messy context of shifting political agendas.<sup>8</sup> As Biancamaria Fontana has argued, ‘the image of Constant as militant in some ideal liberal army is devoid of specific historical content.’<sup>9</sup> In what is usually pictured as his magnum opus and a ‘liberal’ textbook – the *Principes de politique* (1806) – the word is altogether absent. Rare occurrences of the word ‘liberal’ in his texts, if not entirely negligible, are therefore not a very satisfactory entryway to his political thought.<sup>10</sup> If they have been used as such, it is naturally because ‘liberalism’ *today* has become a central political doctrine. And indeed, Constant usually assumes pride of place in recently published liberal textbooks or grand narratives about the birth of liberalism.<sup>11</sup>

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<sup>6</sup> Rosenblatt, ‘Eclipses,’ 377.

<sup>7</sup> Guillaume de Bertier de Sauvigny, ‘Libéralisme. Aux origines d’un mot,’ *Commentaire*, 3/7 (1979), 420-424.

<sup>8</sup> Robert Alexander, *Re-writing the French Revolutionary Tradition. Liberal Opposition and the Fall of the Bourbon Monarchy* (Cambridge, 2003).

<sup>9</sup> Biancamaria Fontana, *Benjamin Constant and the Post-Revolutionary Mind* (New Haven, 1991), xiii.

<sup>10</sup> For a different view, see K. Steven Vincent, *Benjamin Constant and the Birth of French Liberalism*, (New York, 2011) and Rosenblatt, *The Lost History of Liberalism. From Ancient Rome to the Twenty-First Century* (Princeton, 2018).

<sup>11</sup> Pierre Manent, *Histoire intellectuelle du libéralisme* (Paris, 1997); Alan Ryan, *The Making of Modern Liberalism* (Princeton, 2012); Edmund Fawcett, *Liberalism. The Life of an Idea* (Princeton, 2015).

This brings us to the second, main problem. It is now becoming clear that ‘liberalism’ as a coherent political doctrine is in many regards a belated theoretical construction, shaped in the aftermath of the Second World War before being retrojected in a search for founding fathers and canonical texts.<sup>12</sup> It is tempting, both for the sake of convenience and scholarly visibility to use ‘liberalism’ as a generic term to capture Constant’s political thinking. Anachronism, however, is not the sole issue. When scholars choose to write about Constant’s liberalism, they inevitably tend to carry with them not only contemporary presuppositions about the nature of ‘liberalism,’ but also sometimes strong ideological preferences. The willingness to rehabilitate Constant thus occasionally meets the manifest intention to defend, through his figure, the type of liberalism that scholars find most resonant with the current political situation or the academic debate in which they are involved. The consequence is that we have not only ‘many different “Constants,”’ as Helena Rosenblatt puts it, but many *liberal* Constants, each of which reflect what scholars took ‘liberalism’ to mean at a given moment in time.<sup>13</sup> Constant’s thought has been put into a series of ‘liberal’ boxes that coexist on a bigger ‘liberal’ shelf with his name on it.

Up to this day, at least four types of ‘liberalism’ have been connected to his name, each of which reflecting specific concerns. The first one is an individualist type of liberalism, focused on the preservation of individual autonomy. Although this trend can be traced back to Edouard Laboulaye’s re-edition of Constant’s works, the association of Constant with a certain brand of liberalism really started gaining traction with Isaiah Berlin.<sup>14</sup> In ‘Two Concepts of Liberty’ he presented Constant as the advocate *par excellence* of ‘negative liberty,’ ‘the most eloquent of all defenders of freedom and privacy.’ According to Berlin, Constant had rightly perceived, in his critique of Rousseau, the totalitarian potential of democracy, or how an overemphasis on liberty understood as self-mastery – ‘positive liberty’ – could end up obliterating individual liberty.<sup>15</sup> Next to Constant the ‘anti-totalitarian,’ a ‘libertarian’ Constant also started emerging in the 1960s, with Friedrich Hayek recommending his works and a cohort of his followers defending Constant in libertarian journals.<sup>16</sup> Although in less radical terms, it was also the theme of the individual and his

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<sup>12</sup> Duncan Bell, ‘What is Liberalism?’ *Political Theory*, 42/6 (2014), 682-715.

<sup>13</sup> Rosenblatt, ‘Eclipses,’ 351.

<sup>14</sup> In his reissues (1861 and 1872) of Constant’s political works at the height of Napoléon III’s rule, Edouard Laboulaye hailed him as ‘the master of political science for all friends of liberty.’ See Rosenblatt, ‘Eclipses,’ 362.

<sup>15</sup> Isaiah Berlin, ‘Two Concepts of Liberty,’ in *Liberty*, ed. Henry Hardy (Oxford, 2012), 166-217.

<sup>16</sup> Rosenblatt, ‘Eclipses,’ 367-369.

freedom that formed the heart of Paul Bastid's two-volume work on Constant's life and political thought.<sup>17</sup>

The 1980s saw the birth of another, rather different face of Constant's liberalism – a 'democratic' one. In a breakthrough analysis of Constant's political thought, Stephen Holmes took issue not only with Marxist readings and individualistic, Berlin-like interpretations, but also, more polemically, with conservative critiques of 'liberalism.' The partisan tone was clear from the start. In his introduction, Holmes declared that 'Constant's insights suggest a major reassessment of the categories that still dominate the debate about liberalism.'<sup>18</sup> 'An attentive reading of Constant,' he argued, 'casts doubt on the myth of an intractable conflict between liberalism and democracy.'<sup>19</sup> In Holmes' wake, next to 'liberalism,' the tag 'democrat' has been increasingly attached to Constant's name, so much so that he is now often referred as the quintessence of the 'liberal democrat,' who recognized that power must be the expression of the people's sovereignty while insisting that it needed to be limited, and combined a respect for individual rights with a stress on popular participation in political affairs.<sup>20</sup>

More recently, this interpretation has been given new credence in an updated, more historically minded way by scholars interested in the debate about the connection between 'republicanism' and 'liberalism.' Kalyvas and Katznelson have found in Constant a 'liberalism' with a 'republican parentage,' who readily embraced a 'democratic' principle of legitimacy – popular sovereignty – while combining it later onwards with a 'liberal' principle – small government – and a 'conservative' principle – heredity.<sup>21</sup> Drawing attention to different sets of texts, Annelien De Dijn and Andrew Jainchill have both seen in Constant a 'neo-republican' or 'liberal republican,' who combined a classically liberal stress on individual liberty with a republican-minded emphasis on political liberty.<sup>22</sup> In her recent analysis of Constant's engagement with Rousseau, Emanuelle Paulet-Grandguillot went back to Holmes' vocabulary of 'liberalism' and 'democracy,' arguing that Constant's liberalism took shape both within and as a reaction to Rousseau's democratic matrix, without

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<sup>17</sup> Paul Bastid, *Benjamin Constant et sa doctrine* (Paris, 1966), esp. 693-866.

<sup>18</sup> Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, 1984), 1.

<sup>19</sup> *Ibid.* 2.

<sup>20</sup> See, amongst others, Tzvetan Todorov, *Benjamin Constant. A Passion for Democracy* (New York, 1997), 35-36.

<sup>21</sup> Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge, 2008), 146-175.

<sup>22</sup> Annelien De Dijn, *French Political Thought from Montesquieu to Tocqueville: Liberty in a Levelled Society?* (Cambridge, 2008), 95-101; Andrew Jainchill, *Reimagining Politics after the Terror: The Republican Origins of French Liberalism* (Ithaca, 2008), 289-294.



renouncing to the latter's commitment to popular sovereignty.<sup>23</sup> More recently still, Bryan Garsten offered a string of compelling articles in which he draws parallels between Constant and Rousseau, suggesting that 'liberal democracy' might in fact not be an oxymoron.<sup>24</sup>

The third type of liberalism Constant scholars have recently unravelled is a 'moral' liberalism. The foil has been the image of a privacy-addicted Constant, first defended by Berlin, but now propagated by less benevolent 'value-minded republicans' including Philipp Pettit and Quentin Skinner.<sup>25</sup> Constant's numerous works on religion have provided the weapon. Although this has been a lively area of research for quite some time, Constant's interest in religion has received a particularly extensive treatment in Helena Rosenblatt's works.<sup>26</sup> The tone of her book *Liberal Values* is a militant one. She deplores that the neglect of Constant's religious works has left 'a seriously distorted view of his liberalism.'<sup>27</sup> In her eyes, the image of Constant that has prevailed in 20<sup>th</sup> century scholarship has been that of a 'negative,' 'oppositional' thinker, to the detriment of 'his more affirmative, optimistic, and constructive side.'<sup>28</sup> Constant, she deplored, is still often misrepresented as 'an enthusiastic celebrant of *laissez-faire* capitalism' or 'as a great defender of the individual's right to private "pleasures."<sup>29</sup> She has aimed to offer a different, more positive picture: that of an author who had a 'deep concern for morals,' which in fact constituted 'the very heart' of his 'liberalism.'<sup>30</sup> Bryan Garsten has embraced a similar, if more theoretical path, drawing attention to the complementary character of Constant's writing on perfectibility and religion. Taken together, these offer a positive version of a liberalism which, far from being merely defensive, assigned itself an ambitious goal: 'self-development,' or the refinement of

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<sup>23</sup> Emmanuelle Paulet-Granguillot, *Libéralisme et démocratie. De Sismondi à Constant, en passant par le Contract Social* (Geneva, 2010).

<sup>24</sup> Bryan Garsten, 'Representative Government and Popular Sovereignty,' in *Political Representation*, ed. Ian Shapiro, Susan C. Stokes et al. (Cambridge, 2009), 90-110. Garsten, 'From Popular Sovereignty to Civil Society in Post-Revolutionary France,' in *Popular Sovereignty in Historical Perspective*, eds. Richard Bourke and Quentin Skinner (Cambridge, 2016), 236-269.

<sup>25</sup> Philip Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford, 1997); Quentin Skinner, *Liberty before Liberalism* (Cambridge, 1998). 'Value-minded republicans' is Helena Rosenblatt's expression. See her 'Re-evaluating Benjamin Constant's Liberalism: Industrialism, Saint-Simonianism and the Restoration Years,' *History of European Ideas*, 30/1 (2004), 23-37.

<sup>26</sup> See, in addition to her *Liberal Values* (Cambridge, 2008), 'Commerce et religion dans le libéralisme de Benjamin Constant,' *Commentaire*, 102 (2003), 415-26. Amongst earlier works on Constant and religion, see Pierre Deguise, *Benjamin Constant méconnu: le livre "de la religion" avec des documents inédits*, (Geneva, 1966) and Giovanni Paoletti, *Benjamin Constant et les anciens. Politique, religion, histoire* (Paris, 2006).

<sup>27</sup> Rosenblatt, *Liberal Values*, 2.

<sup>28</sup> Ibid. 248.

<sup>29</sup> Ibid. 3.

<sup>30</sup> Ibid. 125-127; 133; 154; 159.

individual's highest faculties.<sup>31</sup> Garsten's avowed aim has been to 'correct the neo-republicans' by responding to 'the long-standing complaint against Constant that they are echoing, the view that his liberalism was little more than an ideological screen for the triumph of capitalism and elitist-representative government over the forces of socialism and real democracy.'<sup>32</sup> These readings tread the less obviously polemical path once opened by George Armstrong Kelly, who argued in the early 1990s that central to 'French liberalism' was 'a respiritualization of its philosophical base,' and Lucien Jaume's magisterial *L'individu effacé*, in which Constant features, in more secular terms, as an advocate of a 'libéralisme du sujet' whose moral character resides in the individual's capacity to make political judgments.<sup>33</sup>

In varying degrees, these readings share the view that Constant was a principled, constructive thinker, who stood for a set of identifiable moral 'values' and ascribed a moralizing role to politics. On that point – in marked contrast with the idea of a 'democratic' or 'republican' Constant, where a virtual unanimity prevails – there is a split amongst Constant scholars. Since the 1980s, a fourth and last version of Constant's liberalism has been on the rise – a sceptical liberalism. Holmes had already described Constant as a 'true skeptic' who refused to promote any conception of the good life, and advocated a neutral state that provided the conditions for citizens to pursue their discordant goals.<sup>34</sup> His target was 'communitarian cant.' Pierre Manent similarly made of Constant a 'skeptic,' albeit from a Schmittian perspective. To Manent, 'liberalism' had less to be defended than put under scrutiny and indirect criticism. In his reading, Constant was the father of a 'libéralisme d'opposition' – a doctrine with which he tirelessly sought to cast doubt on any attempt to impose a particular opinion to the generality of citizens.<sup>35</sup> Without the same ideological charges, Fontana also depicted Constant as a 'natural skeptic' – a prophet of the moral decrepitude of modern societies and the chronic indecisiveness of modern man.<sup>36</sup>

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<sup>31</sup> Bryan Garsten, 'Religion and the Case Against Ancient Liberty: Benjamin Constant's Other Lectures,' *Political Theory*, 38/1 (2010), 4-43. Garsten, 'Constant and the Religious Spirit of Liberalism,' in *The Cambridge Companion to Constant*, 286-312.

<sup>32</sup> Garsten, 'Religion and the Case Against Ancient Liberty,' 6.

<sup>33</sup> Kelly, *The Humane Comedy*, 2; Jaume, *L'individu effacé* (Paris, 1997) and Jaume, 'Coppet, creuset du libéralisme comme "culture morale,"' in *Coppet, Creuset de l'esprit libéral: les idées politiques et constitutionnelles du Groupe de Madame de Staël*, ed. Lucien Jaume (Paris, 2000). For an additional reading of Constant as an advocate of a 'moral liberalism,' see James Mitchell Lee, 'Doux Commerce, Social Organization, and Modern Liberty in the Thought of Benjamin Constant,' *ABC*, 26 (2002), 117-149.

<sup>34</sup> Holmes, *Constant*, 7-9.

<sup>35</sup> Manent, *Histoire intellectuelle*, 194-195.

<sup>36</sup> Fontana, *Constant*, xviii.

This line of interpretation has received a new twist recently in the works of Aurelian Craiutu and K. Steven Vincent. Craiutu sees in Constant a ‘moderate’ who attempted to navigate between various political options in stormy political circumstances. Constant, in his view, was not keen on abstract principles. He was a ‘pluralist’ who strove to secure an always-contingent balance between diverging interests, social forces and ideas, not least through a complex constitutional structure designed to tame partisan passions.<sup>37</sup> As has been shown, Craiutu’s study of political moderation is very much a piece of militancy in favor of a certain type of incarnate, anti-utopian liberalism.<sup>38</sup> This view also permeates, although less explicitly, Vincent’s attempt at unraveling a history of ‘liberal pluralism,’ with Constant as a case in point.<sup>39</sup> Vincent also sees Constant as a pragmatic ‘moderate’ who believed that no principle could apply absolutely.<sup>40</sup> In his view, Constant did not believe that ‘politics could lead to rational truth,’ envisaging it instead as ‘ongoing negotiation among divergent groups and interests.’<sup>41</sup> The divide within Constant scholarship is particularly striking on the conflicting readings scholars make of Constant’s views on perfectibility – a moderate tale about progress or the gradual affirmation of true principles<sup>42</sup> – and his views on individual rights, alternatively interpreted as contingent historical products or natural rights.<sup>43</sup>

The temptation to turn Constant into an ambassador for present-day conceptions of liberalism has led to partial readings, in which dimensions of his thought that are palatable to a scholar’s taste are overemphasized while others are brushed aside. Advocates of an individualist liberalism have rightly highlighted Constant’s core concern for autonomy, while downplaying his stress on political engagement and constitutional engineering. Partisans of a democratic Constant have gone too far in the opposite direction, failing to account for Constant’s original articulation of individual and political liberty. Further, stressing Constant’s ‘republican’ or ‘democratic’ pledges against accusations of depolitization and elitism does not help to understand his later endorsement of hereditary monarchy, the exact

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<sup>37</sup> Aurelian Craiutu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830* (Princeton, 2012), 198-237.

<sup>38</sup> According to Michael Behrent, Aurelian Craiutu’s study of political moderation ‘is really a defense of liberalism, albeit one in which moderation is held to be liberalism’s cardinal virtue.’ See ‘Liberal Dispositions,’ 460.

<sup>39</sup> Vincent, *Constant*, 167-178.

<sup>40</sup> *Ibid.*, 55.

<sup>41</sup> *Ibid.*, 3.

<sup>42</sup> For a rationalist reading of Constant’s ideas on perfectibility, see Jaume, *L’individu effacé*, 109-117 and Kelly, *Humane Comedy*, 50. For the sceptical approach, see Holmes, *Constant*, 181-206 and Fontana, *Constant*, 29-47.

<sup>43</sup> On this point, the boundaries between the two groups are more porous. For a defence of natural rights in Constant, see Jaume, *L’individu effacé*, 91-95. For a historicist account of rights in Constant, see Fontana, *Constant*, 22-24; Kalyvas and Katznelson, *Liberal Beginnings*, 150; Garsten, ‘Constant’s Other Lectures,’ 19.

role he ascribed to political liberty, his insistence on property as a prerequisite for political rights or his arguments about the nature of representative government. To Rosenblatt and Garsten, missing the religious dimension of Constant's work is to miss the nature of his liberalism altogether, if not of 'liberalism' as a whole. No doubt religion was a longstanding concern of Constant's, but highlighting this should not come at the expense of other dimensions of his thought – his *laissez faire* stance as well as his defence of individual interest as a central human motivation.<sup>44</sup> 'Skeptical' or 'pluralist' readings rightly stress Constant's attempt to make diverging interests coexist in a balanced institutional apparatus, but mistakenly assume that Constant's goal in doing so was a 'liberal' one – to put constraints upon government, keep powers separate, or ensure the state's neutrality. Besides, such readings systematically tone down Constant's commitment to timeless 'true' principles. Yet, as George Armstrong Kelly remarked a long time ago, the idea that there was no ultimate unity of truth was alien to nineteenth century 'liberals' like Constant: 'only in the twentieth century has this position deeply colored liberal doctrine.'<sup>45</sup>

Unlike many insightful studies on Constant, Staël or Guizot, this dissertation *does not start with liberalism*. Methodologically, it does not presume that these authors defended an identifiable, coherent doctrine known as 'liberalism,' or were part of a distinctive and consistent French brand of liberalism, supposedly going from Montesquieu to Tocqueville.<sup>46</sup> A nagging problem for advocates of a French liberal tradition is that Tocqueville showed little interest in Constant.<sup>47</sup> Despite the lack of evidence, scholars have indulged in some form of idealized 'Constant-Tocqueville nexus,' as if the fate of the French liberal tradition as a whole revolved around this connection.<sup>48</sup> Further inquiry into the birth of the idea of a 'French liberal tradition' would reveal it as a belated construction, first introduced by Edouard de Laboulaye in the 1860s in order to build up the credentials of the self-titled

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<sup>44</sup> According to Rosenblatt, Constant 'surely had no love for self-interest as a human motivation.' *Liberal Values*, 126. See also Garsten, 'Religious Spirit of Liberalism,' esp. 288-294, the section entitled 'beyond commercial self-interest.'

<sup>45</sup> Kelly, *Humane Comedy*, 89.

<sup>46</sup> Kingsley Martin, *French Liberal Thought in the Eighteenth Century: A Study of Political Ideas from Bayle to Condorcet* (1963); André Jardin, *Histoire du libéralisme politique: de la crise de l'absolutisme à la constitution de 1875* (Paris, 1985); Louis Girard, *Les Libéraux français 1814-1875* (Paris, 1985), Helena Rosenblatt and Raf Geenens (eds.), *French Liberalism From Montesquieu to the Present Day* (Cambridge, 2012).

<sup>47</sup> And perhaps even never read him, with apparently one exception: Robert Gannett Jr has shown that Tocqueville had read some of Constant's writings of the late 1790s. *Tocqueville Unveiled: The Historian and His Sources for The Old Regime and the Revolution*, (Chicago, 2003), 32-37.

<sup>48</sup> Kelly, *Humane Comedy*, 3: 'Any serious anatomy of French liberalism requires particular attention to the Constant-Tocqueville relationship.' See also Stephen Holmes, 'Constant and Tocqueville: An Unexplored Relationship,' *ABC*, 12 (1991), 29-41; Rosenblatt, 'Two Liberals on Religion: Constant and Tocqueville Compared,' *ABC*, 29 (2005), 159-170.

‘liberal’ opposition to Napoléon III.<sup>49</sup> Recent research has shown that the later movement of ‘rediscovery’ of early nineteenth century ‘French liberals’ initiated by Francois Furet and Claude Lefort was similarly driven by a specific polemical purpose, in a context heavily marked by the confrontation with Marxist intellectuals.<sup>50</sup> Despite these warning signs, together with Staël, Guizot and Tocqueville, Constant continues to be involved in evermore fine-grained distinctions between types of liberalism, including ‘constitutionalist liberalism,’ ‘statist liberalism,’ ‘liberal catholicism,’ ‘aristocratic liberalism,’ ‘*laissez faire* liberalism,’ ‘utopian liberalism’ and ‘liberal republicanism’ as the most recent outputs.<sup>51</sup> Such a multiplication raises the question as to whether what is taken to be their common ground means anything at all beyond a vaguely defined commitment to ‘liberty.’

In a recent contribution, Richard Bourke has shown how much our understanding of a key political thinker like Burke could be improved if we took him out from the ‘conservative’ box in which he is usually relegated.<sup>52</sup> Placing Burke back in context rather than starting with ‘conservatism,’ he argued, can pave the way for a ‘critical reconstruction’ that dispels ‘counter-productive assumptions.’<sup>53</sup> It is also my conviction that if we leave behind the now hopefully completed cycle of restoration of ‘French liberals’ and renounce attempts to squeeze Constant into ‘liberal’ boxes or a dreamed-of liberal tradition, new interpretative avenues can be opened up. To avoid confirmation biases, I unbox Constant to look at what his priorities were in a post-revolutionary context, and the concepts with which he addressed these. When we do so, we become more attuned to Constant’s own political vocabulary.

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<sup>49</sup> For starters, see the preface to Laboulaye’s re-edition of Constant’s *Cours de politique constitutionnelle*, 2 v., (Paris, 1861).

<sup>50</sup> Mark Lilla, ‘The Other Velvet Revolution: Continental Liberalism and Its Discontents,’ *Daedalus*, 123 (1994), 129-157; Mark Lilla, ‘The Legitimacy of the Liberal Age,’ in *New French Thought* (Princeton, 1994), esp. 7; 15; Iain Stewart and Stephen Sawyer (eds.), *In Search of the Liberal Moment: Democracy, Anti-totalitarianism and Intellectual Politics in France since 1950*, (New York, 2016) and the ‘review forum’ around the book in *Politics, Religion and Ideology*, 18/3 (2017), 331-349.

<sup>51</sup> Lucien Jaume has divided up French liberalism into three currents: a ‘libéralisme du sujet’ (Constant, Staël), a ‘libéralisme par l’Etat’ (Guizot) and liberal Catholicism (Lacordaire, Montalembert). See *L’individu effacé*. On aristocratic liberalism see Alan Kahan, *Aristocratic Liberalism. The Social and Political Thought of Jacob Buckhardt, John Stuart Mill and Alexis de Tocqueville* (Oxford, 1992) and De Dijn, *French Political Thought. On laissez faire liberalism or utopian liberalism*, see Pierre Rosanvallon, *Le libéralisme économique. Histoire de l’idée de marché* (Paris, 1989). On ‘liberal republicanism,’ see Jainchill, *Reimagining Politics* and Kalyvas and Katznelson, *Liberal Beginnings*. For a similar critique, see Johnson Kent Wright, ‘The Hard Birth of French Liberalism,’ *Modern Intellectual History*, 6/3 (2009), 597-309.

<sup>52</sup> Richard Bourke, ‘What is Conservatism? History, Ideology and Party,’ *European Journal of Political Theory*, 17/4 (2018), 449-455.

<sup>53</sup> Bourke, *ibid.* 4.

## II. Public Opinion, an Entryway to Constant's Political Thought

This dissertation started off as a work on Constant and religion. It was intended as a contribution to the promising area of research that Rosenblatt and Garsten had brought back to the top of the agenda. A close, systematic reading of Constant's texts from the 1790s to the 1820s soon revealed that another concept required more urgent attention: public opinion. The concept is so pervasive in Constant's writings that it imposes itself upon the reader. Constant referred to public opinion not only in journal articles and speeches, but also in all his major political writings, from his early republican writings to his later production under the restored monarchy.

Scholars have occasionally noticed the importance public opinion had for Constant at different periods of his career, albeit very succinctly. Vincent mentioned Constant's concern for 'popular opinion' during the Directory years.<sup>54</sup> Fontana dwelled on Constant's depiction of the role of opinion during the French revolution in his *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays* (1800-1803).<sup>55</sup> Etienne Hofmann has seen in public opinion nothing short than the 'cornerstone' of the *Principes de politique* (1806), written at the height of the Napoleonic Empire.<sup>56</sup> Mention has also been made of Constant's speeches on the press during the restoration in connection to his thoughts about public opinion.<sup>57</sup> Not only is the concept a permanent feature over time, it is also prevalent in contexts as diverse as Constant's constitutional texts, his history of religion or his more literary and autobiographical writings. Given this centrality, commentators have sensed that the concept provided a privileged entryway to Constant's thought. As Fontana suggested, 'public opinion is one of the key concepts...through which the unity of Constant's intellectual project can be best recovered.'<sup>58</sup> John Alexander Gunn, who wrote extensively on public opinion in modern history of political thought has similarly observed that 'the theme

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<sup>54</sup> Vincent, *Constant*, 211-212.

<sup>55</sup> Fontana, *Constant*, 84-85.

<sup>56</sup> Etienne Hofmann, *Les 'Principes de politiques' de Benjamin Constant: la genèse d'une œuvre et l'évolution de la pensée de leur auteur, 1789-1806* (Geneva, 1980), 370-371.

<sup>57</sup> Susan Tenenbaum, 'The Coppet Circle: Public Opinion and the Modern State,' in *Le Groupe de Coppet et le monde moderne*, ed. Françoise Tilkin (Geneva, 1998), 223-234; Béatrice Fink, 'Benjamin Constant: mobilisation et médiation du mot,' in *ibid.*, 333-346.

<sup>58</sup> Biancamaria Fontana, 'Publicity and the "Res publica": the concept of public opinion in Benjamin Constant's writings,' *ABC*, 12 (1991), 63.

of ‘opinion’ and its political importance is one of the most vital ones in Constant’s reflections.’<sup>59</sup>

In light of these considerations, it might seem surprising that analyses of public opinion in Constant’s thought exist in relatively limited numbers.<sup>60</sup> One reason might be that Constant’s views on opinion are all too evident, and do not require extensive attention for that matter. In the standard reading, Constant had a classically ‘liberal’ view on public opinion as a guarantee against arbitrariness: he pictured it as a force of opposition shaped by enlightened writers who criticized the government’s action and prevented rulers from encroaching upon individual rights.<sup>61</sup> Others have seen in Constant’s writings about newspapers a ‘republican’ stress on self-government, public opinion here being taken as synonymous to public interest in political matters.<sup>62</sup> These interpretations, although not erroneous *per se*, should be taken cautiously, because they bear the mark of the grand narrative intellectual historians and political theorists have built around public opinion in the last decades.

The standard story, first popularized by Habermas, is that somewhere around 1750 a rational space of debate emerged, where enlightened individuals made use of their judgment to challenge the power of the state.<sup>63</sup> In 1987, Keith Michael Baker argued that public opinion took shape in modern France as a conceptual category that both partisans and opponents of absolute monarchy alternatively invoked to push forward their political agenda. This triggered a ‘politics of contestation’ that eventually contributed to the downfall of absolute monarchy.<sup>64</sup> On the oppositional character of public opinion, Baker’s argument was not significantly different from Habermas.’<sup>65</sup> The real divergence came on the composition of public opinion: while Habermas seemed to assume it was ‘pluralist’ from the very beginning, Baker claimed that, in France at least, public opinion in the mid-eighteenth century was conceived in strongly monist or unitary terms.<sup>66</sup> This view echoed wider intellectual concerns

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<sup>59</sup> John Alexander Gunn, *When the French Tried to be British. Party, Opposition, and the Quest for Civil Disagreement, 1814-1848* (Montreal, 2009), 288.

<sup>60</sup> Book-length studies on Constant have shied away from the subject. An exception is Fontana, *Constant*, 81-97.

<sup>61</sup> See Hofmann, *Principes*, 370-371. Tenenbaum, ‘Public Opinion’; Béatrice Fink, ‘Mobilisation.’

<sup>62</sup> See De Dijn, *French Political Thought*, 123-124.

<sup>63</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Cambridge MA, 1989).

<sup>64</sup> Keith Michael Baker, ‘Public Opinion as Political Invention,’ in *Inventing the French Revolution* (Cambridge, 1990), 186.

<sup>65</sup> James van Horn Melton has followed this thread, but has put more emphasis on the quarrel around Jansenism and the role of *parlements* to account for the advent of ‘an oppositional public sphere,’ which he situates slightly earlier than Habermas and Baker, in the 1720s. *The Rise of the Public in Enlightenment Europe* (Cambridge, 2001).

<sup>66</sup> Baker, ‘Public Opinion,’ 199.

about the French revolution's craving for unity that Baker shared with fellow 'revisionist' French political historians – François Furet, Mona Ozouf and, later, Pierre Rosanvallon and Lucien Jaume.<sup>67</sup> According to this strand of interpretation, revolutionaries perpetuated the unitary vision that had prevailed before 1789, by stressing the need of turning public opinion into a 'public spirit' that would outdo diverging interests in the long run.<sup>68</sup>

This reading has become the standard 'liberal' or 'modern' view on public opinion, with reason, debate, pluralism, openness and progress as its generic characters.<sup>69</sup> Following this lead, scholars have attempted to demonstrate how much public opinion was interwoven with the birth of 'liberalism' from the mid-eighteenth century onwards.<sup>70</sup> 'The public sphere' now features in textbooks as a key element in the march towards rational modernity and 'liberal democracy.'<sup>71</sup> One problem is that this view of 'public opinion' as an agent of historical progress has infused more specific readings of political thinkers writing about public opinion. Like other classical 'liberal' figures such as Bentham and Mill, Constant's ideas about public opinion have been enrolled in this strongly teleological narrative.<sup>72</sup> Mona Ozouf, for instance, has identified Constant with a distinctively 'moderne' view of public opinion – stemming from 'des premisses individualistes et égalitaires' and manifesting 'la pre-eminence du social sur le politique' – in contrast with an 'archaïque' vision of public opinion, which longed for a fixed unanimity and consecrated 'le primat du politique sur le

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<sup>67</sup> François Furet, *Penser la Révolution française* (Paris, 1978); Mona Ozouf, 'L'opinion publique,' in *The French Revolution and the Creation of Modern Political Culture*, 1, eds. Keith Baker, François Furet and Colin Lucas (Oxford, 1988), 419-434; Pierre Rosanvallon, *Le modèle politique français. La société civile contre l'Etat* (Paris, 2004); Jaume, *L'individu effacé*.

<sup>68</sup> Mona Ozouf, 'Esprit public,' in *Dictionnaire critique de la Révolution française. 4, Idées*, eds. Mona Ozouf and François Furet (Paris, 2017).

<sup>69</sup> As has been shown, Furet, Baker and Ozouf's understanding of public opinion was part of 'a certain implied narrative of rational modernity,' in which individuals gradually emancipated themselves from archaic beliefs and embraced 'a demystified modern condition of rational exchange based on concrete interests.' See Harold Mah, 'Phantasies of the Public Sphere: Rethinking the Habermas of Historians,' *Journal of Modern History*, 72 (2000), 153-182, esp. 174.

<sup>70</sup> Public opinion has been presented as a crucial element in the gradual recognition of society's self-sufficient character. This pre-eminence of 'the social' over 'the political' is often considered as characteristic of liberal thought. See Sheldon Wolin, *Politics and Vision. Continuity and Innovation in Western Political Thought* (Boston, 1960), 285-294; 309-314; Keith Baker, 'Enlightenment and the Institution of Society: Notes for a Conceptual History,' in *Main Trends in Cultural History*, ed. Willem Melching and Wyger Velema (Amsterdam, 1994), 119-20; Daniel Gordon, *Citizens without Sovereignty: Equality and Sociability in French Thought 1670-1789* (Princeton, 1994), 51-54; David A. Bell, *The Cult of the Nation in France; Inventing Nationalism 1680-1800* (Cambridge MA, 2001), 24-27. Lucien Jaume has seen in Locke's use of opinion the 'liberal' recognition of the power of the social order. *Origines philosophiques du libéralisme* (Paris, 2010), 169.

<sup>71</sup> Vincent Price, 'The Public and Public Opinion in Political Theories' in *The SAGE Handbook of Political Research*, ed. Wolfgang Donsbach and Michael Traugott (Thousand Oaks, 2008), 11-24.

<sup>72</sup> Fred Cutler, 'Jeremy Bentham and the Public Opinion Tribunal,' *The Public Opinion Quarterly*, 63/3 (1999) 321-346; Bruce Baum, 'Freedom, Power and Public Opinion: J. S. Mill and the Public Sphere,' *History of Political Thought*, 22/3 (2001), 501-524.



social.’<sup>73</sup> Just as ‘public opinion’ has been knitted together with ‘liberalism,’ Constant the ‘liberal’ has been pictured as holding inevitably ‘liberal’ views about public opinion.

Dissident voices have nonetheless shown that there existed no such thing as a one-key-opens-all-doors approach to public opinion in modern political thought. In a dazzlingly encyclopaedic book on public opinion in France, Gunn argued that the concept did not emerge around 1750 and was therefore not coeval with some sort of political ‘modernity,’ but could be traced back at least to the fifteenth century.<sup>74</sup> Recent research has also drawn our attention to the rich diversity of meanings key political figures attributed to public opinion, including reflections about public opinion as public esteem, reputation and tradition, which do not correspond to the rationality now associated with the concept.<sup>75</sup> Closer to Constant, Necker and Germaine de Staël’s thought have recently been the object of book-length analyses that take public opinion as a guiding thread.<sup>76</sup>

If we take Constant out of the grand liberal narrative about public opinion, as these studies invite us to do, we might get a clearer view of why the theme was so central to his political thinking, and why it is worth studying attentively. It must be said from the onset that Constant did not straightforwardly state his ideas about public opinion in one key piece, like some of his contemporaries like Roederer had.<sup>77</sup> Further, the notion has no single, fixed, established meaning in his writings – an apparently recurrent problem with ‘public opinion’ in texts of the early modern period.<sup>78</sup> When it comes to public opinion it is not ‘always easy,’ as has been observed, to determine to what extent ‘Constant was merely echoing traditional or current rhetoric or suggesting a new approach.’<sup>79</sup> This intractability might be the second main reason why scholars have not dwelt on public opinion in Constant – the opposite twin of its obvious character.

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<sup>73</sup> Ozouf, ‘Opinion publique,’ 430-431.

<sup>74</sup> John Alexander Gunn, *Queen of the World: Opinion in the Life of France from the Renaissance to the Revolution* (Oxford, 1995).

<sup>75</sup> See the contributions in *L’avènement de l’opinion publique. Europe et Amériques XVIIIe-XIX*, ed. Javier Sebastian and Joëlle Chassin (Paris, 2004) and *L’opinion publique dans l’Europe des Lumières. Stratégies et concepts*, ed. Bertrand Binoche (Paris, 2013). See also Bertrand Binoche, *Religion privée, opinion publique* (Paris, 2012).

<sup>76</sup> Léonard Burnand, *Necker et l’opinion publique*, (Paris, 2004); Biancamaria Fontana, *Germaine de Staël. A Political Portrait* (Princeton, 2016).

<sup>77</sup> Pierre-Louis Roederer, ‘De la majorité nationale, de la manière dont elle se forme, et des signes auxquels on peut la reconnoître ou Théorie de l’opinion publique’ in *Mémoires d’économie publique, de morale et de politique*, 1/2 (Paris, 1799), 75-89.

<sup>78</sup> On this terminological complexity, see Ozouf, ‘Opinion publique’ and Binoche, *Opinion publique*.

<sup>79</sup> Fontana, *Constant*, 82.

This indeterminacy should not lead us into thinking that Constant's views on public opinion offer little more than a 'black hole.'<sup>80</sup> Constant's ideas on the subject are spread across his numerous political and constitutional works, but it is possible to discern some form of fundamental, consistent theoretical framework behind scattered occurrences with fluctuating meanings, without for that matter neglecting chronological changes and contextual background. If Constant definitively used the phrase 'public opinion' to legitimate certain strategic political positions on special occasions, especially during the Directory years, his understanding of the concept cannot simply be reduced to a rhetorical device. Public opinion clearly had some major analytical weight in his work. In light of the slipperiness of the vocabulary Constant used, such theoretical content can only be recovered if we look at the arguments behind the words, rather than attempting to track and pile up occurrences of 'public opinion' in his texts. Depending on the context, the expression 'opinion publique' or 'esprit public' could take on specific connotations. Bearing these caveats in mind, it is possible to distinguish two overarching themes of Constant's political thinking that hinged on his views on public opinion: political legitimacy and representative government. These form the two main subthemes of the dissertation.

On legitimacy and representative government, there is an underlying logic in Constant's writings. This dissertation unfolds chronologically and explores Constant's views on these two subjects from the 1790s to the 1820s, by looking at his uses of public opinion to account for what made a political regime legitimate as well as the daily workings of representative government. I say more about the dissertation's structure in section V of the introduction. For now, let me briefly state what is at stake in Constant's reliance on public opinion to address the question of why a society owes allegiance to its government, and how the people's power is channelled into representative institutions.

### **III. Legitimacy Based on Opinion, not Popular Sovereignty**

There is a wide scholarly consensus that Constant endorsed popular sovereignty as the foundation of the state, while insisting that it should be limited. This line of interpretation has

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<sup>80</sup> This is the expression Biancamaria Fontana used in her presentation 'The French Revolution in Germaine de Staël's *Considerations*' delivered on 15 February 2016 at the Cambridge Political Thought and Intellectual History Seminar.

become so prevalent that many scholars have no longer felt the need to treat the question, often referring back to older interpretations of the subject.<sup>81</sup>

This is puzzling for two reasons. First, textual evidence to support this claim is scant and ambiguous. Beyond the two versions of the *Principes de politique*, from the 1790s to the 1820s Constant did not make any positive reference to popular sovereignty, despite his numerous, less well-known discussions of the question of legitimacy. References to popular sovereignty are either lacking or made in plainly negative terms in his early ‘republican’ texts, including the *Fragments*, where he championed an entirely elective system – not popular sovereignty. Even in the manuscript of the *Principes*, where he discussed Rousseau’s ideas, Constant used the term surprisingly little. And in the published, significantly different version of the *Principes* (1815), where Constant did write more extensively about ‘la souveraineté du peuple,’ he employed the term not as his own normative principle but as if the expression had been forced upon him.

Second, insisting that Constant supported popular sovereignty causes a number of theoretical problems. During the second restoration, Constant ended up explicitly supporting heredity as a legitimate ground of legitimacy besides elections. If Constant indeed endorsed popular sovereignty, it is hard to see how he would have squared it, on a conceptual level, with his support for a hereditary king and a hereditary chamber. Further, the question of how Constant could so easily swap a monarchy for a republic in later texts becomes insoluble. This has caused headaches to Constant scholars, who have been forced either to ignore Constant’s references to heredity, or dismiss them as sheer political tactic. On the other hand, those who have stressed Constant’s interest in heredity during the restoration, not only have glossed over Constant’s earlier discussions on the subject, but have been tempted to turn him into a harbinger of some sort of ‘conservative liberalism,’ which fails to account for Constant’s consistent commitment to direct elections, from the 1790s to the 1820s.<sup>82</sup>

This dissertation makes two claims about Constant and legitimacy, a negative one and a positive one. First, it shows that Constant did not simply argue that popular sovereignty needed to be limited, as the standard reading has it, but that popular sovereignty as a concept needed purely and simply to be disposed of. Constant, when he discussed popular sovereignty, was forced to do so by external circumstances. In the first version of the

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<sup>81</sup> See, amongst others, Manent, *Histoire Intellectuelle*; Rosenblatt, *Liberal Values*; Grandguillot, *Libéralisme*; Garsten, ‘Representative Government.’ I give further and more detailed references in the first chapters of part II and III of the dissertation, in which I discuss Constant’s mentions of popular sovereignty.

<sup>82</sup> See, for instance, Guy Dodge, *Benjamin Constant’s Philosophy of Liberalism. A Study in Politics and Religion* (Chapel Hill, 1980).

*Principes* (1806-1810), Constant felt the need to react to Napoléon's repeated rhetorical uses of popular sovereignty, and his claim to be the sole representative of the people. In the second version of the *Principes* (1815), in the specific context of the hundred days, Constant again took issue with Napoléon's rekindling of his argument that the people had delegated sovereignty to the head of state. In light of the concept's absolutist pedigree, it was simply impossible to envisage limited political authority on the basis of popular sovereignty. Constant therefore came to the conclusion that it was nothing more than a dangerous fiction, which should be banned from political theorizing.

The second claim is that Constant did not only offer a radical critique of popular sovereignty, but also designed a functional equivalent to it – opinion. In Constant's view, a government's legitimacy did not depend on abstract principles such as popular sovereignty, but on the people's actual beliefs about who should rule and within what limits in the present historical configuration. In other words, to answer the question of legitimacy, Constant believed that what the people thought about the government in place was the defining criterion. One of the main reasons why scholars have erred on this question is because Constant, in the two versions of the *Principes* and elsewhere, redefined Rousseau's concept of 'the general will' as the people's 'assent' to the institutions in place – the opinion they held about a government's legitimacy. Behind governments, there was no hypothetical popular sovereign, but only the people's opinion, which embodied certain sets of interests tied to the present stage of civilization.<sup>83</sup> For Constant, the government was always the *ultimate* locus of binding decision-making, both for ordinary and extraordinary legislation.<sup>84</sup> When he used the term 'sovereignty' in a positive sense, it was as a synonymous for the institutions that had such authority. The legitimacy of the state and its constitutional framework, however, were always dependent upon what Constant called the people's 'assent.'

Constant's way of thinking about political legitimacy had four main implications. First, grounds of legitimacy were historically situated, and changed as people's expectations evolved. Regime forms changed accordingly. The established practice of the age, however, was not totally contingent. Writing in the aftermath of the French revolution, Constant believed that he was witnessing the dawn of a new political era. Historical changes in opinion followed a clear path towards the (re)discovery of timeless 'principes' embodying the

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<sup>83</sup> That a major political thinker could do without a theory of an underlying sovereign is a claim Paul Sagar has recently made about Hume and Smith. See his *The Opinion of Mankind. Sociability and the Theory of the State from Hobbes to Smith* (Princeton, 2018). I return to Sagar's arguments in the conclusion.

<sup>84</sup> On the distinction between ordinary and extraordinary legislation, see Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge, 2016). I return to Tuck's arguments in the conclusion.

nation's long-term interests, and captured in what he called the nation's 'wish.' Constant's conviction that there existed *true* principles unfolding throughout history implied that even if people temporarily forgot about the sort of opinions they had held previously – the need for some form of political participation and a desire for individual independence – they could be reminded of what they should aspire to. Theory was needed to evaluate political practices. This refusal of sheer relativism allowed Constant to condemn some types of regimes *despite the fact* that the people's opinion seemed to lend it support. The distinction between extant and long-term opinion – the nation's 'wish' – played a crucial role in his works. This conceptual framework explains how Constant could endorse successive political regimes in France, while remaining committed to a core, minimal standard of legitimacy, which he used to condemn Napoléon's despotism and the ultras' rekindling of divine right during the restoration.

Second, Constant insisted that any valid constitution in the present stage of civilisation should recognize these two fundamental principles – individual liberty and political equality. These constitutional articles were intangible, whereas other constitutional articles could be amended by the constituted powers depending on changing opinions about non-fundamental constitutional arrangements. The principles inscribed in the constitution provided a compass to determine when a government trespassed rightful limits.

Third, Constant's theory of legitimacy had two distinct criteria – the 'object' and the 'source' of political authority – both of which were set by opinion. With respect to the 'object' criterion, the government's conduct had to conform to the people's desire for tranquility and independence in modern commercial societies. These needs corresponded to the principle of individual liberty. The 'source' criterion meant that governors had to be designated according to procedures people believed in and supported – elections and/or heredity. These two criteria were complementary: if one was lacking, a given institution became illegitimate – something that caused its downfall in the long run. This is crucial to understand both Constant's relative indifference to regime forms, and the new typology of regimes he sought to offer, which bore only partial resemblances with Montesquieu's.

On the 'source' criterion, Constant initially drew a radical line between two ways of conferring legitimacy: heredity, which he derided as a 'préjugé' based on customary opinion, and elections, based on the rationally demonstrable 'principe' of equality. With the rise to power of Napoléon, Constant started showing some hesitations: considering the English case seriously led him to concede that heredity might benefit stability, even if he then ruled out that it could be resurrected in France, simply because it was out of phase with the state of

opinion. During the restoration, heredity came back to the foreground with the return of Louis XVIII. This convinced Constant that traditions still had traction – definitely more than he had thought as a young republican. This led Constant to reconsider heredity as a plausible title of legitimacy, whose value appeared more clearly in the aftermath of Napoléon's manipulations of elections. Constant's belief that the revolution had seen the triumph of the principle equality nevertheless implied that he never seriously considered a political system from which any form of popular election was absent, hence his condemnation of Napoléon's monopolization of power or the ultras' attempt at reviving the divine sovereignty of kings, at the expense of the power of the Chamber of deputies.

Fourth, Constant's theory of legitimacy was tightly knitted to his views on the balance of powers. His theory implied that the different powers making up the constitutional structure of a given regime could be underpinned by different grounds of legitimacy, to the benefit of the government's stability. For instance, a hereditary king could coexist with a hereditary chamber and an elected chamber. This discrepancy reflected the different dimensions of the general assent that sustained the regime, which was composed both of powerful memories and a craving for rational justifications. Depending on circumstances, regimes could be based on elections only or include hereditary titles. Constant himself considered both options, first in his *Fragments*, when he thought heredity was no longer possible in France and then in his constitutional treatises of the restoration, when heredity was once again supported by opinion.

This was a consistent theoretical framework – a genuine *theory* of legitimacy – that Constant first fleshed out in the 1790s, and subsequently adapted with a keen sense of pragmatism. Constant was a political writer and practitioner. Initially a propagandist at the service of the Directory, he became a member of the Tribune before being eventually elected at the Chamber of deputies during the second restoration. Constant of course wrote ambitious theoretical works, but he also devoted a great deal of his time to comment upon pressing, very concrete questions of legitimacy pertaining to the regimes he was writing under – the Directory, the Consulate and then the Empire, as well as the messy succession of events that occurred after the return of the Bourbons in 1814. One of main aims of this dissertation is to track and explain Constant's evolving views on legitimacy, from the 1790s to the second restoration, and show how these corresponded to a consistent logic about what makes a government legitimate – its correspondence with the needs of the day – and a high degree of flexibility, which Constant used to great effect as changes of regimes occurred in France. In so doing, this dissertation offers renewed perspectives upon Constant's ideas about

sovereignty, the status of individual rights, historical progress and the vexing issue of Constant's shift from his defence of a republican form of government to his endorsement of constitutional monarchy.

#### **IV. Representative Government: the Receptacle of Public Opinion**

Constant's discussions of the notion of 'popular sovereignty' in the two versions of the *Principes* were interventions in debates about fundamental or *extraordinary lawmaking*. He was reacting to Napoléon's uses of the term to legitimize the Consulate, the Empire, and the restored Empire after his ultimate seizure of power in 1815. In Constant's view, popular sovereignty, when recognized as the foundation of the state, was a theoretically ineffective and politically dangerous notion. Accordingly, it was best replaced by society's widespread opinion about the conditions of a just political order in the current historical situation. After the Directory, Constant abandoned the opposition between monarchies and republics to concur that 'representative government', irrespective of whether its second chamber and executive power were hereditary, was the regime form sustained by the nation's 'wish'. The second thread of this dissertation is Constant's rejection of popular sovereignty as a defective basis for theorizing the people's day-to-day role in a representative government. Instead, he used public opinion as a distinct way of conceptualizing the people's power in *ordinary lawmaking*. Public opinion, understood as the expression of society's current interests, had to be channeled into the representative structure. The latter's role was to further clarify the expectations of public opinion, and turn these into ordinary laws as promptly as possible. The two levels – fundamental lawmaking and ordinary lawmaking – were conceptually distinct for Constant. However, he used the notion of public opinion both to designate the 'wish' that underpinned an institutional apparatus at a given moment of time *and* the ordinary expression of the people's power inside that apparatus, through the elected chamber. Constant's reflections on the role of public opinion in ordinary lawmaking provide the second thread of this dissertation.

Constant's views on representative government have usually been interpreted as being based on popular sovereignty.<sup>85</sup> In a recent, landmark article, Bryan Garsten has argued that Constant shared with Rousseau a fundamental concern with the government's tendency to usurp the sovereignty of the people. If they shared the same intention, their means for

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<sup>85</sup> Fontana, *Constant*; Vincent, *Constant*.

preventing the government from substituting itself for the people diverged: while Rousseau argued that sovereignty was inalienable, Constant designed concrete institutional ways – direct elections and the neutral power – of giving voice back to the people’s will.<sup>86</sup> Another strand of scholarship has taken the opposite route, claiming that Constant was closer to Sieyès’ ‘elitist’ view of representative government, which deprived the people of political agency. On this reading, Constant endorsed representative sovereignty or national sovereignty: he believed that sovereignty was held by an artificially created abstract being that preserved the nation’s communality of interests.<sup>87</sup>

These diverging interpretations indirectly perpetuate a by now standard interpretation of the revolution, according to which 1789 saw the confrontation of moderates who defended national sovereignty – representatives hold sovereignty and are free to determine the nation’s will independently from the people’s instructions – and more radical revolutionaries who advocated popular sovereignty – representatives are only the delegates of the sovereign people and are bound by an imperative mandate.<sup>88</sup> This interpretative tradition, if powerful and enlightening, has come under criticism for its binary structure, on the ground that it might prevent us from discerning alternative ways of conceiving the people’s power.<sup>89</sup> Lucia Rubinelli has recently argued that, as far as Sieyès is concerned, his conception of constituent power cannot be reduced to either of these two options.<sup>90</sup> This dissertation suggests that Constant’s conception of the people’s power in ordinary politics has similarly been misinterpreted. It was best conceptualized, he thought, not as popular sovereignty or national sovereignty, but as ‘public opinion,’ which he called ‘la reine du gouvernement représentatif.’

Sovereignty, either in its ‘popular’ or ‘national’ versions, was defective to think about the people’s power in a representative structure. Irrespective of whether it was granted to the

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<sup>86</sup> Garsten, ‘Representative Government.’

<sup>87</sup> Richard Whatmore, ‘Democrats and Republicans in Restoration France,’ *European Journal of Political Theory*, 3/1 (2004), 37-51. Nadia Urbinati, *Representative Democracy* (New York, 2006), 143-144.

<sup>88</sup> See Lucien Jaume, *Le discours Jacobin et la démocratie* (Paris, 1989) and Istvan Hont, ‘The Permanent Crisis of a Divided Mankind: Nation State and Nationalism in Historical Perspective,’ *Political Studies*, 42 (supplementary issue) (1994), 166-231.

<sup>89</sup> Pierre Rosanvallon has argued that the distinction between national sovereignty and popular sovereignty was an intellectual product of nineteenth century French publicists, and did not make much sense in 1789. *La démocratie inachevée. Histoire de la souveraineté du peuple en France* (Paris, 2000), 21-22. For a similar view, see Guillaume Bacot, *Carré de Malberg et l’origine de la distinction entre souveraineté du peuple et souveraineté nationale* (Paris, 1985). The stark distinction between national sovereignty and popular sovereignty might be a belated, Manichean theoretical construction. It is however hard to deny that the Jacobins and the Monarchiens, for instance, irrespective of the vocabulary they used, had starkly different views about how to conceptualize the people’s power and the meaning of representation.

<sup>90</sup> Lucia Rubinelli, ‘How to Think Beyond Sovereignty: On Sieyès and Constituent Power,’ *European Journal of Political Theory*, 18/1 (2019), 47-67.



people or representatives, it caused at least five types of problems. First, since sovereignty was an absolute concept, it implied unlimited political power in whatever hands it resided. Second, sovereignty being an inherently monist concept, it presupposed that diverging, particular interests needed to be transcended in the name of a ‘general interest’ or ‘general will.’ Third, although in different degrees, both theories of sovereignty granted too much importance to the legislative power, idolized as the privileged locus of the general interest, at the expense of the other powers’ role in the collective decision-making process. Fourth, sovereignty relied on the problematic notion of ‘will.’ Laws derived their legitimacy from being the product of either the nation or the people’s sovereignty. This type of legitimacy by consent, in Constant’s view, amounted to consecrate arbitrariness, best exemplified by majority rule, with only little regard for the quality of decision making. Last, each theory envisaged political participation in antagonistic and hazardous ways: while popular sovereignty consecrated the people’s constant harassment of representatives, national sovereignty, by curtailing the people’s active participation, gave representatives free rein to interpret what the general interest required without any bearing on the people’s real expectations.

Representative government, for Constant, had to be turned into the receptacle of public opinion. He first elaborated this intuition alongside Germaine de Staël during the Directory, and developed it into a fully fleshed theory during the Napoleonic period and the restoration. Scholars of the French revolution have argued that revolutionaries, both moderate and radical, conflated public opinion with popular sovereignty or national sovereignty.<sup>91</sup> Beyond that debate, there is a prevailing consensus amongst historians of political thought that public opinion and popular sovereignty are twin concepts, the former being some sort of expression of the latter, and Constant scholars seem to have embraced this view.<sup>92</sup> For Constant, however, public opinion offered an alternative way of acknowledging that the people had legitimizing power in a representative government. Constant consistently argued that sovereignty, in the sense of the ultimate power of decision-making, was exercised by governors. This drew him closer to national sovereignty and explains why some have seen him as a follower of Sieyès, but Constant never used that expression, nor did he believe that

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<sup>91</sup> Lucien Jaume, ‘Opinion publique et légitimité: l’interprétation jacobine,’ in *Echec au libéralisme. Les Jacobins et l’Etat* (Paris, 1990), 44: ‘en appeler à l’opinion publique, de Mounier à Robespierre et de Mirabeau à Marat, c’est en appeler à la souveraineté du peuple, ou de la nation.’

<sup>92</sup> Rosanvallon, *Démocratie inachevée*, 43-52; Marcel Gauchet, *La révolution des pouvoirs. La souveraineté, le peuple et la représentation 1789-1799* (Paris, 1995), 42-48; 80-86; Fontana, *Constant*, 88; Vincent, *Constant*, 211-212. Garsten often uses the terms public opinion and popular sovereignty interchangeably in ‘Representative Government’ and ‘From Popular Sovereignty to Civil Society.’

the logic inherent to representative sovereignty was satisfying. Public opinion, on his understanding, avoided the pitfalls he associated with popular sovereignty and national sovereignty. In what follows, I briefly sketch the main elements of Constant's public opinion-based theory of representative government, as articulated in the *Fragments* and the first version of the *Principes de politique* onwards.

First, public opinion, because it was enlightened opinion shaped by writers, knew that political authority needed to be exercised within certain limits. It was also its function constantly to remind governors of what these boundaries were. Second, public opinion was the expression of society's diverging interests. These interests, Constant defined them, from his republican *Fragments* onwards, as the local interests of various constituencies. Third, Constant believed that the different powers making up the institutional apparatus needed faithfully to represent the interests present across society, as expressed by public opinion. Constant's constitutionalism was designed in such a way that the reforms public opinion desired were delivered in time, with the different powers cooperating to that end, rather than simply opposing each other, as has been assumed. During the Restoration, the fact that each power benefited from a different type of legitimacy contributed to the stability and efficiency of the state in delivering reforms. Fourth, public opinion was the formal and rational manifestation of these interests, and Constant sought to design both institutional and non-institutional ways of ensuring that public opinion was duly and faithfully transmitted, from the bottom up to the political institutions. Direct elections, petitions and newspapers were conceived as different but complementary channels of opinion, intended to provide as much information as possible to rulers. The ultimate objective was that the people's real *needs* – not their will – were expressed and translated into legislative texts. The goal of representative government was the administration of interests through the monitoring of public opinion. Public opinion was thereby tightly connected with Constant's concern for sound, non-arbitrary decision making. Last, Constant conceived political participation as the right to *influence* the government's course of action through contributing to giving shape to public opinion. Public opinion here he understood in two distinct but complementary ways: as the rational expression of society's diverse interests, and as public esteem – the moral judgment electors made about the abilities and virtues of representatives. Voting, sending petitions and writing in newspapers were different ways of making society's interests clear as well as showing appreciation for (or disapproval of) a representative's conduct, bearing in mind that it would always be up to representatives to make binding decisions. Representatives kept some margin of appreciation but were thereby tied by a 'responsibility of opinion': an

informal but powerful incentive to act according to the people's desires as manifested through different channels, not least to secure re-election. Besides elucidating Constant's shifting views on legitimacy, this dissertation tracks how and why Constant came to elaborate his views on representative government as the receptacle of public opinion.

## **V. Methodological Remarks and Structure of the Dissertation**

As I already mentioned, on the two questions of legitimacy and representative government, there is an underlying rationale at work in Constant's writings. This is not to say that Constant's writings should simply be read *en bloc*. On a methodological level, this dissertation tries to avoid two pitfalls. The first one is to assume some sort of substantive unity in Constant's writings, à la Stephen Holmes, for whom Constant was a 'liberal democrat' and anti-monarchist throughout.<sup>93</sup> Fontana has similarly insisted on making him a consistent 'republican,' who, from his early years onwards to the second restoration showed a 'marked preference for republican institutions, in so far as his political model was based upon popular sovereignty, the abolition of hereditary privilege and political equality.'<sup>94</sup> In these readings, Constant's changes are dismissed either as occasional adaptations to political circumstances or marginal updates.

Another pitfall, present in works on Constant that unfold chronologically rather than thematically, is to fetishize one period of Constant's career as the key to his 'liberalism.' The risk here is to read Constant on the assumption that he was a 'liberal' in the making, interested in designing the foundations of some ideal type of liberalism. This question has inevitably received as many answers as there are periods in Constant's busy life. The Directory, the Napoléonic era and the restoration years have all in turn been presented as *the* incubation phase or most important period to understand Constant's liberalism, with each interpretation drawing on a specific set of texts.<sup>95</sup> In these readings, texts that do not fit into the selected 'liberal' frame at a specific period of time are usually dismissed or unaccounted for.<sup>96</sup>

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<sup>93</sup> Holmes, *Constant*.

<sup>94</sup> Fontana, *Constant*, 65.

<sup>95</sup> Vincent has led the case for the Directory years. Scholars who see Constant's middle period – the Napoléonic era – as the most important one include Hofmann and Marcel Gauchet. Rosenblatt has called attention to the importance of the second restoration for understanding Constant's moral politics.

<sup>96</sup> On this problem, see Arthur Ghins, 'Benjamin Constant and Public Opinion in Post-Revolutionary France,' *History of Political Thought*, forthcoming. The article retraces Constant's shifting views on public opinion from the Directory to the restoration, and shows that, if we want to see 'pluralism' as one of Constant's chief 'liberal' concerns, he was certainly not a 'liberal' in the 1790s, nor was he during the Napoléonic era.

Kalyvas and Katznelson have persuasively suggested an alternative approach. In their analysis, Constant's 'work is both consistent and marked by a series of important breaks and novel formulations.'<sup>97</sup> This is true for his views on legitimacy and representative government. Constant elaborated these already in the 1790s, while continuously updating and revising them depending on changing circumstances. The dissertation is divided into three chapters that correspond to what scholars usually see as the three main phases of Constant's career: the Directory years (1795-1799), the Napoléonic era (1800-1814) and the Restoration years (1814-1830). Each period is given equal weight. In each chapter, Constant's views on legitimacy and representative government are studied both in context and on an analytical level. For each period, major theoretical texts are studied alongside less well-known texts, some of which are considered here for the first time. The on-going publication of Constant's *Oeuvres complètes* in Lausanne has brought into light a significant body of manuscripts, but also pamphlets, speeches and journal articles that had fallen into oblivion, a number of which touch on public opinion with important implications for our understanding of Constant's thought. The *Oeuvres complètes* have been used when Constant's texts were already available in that edition. I have chosen to keep quotes in French, to avoid mistranslations.

Each chapter deals with the two questions of legitimacy and representative government in succession. In other words, each chapter has several sections devoted to Constant's ideas about opinion and legitimacy, followed by Constant's corresponding ideas on public opinion and representative government.

In chapter I, on the Directory years, I first explain how Constant struggled to make the case for the Directory's legitimacy even though the opinion of the majority was not supportive of the new regime. I show how the opinion-based approach to legitimacy he started articulating in the 1790s was inspired by David Hume's assertion that all governments were ultimately based on opinion. I then identify what I take to be the main sources of Constant's theory of representative government, which he would start developing at length during the Consulate and the Empire. These sources were Jacques Necker's late work, published in the 1790s, and Germaine de Staël's manuscript *Des circonstances actuelles qui peuvent terminer la révolution, et des principes qui doivent fonder la République en France* (1798), which Constant may have co-authored.

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<sup>97</sup> Andreas Kalyvas and Ira Katznelson, "'We Are Modern Men': Benjamin Constant and the Discovery of an Immanent Liberalism,' 6/4, (1999) 516. This article is a slightly different, earlier version of the chapter on Constant in *Liberal Beginnings*.

In chapter II, on the Consulate and the Empire, I reinterpret the first version of the *Principes* as an attempt to sketch out a theory of legitimacy that does not rely on the concept of popular sovereignty. I lay out the consequences of Constant's theory of legitimacy on his views on revolution, resistance and constitutional change. I then turn to Constant's understanding of representative government, which he exposed in both the *Fragments* and the first version of the *Principes*. I show how Constant's theory drew significantly on William Godwin's ideas about public opinion and representation. From Godwin, Constant derived an anti-voluntarist conception of collective decision making, which in turn should lead us to reassess his judgment about the representative system Sieyès and Roederer designed for the Constitution of Year VIII.

In chapter III, I follow Constant's quickly shifting arguments about legitimacy during the events that unfolded in 1814-1815. I throw light on the reasons of his qualified support for Bernadotte, Napoléon, and then Louis XVIII, and reveal the theoretical coherence behind his changes of allegiance. I then expose Constant's mature theory of representative government as articulated in his *Principes de politique* of 1815 and the two editions of his *Réflexions sur les constitutions*. I focus predominantly on Constant's constitutionalism and his understanding of the cooperation of powers. I contend that Constant sought to secure a harmony between constitutional powers, in such a way that the reform projects put forward by public opinion would be duly integrated in the institutional apparatus, and ultimately find their way into ordinary legislation. Finally, I offer a new interpretation of Constant's lecture on ancient and modern liberty, insisting on the filiation with Jean-Louis Delolme's remarks on public opinion and political participation in his work on the English Constitution.

## **Chapter I: The Directory Years (1795-1799): Managing Opinion in Times of Crisis**

When he arrived in Paris together with Germaine de Staël in May 1795, Constant's youthful republicanism was soon faced with the muddled post-Terror political context.<sup>98</sup> Since April 1795, the Commission of Eleven had been hard at work on a draft constitution. How to stabilize the young Republic was on every mind. The Thermidorians wanted to bring the reign of exception to an end, but were reluctant to pass the test of new, free elections, which, they feared, would bring royalists or neo-Jacobins in power. In June 1795, members of the National convention started to seriously consider automatically re-electing a majority of republican conventionnels – a project that eventually took the form of the two-thirds decrees (August 22 and 30, 1795). In his first published series of pamphlet, *Trois lettres à un député de la convention* (June 1795), Constant endeavoured to dissuade conventionnels from this course of action.<sup>99</sup>

The bulk of Constant's argument was to show that the government's legitimacy depended upon its conformity with the current state of opinion. Constant's argument was twofold. First, Constant observed that, in the aftermath of the Terror, what the vast majority of the French primarily longed for was order, security and justice. This now constituted 'l'opinion publique.'<sup>100</sup> In that respect, the government would keep its credit vis-à-vis the governed only if the upcoming Constitution provided guarantees of public safety. 'Si elle [the constitution] est repressive et protectrice, [elle] ne peut manquer d'obtenir l'assentiment universel.'<sup>101</sup> In other words, Constant suggested that the people's perception of the government's capacity to secure order constituted a chief reason why people owed allegiance to it. Second, Constant insisted that adopting the two-thirds decrees would amount to trampling under foot what constituted the essence of a republican regime – that rulers were submitted, at regular intervals, to the judgment of the electorate.<sup>102</sup> By automatically re-electing a majority of conventionnels without exposing them to 'le creuset de l'opinion' the government would form, in the eyes of the people, 'un corps' distinct from the nation and

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<sup>98</sup> Staël had a slower conversion to republicanism than Constant. After favouring a return to the monarchy, much to the grief of her father Jacques Necker she embraced republicanism in 1794, probably under Constant's influence. See Fontana, *Staël*, 109-112. Constant dwelt on his republican (although explicitly not Jacobin) sentiments in his correspondence with Isabelle de Charrière (1788-1794), when he was *chambellan* in Brunswick. See Gustave Rudler, *La jeunesse de Benjamin Constant* (Paris, 1909); Kurt Kloocke, *Benjamin Constant. Une biographie intellectuelle* (Geneva, 1984); Hofmann, *Principes*; Denis Wood, *Benjamin Constant. A Biography* (New York, 1993) and Vincent, *Constant*.

<sup>99</sup> 'Trois lettres à un député de la convention,' in *OCBC I*, 287.

<sup>100</sup> Ibid. 280.

<sup>101</sup> Ibid. 281.

<sup>102</sup> Ibid. 283.

thereby incapable to foster any form of ‘respect’ – the root of ‘obeissance.’<sup>103</sup> This second argument was both an argument about who should rule – elected magistrates – and how elections ensured that ‘confiance’ prevailed between governors and the governed. These two elements – order and free elections – went hand in hand. Once a ‘constitution libre’ were adopted, Constant was confident that elections would bring to power representatives that were in line with the people’s aspiration for order and justice. The Thermidorians’ fear of free elections was thus misplaced: ‘Les élections ne se feront-elles pas dans le sens de l’opinion, si fortement prononcée contre tout bouleversement?’<sup>104</sup> In any case, Constant observed that, should the current majority be split between terrorists and royalists, as the conventionnels misguidedly believed, opposing to this ‘disposition’ a small, fixed part of the convention would be of no use: even if it succeeded in rallying to itself a couple of members of other factions, ‘elle finirait par succomber.’<sup>105</sup>

This little known text was Constant’s first analysis of the state of French opinion, as well as of public opinion as a concept. It shows how Constant, in his first published output, chose to tackle the issue of what makes a representative government legitimate by focusing on the people’s perception of the government’s actions. The relationship between the governed and governors, in his understanding, was best theorized as based on a dynamic of opinion. This approach was central to Constant’s early works.

In recent years, scholars have highlighted the importance of these works to understand Constant’s later production.<sup>106</sup> This chapter stems from a similar intuition: without the Directory writings, it is difficult to interpret correctly Constant’s intellectual trajectory. It differs from earlier studies in that it makes of public opinion the key to Constant’s reflections during that period. In the Directory’s messy political context, Constant thought hard about how to buttress the republic’s legitimacy despite the fleetingness of opinion, and how to succeed in channeling the changing moods of the French people. Together with Staël, he also attempted to design a constitutional structure that would ensure that the nation’s true, long-term interests were represented rather than the transient, unruly majorities that were plaguing the institutional apparatus set up by the Constitution of Year III.

From 1795 to 1799, Constant published a string of political pamphlets whose defining mark was a combination of a strong sense of political urgency with ambitious theoretical reflections. It is important to stress that Constant’s work in the 1790s was a joint venture with

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<sup>103</sup> Ibid. 287; 283-284.

<sup>104</sup> Ibid. 279.

<sup>105</sup> Ibid. 278.

<sup>106</sup> Hofmann, *Principes*, 95-166; Craiutu, *Moderation*, 200-215; Vincent, *Constant*, 39-80.

Staël, whom he had met in September 1794.<sup>107</sup> Constant and Staël annotated and commented on each other's work, going as far as transferring entire paragraphs from their respective manuscripts.<sup>108</sup> In 1798, at the height of their intellectual collaboration, the couple worked together on the manuscript that became *Des circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République en France*, which Staël eventually renounced to publish.<sup>109</sup> Despite slight differences in style, content and tone – Staël often struck a more sentimentalist chord than Constant, and overall was more considerate of moderate royalists – the two authors' writings display a remarkable doctrinal coherence, which did not last after the rise to power of Napoléon.

In what follows, I explore Constant's early, opinion-based theory of legitimacy, before turning the late 1790s attempts by Necker and Staël to theorize representative government as the repository of public opinion.

## I. Legitimacy Based on Opinion

Constant's *Trois Lettres* did not go unnoticed. Royalists, enthusiastic about Constant's support for free elections, soon enjoined him to join their ranks, while ex-conventionnels such as Jean-Baptiste Louvet acidly accused him of being a royalist in disguise.<sup>110</sup> In October 1795, only a few months after the Constitution was adopted (April 1795), the failed insurrection of Vendémiaire reawakened in the Thermidorian elite a vivid fear of a royalist resurgence. Each day was bringing news that *émigrés* were returning to France in large numbers in the wake of the dissolution of the convention. Realizing that he had misjudges the strength of the royalist party, Constant soon decided to side with the ruling elite's hardheaded approach to politics and endorse the results of the two-thirds decrees.

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<sup>107</sup> On the ties between Constant and Staël, see Renee Winegarten, *Germaine de Staël and Benjamin Constant. A Dual Biography* (New Haven, 2008).

<sup>108</sup> Constant's first brochure, *De la force du gouvernement actuel et de la nécessité de s'y rallier* was written in the winter of 1796 between Coppet and Lausanne, apparently with the help of Staël. In parallel, Staël worked on her first explicitly republican book, *De l'influence des passions*, which Constant immediately praised in a review. Staël, in turn, asked her journalist friends to review Constant's second pamphlet, *Des réactions politiques* (1797). In June 1797, Staël gave birth to Albertine. It is highly probable that Constant was the father. See Kloocke, *Constant*, 59-86.

<sup>109</sup> The manuscript of *Des circonstances actuelles* was written in Staël's hand and left unpublished until 1904. In the margins and the body of text are notes by Constant. Constant later made an annotated copy of passages of Staël's manuscript. On the question of Constant's involvement in *Des circonstances*, see Lucia Omacini, 'Benjamin Constant correcteur de Madame de Staël,' *Cahiers Staëliens*, 25 (1978), 5-23. References to Staël's works are to the *Oeuvres complètes*.

<sup>110</sup> Hofmann, *Principes*, 98-99.



As the conventionnels had feared, the Terror had alienated many citizens from the republic. Public opinion, despite Constant's predictions, was manifestly still far from supportive of the Directory. The government had to stage one coup after the other to stay in power. In such circumstances, the question of legitimacy became particularly thorny: how could a government whose very essence was being contested on both left and right be said to have support across the population? The political spectrum during the Directory years was deeply divided. Besides the neo-jacobins, the moderate republican camp itself was split between those who were unconditional supporters of the government, like Constant, and constitutional republicans, like Pierre-Samuel Dupont de Nemours, Adrien Lezay-Marnésia and Pierre-Louis Roederer, who were calling for an end to violence and a strict obedience of the principles of the Constitution of year III, including respect for the election results and freedom of the press.<sup>111</sup> On the right, constitutional royalists, amongst whom Staël had kept many friends (including her own father, Jacques Necker) coexisted with firm advocates of a return to absolute monarchy.<sup>112</sup>

Constant resorted to different strategies. On a first level, he sought to make the case for the Directory's legitimacy on purely pragmatic grounds: the republic was legitimate because it was the regime in place, and in that respect the most apt to safeguard collective interests. Sensing that an exclusively realist approach to the problem might play against the nascent republic, Constant combined the first set of realist arguments with a more principled argumentation, designed to demonstrate why, on a theoretical level, republics ought to be preferred to monarchies. This second approach culminated with a reflection on the need for fixed, constitutional principles in times of crisis to assess a government's legitimacy. These are the main axes of Constant's early theory of legitimacy, to which we must now turn.

### **Rallying Public Opinion around the Directory**

In April 1796, Constant published *De la force du gouvernement actuel et de la nécessité de s'y rallier*. The main object of this ambitious pamphlet was, as its title suggests, to demonstrate that the Directorial government benefited from some form of legitimacy, contrary to what the currently divided state of opinion suggested. Constant introduced his work as a call to rally around the Directorial republic and create what has been called an

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<sup>111</sup> On the split between constitutional republicans and supporters of the Directory, see Henri Grange, *Benjamin Constant: amoureux et républicain. 1795-1799* (Paris, 2004).

<sup>112</sup> On Staël's circle during the 1790s, see Hofmann, *Principes*, 108-113.

‘extended centre.’<sup>113</sup> Its highly partisan and polemical character notwithstanding, *De la force* constitutes a remarkable study of opinion in times of crisis.

Although this has been overlooked, *De la force*’s case for the legitimacy of the Directory bears the mark of Constant’s engagement with David Hume, whose works he pondered during his student years at the University of Edinburgh (1783-1785) and his subsequent stays in Paris with Jean-Baptiste Stuart (1785-1787), one of the best French specialists of Scottish thought and once a personal friend of David Hume.<sup>114</sup> That all legitimacy was ultimately derived from opinion was a key tenet of Hume’s political theory, which he famously summarized in ‘On the First Principle of Government’:

Nothing appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.<sup>115</sup>

Hume distinguished between two types of opinions: opinion of interest and opinion of right. Opinion of interest referred to the people’s perception of the government’s ability to provide security (mainly maintaining contracts and enforcing property rights) as well as any other government could – an opinion, according to Hume, which provided great security to rulers when it prevailed. Opinion of right, on the other hand, had to do with the people’s perception of who should rule. Opinion of right was further divided into right to power and right to property. People often obeyed their government out of reverence for their ancient, hereditary standing. This, Hume suggested, gave a great advantage to settled constitutional forms as opposed to new institutions. On the other hand, Hume acknowledged that there often existed

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<sup>113</sup> Craiutu, *Moderation*, 208-215.

<sup>114</sup> On Constant’s years at Edinburgh, see Patrice Courtney, ‘An Eighteenth-Century Education: Benjamin Constant at Erlangen and Edinburgh (1782-1785),’ in *Rousseau and the Eighteenth Century. Essays in memory of R.A. Leigh*, eds. Marian Hobson, J.T.A. Leigh and Robert Wokler (Oxford, 1992), 295-324. On Constant’s stay at Suard’s, and the latter’s connection with Hume, see Rudler, *La jeunesse de Benjamin Constant*, 163; 173-184 and Rosenblatt, *Liberal Values*, 15-16. According to Rosenblatt, Suard eventually became known as ‘Hume’s greatest champion in France.’ Constant’s engagement with Hume is often referred to but seldom explored. For an exception, see Catherine Carpenter, ‘Ethics and Polytheism in Constant’s Early Writings: The Influence of Hume, Smith and Gillies,’ *ABC*, 29 (2005), 73-100.

<sup>115</sup> ‘Of the First Principles of Government,’ in *Political Writings*, ed. Knud Haakonssen (Cambridge, 1994), 16. References to the *Essays* are to this edition.

some form of correlation between property and political influence. Even though Hume tended to associate opinion of right in monarchies with antiquity and opinion of right in republics with property (the English monarchy blending the two, with some problems in terms of stability), he was clear that, abstractly speaking, these observations did not make any specific form of government preferable.<sup>116</sup> What made opinion of right might vary from a state to another, but, at a fundamental level, a similar dynamic of opinion underpinned any form of government.

At bottom, Hume's preference was for *existing* forms of government. His inquiry into human nature had convinced him that people were prone to passions and that these were likely to run amok, especially when faced with instability. Regular and stable institutions – where who had authority and what those in power were entitled to do were undisputed matters – provided firm guidelines on which people could rely to orient themselves. Such institutions were the product of a long, arduous process of sociability, which, with time, had made of obedience a matter of habit.<sup>117</sup> Freedom resided in the implicit rules that these institutions consecrated. Consequently, governments should not be lightly disposed of, because revolutions always upset the crystallisation of habits that had taken place. Hume therefore enjoined his British contemporaries to 'cherish and improve' England's monarchy without indulging in 'dangerous novelties.'<sup>118</sup> Of importance here was that Hume's defence of British monarchy was suffused with pragmatism. Contrary to Montesquieu, Hume did not rule out the possibility, in the future, of a republic in a large country like France.<sup>119</sup> Governmental forms were the product of contingent historical circumstances: what mattered was the attachment people gradually developed for fixed institutions:

The general bond or obligation, which binds us to government is the interest and necessities of society; and this obligation is very strong. The determination of it to this or that particular prince or form of government is frequently more uncertain and dubious. Present possession has considerable authority in these cases, and greater than private property; because of the disorders which attend all revolutions and changes of government.<sup>120</sup>

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<sup>116</sup> Ibid., 16-17.

<sup>117</sup> I here build on Knud Haakonssen's 'Introduction' to Hume's *Political Writings*, xxv-xxx.

<sup>118</sup> 'First Principles of Government,' 19.

<sup>119</sup> 'Idea of a Perfect Commonwealth,' 232.

<sup>120</sup> 'Of the Original Contract,' 200.

In many ways, *De la force* can be read as an attempt to adapt Hume's reflections about opinion to the Directory context. It was what has been called 'the enormous emphasis Hume placed on institutional stability' that drew Constant back to Hume in the late 1790s.<sup>121</sup> Hume had observed that 'an established government has an infinite advantage, by that very circumstance of its being established.'<sup>122</sup> It was precisely in the very *existence* of the Directory that Constant found an argument in favour of the government's legitimacy: 'Cette République a pour elle un premier avantage qu'on ne reconnaît point assez, c'est d'être ce qui est le plus établi... La moitié, pour le moins, des intérêts de la France est attachée, dès-à-présent, à la République.'<sup>123</sup> Hume had used his argument about the advantage of existing governments to defend the British monarchy. Constant transferred his line of thought to the Directorial republic.

Constant acknowledged that, as things presently stood, supporters of the Directory were mainly republicans. But moderate royalists had to realize that the perpetuation of the present government was also in their interest; in fact in the interest of all. As a general rule, interests gathered around existing institutions, Constant suggested, because what the mass of the people fundamentally longed for was stability. This process of crystallisation had already started around the republic. Royalists had to come to terms with the fact that the monarchy had collapsed. To argue *in abstracto* that a republic in a large country like France was impossible was nonsense: the Republic now existed, and the majority of the French were growing accustomed to it. 'Les gouvernements subsistent en dépit des théories, parce que dans toutes les nations, la masse veut essentiellement et presque exclusivement le repos: elle se plie à tout ce qui est tolérable, et, par sa flexibilité, elle rend tolérable ce qui d'abord ne l'était pas.'<sup>124</sup> To attempt to restore monarchy – be it an absolute or a constitutional monarchy – would unsettle all the interests that were gradually settling around the government in place. These interests for Constant included respect for property rights (especially those acquired through the sale of *biens nationaux*), the value of *assignats* and of credit, the possibility of engaging in commercial activities, and, more generally, the general sense of being able to pursue one's daily activities without upheavals and the prospect of endless wars. Royalists had to accept that, on all these aspects, a republic would fare just as well as a monarchy, if not better.<sup>125</sup> There was therefore no point, Constant argued, in overturning the present

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<sup>121</sup> Haakonssen, 'Introduction,' xxviii.

<sup>122</sup> 'Perfect Commonwealth,' 221.

<sup>123</sup> *FGA*, 338.

<sup>124</sup> *Ibid.* 366.

<sup>125</sup> *Ibid.* 346-348.

regime for the mere sake of a specific governmental form.<sup>126</sup> A counter-revolution would indeed reopen the unending cycle of vengeance – ‘guerre civile’ or ‘anarchie’ – that the present government had vowed to put an end to.<sup>127</sup> In the aftermath of the French revolution, Constant put to use Hume’s scepticism towards revolutions to make the case against *yet another* revolution.<sup>128</sup>

This was the strategy Constant resorted to again in June 1799, when he drew on Hume’s narration of the exactions that had followed the restoration of the monarchy in England to argue, against counter-revolutionaries, that a restoration would amount to a new, inevitably bloody revolution.<sup>129</sup> In both instances, tapping into the arguments of a writer widely perceived as a royalist to defend the Directorial republic could only strengthen Constant’s point.<sup>130</sup>

Although Constant did defend the theoretical preeminence of the republic until at least 1803, it is worth highlighting that already in 1795, he was aware of the relativistic implications his Humean, stability-driven approach to political institutions had. Pushed to its logical conclusions, Constant’s argument implied the recognition of the contingent value of the regime he championed, and indeed, intriguingly for a young republican Zealot, of all forms of government. ‘Je n’écris contre aucune forme de gouvernement,’ he concluded, ‘mais contre toute espèce de révolution nouvelle. Je n’invite aucun état monarchique à se républicaniser, mais j’adjure, au nom de tous les intérêts, de tous les calculs, de tous les enthousiasmes, au nom de tous les malheurs à prévenir, de toutes les blessures à fermer, les Français de ne pas révolutionner contre la République.’<sup>131</sup> On this line of argumentation, a government’s legitimacy was contingent on the people’s belief in its ability to deliver order and ‘repos.’<sup>132</sup> This was what Hume had called ‘opinion of interest’ – the kind of opinion Constant was attempting to distillate across parties.

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<sup>126</sup> Ibid. 338.

<sup>127</sup> Ibid. 353-354.

<sup>128</sup> Ibid. 338.

<sup>129</sup> ‘Des suites de la contre-révolution de 1660 en Angleterre (Juin 1799),’ in *OCBC I*, 643-679.

<sup>130</sup> Before the revolution, Hume’s *Political Discourses* as well as his *Essays Moral and Political* had been well received in France amongst the *philosophes*, but his greatest success by far was his *History of England*. After 1793, this text became a favorite with counter-revolutionaries, who could easily see in Charles I’s execution and its aftermath an obvious parallel to the unfolding of events in France. See Michel Malherbe, ‘Hume’s Reception in France,’ in *The Reception of David Hume in Europe*, ed. Peter Jones (London, 2005), 43-97 and Laurence Bongie, *Hume, Prophet of the Counter-revolution* (Oxford, 1965). Hume, in Constant’s own judgment in 1799, was ‘modéré par philosophie, mais royaliste par principe.’ See ‘Contre-révolution,’ 646.

<sup>131</sup> *FGA*, 375.

<sup>132</sup> ‘Repos’ is a term Constant used repeatedly in *De la force*. It more or less corresponds to ‘rest’ or ‘tranquillity’ in English, but designates more generally a state of political stability that allows individuals to take care of their daily interests.

At the heart of *De la force* was a fundamental ambiguity. Constant's argumentation wavered between a description of the current state of opinion and comments about what a desirable opinion would look like. Constant was well aware that supporters of the Directory were only a minority. By Hume's standards, such a type of government, which lacked a firm basis in existing opinion, was possibly on the verge of collapsing. To circumvent this problem, Constant established a distinction between two types of opinion: a shortsighted opinion focused on immediate interests and a wise opinion aware of its long-term interests. This allowed him to argue that, if the Directory had indeed little grounding in present-day opinion, at least it was acting in the nation's longstanding interest, and derived its legitimacy therefrom.

In a chapter entitled 'Du rétablissement de la Terreur' (Chapter 5), Constant addressed constitutional republicans who were blaming the Directory for lapsing back into the political repression that had brought discredit upon the republic since 1792. Constant argued that, in light of the present circumstances, it was necessary to defend government stability over – and despite – the present state of opinion. He took aim at those who depicted public opinion as a calm, confident and rational force, upon which the government was supposedly dependent. 'On ne se fait pas une juste idée de l'influence & de la nature de cette opinion, qui ne se connaît pas elle-même,' Constant retorted.<sup>133</sup> He then gave a portrait of public opinion as an unruly, fluctuating and blind energy that gets easily manipulated by opportunists:

Puissance arbitraire & mystérieuse, elle a toujours un but louable & le dépasse toujours. Ennemie implacable des moyens légaux qui la gênent & de la raison qui veut la modérer, elle est l'instrument docile de qui la flatte, fût-ce pour la pousser dans le sens le plus opposé à ses intentions. Elle croit juste tout ce qu'elle ordonne, comme si elle était la volonté générale, & l'exécute par la violence, comme si elle n'était que la volonté d'une faction: elle se plaint comme si on l'opprimait, et menace comme si elle était toute-puissante; elle dédaigne les ménagements, elle abjure ses amis, lorsque, en la servant, ils s'efforcent de la contenir elle veut que ses chefs la devancent au lieu de la diriger.<sup>134</sup>

To fully appreciate the nature of public opinion and how it usually behaved, Constant wrote, one had to think about the Jacobin sections, or how debates had been conducted in the convention or primary assemblies before Thermidor. In the crisis that inevitably followed the

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<sup>133</sup> *FGA*, 358.

<sup>134</sup> *Ibid.*

establishment of a new constitution, when the habits supporting it were not yet fully formed, ‘il est nécessaire, à l’établissement de la liberté, que ces agents soient en opposition avec l’opinion.’<sup>135</sup> Putting public opinion in the place of law amounted to consecrating mob rule, Constant observed: when institutions were put under the pressure of popular opinion, governmental agents could not resist it, and justice was simply trampled under foot because judges feared popular wrath – this is what had happened with revolutionary tribunals. Therefore, he argued, laws should keep public opinion in check.<sup>136</sup> What was now needed were men who had a clear understanding of where the true interests of the nation resided and who were ready to act upon it, despite the ‘défaveur de l’opinion.’ Of course, Constant observed, one could oppose to such a view ‘des principes abstraits’ such as ‘la souveraineté du peuple.’<sup>137</sup> These had no place in the present situation, Constant argued. The government could simply not afford the luxury of a ‘recensement perpétuel des voix, pour ou contre la République.’<sup>138</sup> The majority of the French, and constitutional republicans to begin with, did not know yet where their *true* interests resided. The torrent of the Revolution had left opinions in an utter state of confusion. It was the role of institutions to remind the French what they truly aspired to:

Pour faire marcher une institution, il faut qu’un homme soit partial pour l’institution. Il ne faut pas que, pyrrhonien politique, il aille recueillir les doutes, peser les probabilités, et demander sans cesse à la majorité, si elle persiste à préférer la forme actuelle. L’esprit de l’homme est versatile, il faut que les institutions soient stables. Il faut maintenir la majorité en la supposant invariable. Il faut lui rappeler ce qu’elle a voulu, lui apprendre ce qu’elle veut, en lui faisant trouver le bonheur et le repos sous les lois.<sup>139</sup>

Hume had warned about the unpredictability of opinion, and insisted that governments provided an indispensable reference point to assuage its fickleness, especially in times of upheavals. But he had also stressed that, in politics, the governed’s perception of rulers always had the last word. On this second point, in light of the circumstances of the Directory, Constant radicalized Hume’s emphasis on governmental stability to the point of denying existing opinion a right to speak out. The point of reference, for the present government, should not be popular opinion, but what Constant called the people’s ‘voeu.’ ‘Voeu’ (wish)

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<sup>135</sup> Ibid. 360.

<sup>136</sup> Ibid. 360-361.

<sup>137</sup> Ibid. 340.

<sup>138</sup> Ibid. 341.

<sup>139</sup> Ibid.

was a key concept in Jacques Necker's political vocabulary, and designated the nation's durable aspiration for 'repos' and public happiness. Necker opposed 'voeu' to the people's will – an ill-informed, capricious and short-sighted desire which, if abided to, often led to damaging consequences in the long run.<sup>140</sup> Necker, in 1797, was still a constitutional royalist, with clear ideas about how a hereditary monarchy was best placed to decipher the nation's 'voeu', as we shall see below. For Constant, the people's 'voeu' could be determined not by sampling present-day opinion, but by looking at political events considered from a broader temporal perspective: 'le peuple se prononce par des faits. Le 14 Juillet, il s'est prononcé pour la liberté, le 10 Août pour la République, le 9 Thermidor, le 4 Prairial contre l'anarchie; voilà son vœu.'<sup>141</sup> The people's 'voeu' had been sufficiently demonstrated: the French were for liberty under the present government and against disorder. It was up to the existing government to maintain this 'voeu' against the 'applaudissements passagers des opinions versatiles.'<sup>142</sup> When habits would be fully formed, the government would again be able to rule in accordance with an enlightened public opinion, that is to say, a public opinion aware of its real interests.

The opposite of 'voeu' was what Constant and Staël both called 'la mode' (fashion), which dominated weak minds, was plagued by vanity and constituted 'l'opinion publique d'une certaine classe' – those who were obsessed with petty political interests and had not yet realized the more pressing necessity to rally the government.<sup>143</sup> Under the veneer of fleeting passions, Staël and Constant suggested, the nation's 'voeu' was discernible. No doubt opinions were still hesitant, but with the proper amount of persuasion, and as the government would gradually relinquish the measures it had been forced to resort to because of political urgency, royalist and radical republicans would soon surround the Directory.

Behind the 'dissolution *apparente* de tout esprit national,' Constant argued in *Des réactions politiques* (April 1797), his second significant political pamphlet, true principles prevailed, thanks to the crucial intervention of friends of enlightenment.<sup>144</sup> On this point, Constant and Staël's 'voeu' was more reminiscent of Rousseau than Necker: what Staël called the 'opinion presque générale' of the French sounded like a reboot of Rousseau's

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<sup>140</sup> Jacques Necker, 'Réflexions philosophiques sur l'égalité,' in *De la révolution française*, IV (Paris, 1797), 225. Necker had finished writing the *Réflexions* as early as 1793, and initially intended to publish it as an addition to a new edition of his other key text, *Du pouvoir exécutif dans les grands Etats* (1792). He ended up attaching it to his four-volume work *De la révolution française* (1796-1797), which contained his assessment of the revolution and its aftermath (1789-1795). See Henri Grange, *Les idées de Necker* (Paris, 1974), 66-71.

<sup>141</sup> *FGA*, 341.

<sup>142</sup> *Ibid.* 341-342; *DRP*, 463.

<sup>143</sup> *CA*, 330; *DRP*, 483-485.

<sup>144</sup> *DRP*, 484-485.



general will, which at bottom never erred, even if on the surface it got diverted by factional interests.<sup>145</sup> This ‘voeu’ had a sociological substance foreign to Rousseau’s general will – the protection of material interests including property, the desire for ‘repos’ so as to be able to cultivate *jouissances* – but its logic was similar. Its true nature, the clear embrace of the nation’s real, general interest, would ultimately reveal itself, and it was the role of public writers like Constant and Staël to contribute to this process of reawakening.

If journalists did not live up to their role of support to the government, Constant saw no other issue than cracking down on freedom of the press.<sup>146</sup> Just after Fructidor, Constant went as far as to threaten uncompromising republicans and royalists, and enjoined the government to ‘étouffer la mode.’<sup>147</sup> This was the only realistic way to ensure that the nation’s ‘voeu’ prevailed, and the Directory stayed in place. Public opinion had to be unitary in its support of the republic. The latter was not yet sufficiently rooted in the public sentiment to allow for political contestation. ‘Pluralism’ and stability, at this stage, were not reconcilable.<sup>148</sup> Only when both the Jacobins and the royalists had surrendered their ‘esprit de parti’ would a true ‘esprit public’ emerge.<sup>149</sup> Public spirit was public opinion educated to its task; the exact opposite of fashion. ‘C’est donc quand les principes d’une révolution sont réduits en dogmes sacrés,’ Staël wrote, ‘en points d’honneur, en esprit public, en vérités évidentes pour les différentes classes de caractères qui composent la nation, c’est alors que la révolution est complètement terminée.’<sup>150</sup>

### **The Founding Principles of the Modern Republic (I): Equality**

The bulk of the argument of *De la force* was ruthlessly pragmatic. Yet from the publication of his first political pamphlets onwards, Constant was manifestly concerned about the implications an exclusively realist approach to politics may have. In the Directory context, two problems in particular stood out. First, if the ability to provide security was the standard by which to judge all governments, the legitimacy of the Directory might appear of

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<sup>145</sup> CA, 361: ‘Il y a tant de personnes qui sont disposées à se rallier à la puissance, tant qu’on soulage en leur permettant d’estimer ce qu’elles craignent, qu’il est pour les hommes au pouvoir des époques certaines pour captiver une opinion presque générale.’

<sup>146</sup> On this little known aspect of Constant’s early years, see Ghins, ‘Benjamin Constant and Public Opinion.’

<sup>147</sup> ‘Discours prononcé au Cercle constitutionnel pour la plantation de l’arbre de la liberté, le 30 fructidor an V (16 septembre 1797),’ in *OCBC I*, 561-562.

<sup>148</sup> The ‘anti-pluralist’ tack of Constant’s early years casts doubt, in my view, on the idea that anything like Constant’s ‘liberalism’ emerged in 1795-1797. For another view, see Vincent, *Constant*, 39-81.

<sup>149</sup> CA, 436. On this concept, see Ozouf, ‘Esprit public.’

<sup>150</sup> CA, 315.

disputable value. In fact, the government barely managed to secure its own existence despite a string of repressive measures.<sup>151</sup> Second, Constant's argument could play into the hands of royalists: should they eventually manage to seize power and rally opinion around a restored monarchy (bearing in mind that the majority of French were still royalist at the time), the new regime would have to count as legitimate by the sole fact that it was now (back) in place. Interests would gather anew around what existed and republicans would have to come to terms with this state of affairs.

Perhaps these were the thoughts that encouraged him to justify the 'pré-eminence abstraite' of the republic over the monarchy – something that he admitted doing only reluctantly.<sup>152</sup> On what theoretical grounds, then, could a republic be said to be more legitimate than a monarchy? This question Constant covered not only in the last chapter (VII) of *De la force*, but also in Book I ('Des institutions héréditaires') of his first important political manuscript, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, which he probably started writing as early as 1795.<sup>153</sup> It was also extensively treated in Staël's introduction to *De l'influence des passions*, as well as in *Des circonstances actuelles*.

To Constant and Staël, the theoretical legitimacy of republics, as opposed to monarchies, could be established on two complementary grounds – the source from which they derived their authority and the liberty they left to citizens' private endeavours. In what follows, I consider them in turn.

Constant first sought to demonstrate that the 'principe' of equality on which republics rested made them both more just and politically stable than monarchies resting on the 'préjugé' of heredity. As Hume had shown, people owed allegiance to governments, not only because they believed they were able to act in the public interest – opinion of interest – but also because they had developed the conviction that they ought to obey them. Who was entitled to rule depended on whether people thought legitimacy was a matter of antiquity, in

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<sup>151</sup> For a helpful survey of the politics of the Directory period, see Georges Lefebvre, *La France sous le Directoire*, (Paris, 1977). For a commentary of the political culture of the 'Thermidorians,' see James Livesey, *Making Democracy in the French Revolution* (Cambridge, 2001) and Jainchill, *Reimagining Politics*.

<sup>152</sup> *FGA*, 367.

<sup>153</sup> Constant continued annotating the manuscript until at least 1807. The discussion of heredity and equality in Book I is similar in content and tone to passages in *De la force* and *Des circonstances actuelles*. Books II to VIII deal with problems of constitutional engineering. Mentions are made to the constitutional weaknesses of the Directory, but the bulk of the argument concentrates on the pitfalls of the Constitution of Year VIII. On the chronology of the *Fragments*, see Henri Grange, 'Introduction' to Constant, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, (Paris, 1991), esp. 9-30 and Kurt Kloocke, 'Introduction' to 'De la possibilité d'une constitution républicaine dans un grand pays. Fragments d'un ouvrage abandonné' in *OCBC IV*, 355-396. References are to the edition of the *Oeuvres complètes*.

which case long-time preservation of power created a presumption of legitimacy, or property belongings. In the latter instance, landowners designated through elections were considered the most apt to rule. This ‘opinion of right,’ no matter how balanced it was between ‘right to power’ and ‘right to property,’ was always contingent upon time and place. In other words, for Hume, there was ‘no such thing as a right political arrangement inherent in history.’<sup>154</sup> Monarchies could fare just as well as republics – the sole defining criterion was how legitimate the people took them to be. Constant, in spite of his Humean stress on stability, was not ready to accept such relativism. As far as ‘opinion of right’ was concerned, a clear message had to be sent in favour of elections as the sole valid mode of designating governors – the defining mark of a republic. The ‘la lutte du Système électif contre le système héréditaire,’ Constant observed, was ‘la question principale de la révolution française et pour ainsi dire la question du Siècle.’<sup>155</sup> In Constant’s view, any type of government – be it a republic or a monarchy – rested on what he called ‘masse d’opinions.’<sup>156</sup> Both in *De la force* and his *Fragments*, he aimed at showing that the types of opinion on which republics rested were of a more rational, and hence more defensible type than the sort of opinions on which monarchies reposed. Whereas republics hinged on ‘principes,’ including most importantly ‘égalité,’ monarchies rested on ‘préjugés,’ including first of all ‘l’hérédité.’<sup>157</sup> While equality could be demonstrated to be in the interest of all, heredity was plainly an unjustifiable historical accident that had established a system in the interest of the few. Constant and Staël distinguished between two different types of inequalities: natural inequalities – differences of physical and intellectual abilities – and factitious inequalities. Natural inequalities emerged spontaneously in the absence of constraints; factitious inequalities were the result of entrenched privileges. In the first instance, each individual was given a fair chance to make the most of his faculties; in the second case, the rules of the game were flawed from the beginning, because some individuals benefited from undue advantages – undue in the sense that these advantages derived from something else than simply natural superiorities (e.g. a title of nobility). The protection of property and the material inequalities that derived from it had to be neatly distinguished from the prejudice of heredity. Privileges were advantages that individuals possessed irrespective of their own personal efforts. Property was the reward of personal merits.<sup>158</sup> Laws that protected property were not entrenchments of a privilege of

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<sup>154</sup> Haakonssen, ‘Introduction,’ xvii.

<sup>155</sup> *FCR*, 402.

<sup>156</sup> *Ibid.* 649.

<sup>157</sup> *Ibid.* 401; 418.

<sup>158</sup> *Ibid.* 403-405.

another type: the role of the law was only to promote a space of predictability and regularity where, thanks to the guarantee of personal rights, everyone would be able to develop his own faculties without constraints.<sup>159</sup>

The French revolution had put an end to the factitious inequality, and replaced it by what Staël called political equality: ‘L’égalité politique n’est autre chose que le rétablissement de l’inégalité naturelle.’<sup>160</sup> What Staël called ‘political equality’ meant equality before the law, but not complete equality of political rights. In line with the Constitution of Year III, Constant and Staël’s equality implied the absence of privileges – ‘la loi est la même pour tous’ – as well as the right for each citizen accorded the franchise to contribute to the formation of laws.<sup>161</sup> When individuals obtained enough property rights – in a degree Constant and Staël never specified during the Directory – they would be able to vote and run for elections. This type of social mobility was simply impossible in a society organized around heredity, where political rights were the preserve of a tiny aristocratic elite, to which there was no access but birth. In republics, all public offices were in principle filled through a competitive process that took the form of elections. The factitious criterion of birth that organized the relationship between the governors and the governed was replaced by the true, just and thereby only legitimate principle of all distinctions: ‘la prééminence des facultés.’<sup>162</sup>

To monarchist writers, this type of theoretical demonstration did not mean that the principle of equality, thrown *ex-nihilo* in a specific society, would be politically effective. Even worse: it could yield uncertainty and instability. Like many amongst the Thermidorians, Constant and Staël were acutely sensitive to the fact that abstract thinking had been discredited by revolutionary violence, and keenly aware that theory, in the present circumstances, had to be reconciled with practice.<sup>163</sup> One way of doing this was to show that the principle of equality was not simply the product of abstract speculations, but the result of a clear march of events that had gained traction throughout history as the most plausible way of organizing political life.

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<sup>159</sup> For further developments on these arguments, see Jean-Fabien Spitz, *L’amour de l’égalité. Essai sur la critique de l’égalitarisme républicain. 1770-1830* (Paris, 2000), 148-152. On debates around equality from 1789 onwards, see Jeremy Jennings, *Revolution and the Republic: A History of Political Thought in France since the Eighteenth Century* (Oxford, 2013), 29-65.

<sup>160</sup> *CA*, 293.

<sup>161</sup> See articles 3 and 20 of the Constitution of Year III, in *Les Constitutions de la France depuis 1789*, ed. Jacques Godechot (Paris, 1995), 101-102.

<sup>162</sup> *FCR*, 415.

<sup>163</sup> On the Thermidorians’ preference for the lessons of experience over rational principles and messianic utopias, see Jainchill, *Reimagining Politics*, 32-35.

For royalists like Necker and Maistre, the great advantage of prejudices was that people had grown accustomed to them. Prejudices might be unenlightened opinion, it was effective opinion nonetheless: people were attached to kings and hereditary titles – this was the secret behind the stability of monarchies. In *De la force*, Constant endeavoured to refute counter-revolutionaries by wrestling on their own terrain: ‘les Royalistes en appellent, contre la République, à l’histoire; j’en aurais appelé à l’histoire aussi, contre l’hérédité.’<sup>164</sup> In a striking recasting of Hume’s remark that all governments were founded upon opinion, Constant explained that throughout history, opinions had coalesced to make equality triumph:

Les rois, les grands, & ceux qui les défendent semblent ignorer la puissance des idées. Accoutumés à ce que des forces visibles dominant d’invisibles opinions, ils ne sentent pas que c’est à ces opinions que cette force est due. L’habitude les rend indifférents sur le miracle de l’autorité. Ils voient le mouvement, mais comme ils méconnaissent le ressort, la société ne leur paraît qu’un grossier mécanisme. Ils prennent le pouvoir pour une cause, tandis que ce n’est qu’un effet, & ils veulent se servir de l’effet contre la cause. C’est cependant aux idées seules que l’empire du monde a été donné. Ce sont les idées qui créent la force, en devenant ou des sentiments, ou des passions, ou des enthousiasmes. Elles se forment et s’élaborent dans le silence ; elles se rencontrent et s’électrisent par le commerce des individus. Ainsi soutenues, complétées l’une par l’autre, elles se précipitent bientôt, avec une impétuosité irrésistible. Jamais une idée mise en circulation n’en a été retirée. Jamais une révolution fondée sur une idée n’a manqué d’en établir l’empire, à moins que l’idée ne fût incomplète. Alors la révolution n’était qu’un symptôme avant-coureur d’une crise, et elle s’est achevée dès que l’idée complète est revenue à la charge.<sup>165</sup>

Hume had shown ample skepticism about linear conceptions of history. History, in his understanding, was a muddy field of fleeting opinions and everchanging allegiances following conquests and usurpations.<sup>166</sup> Behind the spectacle of fluctuating opinions, Constant believed that a fundamental dynamic towards equality was perceptible. Equality was ‘une idée mère’ that unfolded throughout history. It had gradually put an end to the reign of castes, slavery, feudalism and, more recently, heredity.<sup>167</sup>

In Constant’s understanding, his future-oriented vision of history provided lessons of political stability – the very reason why he had been interested in Hume in the first place. At

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<sup>164</sup> *FGA*, 372.

<sup>165</sup> *Ibid.* 372-374.

<sup>166</sup> ‘On the original contract,’ 188-195.

<sup>167</sup> *FGA*, 374.

a theoretical level, Constant agreed with counter-revolutionaries (and Hume) that political changes *ex nihilo* were a bad idea: to use power against ideas – to make use of the cause against the effect – was a recipe for disaster. Constant's main point was that their purportedly historically informed realism neglected the basic fact that opinions moved with the times, and were gradually becoming more enlightened. Amongst 'les peuples ignorants,' prejudices had survived, amongst 'les peuples éclairés' they had to give way to a more rational principle of legitimacy.<sup>168</sup> It was simply impossible to rekindle a prejudice like heredity when its time had passed: being the artificial result of chance, prejudices could not last eternally, as opposed to truths 'qui existent nécessairement.'<sup>169</sup> Counter-revolutionaries, by seeking to re-establish prejudices by force were now the cause of unrest.<sup>170</sup> Monarchies had been the regime form of the past, but since ideas were on the march, republics were the regime of the future.

The key to political legitimacy – and hence stability – was a government's conformity, not only to the people's *opinions*, as Hume had argued, but to *ideas* – Constant's other word for principles:

Pour que les institutions d'un peuple soient stables, elles doivent être au niveau de ses idées. Alors il n'y a jamais de révolutions proprement dites. Il peut y avoir des chocs, des renversements individuels, des hommes détrônés par d'autres hommes, des partis terrassés par d'autres partis; mais tant que les idées et les institutions sont de niveau, les institutions subsistent.<sup>171</sup>

Hume's emphasis on the correspondence between institutions and opinions implied a form of indifference towards forms of government that Constant overcame by highlighting that the reference point when it came to stability were demonstrated, rational opinions. Ideas were opinions that were true, and had already been recognized by all or were in the process of being so. There was a great advantage, Staël observed in *Des circonstances*, in grounding institutions on true principles, because it sheltered for good the bases of government from destructive appetites: 'quand une fois le principe sur lequel il repose a été reconnu d'une évidence incontestable; il se forme à cet égard une opinion universelle dont l'influence est toute puissante.'<sup>172</sup> Plato defended slavery, Staël explained, but not even the fiercest aristocrat even dared to reestablish it today – a unanimous opinion simply prevented such

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<sup>168</sup> *DRP*, 471.

<sup>169</sup> *FGA*, 373, note a.

<sup>170</sup> *DRP*, 472.

<sup>171</sup> *Ibid.* 457.

<sup>172</sup> *CA*, 304.

resurgences. This position could be read as an attempt to strike a balance between Hume and Condorcet: opinions carried political weight, but these always ultimately identified with some just or true ideas throughout history.<sup>173</sup>

On Hume's standards, a government lost its legitimacy when, in the eyes of the people, it became incapable of acting in the public interest, or the types of moral grounds on which a ruler's claim to power rested started crumbling away. If, according to Hume, there was no such thing as a right to revolution, revolutions could nonetheless be accounted for as the result of an erosion of public confidence. When opinion of interest vanished, opinion of right might temporarily convince people to stick with the government irrespective of their immediate interest, for instance out of admiration for their ancient standing. But once this opinion of right was equally degraded, revolutions sooner or later became inevitable.<sup>174</sup> For Constant and Staël, it was the gradual – but inevitable – affirmation of true principles throughout history that provoked revolutions. As with any political revolution, the French revolution had been triggered by and given shape to a fundamental idea: the rejection of prejudices and the embrace of equality.<sup>175</sup> This idea, however, had been left to deceitful sophists, who had stirred up opinions with false expectations as to what they meant in practice. The revolution, which had started as a protest against privileges, had thus moved beyond its natural term to end up as a war on property. This, Constant suggested, was exactly the turning point at which the Directory government stood. The Terror had discredited the ideas on which the revolution had been based and, as a result, opinions were wavering between royalist prejudices and republican principles. This back and forth movement was a source of unrest, as it prevented institutions from reaching a rest point.<sup>176</sup>

The cause of revolutions – ideas – and the source of their possible derailments – ideas wrongly interpreted and manipulated – suggested the way out of the turmoil: a thorough clarification of ideas. Since the Terror had been the consequence of a lack of enlightenment (the Republic, according to Constant and Staël, had been founded ten years before writings had prepared it) the solution was not to give up on philosophical principles, as counter-revolutionaries invited the French to do, but more enlightenment.<sup>177</sup> This understanding of the march of events amounted, in practice, to heavily emphasizing the role of political writers

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<sup>173</sup> On Constant's reception of Condorcet, see Arthur Ghins, 'Benjamin Constant and the Politics of Reason,' *History of European Ideas*, 44/2 (2018), 224-243.

<sup>174</sup> As Paul Sagar has argued, for Hume, there existed no such thing as 'justificatory theory of a right to revolution.' *Opinion of Mankind*, 126-127.

<sup>175</sup> *CA*, 433.

<sup>176</sup> *DRP*, 457-460.

<sup>177</sup> *CA*, 434.

in finding a way out of the crisis. The task of (republican) ‘écrivains philosophes’ was to bridge the gap between existing opinions and ideas. ‘Ce sont les philosophes qui ont fait la Révolution,’ Staël observed, ‘ce sont eux qui la termineront.’ Their work would assist the march of history, which irresistibly tended towards ‘perfectibilité’ – a further allusion to Condorcet, but also to William Godwin, whom Constant had started translating in 1798.<sup>178</sup> Political writers were go-betweens and builders of legitimacy: they transmitted the truths that had been discovered to the crowds, and this was how Constant and Staël envisaged their own work – as throwing some light on the legitimizing principles on which the Directory rested.<sup>179</sup>

In Constant’s unpublished manuscripts, there existed an alternative – if complementary – version of that history, where passions played a significant role. It can be found in a striking (but neglected) short text Constant must have written sometime around 1798-1799, entitled *Du moment actuel et de la destinée de l’espèce humaine, ou histoire abrégée de l’égalité*.<sup>180</sup> In many regards, it can be read as a rework of Rousseau’s *Discours sur l’origine et les fondements de l’inégalité parmi les hommes*. The point of this story, as in *De la force*, was to show that the French revolution and its result – the republic – were not free-floating chimeras but the result of a clear march of events.

Constant’s starting point was similar to that of Rousseau: equality was the permanent need of mankind. ‘L’amour de l’égalité est une passion, allumée au fond de nos coeurs par la nature.’<sup>181</sup> Constant argued that men were born equal, in the sense that a difference of physical and intellectual forces was never susceptible of securing a permanent equality. Constant remained quite elusive about the ultimate cause of sociability and the primal loss of equality, gesturing at Boulanger’s suggestion of a natural catastrophe which had plunged mankind in ignorance, and hence forgetfulness of this fundamental equality.<sup>182</sup> Ignorance had bred fear of the gods, on which theocracies had prospered. But from then on, the primeval passion for equality had thrived; taking mankind through a set of noteworthy revolutions that had destroyed, in turn, theocracy, slavery and feudalism. The process culminated in the

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<sup>178</sup> Constant’s translation of *Political Justice* is discussed in Part II of this dissertation, chapter 2, section a.

<sup>179</sup> *DRP*, 472.

<sup>180</sup> Scholars usually mention the text, without discussing it in details. See Craiutu, *Moderation*, 217-218, De Dijn, *French Political Thought*, 75-76. An exception is Béatrice Fink, ‘Benjamin Constant on Equality,’ *Journal of the History of Ideas*, 33 (1972), 307-14.

<sup>181</sup> ‘Du moment actuel et de la destinée de l’espèce humaine, ou Histoire abrégée de l’égalité (1799),’ in *OCBC III, I*, 369; 373.

<sup>182</sup> ‘Egalité,’ 375. This text needs to be read in parallel with *De la force*, 372-375 and the probably slightly posterior set of notes, ‘Fragments d’un essai sur la perfectibilité de l’espèce humaine,’ in *OCBC III, I*, esp. 448-450.



French revolution, which had put an end to heredity. Constant thus somehow inverted Rousseau's vision of a progress of inequality that had led mankind from the domination of the rich over the poor, to that of the powerful over the weak to, lastly, that of the master over the slave. This, according to Rousseau, was the last degree of inequality before new revolutions would bring back the legitimate state of equality that initially prevailed. Like Rousseau, Constant saw history as a process of *rediscovery* of the sole appropriate basis on which to organize just political institutions, but he disagreed about the process through which this return to legitimacy occurred. History did not consist in increasing inequality and corruption, but was marked by a progressive development towards equality.

In marked distinction from Rousseau, who had blamed rising inequalities upon the entrenchment of unjust civil laws and property rights, Constant saw civil laws as an increasingly improved instrument for fostering equality.<sup>183</sup> Equality was coeval with justice: where the weak was oppressed by the strong, he could call upon civil law to reestablish equality – this had been happening increasingly through time.<sup>184</sup> Accordingly, no second social contract was needed to overcome the first, unfair contract. In a further departure from Rousseau, Constant took as an example of equality or justice the legal protection granted to property. Laws, he pointed, protected the property of the poor and the rich equally.<sup>185</sup> Property had played a crucial emancipatory role throughout history: it had bred 'indépendance,' which in turn had encouraged men to contest established privileges.<sup>186</sup> Whereas Rousseau had seen in mankind's perfectibility the cause of its ills, Constant contested his view that man was a depraved animal. For Constant, the use of faculties – interest mitigated by 'sympathie,' which he called 'le germe de la perfectibilité' – had led mankind on the road towards the 'reconquête de ses droits.'<sup>187</sup>

Equality, in Constant and Staël's mind, thus corresponded both to a rational, demonstrable principle that was in the interest of all *and* a fundamental passion that had driven mankind towards always-greater equality. This is why history could be depicted both as the unfolding of ideas and the progressive affirmation of a basic instinct.<sup>188</sup> Modern republics, being founded on sound principles allowed the true 'elements de la nature

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<sup>183</sup> 'Egalité,' 370-371.

<sup>184</sup> Ibid. 371.

<sup>185</sup> Ibid. 372.

<sup>186</sup> 'Fragments d'un essai sur la perfectibilité,' 452.

<sup>187</sup> Ibid. 450.

<sup>188</sup> *FGA*, 372; *DRP*, 471.

humaine’ to unfold unimpeded.<sup>189</sup> By contrast, monarchies bred disorder, because heredity established a forced opposition between the social rank of individuals and their intrinsic worth, which inevitably caused frustration and revolt in the long run – history provided countless examples of this phenomenon.<sup>190</sup> This is why, Staël wrote, ‘il y a de grands biens attachés à fonder son association politique sur des principes dont les calculs sont évidents et les sentiments naturels.’<sup>191</sup>

Equality properly understood, for Constant and Staël, provided a compass to gauge the relative merits of institutions. Simply endorsing irrational types of opinion as a ground of legitimacy amounted to consecrating not only complete relativism, but to turning a blind eye on all types of abuses.<sup>192</sup> When it came to political theory, they thought, a middle way had to be struck between blunt pragmatism and utopianism. Despite all his merits, Montesquieu, in the eyes of Staël and Constant, was ultimately a ‘historiographe du hazard.’ He had collated facts, without risking normative judgments, thereby running the risk of justifying all abuses, including heredity.<sup>193</sup> Utopian thinkers, on the contrary, had shown the principles to which institutions ought to conform, but without relating them to concrete experience.<sup>194</sup> ‘La théorie sans l’expérience,’ Staël observed, ‘n’est qu’une phrase, l’expérience sans la théorie qu’un préjugé.’<sup>195</sup> ‘Le premier homme en législation,’ she wrote, perhaps in an oblique reference to Hume’s wise legislator, designed universal principles on the basis of human nature and the lessons of history.<sup>196</sup> Hume’s ideal of a ‘science of politics’ could be enriched by the insights of French rationalists like Condorcet: general rules, if appropriately deduced from experience understood in the twin sense of historical data and constitutive elements of human nature, could provide not only a roadmap to sound politics, but true guidelines that were applicable in all times and places.<sup>197</sup>

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<sup>189</sup> *CA*, 303-305. At times, they suggested that these two forces corresponded to two distinct social groups – intellectuals and the populace – that collaborated to make equality triumph. See *DRP*, 471.

<sup>190</sup> *CA*, 306-307.

<sup>191</sup> *Ibid.* 303.

<sup>192</sup> *Ibid.* 306.

<sup>193</sup> *FCR*, 406; *CA*, 308.

<sup>194</sup> *CA*, 308. Constant and Staël might have been thinking of Condorcet and Godwin when writing about ‘penseurs utopiques.’ See Constant’s comments about them in his ‘Fragments d’un essai sur la perfectibilité,’ 439.

<sup>195</sup> *CA*, 308.

<sup>196</sup> *Ibid.*

<sup>197</sup> Compare with Hume, ‘That Politics May Be Reduced to a Science.’

## The Founding Principles of the Modern Republic (II): Self-Development

A modern republic could pride itself on being founded on more rational bases than monarchies. But there was also a second reason why they should be preferred to monarchies. Challenging Montesquieu's typology of regimes, Constant further argued that the all-elective institutional apparatus of a representative republic gave citizens the scope and the incentives necessary for the development of their individual faculties that were lacking in monarchies. Montesquieu had famously distinguished between government types on the basis of their nature – their organizational structure – and their spring – the type of passions that set them in motion. In Constant and Staël's appreciation in the 1790s, Montesquieu's typology posed two significant problems.

First, it questioned the legitimacy, indeed the very possibility of a republic in a large commercial country like eighteenth century France – a point royalists were regularly putting forward in the aftermath of the revolution.<sup>198</sup> The spring of the republic was according to Montesquieu, virtue – a moral disposition that encouraged citizens to put their personal interest into perspective and act with an eye upon the general interest.<sup>199</sup> Montesquieu had expressed doubts about whether such a disposition was still alive today: not only because moderns were more interested in commerce than in great deeds, but also because virtue could only be properly nurtured and inculcated in small republics.<sup>200</sup>

Second, Montesquieu's arguments suggested that monarchies had enhanced claims to legitimacy in modern times, because they were able to satisfy the moderns' craving for commercial activities and personal ambition, without for that matter putting in danger the sustainability of the regime. Whereas in a republic personal ambition was destructive, in medium-sized or large commerce-obsessed monarchies, the absence of virtue was not a problem: it was replaced by honour (or rather false honour). Stirred up by the desire of improving one's reputation – vanity – 'chacun va au bien commun, croyant aller à ses intérêts particuliers.'<sup>201</sup>

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<sup>198</sup> See De Dijn, *French Political Thought*, 40-67.

<sup>199</sup> III, 3; IV, 5. References are to the relevant book and chapter of *l'Esprit des lois*, following conventional usage. I have used the Pléiade edition of the *Oeuvres complètes*, ed. Roger Caillois (Paris, 1949-1951).

<sup>200</sup> III, 3; III, 5; IV, 1; 3, 5, 7.

<sup>201</sup> III, 7. There is a split amongst scholars as to whether Montesquieu was more inclined towards a monarchy or a republic. For a monarchist reading, see De Dijn, *French Political Thought*, 20-32 and Michael Sonenscher, *Before the Deluge: Public Debt, Inequality, and the Intellectual Origins of the French Revolution* (Princeton, 2007), 95-172. For a republican reading, see Jacob T. Levy, 'Beyond Publius: Montesquieu, Liberal Republicanism and the Small-Republic Thesis,' *History of Political Thought*, 27/1 (2006), 50-90 and Paul A. Rahe, *Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate, Terrain, Technology*,

Although this has gone unnoticed, in their early writings Constant and Staël offered a reworking of Montesquieu's typology of regimes, as I shall now show with reference to *De la force* and Staël's introduction to *De l'influence des passions* (1796).<sup>202</sup>

Whereas Montesquieu had attributed one chief spring to each regime form – virtue, honour and dread to republics, monarchies and despotic governments respectively – Staël and Constant believed that the same set of human attributes were fundamentally at work in each regime form.<sup>203</sup> These they called alternatively passions, in Montesquieu's fashion, or more often, in a way reminiscent of Condorcet, faculties.<sup>204</sup> There were three such main faculties. Later onward, in his *Principes de politique* (1806, but probably started as early as 1802), Constant would distinguish between mankind's 'facultés industrielles' (interest), 'facultés morales' (sympathy, enthusiasm, pity) and, most importantly, 'facultés intellectuelles' (reason, which Constant also called 'faculté progressive') – a tripartite understanding of human nature.<sup>205</sup>

A chief human motive, according to Staël and Constant, was interest. This motive made ancient-style republican virtue and the self-sacrifice it implied impossible to sustain. 'Quoi,' Staël asked, 'me dira-t-on, ne peut-on pas compter sur le courage de la vertu? Il ne faut jamais calculer en masse que sur les efforts de l'intérêt personnel.'<sup>206</sup> Yet, as Steven Vincent has shown, equally important to Constant and Staël were passions such as enthusiasm, sympathy and pity, a stress that bore traces of their crossreading of Rousseau and Adam Smith. These passions rescued individuals from a narrow-minded type of egoism and were, by the same token, the source of strengthened social ties.<sup>207</sup> In a slightly later set of notes, probably written around 1800, Constant observed that, while humans were primarily

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*Uneasiness of Mind, the Spirit of Political Vigilance, and the Foundations of the Modern Republic* (London, 2009). For a survey of the arguments of both parties, see Robin Douglass, 'Montesquieu and Modern Republicanism,' *Political Studies*, 60 (2012), 703-719.

<sup>202</sup> The relationship between Constant and Montesquieu is little studied, and often taken for granted. See Fontana, *Constant*, and Fontana, 'Benjamin Constant, la méthodologie historique et l'*Esprit des lois*' in *Le temps de Montesquieu*, ed. Marc Porret and Catherine Volpilhac-Augier (Geneva, 2002), 385-390.

<sup>203</sup> This had already been the approach of Helvétius, who had argued that 'l'amour du pouvoir' was the only principle that underpinned all regimes. See *De l'homme*, section IV, chapter 11 (London, 1773). Treading in Helvétius' footsteps, the Napolitan legist Gaetano Filangieri similarly argued that love of power was the principle of all regimes, adding to Helvétius' analysis a republican twist: love of power, in his view, was compatible with a certain type of virtue. See Filangieri, *La Science de la législation*, I, transl. Jean-Antoine Gaillois (Paris, 1798), esp. chapter 12. Filangieri's typology of regime might have had an impact on Constant and Staël's reading of Montesquieu.

<sup>204</sup> See, for instance, the preface to Condorcet's *Esquisse d'un tableau historique des progrès de l'esprit humain*.

<sup>205</sup> PdP (1806): on industrial faculties, see 531; on moral faculties, see 493, 618-619, 680. On intellectual faculties, see esp. 112, 256, 326, 342, 478, 519.

<sup>206</sup> CA, 377.

<sup>207</sup> Vincent, *Constant*, 143.

creatures of need, ‘tout ce qu’il y a de généreux et de grand a son principe dans la sympathie, c’est à dire dans l’impossibilité de contempler la douleur d’un autre sans émotion, et dans le besoin de la secourir.’<sup>208</sup> Last, in addition to interest and higher types of emotions, Constant and Staël also highlighted reason as inherent to human nature. In *De l’influence des passions*, referring to Descartes, Staël stressed the relative independence judgment could acquire vis-à-vis passions of all types.<sup>209</sup> Constant’s early faith in individual reason was, for his part, pinned upon his belief that ‘les hommes tendent toujours au vrai.’<sup>210</sup> In Condorcet and Paine’s fashion, Constant repeatedly called individuals to make use of their judgement to shun received traditions: when properly examined, prejudices would inevitably lose their status of dogmas and be replaced by demonstrable ideas.<sup>211</sup>

The spring of *all* types of government was a combination of these three faculties properly exercised. Staël and Constant alternatively called it ‘talent,’ ‘génie’ or a refined type of ambition or virtue – a point to which we shall return at the end of this section. In their view, all these amounted to the same thing: the development of faculties. In each government form, individuals were able to, or prevented from, seeking their own interest and making use of their judgment. They would be stimulated in their endeavor by the recognition of their peers. Enthusiasm was the key to this positive emulation of talents: it meant the appreciation and admiration of great deeds, which provided both an incentive and a reward to the exercise of faculties.<sup>212</sup>

Constant and Staël usually described this spring in anthropological terms. But in *Des circonstances actuelles*, Staël also suggested that the desire to develop one’s abilities was a distinctively modern one, characteristic of the established practice of the age. In a chapter entitled ‘De l’opinion publique,’ she explained that, today, public opinion had specific interests, including ‘l’aisance et la tranquillité’ – the preconditions for developing individual abilities.<sup>213</sup>

Just like Montesquieu’s definition of the spring that animated regimes had to be amended, his definition of the nature of governments needed reconsideration. For Montesquieu, the structure of a government form referred to the way in which power was

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<sup>208</sup> ‘Fragmens d’un essai sur la perfectibilité,’ 449–450.

<sup>209</sup> *DIP*, 226–227. On individual judgment in Staël and Constant, see Jaume, *L’individu effacé*, and Helena Rosenblatt, ‘Madame de Staël, the Protestant Reformation, and the History of Private Judgement,’ *ABC*, 31–32 (2007), 143–154.

<sup>210</sup> *FGA*, 373–374, note a.

<sup>211</sup> *DRP*, 464.

<sup>212</sup> *FGA* 368.

<sup>213</sup> *CA*, 351.

exercised in each instance, with stability as an ultimate objective. In a republic, sovereign power resided in the hands of the people as a whole (democracy) or only part of the people (aristocracy). In a monarchy, this power was in the hands of a king checked by a body of nobles, acting as the guardians of a set of inherited customs. In a despotic government, the despot ruled without any checks upon his power.<sup>214</sup> Constant and Staël concurred with Montesquieu's concern for stability, but insisted that the latter should always be assessed in tandem with the space each regime left to individuals to refine their abilities. Montesquieu's quest for 'moderate' government forms had to be combined with Condorcet's stress on the development of faculties.

In the introduction to *De l'influence des passions*, Staël provided a survey of the main arguments of what she presented as an upcoming work of political theory (which would eventually become *Des circonstances actuelles*) that would 'analyser les gouvernements sous le rapport de la part qu'ils laissent à l'influence des passions' – *De l'influence des passions* itself dealing primarily with passions at the individual level.<sup>215</sup> Referring to Montesquieu's methodology, but also to Condorcet's attempts to reduce politics to a science, Staël explained that it was possible to determine with exactitude the organisation of a constitution on the basis of fixed data. Sound political theory needed to take into account mankind's 'passions naturelles,' and, at a second stage, observe how, throughout history, in each type of government form, these passions had behaved.<sup>216</sup> From then on, a new repartition of government types could be achieved on the basis of the balance between 'l'ordre' and 'la liberté' that prevailed in each regime form. 'Le seul problème des constitutions est donc de connaître jusqu'à quel degré on peut exciter ou comprimer les passions, sans compromettre le bonheur public.'<sup>217</sup>

In light of the recent experience of the revolution, Montesquieu's despotic form could be reinterpreted in a new way. Staël distinguished between two types of despotic governments: those where 'toutes les passions ont été comprimées' by an external force – a likely reference to absolute monarchy – and those 'anarchies démagogiques ou militaires' where passions had been 'excitées' to the point of frenzy with similar results – an unmistakable allusion to the Terror.<sup>218</sup> These two first types of regimes were, respectively, a deviant type of monarchy and a deviant type of republic, where no sound balance between

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<sup>214</sup> II, 1.

<sup>215</sup> *DIP*, 137.

<sup>216</sup> *Ibid.* 137; 140; 144.

<sup>217</sup> *Ibid.* 138.

<sup>218</sup> *Ibid.* 141.

order and liberty prevailed. In the first instance, excessive stability quenched all human sentiments, in the second one, extreme exhilaration left no time for individual activities and the cultivation of mild passions.

There were, however, two alternatives. The first one was a small country where ‘la liberté démocratique’ prevailed – this was Montesquieu’s own definition of the republic in its democratic version. In such governments, Staël explained, the balance between order and liberty was tolerable, but citizens had in fact little incentives to develop their faculties. The size of the country implied that the challenges they faced were less enthralling, and the recognition citizens would get from political engagement would be limited:

Il faudrait observer comment l’homme tend à l’exercice de ses facultés, comment il veut agrandir l’espace en proportion de ses forces. Dans les états obscurs, les arts ne font aucun progrès, la littérature ne se perfectionne, ni par l’émulation qui excite l’éloquence, ni par la multitude des objets de comparaison, qui seule donne une idée fixe du bon goût. Les hommes privés d’occupations fortes se resserrent tous les jours plus dans le cercle des idées domestiques, et la pensée, le talent, le génie, tout ce qui semble un don de la nature, ne se développe cependant que par la combinaison des sociétés.<sup>219</sup>

Monarchies – not absolute ones, but those where the king ruled according to a body of conventional laws, à la Montesquieu – provided the second alternative. Here as well, the balance between liberty and order was somehow acceptable, but the hereditary structure on which it rested was nonetheless a significant deterrent to the flourishing of faculties. In *De la force*, Constant argued that the system of ranks even moderate monarchies relied upon ‘condamnent une grande partie de nos facultés et de nos espérances à l’inactivité.’ No doubt men in general wanted ‘repos,’ but not ‘inactivité’: ‘les hommes veulent qu’on ne les agite pas, mais ils ne veulent point qu’on les paralyse: et si la Monarchie, par sa nature, met d’inutiles entraves à l’activité, c’est déjà, quoi qu’en disent ceux qui spéculent sur le sommeil de l’espèce humaine, un vice immense dans la Monarchie.’<sup>220</sup> Ambition, according to Montesquieu, gave life to monarchies without endangering them, since it was constantly repressed by a congealed hierarchical structure.<sup>221</sup> Constant inverted Montesquieu’s analysis. He agreed with Montesquieu that, in monarchies, ambition was constantly muffled by social immobility, but believed this dynamic to be utterly deleterious. Individual interests

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<sup>219</sup> Ibid. 141-142.

<sup>220</sup> *FGA*, 367.

<sup>221</sup> III, 7.

did not unconsciously contribute to the public interest in monarchies. These interests, because they were not stimulated by enthusiasm, degenerated into egoism:

L'âme est toujours resserrée, lorsqu'elle est repoussée dans l'égoïsme: il y a toujours quelque chose de terne, de flétri, dans ce qui ne regarde que soi, dans ce qui n'émane pas de la nature et ne marche pas vers la liberté. L'ambition, dans les Monarchies, lors même qu'elle veut s'élever au bien, est toujours refoulée vers elle-même. On ne peut s'oublier, on ne peut se livrer à l'enthousiasme, on n'est pas électrisé par la reconnaissance de ses égaux, on se courbe devant les remerciements d'un maître. On se sent rapetissé de la petitesse environnante. Le honteux ennui marque de son sceau tout ce qui n'est pas ou dégradé par la servitude, ou distrait par d'ignobles jouissances.<sup>222</sup>

Constant in fact took Montesquieu at his word: what monarchies relied upon was indeed *false* honour, combined with *perverted* ambition. In the present circumstances, Constant argued, partisans of the *ancien régime* were animated by 'vanité' mixed up with a desire to secure pecuniary interests.<sup>223</sup> Monarchies debased individuals rather than inviting them to exercise all their talents. In monarchies, Constant further argued, prejudices like Catholicism had bred the habit of obeying without questioning. This explained both why people were still so attached to prejudices, and why the development of individual thinking was proving so hard.<sup>224</sup>

The ultimate government form was, according to Constant and Staël, a republic in a large country, or what they sometimes called a representative government. As we have seen, like most Thermidorians, Constant and Staël defended a meritocratic equality, and were in favour of franchise-based elections. On Montesquieu's reading, such a republic would qualify as an aristocracy, where only part of the people had supreme political power. Montesquieu had not ruled out that an aristocracy could approach democracy by expanding the franchise, but he also had suggested that in an aristocratic republic, the relationship between the governors and the governed often verged on oppression.<sup>225</sup>

Staël and Constant demurred. Small-state republics might be satisfactory, Staël claimed, but it was easy to prove that, in light of mankind's natural sentiments, men inevitably tended to strive to expand their power, through conquests, to have at their disposal

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<sup>222</sup> *FGA*, 367-368.

<sup>223</sup> *Ibid.* 338.

<sup>224</sup> *DRP*, 460.

<sup>225</sup> II, 3.



a greater stage where they could distinguish themselves.<sup>226</sup> Representative government provided means to ‘concilier les avantages’ of the two known species of government, monarchies and republics: it provided the perfect articulation of freedom – the trademark of republics – and order – the specificity of monarchies – in such a way that passions could thrive without degenerating into excesses. ‘Il faudrait créer,’ Staël wrote, ‘un gouvernement qui donnât de l’émulation au génie, et mît un frein aux passions factieuses; un gouvernement qui pût offrir à un grand homme un but digne de lui, et décourager l’ambition de l’usurpateur’ – the would-be Robespierres.<sup>227</sup> In his review of Staël’s *De l’influence des passions*, summarizing her argument, Constant argued that representative government combined ‘l’ordre qui empêche les passions de devenir dangereuses, et la liberté qui leur laisse l’essor nécessaire au développement des plus belles facultés de l’homme.’<sup>228</sup> In *De la force*, Constant had in fact already defended representative government as providing this *juste milieu*:

J’aurais recherché enfin, si la sublime découverte du système représentatif, en conservant le but sublime de l’ambition Républicaine, et en modérant sa fermentation, n’établit pas un juste milieu, et si, même, cet avantage n’est pas en raison de l’étendue d’une République, parce que la grandeur des objets fait disparaître les petites passions, exclut les petits moyens, et met entre les hommes, une distance, qui ne leur permet plus de s’aborder dans leurs différends, leurs intérêts ou leurs jalousies personnelles.<sup>229</sup>

While small republics ‘n’offrent point au-dedans de place qui puisse contenter l’ambition et le génie,’ in large republics the issues at stake transcended petty interests and stimulated ambition.<sup>230</sup> In the representative system, each citizen, in principle, was invited to ‘s’occuper des plus grand intérêts & à exercer toutes ses forces dans la carrière immense qui vient de s’ouvrir devant lui’ – to exercise political rights once he had become a property owner.<sup>231</sup>

While monarchies bred false honour, Constant suggested, republics refined through representation were the cradles of restored ambition and true honour. In *De la force*, Constant unflatteringly compared debased monarchichal ambition with what he called ‘ambition

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<sup>226</sup> *DIP*, 142: ‘Voulant exciter leurs facultés, reculer en tout genre les bornes de l’esprit humain, ils appellent autour d’eux, d’un commun accord, les circonstances qui secondent ce désir et cette impulsion.’

<sup>227</sup> *Ibid.*

<sup>228</sup> ‘Compte-rendu de *De l’influence des passions*,’ in *OCBC I*, 422.

<sup>229</sup> *FGA*, 368.

<sup>230</sup> *DIP*, 141.

<sup>231</sup> *FGA*, 368.

populaire' or 'ambition républicaine.'<sup>232</sup> A monarchy 'déplace plutôt l'ambition qu'elle ne l'éteint,' by condemning men to baseness and favoritism, 'tandis que l'ambition populaire élève, alors même qu'elle ényvre.'<sup>233</sup> In the Directorial context, Constant argued that republicans were defending a certain type of pride or glory: 'un orgueil plus profond, plus mâle, plus inhérent à leur nature, plus cher à leur coeur, car il est pour eux la réhabilitation de leur classe.'<sup>234</sup>

While Constant in general shied away from using the term virtue, Staël sometimes used it in *Des circonstances actuelles*. When she did so, however, the type of virtue she had in mind was manifestly not the type of virtue Montesquieu had seen as the spring of republic, nor was it the virtue Rousseau had believed should prevail in any kind of regime form.<sup>235</sup> Virtue or 'l'amour de l'égalité,' for Montesquieu, implied self-sacrifice, and some form of equal material treatment between citizens.<sup>236</sup> For Staël, if properly understood as a more reasoned type of patriotism, virtue could still be worth talking about in a large, post-revolutionary country like France. In such setting, virtue needed to be reconciled with self-interest and the use of reason. First, there was to be no more coercion in the name of the public good: 'la vertu doit être volontaire.' Second, virtue had to be compatible with the general aspiration for rest: 'la majorité de l'espèce humaine a besoin de repos pour pratiquer la vertu.'<sup>237</sup> Third, blind sacrifice to public interest had to be banned: individual interests had a legitimacy of their own. The key, for Staël, was to 'faire revenir à la vertu par l'intérêt.'<sup>238</sup> Self-sacrifice, for Staël, was no longer needed. In the Thermidorian republic, citizens contributed to the public interest while satisfying their own interests – this was the underlying logic of the spring Montesquieu had attributed to monarchies. Interests, however, were not just base material interest, but, primarily, the development of intellectual faculties. 'Après la vertu,' Staël wrote, la supériorité la plus incontestable qui puisse exister parmi les hommes, c'est l'étendue des idées.'<sup>239</sup> 'Si Montesquieu eût vécu de nos jours,' she added, 'peut-être aurait-il pensé que le principe de la République française, c'était la philosophie; sans doute la vertu est aussi de la philosophie.'<sup>240</sup> In the end, virtue, as Staël understood it, was a refined love of the republic in a representative system: being virtuous consisted in fulfilling oneself

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid. 338.

<sup>235</sup> See Book III, chapter 4 of *Du contrat social*.

<sup>236</sup> III, 3.

<sup>237</sup> *CA*, 486.

<sup>238</sup> Ibid. 451.

<sup>239</sup> Ibid. 448.

<sup>240</sup> Ibid. 345.

through voluntarily putting one's capacities at the service of the public good – what Constant had called the care of the nation's greatest interests.

Thus understood, Staël's refined virtue was the same notion as Constant's refined ambition. In Staël and Constant's reading, philosophical virtue and popular ambition amounted to the same thing: talent, genius, or the development of faculties. The latter was only fully possible in a representative republic, which therefore should be preferred even to a constitutional monarchy. Montesquieu's republic-monarchy chronological dyad needed to be reverted: moderns wanted self-development, they would find it only in an enhanced type of republic where emulation prevailed. Once again, monarchies had to be relegated to the past: their organizational structure, based on the prejudice of heredity, made them unable to satisfy both the anthropological and distinctively modern need for self-development.

### **Constitutional Principles**

When *De la force* came out in April 1796, constitutional republicans had immediately derided it as a Machiavellian piece of work that favoured political expediency over principled politics.<sup>241</sup> *Des réactions politiques* was partly an answer to these accusations. In this work, Constant started moving away from his earlier statements that the government could find legitimacy in acting in conformity with the people's 'voeu,' at the expense of their actual, current opinion.

In *De la force*, Constant had argued that the government was the best interpreter of the people's real interests, and was accordingly sole judge of the measures necessary to secure these. Part of the message of *Des réactions* was that, if popular opinion could not always be taken as an appropriate rule of political conduct, neither could the opinion of rulers about what the common interest involved be always trusted. Politics, he now explained, was an area of competing interests, which never completely cancelled each other out.<sup>242</sup> Factions – royalists and republicans alike – were constantly tempted to resort to arbitrariness rather than constitutional rules, because it better served their immediate political interests (or so they thought). Charismatic rulers could manipulate popular opinion; ambition could lead respectable rulers astray. In light of this relentless swirl of opinions, an external point of

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<sup>241</sup> Kloocke, *Constant*, 67-75.

<sup>242</sup> *DRP*, 497.

reference was needed, Constant insisted, in the form of a constitution, which should contain a minimal set of principles.<sup>243</sup>

Principles were in the interest of all and acted as reminders in troubled times, even when opinion erred or was deceived, of what was required for all to live in peace.<sup>244</sup> In a way, the constitution was for Constant the embodiment of what he had called the nation's 'voeu.' It acted as a lighthouse in times of troubles when opinions became confused. Pure political realism was self-destructive. Without such principles, Constant wrote, there would only be circumstances, and 'chacun est juge des circonstances.'<sup>245</sup> The answer to the vagaries of *realpolitik* were limits that exist 'de droit': 'sans la garantie, rien n'existe, car rien n'existe que de fait, et le fait n'est qu'un accident: il n'y a d'existant en institution que ce qui existe de droit.'<sup>246</sup>

Respect for constitutional rules, Constant argued, was the only thing that distinguished a regular government from a revolutionary one. Otherwise, how could the Directory be differentiated from the Robespierristes, if the former acted arbitrarily? The defining characteristic of constitutional rules was that they were 'fixes,' as opposed to opinions, which were mobile by essence. Constitutional rules provided guardrails to the government's action, and points of reference for the governed who developed vis-à-vis rulers the legitimate expectation that they would rule in accordance with the constitution.<sup>247</sup> If the government violated the rules inscribed in the constitution, its irregularity became obvious to all, and it would gradually lose credit in the eyes of the public. With a clear set of principles inscribed in a constitution, legitimacy would no longer be simply dependent upon the people's momentary opinion, or the rulers' capacity to act in the public interest, but upon respect for the constitutional text.

Recognizing constitutional rules did not mean, Constant specified, that the government had to be inactive. The margin of appreciation of rulers had to be condensed within clear constitutional boundaries, but could not be non-existent – if it was, the political 'machine' would soon stop working.<sup>248</sup> There existed some fundamental 'bases' that the legislative and executive powers, taken together, could not modify. But they were free to do anything that did not run against these.<sup>249</sup> Constant was selective about what these 'bases'

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<sup>243</sup> Ibid. 502.

<sup>244</sup> Ibid. 497.

<sup>245</sup> Ibid. 495.

<sup>246</sup> Ibid. 498.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid. 502.

<sup>249</sup> Ibid. 503.

were: ‘une représentation nationale en deux sections, point d'unité, point d'hérédité, l'indépendance des tribunaux, l'inviolable maintien des propriétés que la constitution a garanties, l'assurance de n'être pas détenu arbitrairement, de n'être point distrait de ses juges naturels, de n'être point frappé par des lois rétroactives, et quelques autres principes en très-petit nombre.’<sup>250</sup> This list was a way, for Constant, of sanctifying the principles that made a government legitimate, and reflected his earlier statements about equality and the ability to provide security, itself a precondition for self-development, as the two key elements that founded legitimacy. It was also a cursory reading of the Constitution of Year III, that passed under silence many constitutional freedoms, including, for instance, a position of principle in favour of freedom of the press or the recurrence of open, free elections. This reserve, combined with the statement that the government should not feel overly constrained by the ‘frein’ of the constitution – it always remained sole judge of ‘tout ce qui est nécessaire pour faire marcher la constitution’ – shows how difficult Constant found it to square his conviction that arbitrary politics was in the long run destructive of a government’s legitimacy and his abiding support of a government whose measures had been repressive from the start.<sup>251</sup>

The obvious problem was that, still in 1797, the Directory was on the brink of collapse, and it was far from certain that strict respect for constitutional rules would not precipitate its downfall. As a result, Constant fell back upon his argument that, in the present circumstances, the government was still the best judge of what types of measures were needed to make the nation’s ‘vœu’ prevail. In an infamous speech given a few months later, in defense of the coup of Fructidor (14 September 1797), Constant argued that neutrality in the present circumstances amounted to guiltiness.<sup>252</sup> The government’s ‘partialité’ sometimes implied that constitutional freedoms be put in parenthesis for the survival of the republic.<sup>253</sup> As the elections of April 1798 were nearing and neo-Jacobins were on the rise, Constant, in another buoyant speech, called upon the Directorial elite to bar them from occupying any public function, just as had been done earlier for royalists.<sup>254</sup> In the same speech, Constant accused counter-revolutionaries and constitutional monarchists of perpetuating Catholic bigotry and entertaining in the French people the false hope of a return to monarchy. It was their excesses, in fact, that had forced the Directory to resort to illegal measures: ‘si quelques

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid. 503.

<sup>252</sup> ‘Plantation de l’arbre de la liberté,’ 561-562: ‘la justice est un devoir dans les gouvernants, l’impartialité n’est qu’une folie et un crime.’

<sup>253</sup> Ibid. 554-555.

<sup>254</sup> ‘Discours prononcé au Cercle constitutionnel, le 9 ventôse an VI (27 février 1798),’ in *OCBC I*, 585-601.

parties de la liberté ont été froissées, nous en accusons le royalisme; c'est lui qui nous a poussés dans ces défilés où le danger semblait motiver l'oubli momentané de la loi.'<sup>255</sup>

What makes these speeches fascinating is that, in the very same texts, Constant could insist on the importance of constitutional guarantees against arbitrariness while endorsing the Directory's anti-constitutional measures. To alleviate the tension between theory and practice, Constant often distinguished between short-term and long-term courses of action: for the time being, he conceded that repression might be needed, precisely to ensure the triumph of principled, non-arbitrary republican politics in the long run. Only once royalists had been tamed, would a return to freedom and order be possible.

## **II. Representative Government: Making the Nation's 'Voeu' Triumph**

A representative republic benefited, in Constant and Staël's view, from an enhanced legitimacy when compared to monarchies. A real challenge remained to make an all-elective constitutional structure work in the circumstances the Directory was facing. Twice, the Directory had been forced to annul the results of the national elections in order to secure its existence. In September 1797, the government had put a violent end to the ambitions of the royalist party, emboldened by its victory to the elections of April 1797, with the coup of Fructidor. Less than a year later, the coup of Floréal similarly quashed the results of the elections of April 1798, which had brought a Jacobin majority to the Chamber. Free elections, so it seemed, were both the answer to the Directory's lack of legitimacy and the problem, since the majorities brought into the two elective Chambers of the Constitution of Year III – the Conseil des Cinq-Cents and the Conseil des Ancients – threatened to overrun the Directory's institutional system. The heart of the difficulty was one Constant and Staël had highlighted numerous times: existing opinion was split between republicans and royalists of all sorts. With its all-elective structure based upon a partial renewal of a third of each chamber every year, the representative system of the Constitution of year III was importing and reproducing, at the state level, the fleetingness of current public opinion.<sup>256</sup>

In *Des circonstances actuelles*, the manuscript she wrote with the help of Constant, Staël offered a complex theory of representative government meant to address what she saw as the constitutive weaknesses of the Constitution of Year III, including its clumsy

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<sup>255</sup> Ibid. 597.

<sup>256</sup> For a commentary of the Constitution of Year III, see Jainchill, *Reimagining Politics*, 26-61.

bicameralism and neglect of the importance of the executive power.<sup>257</sup> Scholars have assumed that Staël's conception of representative government 'was based on the recognition of the principle of popular sovereignty.'<sup>258</sup> Staël's theory, however, did not hinge on popular sovereignty, but on public opinion as a distinct way of designating the people's political authority. 'Il faut que l'opinion publique,' Staël insisted in her introduction, 'soit le pouvoir souverain d'un gouvernement représentatif.'<sup>259</sup>

Public opinion here had two different, complementary meanings, which corresponded to the two main issues that were central to Staël's conception of representative government – the problem of political obedience, and the problem of how to make the nation's 'voeu' triumph despite the current state of public opinion without lapsing into outright despotism. On these two issues, she was in constant dialogue with her father, Jacques Necker.

For Constant and Staël, equality constituted an intrinsically better way of organizing the relationship between governors and the governed – something of which public opinion was becoming increasingly aware each day. Republics might be structured on principles perceived by all to be just, such as equality, but what if, Necker had asked, this *theoretical* legitimacy did not work out *in practice*? In other words, abstract legitimacy was one thing, how it operated – actual subordination in the long run – another. To solve the problem of political allegiance in a representative republic, Staël introduced the notion of public opinion as *estime publique*.

When it came to constitutional engineering, Necker recommended not to start with popular sovereignty. His favourite model was the English system: a type of bicameralism with a hereditary chamber, flanked by a hereditary king with extended powers. This 'souverain complexe' was in charge of interpreting the nation's long-term interests – its 'voeu' – independently of popular, current opinion. In *Des circonstances*, Staël built on her father's constitutional reflections, purging it from its references to heredity to design a

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<sup>257</sup> To argue, as Biancamaria Fontana does, that Staël 'stressed those features of the 1795 Constitution which in her view reflected the more basic and widely applicable principles of representative government,' including the popular election of the two legislative assemblies, the absence of any hereditary magistracy and the separation of the executive power from the legislative, is therefore to miss the point of *Des circonstances*, which aimed precisely to remedy the problems she associated with these principles. Biancamaria Fontana, 'The Thermidorian republic and its principles,' in *The Invention of the Modern Republic*, ed. B. Fontana (Cambridge, 1994), 126.

<sup>258</sup> Fontana, *ibid.*, 124. Without referring to popular sovereignty, Andrew Jainchill has similarly argued that Staël defended 'representative democracy' and envisaged elections as the expression of 'the collective will of the people,' while insisting that Staël's republicanism was of the elitist, 'aristocratic' type. *Reimagining Politics*, 137-138. Kalyvas and Katnelson have likewise acknowledged that Staël endorsed 'popular sovereignty,' while arguing that she saw representation as a way of 'limiting access to political office to the most qualified and educated citizens.' *Liberal Beginnings*, 128.

<sup>259</sup> *CA*, 300.

constitutional structure where powers would cooperate to ensure that the nation's rational opinion, aware of its long-term interests, would prevail over the current debased opinion.

This way of conceptualizing the people's power implied that the pitfalls she associated with popular sovereignty – unlimited power, arbitrary majority rule, monism and the people's direct involvement in political affairs – could be circumvented, and France governed in accordance with the nation's deep 'voeu.' In that respect, her theory of representative government was framed as a way of *domesticating* popular sovereignty.

In what follows, these two themes – political obedience and constitutionalism – are explored first by introducing Necker's theory of representative government, before exposing the main elements of Staël's own model.

### Necker's Theory of Representative Government<sup>260</sup>

Like Hume, Necker believed opinion was crucial to understand the mystery of the allegiance people naturally owed to their rulers.<sup>261</sup> In his *Réflexions philosophiques sur l'égalité*, he offered a comparison of how subordination worked in republics and monarchies, suggesting that the experience of the Terror had shown how much better than republics time-honoured monarchies were at solving the problem of political obligation. The key to political obedience, according to Necker, resided in human imagination. The vast majority of men were not able to understand the analogy between their own interest and the public interest: 'l'habitude du respect et de la subordination ne peut jamais être un simple produit de la réflexion.'<sup>262</sup> It was through imagination, not reason, that the masses were tied to the great principles that preserved public order.<sup>263</sup> People were fundamentally unequal – intelligence and abilities, but also wealth and rank were unevenly distributed amongst individuals. The force that ultimately held society together by making difference in property belongings tolerable to the poor was 'le spectacle habituel des différentes gradations introduites par le temps au milieu des sociétés politiques.'<sup>264</sup> What underpinned any kind of successful

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<sup>260</sup> Necker's views on representation and constitutional theory have been analyzed in Grange, *Necker* and Craiutu, *Moderation*, 113-157. This section suggests that Necker's views on representative government would benefit from being reconsidered from the specific angle of 'public opinion.' On Necker and public opinion, see Burnand, *Necker et l'opinion publique* and Lucien Jaume, 'L'opinion publique selon Necker: entre concept et idée-force,' in *L'avènement de l'opinion publique*, 33-50.

<sup>261</sup> See Necker's reworking of Hume's idea that all governments rest on opinion in *Du pouvoir exécutif dans les grands Etats* (1792), 21-22. It is likely that Necker had read Hume's *Essays*. See Grange, *Necker*, 320.

<sup>262</sup> 'Réflexions philosophiques,' 136.

<sup>263</sup> Ibid. 136-137.

<sup>264</sup> Ibid. 139.



institutional apparatus was the timeworn, tacit acceptance of a certain type of social ladder transmitted through generations, which he called ‘assentiment.’<sup>265</sup>

The sovereign power – the ultimate bearer of political authority – that rested on this assent was what Necker called a complex sovereign, made up of two chambers and the executive power, i.e. the king and his ministers. In order to successfully secure political obedience in a large country, these different powers had to be sustained by a specific atmosphere of opinion. To that end, Necker designed a complex institutional pyramid, reminiscent of the English system, whose different echelons corresponded to different sorts of opinions people had about institutions.

As a general rule, Necker believed that elections were a poor, unreliable way of securing people’s allegiance, given how often these were manipulated and how uniformed people’s opinion was, as expressed through ballot boxes.<sup>266</sup> They did little more than *formally* concede authority upon a group of men without firmly rooting institutions in the people’s opinion.<sup>267</sup> To alleviate this problem, Necker recommended a narrow franchise, and strict property requirements in order to be elected: only property owners would be credible enough to generate admiration across the populace.<sup>268</sup> Beside the elected chamber, Necker saw the hereditary chamber as an indispensable buffer zone between the legislative body and the king. The type of opinion on which it rested was of a different nature than the opinion that sustained the legislative body: the heredity of peers fostered a powerful sense of awe, which constituted ‘la suprême haie d’honneur qui entoure le chef de l’Etat.’<sup>269</sup> The two chambers making up the legislative body, thus endowed with a certain sense of ‘majesté’ would have ascendancy over an unruly public opinion rather than being dependent on it.<sup>270</sup> This admiration culminated in the person of the king, who ‘par l’assentiment des siècles et des générations passées, a été consacré le gardien immuable des lois et de la félicité publique.’<sup>271</sup> Thus constituted, the complex sovereign rested on a pyramidal system of ‘gradation’ of ranks, ensuring ‘la transition douce et mesurée qui existe dans l’opinion, entre la majesté du prince, la haute dignité des pairs du royaume, et la considération personnelle des députés des communes, à titre de propriétaires, à titre d’hommes distingués par leur education.’<sup>272</sup>

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<sup>265</sup> Ibid. 299; 316.

<sup>266</sup> Ibid. 243. See also *Pouvoir exécutif*, 73-74.

<sup>267</sup> ‘Réflexions philosophiques,’ 246.

<sup>268</sup> *Pouvoir exécutif*, 75.

<sup>269</sup> Grange, *Necker*, 283.

<sup>270</sup> *Pouvoir exécutif*, 59-60.

<sup>271</sup> Quoted in Grange, *Necker*, 271.

<sup>272</sup> *Pouvoir exécutif*, 79-80.

Revolutionaries, in Necker's analysis, had mistakenly believed that the problem of 'la soumission d'un grand Peuple aux obligations imposées par un petit nombre d'hommes était une affaire simple.'<sup>273</sup> Equality of ranks introduced *ex nihilo* had upset the equilibrium between the material power of the people and the moral authority of leaders, and made respect for the law henceforth impossible.<sup>274</sup> Before the revolution, Necker had praised the role of public opinion as a check against abuses of power and a just arbiter of reputations on the basis on merit.<sup>275</sup> Its influence, however, depended on a now lost gradation of ranks.<sup>276</sup> 'Sous le règne de l'Egalité absolue, l'opinion publique est sans autorité, et ce grand réformateur des abus n'existe plus. L'égalité parfaite, une fois reçue, une fois établie, aucune lumière ne vient d'en haut.'<sup>277</sup>

Necker believed popular sovereignty to be an unreliable and dangerous basis for representative government. 'C'est par une fiction que la Souveraineté du Peuple nous est présentée comme l'idée primitive, comme le principe originaire de tous les Gouvernemens libres.'<sup>278</sup> There were four main problems with popular sovereignty. First, its monolithic nature presupposed a perfect agreement of views, which was simply impossible in a nation made up of diverse, unequal characters with inevitably different types of interests.<sup>279</sup> Second, popular sovereignty implied arbitrary majority rule – a way of adjudicating complex subjects by reducing them to questions of numbers. It amounted to granting collective decision making to the lawless, instructionless will of the populace, which, for the most part, had no notion of what sound politics was.<sup>280</sup> Third, recognizing popular sovereignty amounted to creating a rival power to the chamber of representatives. As a result, the people, unsatisfied with their limited role of choosing representatives, constantly harassed them with anarchy at the end of the tunnel.<sup>281</sup> Fourth, making all legitimacy derive from the people's vote, popular sovereignty gave a problematic preeminence to the legislative power at the expense of other constitutional powers: 'le principe absolu de la souveraineté du peuple peut encore être mis au rang de ces idées spéculatives qui, dans l'organisation du gouvernement français, ont combattu l'établissement d'une salubre balance entre les différents pouvoirs politiques.'<sup>282</sup>

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<sup>273</sup> 'Réflexions philosophiques,' 133.

<sup>274</sup> Ibid. 193-194.

<sup>275</sup> See Necker's introduction to *De l'administration des finances en France*, I (1784), i-clix.

<sup>276</sup> 'Réflexions philosophiques,' 106-108.

<sup>277</sup> Ibid. 210.

<sup>278</sup> Ibid. 227.

<sup>279</sup> Ibid. 221-222.

<sup>280</sup> Ibid. 222; 224-225.

<sup>281</sup> Ibid. 246-248; 252.

<sup>282</sup> Ibid. 228-229.

Necker's complex sovereign rested on the people's assent, understood as a twin product of voting and admiration for heredity. This complex sovereign, in his view, was in charge of expressing what he called the nation's 'voeu,' which he explicitly distinguished from the concept of will he associated with popular sovereignty. 'Ces deux expressions, ces deux idées, les vœux et la volonté, deviennent par leur confusion une grande source d'erreurs.'<sup>283</sup> 'Volonté' referred to the short-lived interests of individuals comprising the present day generation. The nation's 'voeu' by contrast transcended successive generations. It corresponded to the steady, long-term yearning of a nation for 'la félicité publique.'<sup>284</sup> Necker thus opposed two versions of 'the people' – the concrete, existing people at a given time and place and the people understood as a transhistorical entity – and argued that these did not always have the same interests. The existing generation was much too often prone to take decisions that satisfied its immediate interests, without regard for the interests of past and upcoming generations.<sup>285</sup> 'C'est dans leurs vœux, et non dans leurs volontés,' he insisted, 'que les Nations sont constantes.'<sup>286</sup> This 'voeu' was the product of accumulated past experiences – a form of residual wisdom about the general conditions of public happiness. Contrary to capricious majorities, these 'vœux' remained consistent over lengthy periods of time, because 'ils deviennent plus simples et plus éclairés lorsqu'un long intervalle les sépare de l'atmosphère et du tourbillon des passions.'<sup>287</sup> 'Will' and 'voeu,' Necker at times suggested, corresponded to two different faces of opinion. 'Voeu' Necker assimilated with a sense of 'justice' as conveyed through the ages, 'une opinion universelle formée par la successions des idées' which he contrasted to 'sentiments éphémères' – the fleeting opinion of the day.<sup>288</sup>

To make this 'voeu' triumph, constitutional powers needed to be distinct, to be sure, but more fundamentally must also *cooperate* with each other. Montesquieu's theory of the separation of powers, in Necker's eyes, needed to be replaced by the 'intertwining of powers.'<sup>289</sup> This cooperation was possible thanks to the different types of legitimacy from which each power proceeded. The two chambers were the receptacle of these two different

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<sup>283</sup> Ibid. 225-226.

<sup>284</sup> Ibid.

<sup>285</sup> Necker took the example of property rights: the existing majority, being poor, could will to overturn this institution, without taking into account the fact that the protection of property was in the interest of all, past and future, because it allowed everyone to secure the fruits of his labour. Ibid. 231-233. Beyond the sole protection of property, Necker's 'voeu' corresponded more generally to the tendency to persevere in the being of a community envisaged in the succession of centuries. Grange, *Necker*, 267.

<sup>286</sup> 'Réflexions philosophiques,' 225.

<sup>287</sup> Ibid. 226.

<sup>288</sup> Ibid. 236-237.

<sup>289</sup> Craiutu, *Moderation*, 150-154.

faces of opinion, which reflected respectively the people's short term and longterm interests. The elected chamber only represented a transitory, 'opinion populaire' – a 'voeu mobile par sa généralité même, et par les elements passions dont cette généralité se compose.'<sup>290</sup> The hereditary assembly 'stable dans son état et dans ses fonctions, représente ainsi plus particulièrement l'intérêt constant du royaume.'<sup>291</sup> The second chamber was designed to act as a counterweight to the fluctuations of opinion, and thereby constituted the symbol of the perennial nation.<sup>292</sup> Being hereditary, its members were more apt to take the long view in their contribution to the law-making process. Last, the endorsement of the executive power was needed to ensure that the decision taken by the two chambers reflected the nation's true, long-term interests. In many instances, Necker pleaded for a rehabilitation of the role of the king, whom he endowed with both a right to legislative initiative and a right to veto.<sup>293</sup> The king's involvement in the legislative process could only benefit the quality of collective decisions: his superior, ancestral type of legitimacy made him particularly apt to take the long view.<sup>294</sup>

Necker's complex sovereign had thus full autonomy to interpret and determine the nature of the nation's voeu. The egoistic, diverging interests that were usually found in the elected assembly were transcended by the intervention of a second chamber with higher, longterm views and the ultimate intervention of the king – the bearer *par excellence* of the common interest. No genuine agreement was possible within a single elected assembly that brought together members with diverging interests. The only possible agreement was about the wellbeing of the nation in the *longue durée*, independently of current, fleeting passions. Existing public opinion – the 'pluralité passagère' – was thus taken into account via the elected chamber, but ultimately enhanced through the intervention of the hereditary chamber and the king to make it conform to the eternal rules of justice and reason (i.e. customary wisdom transmitted through the ages).<sup>295</sup> This system was truly representative, Necker insisted, because it made the people's *true* interests triumph, as opposed to what they often mistakenly believed these interests were: 'Ce n'est donc pas une violation des droits du peuple, que de lui donner pour guide son véritable intérêt, lorsque cet intérêt peut être interprété par des législateurs dans la sagesse desquels il a mis sa confiance; car cet intérêt est

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<sup>290</sup> *Pouvoir exécutif*, 60.

<sup>291</sup> *Ibid.*

<sup>292</sup> Grange, *Necker*, 269.

<sup>293</sup> *Ibid.* 290-293.

<sup>294</sup> *Ibid.* 280.

<sup>295</sup> 'Réflexions philosophiques,' 231; 236.

bien plus le gage de son opinion, que son opinion n'est le gage de son intérêt.<sup>296</sup> Existing opinion mattered, but seldom embodied the people's genuine interests – hence the need of a complex sovereign to decipher these.

### **Staël's Theory of Representative Government (I): Public Esteem**

'Il y a un ensemble d'idées qui soutient une république comme un ensemble d'égards soutient une monarchie,' Staël observed in *Des circonstances actuelles*.<sup>297</sup> Both governments offered two radically different ways of securing their subject's allegiance. Staël and Constant's ambition was to demonstrate, *contra* Necker, that the rational organizational structure of a representative republic, in which offices were filled through a competitive, elective process, was animated by a type of opinion that gave people genuine and, therefore, more robust motives of allegiance than those that underpinned monarchies.<sup>298</sup> Clearly, the illusory 'opinion coutumière' that sustained monarchies had some efficacy, they acknowledged.<sup>299</sup> In Britain, it still prevailed, but France, they argued, was not England: equality was here to stay, and no compromise with heredity could be tolerated. Royalists (including Necker) had to come to terms with the fact that their solution to the problem of allegiance was no longer applicable.<sup>300</sup> On the other hand, Staël observed, it was obvious that republicans, as a party, still lacked 'l'art de captiver la nation. Habiles en révolution, ils ne savent point encore faire de l'opinion avec de la puissance.' 'L'ancienne considération est détruite, mais non pas remplacée.'<sup>301</sup> Fear, it was becoming increasingly clear (Staël was writing in 1798), would not do in the long run. The Directory's coups and manoeuvres were no efficient way to foster respect, quite the contrary. In order to make a people of twenty-three million contribute to the formation of the law and make them obey, a substitute for the old customary opinion was needed.<sup>302</sup> This new type of opinion, for Constant and Staël, had to take the form of a general recognition of merits – *estime publique* for talented individuals.

The concept of 'estime publique' was not a mere invention on Staël and Constant's part. It had gained ground in France in the second half of the eighteenth century, and referred

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<sup>296</sup> *Pouvoir exécutif*, 74.

<sup>297</sup> *CA*, 476.

<sup>298</sup> That Constant and Staël were in dialogue with Necker on the question of political obedience is perceptible from Constant's reformulation of Necker's ideas in chapter 3 of Book I of *FCR* (403) and *FGA* (370).

<sup>299</sup> *FCR*, 423.

<sup>300</sup> *Ibid.* 423-424.

<sup>301</sup> *CA*, 344.

<sup>302</sup> *Ibid.* 346.

to the moral judgement a community made upon the actions of its members.<sup>303</sup> Necker had played no minor role in popularizing the notion, but it was Rousseau who had made one of the most remarkable political uses of the concept in his *Considérations sur le gouvernement de Pologne*. The complex political structure Rousseau had sketched in this work was based on a system of echelons, which citizens would climb gradually throughout their career. Promotions would exclusively depend on merit and talents. The judge of each citizen's worth was to be none other than public opinion. The objective, according to Rousseau, was

de faire en sorte que tous les citoyens se sentent incessamment sous les yeux du public; que nul avance et ne parvienne que par la faveur publique, qu'aucun poste, aucun emploi ne soit rempli que par le voeu de la nation et qu'enfin depuis le dernier noble, depuis même le dernier manant jusqu'au roi, s'il est possible, tous dépendent tellement de l'estime publique qu'on ne puisse rien faire, rien acquérir, parvenir à rien sans elle.<sup>304</sup>

A positive spirit of emulation would irrigate Rousseau's hierarchichal structure. This spirit would be nurtured through public festivals, education and censorial committees in charge of registering the merit of citizens, as recognized beforehand by public opinion.<sup>305</sup>

In *Des circonstances actuelles*, Staël and Constant adapted Rousseau's public to their franchise-based electoral system in a representative republic. Rousseau had sought to make of classical republican virtue a central criterion of social promotion; Staël and Constant, in line with their updated understanding of virtue, put more emphasis on material and intellectual achievements, repeatedly highlighting property as a clear mark of personal success. Only once public esteem had replaced blind respect for tradition and ranks would the problem of political allegiance to the Directory be solved:

L'on n'aurait pas peur d'anciens restes de propriétés, ou de souvenirs ridicules de préjugés détruits, si l'on avait créé dans les pouvoirs publics une nouvelle masse de considération fondée sur les lumières, les vertus et la fortune indépendante et réelle qu'il faut attacher aux principaux emplois. En fait d'idées et de sentiments, on ne détruit rien qu'en remplaçant...voulez-vous détruire jusqu'au souvenir des castes privilégiées, portez ailleurs l'estime, les égards, la dépendance, non par la simple action de la force, mais par la

<sup>303</sup> On public opinion as *estime publique* see Binoche, *Opinion publique*, 109-113.

<sup>304</sup> Jean-Jacques Rousseau, 'Considérations sur le gouvernement de Pologne,' in *Œuvres complètes*, III, eds. Bernard Gagnebin, Marcel Raymond et al. (Paris, 1964), 1019.

<sup>305</sup> Colette Ganochaud, 'Opinion publique et changement social chez Jean-Jacques Rousseau,' *Revue française de science politique*, 28/5 (1978), 913-916.

réunion de tout ce que les hommes considèrent réellement dans les relations sociales fondées sur la raison.<sup>306</sup>

In republican France, where considerations of rank or birth were no longer admitted, the key to ‘motiver d’une manière sensible la subordination du citoyen’ was *election* – the only way to bring ‘à toutes les places les hommes les plus distingués par leurs lumières.’<sup>307</sup> In her notes, Staël referred to Jean-Louis Delolme’s *Constitution de l’Angleterre*, in which he had condemned Rousseau’s admiration for Roman censors.<sup>308</sup> It was the people itself, Delolme had argued, that should express their opinion about rulers through elections and newspapers.<sup>309</sup> In republics, in Constant and Staël’s analysis, citizens developed the opinion that representatives were legitimate, because they had been selected through a fair and open competitive process, to which everybody, in principle, had access. Rulers derived their moral authority from such screening procedure. This was why republics rested on a ‘respect plus raisonné’ than the fake opinion on which monarchies and their necessary corollary, heredity, rested.<sup>310</sup> Enthusiasm, for Staël and Constant, was the human disposition that generated admiration for the achievements of one’s peers. Public esteem thus derived from genuine, natural sentiments, as opposed to the admiration for aristocratic ranks, which relied on ‘sentiments factices’ fuelled by ‘une vanité servile’ – the antithesis of enthusiasm.<sup>311</sup>

Equality did not have to mean universal leveling, as Necker had argued. In fact, it was hereditary distinctions that established a ‘nivellement en sens inverse,’ by submitting all degrees of merit to the empire of chance.<sup>312</sup> The opinion of the public, as expressed through elections, was to be the sole judge of merit – it would itself establish those gradations Necker deplored equality had destroyed. ‘Dès qu’il y a de l’opinion publique, il y a des rangs naturels,’ Staël insisted.<sup>313</sup> Elections thus framed were not simply a freewheeling, clinical method through which people merely designated representatives. Elections *gave life* to the

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<sup>306</sup> CA, 365.

<sup>307</sup> CA, 345.

<sup>308</sup> Ibid. 534-535. After a reference to Delolme’s critique of *censeurs*, see Staël’s remark: ‘Trois choses qui tendent au même but. Les censeurs à Rome, L’opinion publique, de la liberté de la presse, peut-être aussi les idées religieuses.’

<sup>309</sup> Jean-Louis Delolme, *Constitution de l’Angleterre*, ed. Jean-Fabien Spitz (Paris, 2008), Book II, chapter 12, 209. I have used the recent Dalloz edition, itself based on the 1822 Delarue edition. The book was first published in French in 1771. On Delolme, see Iain McDaniel, ‘Jean-Louis Delolme and the Political Science of the English Empire,’ *The Historical Journal*, 55/1 (2012), 21-44.

<sup>310</sup> FGA, 370.

<sup>311</sup> ‘Addition à l’Ouvrage intitulé: des Moyens de constituer une république dans un grand pays,’ in *OCBC IV*, 684.

<sup>312</sup> FCR, 403.

<sup>313</sup> CA, 517.

principle of obedience. Representative government was, at a deep level, a machine of opinion; elections a process through which esteem for the best was manifested, and ‘confidence’ secured. This phenomenon Constant had already highlighted in his *Trois lettres à un député de la convention*. Public opinion, as expressed through votes, Constant had argued, would distribute blame and rewards, and would bring back to the national assembly representatives who would then benefit from a genuine credit from the people, from which they ultimately derived their political strength. ‘La convention rentrée toute entière dans la masse du peuple, attendra que la nation en fasse ressortir les membres qui, au milieu de tant d’orages, auront conservé son estime & sa confiance.’<sup>314</sup>

The representative system installed the necessary distance between the governed and governors – a distance Necker had seen as the key to the problem of political obedience. In *De l’influence des passions*, Staël recommended a two-level election system (without elucidating what these levels were) that would serve as a screening process for talents, *via* public esteem, and establish ‘le gouvernement des meilleurs,’ while avoiding falling into the trap of setting conflicting interests against one another.<sup>315</sup> On this understanding, what was manifested through elections was less a popular *will*, than a certain type of *judgment*, which operated on the basis of clearly recognizable elements – merit and talent, as embodied in property. It is in this sense that Staël could write that, in a republic, ‘il est impossible que le choix libre du peuple, c’est-à-dire l’opinion publique, ne recherche pas les lumières.’<sup>316</sup> If the ‘people’ could not err on that occasion, it was because it was restricted to a definite sociological group: landowners who had enough education to be able to judge the merits of one’s peers. Popular elections would naturally bring to power enlightened and wealthy citizens and keep the ignorant class at bay.

Between elections, Constant suggested that newspapers also had a role to play to keep up reputations and sustain public esteem. Elections rejuvenate the republic by bringing to power ‘des hommes choisis par l’opinion,’ but freedom of the press was equally crucial to that end in a modern republic: ‘Il faut honorer la pensée, là, surtout, où le prestige des rangs

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<sup>314</sup> ‘Trois lettres,’ 286-287.

<sup>315</sup> *CA*, 294. See also *DIP*, 146: ‘Supposez d’abord un très petit nombre d’hommes extraits d’une nation immense, une élection combinée, et par deux degrés, et par l’obligation d’avoir passé successivement dans les places qui font connaître les hommes, et exigent de l’indépendance de fortune et des droits à l’estime publique pour s’y maintenir. Celle élection, ainsi modifiée, n’établirait-elle pas l’aristocratie des meilleurs, la préeminence des talents, des vertus et des propriétés? Ce genre de distinction, qui, sans faire deux classes de droit, c’est-à-dire deux ennemis de fait, donne aux plus éclairés la conduite du reste des hommes.’ See also *DRP*, 477.

<sup>316</sup> *CA*, 294.



est détruit. Ils prêtent au pouvoir un appui factice; la pensée lui donne une force morale.<sup>317</sup> The superiority of enlightenment had to be once and for all acknowledged. Staël took issue with those amongst republicans – most importantly the neo-Jacobins – who saw the recognition of natural inequalities as a subversion of egalitarian ideals. ‘Beaucoup de républicains,’ she observed, ‘ont une absurde crainte des esprits supérieurs...Les républicains...dont le système est favorable à toutes les distinctions qui naissent du seul mérite personnel, comment peuvent-ils craindre les lumières?’<sup>318</sup> If republicans frankly decided to honour distinguished talents and recruit amongst the educated, they ‘seraient dans l’opinion ce qu’ils sont dans le fait, le parti des lumières et de la philosophie.’<sup>319</sup>

Necker had pointed out that one of the advantages of the admiration for hereditary ranks was that it applied to all people equally, irrespective of their level of education. In *De la force*, Constant retorted that respect for traditional hierarchy was the preserve of aristocrats. The mass of people was impervious to the subtle distinctions on which past links of subordination rested. What the multitude respected, at bottom, was power. As a rule, the feelings of respect the people held vis-à-vis authority was directed not towards the past, but towards the future, Constant explained in a reworking of Hume’s argument about antiquity. Irrespective of their level of instruction, people had some deep, basic sense of foresight. No doubt aristocracy had been powerful, but the consideration on which it had rested depended on the power it had had. In Directory France it was becoming increasingly clear to the populace that power had drained away from the aristocracy, and was now in the hands of republican officials.<sup>320</sup> With time, the uneducated masses would grow accustomed to seeing power attached to offices rather than names.<sup>321</sup> Allegiance to Constant and Staël’s republic was thus secured through different sets of opinion, depending on the level of education. While educated property owners could recognize the representatives’ talents, the illiterate masses knew by instinct that power was now with the republicans. With time, the opinion of the multitude would grow more enlightened: it would surrender its admiration for heredity, and the form of tribute it paid to institutions would become more rational. The masses would see in the republic not just another system for preserving ‘repos’ and fostering security, but a specific system of obedience based on respect for intrinsic worth – a system, additionally, in which they would want to distinguish themselves.

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<sup>317</sup> ‘Plantation de l’arbre de la liberté,’ 562.

<sup>318</sup> *CA*, 345.

<sup>319</sup> *Ibid.* 346.

<sup>320</sup> *FGA*, 370.

<sup>321</sup> *Ibid.* 371.

## Staël's Theory of Representative Government (II): 'the Great Ensemble of Public Opinion'

Like Necker, Staël believed that a government's legitimacy and its constitutional structure depended on the established practice of the age. Unlike him, she believed that the English constitutional monarchy her father was eulogizing was a pipe dream in post-revolutionary France. In order to understand what kind of representative government was required in Directorial France, one needed to look at the state of opinion and the sorts of needs that composed it. Here, time mattered just as much as geography. In a short, already mentioned chapter aptly entitled 'de l'opinion publique,' Staël provided her own assesment of the current set of expectations amongst the population. There currently existed a mass in the nation, Staël explained, that was whispering a sort of public opinion: 'elle est assez éclairée par les écrivains et par la Révolution, pour ne se soucier en aucune manière de la Royauté; mais elle n'est point assez enthousiaste pour vouloir de la République, au prix de sa tranquillité.'<sup>322</sup> Monarchy, because it rested on heredity, was now gradually disappearing as the march of ideas made progress. There was however another type of government that, unlike constitutional monarchy, relied exclusively on equality: democracy. In the remainder of her chapter on public opinion, Staël built on the distinction between ancients and moderns to show to what extent this type of regime had become out of phase in a large commercial country like France. The ancients, Staël argued, had all their interests bound up with the fate of their homeland. Democracy – the constant, direct exercise of political power in the public space – was the type of government that corresponded to their aspirations. In modern, commercial France, 'il ne faut pas perdre de vue,' she insisted, 'que l'opinion publique sera fondée sur l'amour du repos, le désir d'acquérir de la fortune, le besoin de la conserver.'<sup>323</sup> Public opinion now wanted 'repos,' as Constant had already argued in *De la force*. Needs had changed: people's ambition was no longer to take part in public affairs, but to take care of their private interests. The type of regime that corresponded to the current state of opinion was neither a hereditary monarchy nor ancient style democracy, but a republican type of representative government.

Pure democracy and representative government were two possible ways of giving shape to the principle of political equality – the right of each citizen to contribute to the

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<sup>322</sup> CA, 351.

<sup>323</sup> Ibid. 354.

formation of the laws that govern him.<sup>324</sup> Beyond this point, their nature sharply diverged. Representation for Staël was much more than a technical expedient designed to ensure the people's participation in a large country.<sup>325</sup> 'Il est un système entièrement nouveau, et on le méconnaît quand on le mêle avec les lois de la démocratie...Rousseau l'a dit, et cela peut se démontrer comme une vérité mathématique: il n'y a point de de démocratie, la où il faut un gouvernement représentatif.'<sup>326</sup> Radical republicans like the Jacobins had attempted to square an antiquated way of conceptualizing the people's power – popular sovereignty – with a modern organizational structure – representative government. This was, Staël wrote, 'la fausse application du principe de la souveraineté du peuple dans le gouvernement représentatif.'<sup>327</sup>

As has been shown, radical republicans were not against representation *per se*, but had aspired to reproduce the inherent logic of Rousseau's popular sovereignty at the level of the elected assembly. They longed for a mythical reconciliation of direct democracy and the representative principle, not least through the imperative mandate.<sup>328</sup> For Staël, in a representative government, the people never exercised sovereignty: it was always delegated. As a result, not only the depository of political power changed but also the way in which this power was exercised, and the nature of the decisions that were taken. 'Le principe de la représentation,' she insisted, 'n'est point ni *la proportion* des représentants avec les représentés, ni *l'unité* de la représentation, ni sa *toute puissance*.'<sup>329</sup> She first took issue with the idea that representative government had to be the exact mirror of the people, insisting instead that representation implied a form of detachment and transformation that resulted in the nation's interests being defended. 'La représentation n'est pas le calcul de réduction, si l'on peut s'exprimer ainsi, qui donne en petit l'image du peuple. La représentation, c'est la combinaison politique qui fait gouverner la nation par des hommes élus et combinés de manière qu'ils ont la volonté et l'intérêt de tous.'<sup>330</sup> Second, in a way reminiscent of Necker,

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<sup>324</sup> Ibid. 295.

<sup>325</sup> In Fontana's analysis, *Des circonstances* conceived representative government mostly as a technical expedient through which 'popular sovereignty could be realized in practice' in a large country where political equality had been recognized. 'The Thermidorian republic,' 166-170. Staël's theory, on the contrary, was designed to tame popular sovereignty. For a broader argument on the transformative nature of representative government, see Manin, *Gouvernement représentatif* and Rosanvallon, *Démocratie inachevée*, 12-13.

<sup>326</sup> *CA*, 380.

<sup>327</sup> Ibid. 309.

<sup>328</sup> On this logic of 'representation-incarnation,' see Jaume, *Le discours Jacobin*.

<sup>329</sup> Ibid. 299. My italics.

<sup>330</sup> Ibid. The Jacobins saw representation as an instrument of popular sovereignty. See for instance, Pétion's statement: 'tous les individus qui composent l'association ont le droit inaliénable de concourir à la formation de la loi, et si chacun pouvoir faire entendre sa volonté particulière, la réunion de toutes ses volontés formerait la véritable volonté générale.' Quoted in Rosanvallon, *Démocratie inachevée*, 16. Compare with Staël: 'Voici

Staël argued that popular sovereignty implied an overemphasis on a *monist* general interest that neglected the existence of the nation's *diverse interests* and the possibility of representing these in various constitutional powers. The 'essence' of representative government, she was adamant, was that 'les intérêts de la nation' in the plural were represented.<sup>331</sup> Third, popular sovereignty presupposed unlimited power. Representation properly understood – the nation's interests – supposed a type of collective decision making respectful of individual independence, since the latter was part and parcel of the current state of public opinion.<sup>332</sup>

Elsewhere in the manuscript, Staël highlighted two further problems with popular sovereignty and the way in which it made the Jacobins envisage representation. The fourth one was that popular sovereignty, when imported within the assembly, echoed uninformed, arbitrary majority rule: through 'la représentation du nombre des individus soumises à un calcul arithmétique, vous ne faites que chiffrer la tyrannie.'<sup>333</sup> Last, popular sovereignty conceived of political participation as the people's *direct* exercise of sovereignty. Referring once again to Delolme, who had argued that political liberty in a representative government like England consisted not in directly exercising power like in ancient rome, but in 'influencer' political choices through elections and newspapers, Staël observed: 'La puissance utile du peuple n'est pas d'agir mais de pouvoir agir, non pas de frapper, mais d'en imposer.'<sup>334</sup>

The key difference between democracy and representative government resided in the way in which the people's power was conceptualized and implemented in each instance. While ancient style democracy understood people's power as popular sovereignty, representative government theorized it as public opinion, understood as the expression of the nation's interests. When 'public opinion' was properly recognized as the basis of representative government, the pitfalls of popular sovereignty could be avoided.

The constitutional structure in each country, Staël suggested, had to be shaped in such a way as to ensure, not the expression of the people's will, but the triumph of public opinion:

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celui qui me paraît l'essence du gouvernement représentatif c'est, que ce sont les intérêts de la nation, et non les individus qui la composent, qui sont représentés.' Necker had already targeted this mystical identification of the people with their representatives in his 'Réflexions philosophiques sur l'égalité' (259): 'ils sont toujours vous ces élus, et vous dans une exactitude parfait. Leut intérêt, leur volonté sont les vôtres...Et c'est toujours le mot *représentant* qui determine une si aveugle confiance! Le mot donne l'idée d'un autre soi-même.'

<sup>331</sup> CA, 299.

<sup>332</sup> Ibid. 303: 'Mettre la démocratie dans la représentation, c'est *enchaîner* la souveraineté du peuple, et la nation n'est libre que quand ses députés ont un frein.'

<sup>333</sup> Ibid. 302.

<sup>334</sup> Ibid. 535. Compare with Delolme, *Constitution de l'Angleterre*, 215.

Qu'il y ait une ou deux chambres, un directoire puissant ou dépendant, trois degrés d'élection, ou un seul, des pouvoirs longs ou temporaires, aucune de ces institutions ne sont ni défendues, ni commandées par le principe de la représentation. Dans tel pays, il faut les uns; dans tel pays, il faut les autres pour assurer le triomphe de l'opinion publique.<sup>335</sup>

At first sight, this implied that, just as interests differed from one nation to another, the way in which these would be represented and articulated would depend on local preferences. As has been noticed, however, Staël wavered in her manuscript between the social and the anthropological: rather than consistently presenting interests as conditioned by time and place, she sometimes essentialized France's current interests, presenting them as natural interests inherent to all human societies.<sup>336</sup> Accordingly, the triumph of public opinion in an *ad hoc* constitutional structure would also be, on her reading, the triumph of mankind's *true* interests – not just contingent ones. 'Il y a deux intérêts, deux intérêts élémentaires, pour ainsi dire, qui se partagent le monde: le besoin d'acquérir et celui de conserver.'<sup>337</sup> To divide representatives simply along economic interests, like Sieyès had recommended (rural industry, commerce and cultural productions), proceeded from an adequate intuition – that each type of interest needed a defender in public powers – but was fundamentally flawed, since the 'états de la société' were not 'fixement séparés' along commercial or professional lines.<sup>338</sup> In other words, people from different walks of life equally shared a twofold aspiration for permanence *and* progress. This was the true state of opinion, which needed to be duly translated into an adequate representative framework:

Il faut donc, pour avoir un gouvernement représentatif, pour être fidèle au principe de ce gouvernement, en faire, pour ainsi dire, un tableau réduit selon les proportions du grand ensemble de l'opinion publique. Il faut que le corps législatif soit organisé de manière que...les deux intérêts distincts des sociétés soient représentés.<sup>339</sup>

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<sup>335</sup> CA, 301.

<sup>336</sup> Bronislaw Baczko, 'Opinions des vainqueurs, sentiments des vaincus,' Introduction to *Des circonstances actuelles*, 228.

<sup>337</sup> CA, 382.

<sup>338</sup> Ibid. See 'Opinion de Sieyès prononcée à la convention le 2 Thermidor de l'an III,' in *Essai sur les privilèges et autres textes*, ed. Pierre-Yves Quiviger (Paris, 2007), 120.

<sup>339</sup> CA, 381.

In a way reminiscent of Necker, Staël ascribed each of these interests to a specific chamber, with specific modes of nomination intended to ensure that these two different components of public opinion were duly reflected in the institutional structure. In that respect, elections were not just processes through which public esteem for talents was granted. They also manifested another dimension of public opinion: the nature of the interests prevailing in society.

Young property owners who had reached the age of majority – twenty-one – would be elected (according to a procedure Staël did not indicate) at the Conseil des Cinq-Cents. Lowering the age threshold – the Constitution of Year III had fixed the age limit at thirty – was the only way, Staël argued, of bringing into this assembly ‘les amis des idées nouvelles.’<sup>340</sup> The Conseil des Anciens, on the other hand, should *not* be elected, Staël insisted.<sup>341</sup> It should constitute a ‘corps conservateur,’ a permanent assembly of two hundred and fifty life members.<sup>342</sup> Staël did not dwell on how the Conseil des Anciens would be formed, because she sensed that her stance would be met with opposition from republicans committed to the principle of elections. At some point, she vaguely hinted that the Anciens would be, for the time being, coopted by a refined Conseil des Cinq-Cents, and thereby include committed republicans and former revolutionaries.<sup>343</sup> This imprecision notwithstanding, she was adamant that it was indispensable to ‘fortifier, proroger l’existence du Conseil des Anciens’ in order to oppose an element of permanence to the constantly changing majorities brought to the Conseil des Cinq-Cents.<sup>344</sup> Anciens would be given a considerable fortune, which, coupled with their life nomination, would guarantee their independence.<sup>345</sup> These conditions would make of them a rampart against the everchanging tide of new interests brought to the chamber. When the Anciens were elected annually, as was the case in the Constitution of Year III, their chamber could not play its conservative role. In such a setting, given its elective and thus transient nature, it simply constituted a sub-section of the Conseil des Cinq-Cents.<sup>346</sup>

Sieyès’ Jury Constitutionnaire, Staël insisted, would be unable to preserve the harmony between powers: its members being elected for a temporary mandate, they would be ‘choisis d’après l’esprit dominant.’<sup>347</sup> In other words, being elected, its members would equally

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<sup>340</sup> Ibid. 394.

<sup>341</sup> Ibid. 376.

<sup>342</sup> Ibid. 374.

<sup>343</sup> Ibid. 377-378.

<sup>344</sup> Ibid. 374.

<sup>345</sup> Ibid. 379.

<sup>346</sup> Ibid. 377.

<sup>347</sup> Ibid. 375.

represent the opinion of the day. The very problem of the Directory, as Constant had so potently shown in *De la force*, was that the current opinion was not in phase with the real interests of the nation – what Constant had called, in Necker’s fashion, its ‘voeu.’ This is why a stable power was needed to constrain the still uninformed opinion – royalist and neo-Jacobin majorities – brought into the Conseil des Cinq-Cents at each yearly election. ‘C’est parce que la generation née sous les rois n’est pas encore passée, qu’il faut placer au centre du gouvernement un corps immuable autour duquel les nouvelles recrues viennent se placer, mais dont la force soit telle qu’il puisse et combattre et ramener tout esprit contraire au sien.’<sup>348</sup> The Anciens embodied the real, long-term interests of the nation: the maintenance of political equality and hence of a republican form of government as well as the protection of property.<sup>349</sup> They had an immediate self-interest in these, because their own life appointment depended on them.<sup>350</sup>

The parallel with Necker’s conception of bicameralism as a balance between two aspects of opinion is striking, so much so that Staël anticipated accusations of anti-republicanism: ‘oui, c’est une institution aristocratique, composée des destructeurs et des ennemis irréconciliables de la véritable aristocratie.’<sup>351</sup> Republicans, she insisted, must adopt ‘quelques unes des idées de l’aristocratie pour établir solidement les institutions populaires. Les démocrates savent conquérir, les aristocrates conserver.’<sup>352</sup> Necker had rightly shown that an element of permanence was necessary to counterbalance temporary opinions if the real interests of the nation were to prevail. The Conseil des Anciens could not be composed of aristocrats, but its *spirit* had to be the same to the one Necker had attributed to the English House of Lords.

For a short period of time, elections would probably continue to bring anti-republicans to the Conseil des Cinq-Cents, because the young generation was still plagued with atrocious memories of the Terror. ‘Mais, au bout de quelques années, l’innovation populaire sera le mobile du conseil élu, et la conservation constitutionnelle l’objet du Conseil permanent. Enfin, si l’opinion s’éclaira assez, si l’instruction se disséminait davantage, on verrait les changements qui pourraient se faire en équation avec les lumières de la nation.’<sup>353</sup> In line with her idea that institutions themselves would change depending on the state of

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<sup>348</sup> Ibid. 384.

<sup>349</sup> Ibid. ‘Par la nature de la Révolution française, c’est le corps des hommes éclairés qui doit conserver ses vrais principes et les diriger.’ See *ibid.* 447.

<sup>350</sup> Ibid. 376.

<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid. 383.

opinion, Staël further suggested that, once this stage had been reached, the non-eligible character of the Conseil des Anciens could be given up, because opinion would then be sufficiently enlightened to elect moderate republicans.<sup>354</sup>

The Constitution of Year III had failed because it gave the initiative to propose laws to the Conseil des Cinq-Cents.<sup>355</sup> The latter being the reflection of present-day opinion, when royalist or neo-Jacobins majorities were brought to power, they could put on the agenda legislation that ran counter the long-term interests of the nation.<sup>356</sup> Staël urged that the Conseil des Anciens be endowed with the right to propose laws to make real interests prevail over fleeting ones. Similarly, she pleaded for a rehabilitation of the executive power (whose members would be taken from the Conseil des Anciens, then reintegrated into it at the end of their term) who should have the right of initiative, a suspensive veto as well as a right to dissolve the Conseil des Cinq-Cents.<sup>357</sup> The question of the balance of power, she insisted in Necker's fashion, was not a question of dividing power, but a question of finding a harmony between power that made real public opinion prevail: 'La balance des pouvoirs, c'est la suite de combinaisons qui les amène à être d'accord.'<sup>358</sup> The Directory, in Staël's mind, was above the swirl of popular opinion. It was, she insisted, 'le représentant de la nation,' not 'le délégué' of the two chambers taken together.<sup>359</sup> Staël's conviction was that, with time, as moderate republican ideas made progress and opinion grew more enlightened, citizens elected to the assembly would reflect the interests it had not yet fully embraced. The Directory, by calling for new elections when neo-Jacobin or royalist majorities won over the Conseil des Cinq-Cents, and acting in concert with the permanent Conseil des Anciens, would ensure that the nation's interests were safeguarded up to the point when the people themselves had realized what these were. In this way, another Fructidor coup could be avoided. 'Les élections seraient libres, et les révolutions impossibles.'<sup>360</sup>

Thus conceived, the Directory would ensure the triumph of public opinion, as Staël had announced in her introduction. Her constitutional system avoided giving too much room to the 'factions' an all-elective system would inevitably bring to power – royalist and

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<sup>354</sup> Ibid. See also 374: 'Vous pouvez démocratiser la constitution à mesure que l'esprit public fera des progrès. Tout ce qui se fait d'accord avec l'opinion est maintenu par elle, mais, dès qu'on la précède ou qu'on la combat, il faut avoir recours au despotisme.'

<sup>355</sup> Article 76 of the Constitution of Year III, ed. Godechot, 111.

<sup>356</sup> *CA*, 377.

<sup>357</sup> Ibid. 386.

<sup>358</sup> Ibid. 388. See also her statement: 'Un penseur éloquent a dit, c'est à l'union des pouvoirs qu'il faut tendre' (385). Scholars have usually connected this quote to Sieyès, but an equally plausible candidate might be Necker.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid. 374.



Jacobins, as recent experience had shown – while circumventing ‘usurpation’ – the government substituting itself for the people’s choices (Fructidor and Floréal) – since it still left *some* space for the manifestation of existing opinion through elections.<sup>361</sup> This system was indispensable in light of the fact that existing preferences were not yet clearly aligned with the nation’s true interests. Staël’s institutional apparatus would act in the nation’s long-term interests, up until the day when existing opinion would have been turned into the ‘grand ensemble de l’opinion publique.’

Staël often called the product of the legislative process ‘vœu général’ or ‘vœu de la nation,’ in Necker’s fashion. In her notes, she made this filiation explicit: ‘en traitant de la majorité, belle distinction de mon père entre les vœux et les volontés. Sur la majorité. Voir des idées fixes de bonheur dans l’égalité.’<sup>362</sup> The true representative government acted in the long-term interest of the nation – the public prosperity Necker had set as the goal of the political community – without sacrificing it to the whims and fancies of transient majorities.<sup>363</sup> Her insistence on the fact that interests were represented was meant to establish a radical distance between the people and representatives – a distance the concept of popular sovereignty had traditionally recused. Government by consent was here of little importance: ‘la nation ne veut que les résultats et ne se passionne pas pour les moyens.’<sup>364</sup> In certain circumstances (those of the Directory), Staël observed, recurrent elections were not a sufficient guarantee that the nation’s ‘vœu’ was duly represented – quite the contrary.<sup>365</sup> In a representative government, the people’s *will* was better replaced by the nation’s objective *interests*: ‘la souveraineté du peuple, c’est la souveraineté de son intérêt.’<sup>366</sup> In Staël’s view, property owners were best placed to interpret the nation’s ‘vœu,’ since their possession made them bearers of a widespread need to conserve. Further, property constituted evidence of a refined education – something Staël took for granted, without elucidating the connection between wealth and enlightenment.<sup>367</sup>

Staël’s model of representation made the laws’ legitimacy derive not so much from their source – the people’s vote – but from their conformity with the nation’s genuine aspirations. The representation of interests sought to maximize the chances of sound decision

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<sup>361</sup> Ibid. 301.

<sup>362</sup> Ibid. 506.

<sup>363</sup> See Staël’s reference to ‘le véritable intérêt de la majorité des générations,’ *ibid.* 319.

<sup>364</sup> Ibid. 352.

<sup>365</sup> Ibid. 299: ‘Il pourrait y avoir une assemblée de tant d’hommes élus régulièrement par chaque canton qui, devenant factieuse par son organisation même, représenterait beaucoup moins le vœu national que le plus illégitime gouvernement du monde.’

<sup>366</sup> Ibid. 506.

<sup>367</sup> Ibid. 393-394.

making, ensuring that the choices made would always be ‘bons.’<sup>368</sup> This epistemic dimension implied that the holders of political authority did not have unlimited power. Enlightened, wealthy men *knew* that the nation’s interests depended on a minimal standard of individual liberty and ‘repos.’ This is why citizens accorded the franchise would naturally impose constitutional limits upon their ‘procureurs fondés’ – those they elected for the management of their interests.<sup>369</sup> ‘C’est que les articles constitutionnels devraient être, comme les lois de la morale, un petit nombre de droits évidents pour tout le monde, et que le peuple voudrait en sachant ce qu’il veut.’<sup>370</sup> The last sentence was a reference to Sieyès’ famous 1795 speech, in which he had denounced popular sovereignty as a ‘monstre,’ pleading for the substitution of a rational type of collective decision making for the vagaries of an arbitrary will.<sup>371</sup> Staël reasserted this strong antivoluntarist stance in several places of her manuscript, suggesting at some point that laws needed to be the perfect mirror image of ‘moralité’ – the quintessence of the interests of all. The idea that morality was the legislator’s ‘guide,’ she wrote, ‘substitue à ce mot la volonté du peuple, à ce mobile factieux que chacun fait servir chaque jour à sa passions momentanée, la volonté permanente d’une nation, c’est-à-dire son intérêt.’<sup>372</sup>

Staël’s representation of interests rejected the imperative mandate. In principle, representatives had thus some margin of interpretation to determine the nation’s ‘vœu.’ They were, however, guided in this task by writers – the privileged interpreters of real public opinion. Public writers like herself and Constant, she suggested, were well placed to analyze the nations’ interests, because their neutral position, above the swirl of passions, made them indifferent to ‘l’esprit de parti.’<sup>373</sup> To avoid arbitrary decisions, rulers would be well advised to listen to writers, who had an overarching vision of what the nation truly aspired to rather than attempting to force upon the nation non-desired reforms (i.e. reforms not consonant with their interests):

L’esprit révolutionnaire perd, en France, l’esprit législateur. L’un, dans la chaîne de ses moyens, fait du gouvernement de la force la base et la cause de l’opinion publique; l’autre, doit s’attacher à former l’opinion publique comme la base et la cause de la force du gouvernement... Tout acte législatif doit dériver de la pensée du philosophe adoptée

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<sup>368</sup> Ibid. 295.

<sup>369</sup> Ibid. 299.

<sup>370</sup> Ibid.

<sup>371</sup> ‘Opinion de Sieyès, 2 Thermidor an III,’ esp. 111; 114.

<sup>372</sup> *CA*, 408. Staël referred her readers to Godwin’s *Political Justice*, which featured a similar anti-voluntarist conception of legislation. Godwin’s anti-voluntarism and its impact upon Constant is explored in part II of the dissertation.

<sup>373</sup> Ibid. 469.

par l'opinion publique.<sup>374</sup>

In practice, this amounted to granting considerable political power to writers. Staël intimated that it was writers who, by shaping public opinion, ultimately triggered the legislative process. Under public pressure thus orchestrated, the executive or any of the two Chambers then initiated the formal legislative procedure. 'Quand une idée est fondée dans toutes les têtes, on demande l'institution qui la consacre. Le gouvernement alors a plus besoin de contenir que d'exciter.'<sup>375</sup> This presupposed an alliance between writers and the state, which Staël and Constant explicitly called for.<sup>376</sup> Writers would provide the legislator with an objective content to work on – the standard to which laws should conform. If trampled underfoot, representatives would become usurpers: 'il ne faut pas que la loi puisse se mettre au-dessus de l'opinion, ou il n'y a pas de gouvernement représentatif.'<sup>377</sup> At the end of the day, representatives were called upon translating public opinion thus interpreted into legal texts, which then embodied the 'vœu' of the nation.

### III. Conclusion

In this chapter, I have shown how Constant (and Staël) updated Hume's assertion that all governments rest on opinion to account for why the Directory could be considered a legitimate regime, especially when compared to the monarchical regime from royalists were trying to re-establish in France. I have also revisited Necker and Staël's views on representative government as two attempts to frame the people's power, not as popular sovereignty, which they both dismissed, but as public opinion.

In the first months of 1799, however, it soon became clear to Constant and Staël that their arguments required updating. The Directory, whatever actions it took, was clearly unable to secure its grip upon public opinion. Each day, the situation of the government was growing more desperate. The French army had experienced a series of heavy setbacks in Italy, Holland and Switzerland that had put the *directeurs* under heavy pressure. Emboldened by these defeats, royalists were gathering forces, while the Jacobins were calling for a return to the constitution of 1793. In May 1799, Constant and Staël saw at last a sign of hope: Reubell was dismissed from his post of *directeur* and replaced by Sieyès. His nomination lent

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<sup>374</sup> Ibid. 437.

<sup>375</sup> Ibid.

<sup>376</sup> *DRP*, 466.

<sup>377</sup> *CA*, 301.

additional credence to a possible revision of the constitution – a perspective that had a growing number of partisans since the 18<sup>th</sup> of Fructidor. Since March 1798, Constant's reputation in governing circles had been waning. In May 1798, the Floréal coup cancelled the election of a hundred of Neo-Jacobin representatives. Constant's fall out of favour, coupled with the growingly manifest inability of the government to bring back order, convinced him and Staël to side with the revisionist group.<sup>378</sup>

In June 1799, with *Des suites de la contre-révolution en Angleterre*, Constant became a dissident, and blamed the current 'dégradation de l'esprit public' no longer exclusively on opposition writers, but on 'la dictature accordée au Directoire.'<sup>379</sup> The current disaffection of the French for the government, Constant argued, had to do with the government's duplicity: while the Directorial elite claimed its veneration for constitutional forms, it constantly violated them in practice. These contradictions had left nothing but 'incertitude' for the governed, and arbitrariness in the conduct of governors. 'Ce manque d'esprit public,' Constant wrote, 'est la suite d'une conviction générale et profonde, que rien encore n'est stable parmi nous, parce que les pouvoirs n'ont aucune garantie l'un contre l'autre, et que les citoyens n'ont aucune garantie contre les pouvoirs.'<sup>380</sup> The government had lost its credit because, in the eyes of the French people, it had failed to fulfill its basic role of respecting the principle of elections and providing peace and 'repos' for the development of faculties. Once the constitution was revised – Constant gave no concrete suggestions at this point but promised to give some in due time – and arbitrary rule banned, then 'l'esprit public renaîtra, parce qu'il est le fruit de la sécurité, de l'ordre, de l'amélioration régulière et progressive.'<sup>381</sup>

After having derided *existing* public opinion for several years because it was not subservient enough to the Directory, Constant now gestured at some form of inescapable interdependency between public opinion as it existed and the government's course of action: if the government acted arbitrarily, public spirit disappeared. It was replaced by fear and disdain for rulers. If the government stuck to constitutional rules, public spirit, in the twin sense of a calm confidence in the government's ability to run things effectively and an admiration for the achievements of rulers, would inevitably surround institutions. Constant's distancing from the Directory ultimately led him to unambiguously affirm the pre-eminence of public opinion over political authority. 'Sans la puissance de l'opinion, il n'exista jamais de puissance nationale. L'opinion seule est le lien des hommes, la base de la morale, la

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<sup>378</sup> See Grange, *Constant*, 209-260.

<sup>379</sup> 'Contre-révolution,' 675.

<sup>380</sup> Ibid. 676.

<sup>381</sup> Ibid. 677.

récompense des vertus.’<sup>382</sup> After a long detour, Constant had returned to the position he had first expressed in his *Trois lettres à un député de la convention*.

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<sup>382</sup> Ibid. 679.

## **Chapter 2: The Napoleonic Era (1800-1813): Reawakening Public Opinion**

Constant's rapprochement with Sieyès soon bore fruit. If his role in the preparation of Brumaire remains unclear, both he and Staël welcomed the coup that dispelled their fear of a Jacobin takeover. Despite his doubts about Napoléon's intentions, in December 1799 Constant became a member of the Tribunat, one of the chambers of the new institutional regime set up by the Constitution of year VIII. This appointment did not buy Constant's silence. In his first speech as a Tribune, on the 5<sup>th</sup> of January 1800, at a time when the new Constitution was freshly put the test, Constant insisted that a constitution was 'par elle-même un acte de défiance, puisqu'elle prescrit des limites à l'autorité.'<sup>383</sup> His speech was immediately perceived as a declaration of war on the new regime. In January 1802, Constant was dismissed from the Tribunat together with other members whose spirit of independence had become unpalatable to Napoléon.

Constant spent most of the following years as a political exile. Moving between Germany and Switzerland, Constant produced a significant set of manuscripts between 1800 and 1813, amongst which stand out his abandoned translation of Godwin's *Political Justice*, his on-going work on religion, a set of notes on human perfectibility, his *Fragments* and, last but not least, the first version of his *Principes de politique*. Most scholars consider this work to be his magnum opus, the bulk of which was apparently written between 1806 and 1810.<sup>384</sup> This work is recurrently presented as providing the foundation of Constant's 'liberalism.'<sup>385</sup> On this reading, the *Principes* stand out for their 'liberal' tenets: in this text, Constant relinquished his earlier calls for repression on political opponents, developed his critique of Rousseau, and delivered his most forceful defence of individual liberty and limited government.<sup>386</sup>

The word 'liberal' is nowhere to be found in the *Principes*. This type of labelling not only obscures elements that do not fit the desired liberal canvas, but also poses the intractable question of why Constant wrote a 'liberal' textbook – the *Principes* – in parallel with a 'republican' one – the *Fragments*. Scholars usually dodge the point by assuming that Constant wrote the *Fragments* first before recommending total indifference vis-à-vis regime

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<sup>383</sup> 'Discours prononcé par Benjamin Constant sur le projet concernant la formation de la loi, proposé au Corps législatif par le Gouvernement le 12 nivôse an VIII (15 nivôse an VIII - 5 janvier 1800),' in *OCBC*, IV, 76.

<sup>384</sup> For details, see Hofmann, *Principes*.

<sup>385</sup> To Helena Rosenblatt, 'the *Principles of Politics* constitutes the first and foremost example of Constant's transformation into a truly liberal political thinker.' *Liberal Values*, 122.

<sup>386</sup> Gauchet, 'Constant'; Hofmann, *Principes*; Kalyvas and Katznelson, *Liberal Beginnings*, esp. 148; 159-166.

forms in the *Principes*.<sup>387</sup> This does not do justice to the arguments presented in the texts, and neglects the fact that Constant regularly moved back from one manuscript to the other and explicitly conceived both texts as complementary.<sup>388</sup> These two texts must therefore be considered together, alongside other texts written over the same period of time.

Scholars have argued over whether these texts, and the *Principes* especially, constituted a radical break with earlier writings, or on the contrary brought nothing substantially new to these.<sup>389</sup> Both sides have a point: the texts of the Napoleonic era displayed some fundamental continuity with earlier writings *and* featured significant updates and original developments. The continuity with earlier writings was firstly methodological: as he had done earlier, Constant continued to approach political problems through the lens of opinion, interests and beliefs. It was also conceptual. Constant continued to struggle with questions of political legitimacy and institutional design. On the other hand, Constant's personal situation – he was now a political exile with plenty of time – encouraged him to write more ambitious, and indeed more systematic political treatises, even if these ultimately remained unpublished, not least out of fear of repression. From 1800 onwards, it is also striking that Constant's working relationship with Staël became gradually looser. While henceforth Staël chose to focus on literary criticism, if with a clear political intent, Constant continued working on more 'classical' political treatises.<sup>390</sup>

In the first part of this chapter, I reinterpret Constant's views on legitimacy as developed in the *Principes* and the *Fragments*. Dismissing popular sovereignty as providing a tool for Napoléon to reclaim absolute power through plebiscites, Constant, like Necker and Staël, used public opinion instead as the basis of an alternative theory of legitimacy. The problem, however, was no longer to unite an undecided general opinion around the founding principles of the republic, as had been the case during the Directory. It was to reawaken a general opinion that had grown disturbingly subservient to a charismatic leader. Constant wished to remind this opinion of the transhistorical principles it had previously embraced but was now on the verge of forgetting. In the preface to the *Principes*, he presented his work as

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<sup>387</sup> Rosenblatt, *Liberal Values*; Kalyvas and Katznelson, *Liberal Beginnings*. Andrew Jainchill eschews the problem differently, arguing that the *Fragments* were in fact a 'liberal republican' manifesto. *Reimagining Politics*, 275-285.

<sup>388</sup> As Etienne Hofmann has shown, it is highly plausible that both manuscripts were originally intended as two complementary parts of a single ambitious political treatise, which Constant decided to split at some point. See his *Principes*, 247-296. Constant's introduction to the *Principes* tends to confirm this hypothesis. *PdP* (1806), 91-92.

<sup>389</sup> For the radical break theory, see Rosenblatt, *Liberal Values*, Kalyvas and Katznelson, *Liberal Beginnings*. For the continuity argument, see Vincent, *Constant*.

<sup>390</sup> On Staël's political works as of 1800, see Fontana, *Staël*.

a recapitulation of the fundamental principles of freedom, in a context where the people, weary of political upheavals, had given up on political theory and most writers had rallied to the government. Against such a façade of assent, Constant, as a ‘penseur indépendant,’ offered to break the *perceived* unanimity that surrounded Napoléon and throw light on the principles that made a political association legitimate.<sup>391</sup> I further explain how this re-interpretation of Constant’s theory of legitimacy sheds light on Constant’s views on resistance and the type of constitutional changes he envisaged in order to eschew violent revolutions.

In the second part of the chapter, I contrast Roederer, Sieyès and Cabanis’ views on representative government with Constant’s critique of the institutional structure they had couched in the Constitution of year VIII. I reinterpret these conflicting views as two variations on how to obtain a sound administration of interests through the registration of public opinion.

## **I. Legitimacy Without Popular Sovereignty**

Book I of the *Principes* contained an extensive treatment of the question of political legitimacy, in the form of a dialogue with Rousseau. A long-standing interpretation has been that Constant, like Rousseau, endorsed popular sovereignty while denying that such sovereignty was absolute. This view has been defended by several generations of Constant scholars, from Stephen Holmes, Marcel Gauchet and Biancamaria Fontana, to, more recently, Aurelian Craiutu, Steven Vincent, Emanuelle Paulet-Grandguillot and Bryan Garsten.<sup>392</sup> Beyond Constant scholarship, this has become the standard reading: prominent scholars of modern political thought such as Philippe Raynaud, Pierre Manent, Pasquale Pasquino and Pierre Rosanvallon have all agreed in interpreting Constant as an advocate of popular sovereignty, if a limited one.<sup>393</sup> The unanimity on the question is such that George Kelly

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<sup>391</sup> *PdP* (1806), 95.

<sup>392</sup> Jean Roussel, *Jean-Jacques Rousseau en France après la Révolution. 1795-1830* (Paris, 1972), 489-522; Holmes, *Constant*, 86; Gauchet, ‘Constant,’ 81; Fontana, *Constant*, 19-20; 50; Todorov, *Constant*, 36-37; Kalyvas and Katznelson, *Liberal Beginnings*, 154-155; Vincent, *Constant*, 108; Grandguillot, *Libéralisme* and ‘Benjamin Constant lecteur du *Contrat social*,’ *ABC*, 27 (2003), 83-126; Craiutu, ‘The Battle for Legitimacy: Guizot and Constant on Sovereignty,’ *Historical Reflections*, 28/3 (2002), 471-491; Garsten, ‘Representative Government,’ 98-99 and Garsten, ‘Political Representation,’ 256.

<sup>393</sup> Simone Goyard-Fabre, ‘L’idée de souveraineté du peuple et le libéralisme pur de Benjamin Constant,’ *Revue de Métaphysique et de Morale*, 81/3 (1976), 289-327; Robert Derathé, ‘Les réfutations du *Contrat social* en France dans la première moitié du dix-neuvième siècle,’ in *Reappraisals of Rousseau. Studies in honour of R.A. Leigh*, eds. Simon Harvey, Marian Hobson, David Kelley et al. (Manchester, 1980), 90-110; Pierre Manent, *Histoire intellectuelle*, 184-187; Philippe Raynaud, ‘Un romantique libéral. Benjamin Constant,’ *Esprit*, 33



could observe in 1991 that Constant's argument about sovereignty was 'well known' and therefore did not require special attention.<sup>394</sup>

In fact, very few scholars have gone into the details of what Constant actually wrote in the first chapters of the manuscript of the *Principes*. This section suggests that these chapters should be read as an attempt to convince his readers that the concept of popular sovereignty was a dangerous fiction that should be disposed of, in a context where Napoléon was making rhetorical uses of the concept to exercise unchecked power. In its place, Constant put his own, idiosyncratic definition of the general will. For Constant, the general will was *not* synonymous with popular sovereignty, nor did it constitute its privileged expression. The general will meant the general opinion a society held about who was entitled to rule at a given time and place. Constant gave to the general will a new meaning while *claiming* to be on the same wavelength as Rousseau. In the guise of a dialogue with Rousseau, he was offering an alternative theory of legitimacy, based on opinion.

The first striking element about the manuscript of the *Principes* is just how seldom Constant used the terms 'popular sovereignty' or 'the sovereignty of the people' *sensu stricto*. When he did so, it was either in a negative sense, or in ways that indicate that this concept was not part of his own political vocabulary. All in all, Constant used the expression five times in a manuscript of more than six hundred pages. In the rare instances in which he employed the term, he did so in a mostly pejorative way, which suggested the notion was not part of his *own* preferred political vocabulary. He thus referred to popular sovereignty as an 'axiome' or 'dogme' defended by some 'apôtres zélés.'<sup>395</sup> If Constant did use the term 'popular sovereignty' in a different way in the published *Principes* of 1815 for contextual reasons we shall explore in the next chapter, in the unpublished manuscript of the *Principes*, he mostly shied away from it.

Constant's problems with Rousseau's conception of popular sovereignty are mostly perceptible in Book I Chapter 5, entitled 'Que l'erreur de Rousseau vient de ce qu'il a voulu distinguer les droits de la société de ceux du Gouvernement.' As its title indicates, Constant's

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(1983), 49-66; Pasquale Pasquino, *Sieyès et l'invention de la constitution en France* (Paris, 1998), 136; Rosanvallon, *Démocratie inachevée*, 98.

<sup>394</sup> Kelly, *Humane Comedy*, 49.

<sup>395</sup> *PdP* (1806), 108 ('l'axiome de la souveraineté du peuple'), 377 ('les apôtres zélés de la souveraineté du peuple'), 575 ('la souveraineté du peuple absolue, illimitée avait été transportée par la nation, ou du moins en son nom, comme c'est l'ordinaire, par ceux qui la dominaient, à des assemblées représentatives.'), 644 ('dogme de la souveraineté nationale'), 645 ('lorsque, par exemple, une majorité égarée opprime la minorité, ou, ce qui arrive bien plus souvent, lorsqu'une minorité féroce et tumultueuse s'empare du nom de la majorité pour tyranniser l'ensemble, que réclame-telle pour la justification de ses attentats ? La souveraineté du peuple.') Constant did not seem to make a difference between 'souveraineté du peuple' and 'souveraineté nationale.'

main worry resided in the distinction Rousseau had established between sovereignty and the government. In a recent book, Richard Tuck has reminded us of the importance of that distinction, drawing our attention to a fundamental split amongst modern political thinkers between those who, like Rousseau, defended the existence of a popular sovereign distinct from the government, with the people always remaining the locus of sovereign power and reawakening at regular interval, and those who believed that sovereignty and government were best conflated – government being the sole and only effectual site of sovereignty.<sup>396</sup> Constant's fundamental point in this chapter was that the sovereign and government that Rousseau had distinguished in theory were always conflated in practice. That government was the sole effective of site of sovereignty was not a problem *per se*. For Constant, it was always up to a minority in power to take binding decisions for the political community. Popular sovereignty was nothing more than 'une chose abstraite' as opposed to 'la chose réelle,' 'l'exercice de la souveraineté' by the government.<sup>397</sup> The problem, given this inescapable reality, was with the fiction of an underlying sovereign, which in its essence was absolute. In the *Principes*, Constant approvingly quoted Sieyès' speech of Year III, where the abbé had famously denounced popular sovereignty as a 'monstre,' blaming its absolute character on the conceptual transfer the revolutionaries had implicitly operated from the sovereignty of the king to that of the people.<sup>398</sup> In a similar vein, Constant argued that revolutionaries had merely displaced the immense power that belonged to one person to the entire society.<sup>399</sup> In light of this absolutist pedigree, to claim that there existed such a thing as popular sovereignty, Constant argued, simply amounted to giving to rulers a pretext to exercise absolute power, and oppress the people in its very name.<sup>400</sup> The whole point of his discussion of Rousseau's sovereign-government distinction was to show that the idea of a popular sovereign was an empty fiction, which did not exist – and should not be said to exist:

La société ne peut exercer par elle même les droits qu'elle reçoit de ses membres. En conséquence elle les délègue. Elle institue ce que nous appelons un gouvernement. Dès lors toute distinction entre les droits de la société et ceux du gouvernement est une abstraction chimérique. Car, d'un côté, la société *eut-elle* légitimement une autorité plus étendue que celle qu'elle délègue, la partie qu'elle ne délègue pas, ne pouvant être exercée, serait comme non existante. Un droit qu'on ne peut ni exercer par soi même, ni

<sup>396</sup> Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge, 2016).

<sup>397</sup> *PdP* (1806), 118.

<sup>398</sup> See Sieyès, 'Opinion du 2 thermidor de l'an III,' 114.

<sup>399</sup> *Ibid.* 109, note a.

<sup>400</sup> *PdP* (1806), 121-122.

délèguer à d'autres, est *un droit qui n'existe pas*: et de l'autre part, *il y aurait*, à reconnaître de pareils droits, l'inconvénient inévitable que les dépositaires de la partie déléguée parviendraient infailliblement à se faire déléguer le reste.<sup>401</sup>

This is why Constant congratulated Rousseau on his idea that sovereignty could not be alienated: 'c'était déclarer en termes moins clairs qu'elle ne pouvait être exercée. C'était anéantir de fait le principe qu'il venait de proclamer.'<sup>402</sup> Rousseau, Constant explained, had been extremely coherent: having designed an unlimited, monstrous concept, and not knowing what to do with it in practice, he had designed 'un expédient qui rendit impossible l'exercice de cette souveraineté.'<sup>403</sup> In general, Constant's critique of Rousseau was based on what he saw as his overreliance on abstract theory rather than concrete politics: 'le système de Jean-Jacques et tous les raisonnements qui l'appuient sont frappés d'un grand vice, l'oubli des choses réelles.'<sup>404</sup> In a neglected set of notes written in parallel to the *Principes*, Constant further expressed his impatience with the very notion of popular sovereignty: 'Cette éternelle métaphysique du contrat social, reposant toujours sur 'une hypothèse'; l'idée gigantesque d'une Souveraineté qui n'existe pas, qui ne doit pas exister, a fait peut-être autant de mal à l'espèce humaine qu'aucun système de servitude.'<sup>405</sup>

Constant did not simply state that popular sovereignty should be limited – this was impossible in his view, given its absolutist lineage. He was attempting to convince his readers that the very concept needed to be erased from our political vocabulary.

### **The General Will Redefined**

In the 1790s Constant had already considered abstract concepts such as popular sovereignty to be an unhelpful way of thinking about legitimacy, choosing instead, in Hume's fashion, to shift the focus to people's opinion. In the manuscript of the *Principes*, Constant revisited Hume's theory of opinion to offer a revamped version of Rousseau's distinction between sovereignty and government. In many instances, Constant replaced it by his own distinction between 'société' and 'autorité sociale.' Society referred to a concrete, historically contingent political community with changing ideas about what constituted political right.

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<sup>401</sup> Ibid. 117.

<sup>402</sup> Ibid. 129.

<sup>403</sup> Ibid.

<sup>404</sup> Ibid. 115, note a.

<sup>405</sup> Constant, 'De l'intervention de l'autorité dans ce qui a rapport à la religion,' in *Deux chapitres inédits de l'Esprit des religions (1803-1804)*, ed. Patrice Thompson (Geneva, 1970), 135.

Social authority designated the institutions that make obligatory laws for all citizens. When Constant used the term ‘souveraineté’ in a positive sense, it was to designate social authority, his synonym for government. His coining of the term ‘autorité sociale’ betrays Constant’s concerns that the term ‘sovereignty,’ even when assimilated with the government, might suggest absolute power.

These concerns, in the manuscript of the *Principes*, are directly related to the immediate political context. To Constant, Hume’s theory offered an apt starting point to apprehend the puzzles of Napoléon’s rise to power and his widespread support across the French population. After the Brumaire coup had brought him to power in 1799 (a coup Constant had initially endorsed), Napoléon had sought to buttress his legitimacy through a combination of eclectic principles. He first called upon popular sovereignty, as expressed through plebiscites, going sometimes as far as claiming to be the sole representative of the people – this was exactly the delegation process Constant had sought to denounce in his chapter on the inevitable conflation of sovereignty and government.<sup>406</sup> Subsequently, he sought to reactivate a certain type of monarchical legitimacy by reintroducing the doctrine of heredity. This lineage was reinforced through religious references, especially after 1804, when Napoléon became Emperor ‘par la grâce de Dieu et les constitutions de l’Empire.’<sup>407</sup> Last, Napoléon often invoked a charismatic legitimacy, which made him appear as the only man able to govern France in light of the present circumstances – a man victorious abroad and able to pacify French society, whose intrinsic genius made him fit to exercise power.<sup>408</sup> What is important here is that Napoléon resorted to eclectic means to secure his grip on the French people – elections, heredity (buttressed by divine right) and charisma.

In his chapter on Rousseau’s ‘premier principe’ about the ‘source de l’autorité sociale,’ Constant wrote that ‘Rousseau commence par établir que toute autorité qui gouverne une nation, doit être émanée de la volonté générale. Ce n’est pas ce principe que je prétends contester.’<sup>409</sup> Most scholars have taken Constant’s proclaimed endorsement of Rousseau’s ‘premier principe’ at first value, i.e. as evidence of his support of popular sovereignty. But

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<sup>406</sup> Following the Brumaire coup, the Constitution of year VIII was ratified by plebiscite in February 1800. In May 1802, a second plebiscite endorsed Napoléon’s consulate for life and in May 1804, another plebiscite confirmed Bonaparte’s nomination as Emperor of the French and the hereditary succession. A few months later, in November 1804 a fourth plebiscite approved the Constitution of Year XII. On 15 December 1808, the *Moniteur* stated: ‘le premier représentant de la nation, c’est l’empereur.’ See Jaume, *L’individu effacé*, 73, note 127.

<sup>407</sup> This was included in the official opening paragraph of the Sénatus-consulte organique du 28 floréal an XII (18 May 1804).

<sup>408</sup> On Napoléon’s legitimacy during the Consulate and the Empire, see François Bluche, *Le bonapartisme: aux origines de la droite autoritaire (1800-1850)* (Paris, 1980), 26-33.

<sup>409</sup> *PdP* (1806), 102.

the definition Constant gave of the general will had clearly little to do with popular sovereignty – a term he did not use in the chapter:

Si vous supposez le pouvoir du petit nombre sanctionné par l'assentiment de tous, le pouvoir devient alors la volonté générale. Ce principe s'applique à toutes les institutions. La Théocratie, la Royauté, l'Aristocratie, lorsqu'elles dominent les esprits, sont la volonté générale. Lorsqu'elles ne les dominent pas, elles ne sont autre chose que la force. En un mot, il n'existe au monde que deux pouvoirs, l'un illégitime, c'est la force: l'autre légitime, c'est la volonté générale.<sup>410</sup>

Constant's general will was primarily a sociological account of how political obedience was secured under different types of regimes. As a Rousseau scholar has observed, 'Benjamin Constant conçoit donc la volonté générale comme l'expression accidentelle, manifestée à tel ou tel moment de l'histoire d'une nation, d'une opinion dominante... Elle est l'effet d'une persuasion d'ordre psychologique et empirique; elle s'inscrit dans une histoire des mentalités.'<sup>411</sup> Such a definition of the general will was close to Hume's opinion: it referred to the tacit and implicit consensus that prevailed in a given society about the identity of rulers and the ways in which they accessed power. On Constant's understanding, the way in which power was conferred upon governors had more to do with a passive, unconscious opinion – what he called 'assentiment' – than any voluntary consent. Assent was the term Necker had used to designate the general atmosphere of opinion that underpinned any kind of regime, and in particular in a constitutional monarchy, where respect for elected property owners coexisted with admiration for hereditary titles. Such opinion, Constant similarly suggested, prevailed under different regime types, and could take different forms – diffuse admiration for past traditions (hereditary monarchy), belief in the God-given sanctity of institutions (theocracy), respect for talents or hereditary titles (aristocracy) or more or less explicit endorsement through ballot boxes (republic). Whatever the channels and forms of expressions (which could be combined in different ways under the same regime forms, such as in Britain's constitutional monarchy), it was always the same dynamic of opinion that sustained political regimes.

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<sup>410</sup> Ibid.

<sup>411</sup> Paul Hoffmann, 'Benjamin Constant critique de Jean-Jacques Rousseau,' *Revue d'histoire littéraire de la France*, 82/1 (1982), 24-25.

Constant had already come close to reaching such a conclusion in his *Fragments*, where he had pointed out that all types of political regimes rested on ‘masse d’opinion.’<sup>412</sup> The *Fragments*’ objective was to design a constitutional structure on the organizational principle of elections exclusively – a principle that, in Constant’s analysis, post-1789 public opinion had finally recognized as the sole legitimate way of designating rulers.<sup>413</sup> Napoléon’s uses of plebiscites in 1800, 1802 and 1804, however, deeply shattered Constant’s uncompromising support for elections. The *Fragments* contained several observations about how easily elections could be manipulated, especially when used to designate the head of the executive.<sup>414</sup> On the point of how the head of the executive was chosen, Constant rehabilitated hereditary monarchies. The unquestioned customary opinion on which the legitimacy of the head of state rested in a monarchy, he argued, offered valuable advantages in terms of stability.<sup>415</sup> Similarly, Constant half-heartedly conceded that England’s constitutional monarchy, despite the shocking heredity of the King and the Chamber of Lords, was nonetheless admirable for the liberty it offered to its citizens.<sup>416</sup> In that respect, it is striking just how much the *Fragments* conceded to hereditary monarchy for a republican manifesto.<sup>417</sup> Despite the work’s reconsideration of heredity as a potentially efficient ground of legitimacy, Constant was adamant that heredity, be it for the head of state or one of the chambers, was now impossible in France, where equality had been so staunchly affirmed and monarchy had collapsed. Taking aim at Napoléon’s attempt to create for himself a hereditary line and his recent creation of an Imperial nobility, Constant argued that these were hopeless anachronisms which French public opinion would inevitably shun given how out of phase heredity was with post-revolutionary practices.<sup>418</sup>

As his analysis of Napoléon’s rule deepened, Constant grew more pessimistic about this prospect. This explains the gloomy tone of his definition of the general will in the *Principes*. In Book I, Constant conceded concerning the general will the ‘difficulté de la

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<sup>412</sup> FCR, 649. See also *PdP* (1806), 581.

<sup>413</sup> See Book I, in which Constant tried to make the case for elections against heredity as a way of establishing the ‘division des citoyens en gouvernans et en gouvernés.’ To claim that the *Fragments* defended ‘popular sovereignty’ as a key principle of legitimacy is therefore misguided. See Kalyvas and Katznelson, *Liberal Beginnings*, 152-158.

<sup>414</sup> See Book III of the *Fragments*, ‘De la monarchie élective ou du pouvoir confié par l’élection à un seul homme sans hérédité,’ esp. chapters 5 and 6.

<sup>415</sup> FCR, 451-452 and Book IV, ‘De la monarchie héréditaire,’ esp. chapter 1: ‘Que la Monarchie héréditaire est préférable à l’unité élective.’

<sup>416</sup> Ibid. 460-465.

<sup>417</sup> Grange, ‘Introduction’ to *Fragments d’un ouvrage abandonné*, 98.

<sup>418</sup> FCR, Book I, chapter 6, ‘impossibilité d’établir l’hérédité par des institutions positives,’ 422-424.

reconnaître et de l'exprimer.<sup>419</sup> To Constant, Hume's theory of opinion also helped to account for a phenomenon that deeply puzzled him: the fact that opinions, however manipulated, could nonetheless play a legitimizing role. As Constant observed, people were malleable, and always adapted themselves to political circumstances, shaping their habits around what existed.<sup>420</sup> People's opinions, if they constituted the basis of government, were often shaped by those in command. Plebiscites could be nothing more than an organized masquerade through which controlled opinions were expressed, and yet they granted some sort of legitimacy to those who orchestrated them.<sup>421</sup> A theory of heredity could be made up from bits and pieces of revised history and false titles, and yet people could be made to believe them. Divine right could be similarly rekindled, as the experience of the Concordat and the instauration of a Napoleonic catechism had shown.<sup>422</sup> Personal achievements could be easily exaggerated and magnified, just as failures could be covered up. Charisma was utterly subjective, and people could easily been brought to admire and support a leader, irrespective of his intrinsic worth and political successes. The example of Napoléon was a form of perverted, perhaps misplaced public esteem, but an effective one. In that respect, Constant's earlier opposition between the public esteem that underpinned republics, as opposed to the blind, superstitious admiration for hereditary privileges on which monarchies relied no longer made sense: all types of regimes were sustained by intractable and highly acquiescent opinions.

Yet, as the relabeling of Hume's opinion as general will suggests, Constant was also implying that, in principle, regimes where 'the people' not only sustained laws through their opinions (as in a theocracy) but also had some real implication in their making through a genuine electoral process (and not just a mechanism of selection of elites Constant associated with the Constitution of year VIII, as we shall see below) were more desirable. There was indeed a second, more positive sense Constant attached to the general will in the *Principes*, which justified, to a certain extent, the reference to Rousseau. As already mentioned, in Constant's mind, in any given regime form, it was always up to a tiny minority to make laws for the vast majority. This 'privilège' of a minority over the majority was inescapable. In other words, representatives – or those who claimed to act as such – were always the ones who held real political power. The true question was, according to Constant: 'quelle sera

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<sup>419</sup> *PdP* (1806), 103.

<sup>420</sup> *Ibid.* 92-93.

<sup>421</sup> *PdP* (1806), 222-223.

<sup>422</sup> On the Condordat, see Rosenblatt, *Liberal Values*, 93-96.

l'origine du privilège exclusif que vous concéderiez à ce petit nombre?'<sup>423</sup> Constant considered four options. Despite having included theocracy in his definition of the general will, probably in an oblique denunciation of Napoléon's rehabilitation of divine right, Constant insisted that the religious hypothesis on which this 'doctrine' rested was impossible to admit now that governments rested on 'des bases humaines.'<sup>424</sup> Another option was force – power belonged to the one who seized it. This possibility Constant readily dismissed, as the aforementioned quote on the general will makes clear. In that respect, Constant parted ways with Hume, who had less trouble conceding the performativity of force and conquest.<sup>425</sup> Perhaps building on Book I Chapters 1 and 2 of *Du contrat social*, Constant argued that right could never proceed from force. In other words, physical and/or intellectual superiorities would never be able to justify political inequalities.<sup>426</sup> Napoléon's charismatic legitimacy, if effective, had to be condemned as nothing short than a monopolization of power. The third option was heredity, which Constant did not explicitly discuss in Book I, but scorned in a very brief but telling remark in Book III of the manuscript, where he also rehabilitated elections – the fourth way of granting political power: 'L'hérédité ne nous présente qu'une succession de gouvernans élevés dans la puissance, et l'expérience est presque superflue pour nous indiquer le résultat de deux élémens tels que le hasard et la flatterie. L'élection donne aux gouvernemens la sanction du vœu populaire.'<sup>427</sup> Constant's 'homage' to Rousseau in the manuscript – 'il a le premier rendu populaire le sentiment de nos droits' – was a nod to Rousseau's defence of equal political rights, which Constant, together with Staël, had interpreted in the 1790s as a franchise-based political equality in a representative regime.<sup>428</sup>

Calling upon 'le premier principe de Rousseau' was a way for Constant to remind Napoléon and his acolytes, at the height of the Empire, that, in principle and in the wake of the revolution, laws had to be made by 'the people' as a whole. They should not be the brainchild of a single individual and his advisers, and this minimal standard of political equality had to be duly translated into a constitutional text.<sup>429</sup> Political equality was the legacy of the French revolution that Napoléon was forfeiting.<sup>430</sup> 'Dans une société dont les membres apportent des droits égaux,' Constant wrote (and by society he meant an advanced,

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<sup>423</sup> *PdP* (1806), 102.

<sup>424</sup> *Ibid.* 102; 161.

<sup>425</sup> Hume, 'Original Contract,' 188-189.

<sup>426</sup> Grandguillot, *Libéralisme*, 366 and note 1.

<sup>427</sup> *PdP* (1806), 161.

<sup>428</sup> *Ibid.* 129.

<sup>429</sup> *Ibid.* 224.

<sup>430</sup> On the use of Rousseau as a flagship of the revolution, see Bernard Manin, 'Rousseau,' in *Dictionnaire critique de la Révolution française*, 4.



modern, commercial society at a certain historical stage) ‘il est certain qu’il n’appartient à aucun de ces membres isolément de faire des lois obligatoires pour les autres.’<sup>431</sup>

### **The Limits of ‘Social Authority’**

Above the ever-changing tide of opinions stood social authority. The ‘source’ criterion of legitimacy was no doubt important. But whether government was undergirded by a customary opinion such as heredity or, preferably, a title derived from elections, ‘l’autorité qui émane de la volonté générale n’est pas légitime par cela seule.’<sup>432</sup> The first criterion had to be complemented by a second one – the ‘objet’ or ‘étendue’ of social authority. Constant asserted that the scope of social authority was strictly bounded: there is ‘une partie de l’existence humaine, qui, de nécessité, reste individuelle et indépendante, et qui est de droit hors de toute compétence sociale.’<sup>433</sup> ‘La souveraineté,’ here in the sense of the government’s power of ultimate decision making, ‘n’existe que d’une manière limitée et relative. Au point où commence l’indépendance de l’existence individuelle, s’arrête la juridiction de cette souveraineté.’<sup>434</sup> Constant explained that this sphere of independence included freedom to do anything that does not harm others, freedom of religion, freedom of opinion, the inviolability of property, the right not to be arrested arbitrarily as well as the right to a fair trial.<sup>435</sup>

Scholars have seen two problems with Constant’s second criterion. First, they have argued that there existed a tension between Constant’s defense of popular sovereignty and the simultaneous affirmation of rights totally independent from authority, which therefore escaped collective self-determination.<sup>436</sup> Second, they have stressed that Constant was incoherent about the status of these rights, at times suggesting that they were natural rights, at others that they were the product of a historical development.<sup>437</sup> These two problems can be

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<sup>431</sup> *PdP* (1806), 133. In the same chapter, Constant wrote that ‘l’universalité des citoyens est le souverain, c’est à dire nul individu, nulle fraction, nulle association partielle ne peut s’arroger la souveraineté qu’elle ne lui ait été déléguée.’ This statement cannot be read as evidence of Constant’s endorsement of popular sovereignty. The phrase ‘l’universalité des citoyens est le souverain’ was copy pasted from article 2 of the Constitution of Year III. The expression was thus not Constant’s own. He used it as an illustration of his argument that any monopolization of power was illegitimate in an age of equality. Further, as Jainchill has shown, the Constitution of Year III, in making property-owning citizens (as opposed to the people) the bearer of sovereignty was attempting to break with the concept of popular sovereignty that the Constitution of 1793 had consecrated (article 7). *Reimagining Politics*, 18.

<sup>432</sup> *PdP* (1806), 133.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.* 146.

<sup>436</sup> Manent, *Histoire intellectuelle*, 187-189, Raynaud, ‘Romantisme libéral.’

<sup>437</sup> Manent, *ibid.* Scholars are split over Constant’s conception of individual rights. For Lucien Jaume, Constant was an advocate of natural rights. *L’individu effacé*, 91-95. For others, Constant had a purely historicist

elucidated once we understand Constant's theory of legitimacy as being based upon the people's gradually changing opinions.

Although this has gone unnoticed, Constant introduced his discussion about the object of political authority with a survey of the current state of beliefs on the subject. For decades, Constant complained, French political writers of all sorts – d'Holbach, Mably, Necker – had raved about the political advantages of an all-powerful and omniscient state. Their mistake was all too obvious: 'de ce que l'autorité peut faire beaucoup de mal, on en conclut qu'elle peut faire beaucoup de bien.'<sup>438</sup> The idea that the state was the guardian of the general interest had deep roots in public opinion. No doubt, other writers had denied that political authority was unlimited, including Paine, Sieyès and Condorcet – 'mais il ne paraît pas que la logique de ces écrivains ait fait impression. L'on parle encore sans cesse d'un pouvoir sans bornes.'<sup>439</sup> It was high time, in Constant's view, to draw attention upon the 'principes à substituer aux *idées reçues* sur l'étendue de l'autorité sociale.'<sup>440</sup> There existed a hiatus between current beliefs about the scope of political authority, and what the latter should be for the preservation of individual liberty. Just as the source of political authority depended upon the established practice of the age, so we needed to look, Constant suggested, at what the people's *genuine* expectations were today in terms of what the government was entitled to do. There was thus no tension, in the manuscript of the *Principes*, between a purported popular sovereign on the one and free-floating individual rights on the other, since both the source of sovereignty and the limits of sovereign authority were, in Constant's mind, ultimately dependent upon the people's opinion.

To further understand Constant's 'object' criterion, we must turn to the emblematic treatment of the distinction between ancients and moderns Constant offered in Book XVII of the *Principes*. This version of the distinction can be read as an attempt to describe the needs that prevailed in post-revolutionary France. Here we are reminded that, in *Des circonstances actuelles*, Staël presented the distinction between ancients and moderns as an analysis of the state of public opinion that constituted each epoch.<sup>441</sup> Staël had insisted that in modern times, public opinion had gained a consistency of its own, which greatly impacted the leverage legislators had upon society. While ancients could easily 'captiver l'opinion' through patriotic demonstrations and conquests, in modern France, rulers had to be aware that public

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understanding of rights. See Kalyvas and Katznelson, *Liberal Beginnings*, 150; Garsten, 'Constant's Other Lectures,' 19.

<sup>438</sup> *PdP* (1806), 595.

<sup>439</sup> *Ibid.* 109-110.

<sup>440</sup> This is the title of Book II of the *Principes*, 131. My italics.

<sup>441</sup> *CA*, 353.

opinion longed for peace and quiet and would therefore oppose vigorous governmental action.<sup>442</sup> Partly building on Staël, Constant argued that ancient and modern liberty constituted two possible combinations of what he called civil liberty and political liberty. Civil rights and political rights both had a minimal, core content, but could be articulated differently depending on the needs of the day and the progress of enlightenment. Individual liberty consisted in the rights Constant had highlighted in the opening chapters of the *Principes*. Political liberty Constant generically defined as the right to be involved in matters of common interest or ‘l’exercice du pouvoir social.’<sup>443</sup> In ancient times, individual liberty existed, but only virtually, as a potentiality – public opinion simply ignored that it had some substance. It was unknown to the ancients, and constantly crushed by an expansive conception of political liberty.<sup>444</sup> In modern times, thanks to the growth of commerce, the abolition of slavery and the increase in nations’ size, the articulation between the two types of liberty was almost entirely the opposite: individual liberty had been at last recognized and, as a result, political liberty was not only proportionally limited, but also had a new function: to act as a ‘garantie’ of individual liberty.<sup>445</sup> Constant thus suggested that rights were trans-historical – in a much commented-upon chapter, he insisted on defending natural rights against Bentham – while *at the same time* insisting that not only their specific form, but also their recognition and hence efficacy were always contingent upon ‘l’état actuel de la civilisation.’<sup>446</sup> In that regard, Constant’s views on individual rights were less incoherent than has been argued: rights were timeless principles whose effectiveness was always contingent upon people’s beliefs:

Nous possédons encore aujourd’hui les droits que nous eumes de tout tems, ces droits éternels à la justice, à l’égalité, à la garantie [i.e, civil liberty, equality before the law and political liberty], parce que ces droits sont le but des associations humaines. Mais les gouvernemens qui ne sont que les moyens de parvenir à ce but, ont de nouveaux devoirs. Les progrès de la civilisation, les changemens opérés par les siècles dans les dispositions de l’espèce humaine leur commandent plus de respect pour les habitudes, pour les affections, en un mot pour l’indépendance des individus. Ils doivent porter chaque jour sur

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<sup>442</sup> Ibid. 354.

<sup>443</sup> *PdP* (1806), 621.

<sup>444</sup> Ibid. 599.

<sup>445</sup> Ibid., 621.

<sup>446</sup> See chapter 7 of Book 1, ‘Du principe de l’utilité substituée à l’idée de droits individuels.’ For the reference to ‘l’état actuel de la civilisation,’ see *PdP* (1806), 626, note a.

ces objets sacrés une main plus prudente et plus légère.<sup>447</sup>

The new duties Constant believed now weighed upon governments were not mere fancies, but very concretely, novel expectations amongst the governed, which constituted the present stage of public opinion. The problem was that, in France, the revolution had generated considerable confusion about what the real needs of the age were, making it possible for Napoléon to extend gradually his power to a considerable number of different realms of human affairs. This is why Constant believed he needed to make the case for principles of liberty. His manuscript was intended as a work of systematization of what the practice of the age now required, in order to convince public opinion that social authority – thus named because it took care of society's present needs – had to be limited if moderns were to be able to exercise their faculties independently. In that respect, Constant's diverse statements about the nature of individual rights in the *Principes* can also be seen as various attempts to convince public opinion that social authority was not absolute, no matter what type of arguments his audience – the people, other public writers, rulers – would find more convincing.<sup>448</sup>

### Theory and Practice

One implication of Hume's way of thinking about political right, according to Sagar, was that the people cannot be mistaken in their opinions about legitimacy. On this reading, for Hume there was no external justificatory criterion by which to assess existing governments, such as an ancient constitution or a social contract. In Sagar's words, 'insofar as the opinion of mankind judges that some power possesses authority and is owed

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<sup>447</sup> Ibid. 626-627. Although Constant never articulated his earlier conception of 'equality,' which included equality before the law and some form of 'political' equality, with his statements about civil liberty and political liberty, it seems it took the two dyads to be roughly synonymous.

<sup>448</sup> The aim of convincing rulers that political power should be limited pervaded the arguments of the *Principes*. Books VII, VIII, XI, XII and XIV were intended as illustrations of the negative effects 'l'action de l'autorité sociale' had when it trespassed legitimate boundaries in matters of enlightenment, religion, property, taxes and industry. In these books, the argumentation was heavily consequentialist: all-pervasive regulations went together with aftereffects rulers could not anticipate, which eventually brought discredit upon the government. In a set of preparatory notes for what would become Book VIII of the *Principes* on freedom of religion, Constant made this rhetorical tactic clear: 'Nous traiterons beaucoup plus, dans ce chapitre, de ce que l'autorité peut faire de ce qu'elle doit faire. La démonstration de son impuissance et de l'inutilité de ses tentatives est auprès d'elle, je suis disposé à le penser, un meilleur moyen de persuasion que l'exposé de ses devoirs.' Constant, manuscript Co 3418, quoted by Thompson in *Deux chapitres inédits*, 153. This attitude explains why Holmes has read Constant's arguments about individual rights as purely instrumental. See his *Constant*, 126-127.

obedience, it therefore does and is.’<sup>449</sup> In Constant’s analysis, the Terror and Napoléon had amply shown how easily opinions could be manipulated, to the point of making people forget the very principles that had been fought for in 1789. This, Constant believed, proved that, at a fundamental level, a bare appeal to *existing* general opinion did not always provide a satisfactory basis for politics.<sup>450</sup> One had to take a broader view: to look at the achievements of the revolution and the kind of expectations and the needs it had roused amongst the population, and, should the people be lured astray, remind them of their true interests if need be. Constant’s belief in the existence of true principles implied that, even if opinions were manipulated to the point of giving up on them, these principles could be rekindled with the proper amount of persuasion. Political regimes could thus be condemned for not living up to these principles, rather than being merely accounted for because they were in phase with the opinions of their subjects. No doubt, current opinion was determinant, but Constant was adamant that abstract theory was required to sort opinions out – to discriminate between fleeting passions and the people’s true, long-term interests.

Although this has been generally overlooked, the *Principes*’ discussion on political legitimacy contained important developments about why political *theory* was important. In the wake of violent revolutions, Constant explained, everybody was often weary of abstract principles, because these had been discredited by the fallacious use that had been made of them. But the whole point of the *Principes* was that immovable points of reference were absolutely needed, irrespective of changing tides of opinions – hence its title, *Principes de politiques applicables à tous les gouvernements*. Here, Constant was expanding on his earlier stress on the importance of principles in *Des réactions politiques*. On the connection between theory and practice, Constant suggested, as he had done earlier, that principles were the conceptual systematization of mankind’s true needs, as evidenced by historical events. Writing in the wake of the revolution, Constant believed that the principles discovered throughout history were *true*, both in the sense that they conformed to mankind’s most natural needs and in the sense that they were rationally demonstrable. ‘La théorie,’ Constant wrote as Staël had done earlier in *Des circonstances actuelles*, ‘n’est autre chose que la pratique réduite en règles par l’expérience, et que la pratique n’est que la théorie appliquée.’<sup>451</sup> Theory was the lessons of past history properly registered and understood.

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<sup>449</sup> Sagar, *Opinion of Mankind*, 130; 138.

<sup>450</sup> The problems connected with Sagar’s exclusively ‘realist’ approach to legitimacy have been highlighted by Clifton Mark in his review of Sagar’s book for *Political Theory*.

<sup>451</sup> *PdP* (1806), 113.

A particularly emblematic illustration of Constant's method can be found in a manuscript he wrote in parallel to the *Principes* entitled 'de la perfectibilité de l'espèce humaine.'<sup>452</sup> This much commented-upon text was at bottom a reflection on how the grounds of legitimacy changed over time.<sup>453</sup> Constant expanded upon the future-oriented vision of history he had started developing in the 1790s, arguing that after the struggles against theocracy, slavery, feudalism and, finally, aristocracy mankind had now reached 'l'époque des conventions légales.' After having placed the source of political authority in bases outside human nature, mankind had finally recognized that laws must be the product not of 'préjugés' but of a common transaction between equal citizens.<sup>454</sup> When mankind was less enlightened, it had substituted 'des opinions plus ou moins erronées' for the truths it still ignored. 'Les institutions à l'origine ne sont que des opinions mises en pratique,' Constant observed.<sup>455</sup> With time, principles were replacing erroneous opinions as the only valid basis of political organization.

As Constant had already argued in *De la force*, clearly demonstrable ideas – principles that were in the interest of all – had an intrinsically persuasive character, that, in the long run, made opinions coalesce behind them. By historicizing opinions in this way, Constant could uphold the transcendent character of political rights while affirming, at the same time, their historically contingent character. History was moving in a specific direction and the true principles that were thus rediscovered provided fixed criteria against which the merits and demerits of political regimes, past and present, could be assessed. Past abuses, such as aristocracy, could accordingly be both accounted for while being condemned retrospectively as an insult against the true principle of equality.<sup>456</sup> Similarly, once the principle of equality had been rediscovered – as had happened with the French revolution – a certain threshold of political requirements had been reached, and could no longer be simply thrown aside if opinions relapsed into errors for some time. If one took a broad historical

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<sup>452</sup> 'De la perfectibilité humaine' in *OCBC III, I*, 456-475. This first version was probably written between 1799 and 1805. Constant eventually published a slightly amended version of this text in his *Mélanges de littérature et de politique* (1829).

<sup>453</sup> Constant's theory of perfectibility has been often analysed for its own sake, in a vacuum. As a result, scholars have read it in antagonistic ways. Jaume has read it as a history of progress on a grand scale in which the self-moving progressive revelation of truth clashes with Constant's defence of individual judgment. *L'individu effacé*, 109-117. Partisans of a sceptical Constant have read it as a reflection on the limits of progress and a warning about over-ambitious teleological visions of history. See Holmes, *Constant*, 181-206 and Fontana, *Constant*, 29-47. The text on perfectibility, however, should be read in conjunction with the arguments developed in the *Principes* about legitimacy. On the context in which Constant wrote this text – the 'querelle de la perfectibilité' which erupted in 1800 – and possible sources of inspiration, see Etienne Hofmann, 'The Theory of the Perfectibility of the Human Race,' in *Cambridge Companion to Constant*, 248-274.

<sup>454</sup> 'Perfectibilité,' 474.

<sup>455</sup> *Ibid.* 472.

<sup>456</sup> *Ibid.* Compare with *PdP* (1806), 583-584.

perspective, hesitations were only transitory – once opinions would be definitively won over to true principles, men would go back to the ‘idées morales’ that they professed before the ‘secousses’ that had led them astray.<sup>457</sup> In that respect, Napoléon’s somehow successful rekindling of heredity and his charismatic legitimacy could appear as a symptom that the battle for equal political rights was not over yet.

Just as equality had been gradually rediscovered, the need for individual freedoms was increasingly becoming clear to all. Both the source and the limits of political authority were set by the state of opinion, with this specificity that public opinion progressively buttressed what seemed the best way of organizing the political community – best in the sense that it was in the interest of all. In the manuscript of the *Principes*, Constant described the gradual process of recognition of individual rights in terms similar to those he had used about equality in his essay on perfectibility. A quick look at history, he asserted, showed that this principle, too, was gaining traction:

Bien que l’autorité sociale ne soit pas encore limitée en théorie, elle est néanmoins de fait plus resserrée de nos jours qu’autrefois. L’on n’attribue plus, par exemple, même à la société entière le droit de vie et de mort sans jugement; aussi nul gouvernement moderne ne prétend exercer un pareil droit. Si les tyrans des anciennes Républiques nous paraissent bien plus effrénés que les gouvernans de l’histoire moderne, c’est en partie à cette cause qu’il faut l’attribuer. Les attentats les plus monstrueux du despotisme d’un seul furent souvent dûs à la doctrine de la puissance sans bornes de tous. La limitation de l’autorité sociale est donc possible. Elle sera garantie, d’abord par la même force qui garantit toutes les vérités reconnues, par l’opinion.<sup>458</sup>

Constant’s texts on equality as well as his remarks in the *Principes* about how social authority was now much more limited than it used to be were illustrations of how theory could be derived from historical experience, when analysed in a certain way. His understanding of abstract theory bore some similarities with Hume’s ideal of a ‘science of politics,’ although it is clear that Hume would not have endorsed Constant’s rationalist predictions about how truth would one day become known to all. Constant nonetheless believed that Hume could be enrolled to prove his point. In his discussion on theory and practice, he referred to Hume’s essay ‘Of the First Principles of Government,’ suggesting that Hume’s distinction between opinion of interest and opinion of right could be interpreted as a

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<sup>457</sup> ‘Perfectibilité,’ 466.

<sup>458</sup> *PdP* (1806), 144.

stress on the partial independence moral opinion could have from the calculation of interests. In his definition of what counted as ‘opinion of right,’ Hume had hinted at some deep connection between right to power and a general thirst for ‘public justice,’ for which, he observed, men often showed great obstinacy.<sup>459</sup> In Constant’s rendition, Hume had argued that ‘l’opinion de justice a toujours eu beaucoup plus d’influence que l’intérêt.’<sup>460</sup> Constant’s point was that the people’s opinions, if whimsical, were also eminently sensitive to reasoned arguments – true principles, which were inherently just – and ultimately shaped by them.<sup>461</sup> Each individual, for instance, could understand that it was in the interest of all that political authority should be limited. The *Principes* themselves were conceived as a contribution to the great work of rehabilitating the basic principles that made political life possible. In the long run, even if public opinion was led astray, people would come back to more reasonable ideas about political life, and realize that theory was worthwhile.<sup>462</sup> In an emblematic chapter, Constant addressed the thorny question of how he believed social authority could be limited *in practice*.<sup>463</sup> No doubt the balance of powers was important, he argued, but the latter would be ineffective without prior agreement on the total sum of political authority. The limitation of social authority, he explained, would be the product of a general conviction, across the population, that power now had to respect individual independence: ‘Il se forme à l’égard de toutes les vérités que l’on parvient à environner de preuves incontestables une opinion universelle qui bientôt est victorieuse. S’il est reconnu que l’autorité sociale n’est pas sans bornes, c’est à dire qu’il n’existe sur la terre aucune puissance illimitée, nul, dans aucun tems n’osera réclamer une semblable puissance.’<sup>464</sup>

Constant believed that proving wrong inaccurate theories might weaken the hand of a deceitful ruler. In his discussion of theory and practice, Constant insisted on the political importance of refuting errors, ‘parce que c’est dans les opinions que les intérêts cherchent des armes.’<sup>465</sup> There existed, Constant explained, one major difference between interests and opinions: whereas interests divided – each individual had specific interests – opinions united.

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<sup>459</sup> Hume, ‘First Principles of Government,’ 16-17.

<sup>460</sup> *PdP* (1806), 111, note a.

<sup>461</sup> In a separate set of notes on perfectibility, Constant interpreted Hume’s essay ‘On eloquence’ in a teleological way: the fact that moderns no longer practiced eloquence as passionately as the ancients had – something Hume deplored – showed, in Constant’s analysis, that reason was on the march and gaining grounds over passions. Similarly, Constant referred to Hume’s remark, in his essay ‘That Politics May Be Reduced to a Science’ about the discrimination ancient republics such as Rome made between Roman citizen and subjects of conquered territories as a hint that principles of justice were gaining grounds, since no such distinction existed in modern republics. See ‘Fragments sur la perfectibilité,’ 453.

<sup>462</sup> *PdP* (1806), 113.

<sup>463</sup> Book II, chapter 4: ‘Objection contre la possibilité de limiter l’autorité sociale.’

<sup>464</sup> *Ibid.* 143.

<sup>465</sup> *Ibid.* 111.



Each individual could direct only himself in the reckoning of his interests. When he wanted other people to support him, Constant wrote, ‘il est obligé de leur présenter une opinion qui leur fasse illusion sur ses véritables vues.’<sup>466</sup> This is where particular interests derived their strength from – from opinion, true or false. There was thus virtue, according to Constant, in dispelling erroneous opinions, which were only in the interest of a few. Once exposed, false opinions appeared as what they truly were: a smokescreen for fostering vested interests. These interests thereby lost their force – ‘vous anéantissez ses moyens d’influence sur ses alentours, vous déchirez l’étendard, l’armée se dissipe.’<sup>467</sup> Popular sovereignty had been precisely one of these false notions that had served the ambitions of the likes of Napoléon, and this is why it needed to be denounced as nothing more than a fiction. Rousseau was the great theorist of sovereignty revolutionaries had invoked countless times – and he needed to be put back in his place.<sup>468</sup>

In the 1790s, Constant had suggested that the representative republic was the modern regime par excellence, sustained by a refined type of ambition that Staël still insisted upon calling ‘virtue.’ Napoléon’s authoritarian politics under the Consulate convinced Constant that a republic in a large country – a model he still sought to defend in the *Fragments* – could do little service to individual freedom. In the *Principes*, Constant expanded on his idea that the same type of human dispositions underpinned all types of regimes. As in his earlier texts, Constant wavered between the affirmation of constitutive traits of human nature – material faculties, intellectual faculties, moral faculties – and a more historically contingent approach. To evaluate political regimes, there was no need to fall back on a primordial social contract, but on principles. These were not simply lofty speculations, but both demonstrable truths and the result of a clear, ongoing historical process. Irregular regimes could thus be condemned as out of phase with the established practice of the age, as registered in abstract principles, themselves best translated in a constitutional text.

In his chapter on ancients and moderns, Constant historicized his argument of a common spring active under any type of regime. Human ‘dispositions,’ he explained, had changed with evolving historical circumstances. Ambition, the desire for *jouissances* or, in a nutshell, the cultivation of faculties, had become particularly vivid in modern times. The same set of dispositions underpinned all modern regime forms, just as a different set had

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<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid.

underpinned them in the past. Accordingly, Montesquieu's distinction between regime forms needed to be revised along chronological lines:

Les politiques grecs, qui vivaient sous le gouvernement populaire, ne reconnaissaient d'autre force qui put le soutenir, que celle de la vertu. Ceux d'aujourd'hui ne nous parlent que de manufacture, de commerce, de finances, de richesses et de luxe même. Mont. Esp. des loix. III. 3. Il attribue cette différence à la République et à la monarchie. Il faut l'attribuer à l'Etat dissemblable des tems anciens et des tems modernes.<sup>469</sup>

Constant relinquished the language of virtue Staël had used earlier. Moderns were now pictured as doubtful, overly rational skeptics who aspired to 'repos' and commercial activities, had little appetite for enthusiasm and scant admiration for great deeds.<sup>470</sup> This was not only a rebuke of ancient style republicanism, but also an attempt to warn Napoléon that his dreams of conquest were doomed to fail in light of their anachronistic character.<sup>471</sup>

Constant set aside his former emphasis on the representative republic, drawing attention to the fact that, on the 'object' criterion, commercial monarchies that respected individual independence, as in England, could be just as legitimate as a republic. This amounted to a toning down of Constant's earlier stress on political participation as the true vector of emulation and self-development. And indeed, if the *Principes* recognized that political liberty was indispensable in modern times, it did so in qualified terms, focusing instead on individual liberty as the distinctively modern liberty, and the most important one.<sup>472</sup> On the 'object' criterion, the modern need for individual independence condemned two types of regimes as irregular: 'Il n'y a que deux formes de gouvernement, si toutefois on peut leur donner ce titre, qui soient essentiellement, éternellement illégitimes, parce qu'aucune association ne les peut vouloir, c'est l'anarchie et le despotisme.'<sup>473</sup> Anarchy and despotism, either for lack or excess of political authority, both failed to provide the necessary guarantees to individual rights, and in that respect were not so different from each other, Constant commented.<sup>474</sup>

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<sup>469</sup> Ibid. 629.

<sup>470</sup> Ibid. 618-620.

<sup>471</sup> Ibid. 619.

<sup>472</sup> Ibid. 621.

<sup>473</sup> Ibid. 103.

<sup>474</sup> Ibid. 103-105.

Constant's focus on individual liberties led him to grant comparatively less importance in the *Principes* to the 'source' criterion. This probably had to do with his doubts about the truthfulness of the people's assent to institutions in place. Besides anarchy and despotism, he wrote, 'toute autre forme de gouvernement peut être utile, toute autre forme peut être bonne, toute autre forme peut être voulue par une association, et par conséquent être légitime.'<sup>475</sup> This implied a proto-relativism vis-à-vis the type of assent that underpinned regime forms. Nonetheless, as we have seen, it was also clear from his earlier texts and scattered remarks in the manuscript that Constant deemed illegitimate, not only divine right and force, but also any kind of regime that ruled out any kind of 'popular' participation to the law making process. These were limited exclusives, but they were enough to condemn Napoléon's regime, and envisage a way out of the present *status quo*.

### **Sleeping Public Opinion**

Like Hume, Constant believed that there was no such thing as a right to revolution.<sup>476</sup> Giving to individuals fixed rules of conduct about revolutions was puerile, he argued, in light of the innumerable variety of circumstances that triggered revolutions and the frenzy that usually ensued.<sup>477</sup> Making his overwhelming preference for stability very clear, Constant insisted that at the end of the day, rulers were the only ones who could benefit from knowing how revolutions usually arouse so as to be better able to prevent them.<sup>478</sup> It was in the nature of things, Constant observed, that a government perished when there existed too great a contrast between the existing set of opinions of the governed – interests, habits, dispositions – and the institutions in place. Historical experience amply demonstrated that, when such a hiatus emerged, either the government implemented the necessary reforms and lasted, or it started acting arbitrarily to prolong their existence despite the people's expectations, and perished sooner or later. Referring to Hume's essay 'Of the First Principle of Government,' Constant compared governments that sought to secure their grip on power through force to

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<sup>475</sup> Ibid. 105.

<sup>476</sup> Ibid. 681: 'faire une révolution n'est jamais un droit.' Constant distinguished between *individual* resistance to illegal measures, which he considered 'un droit positif, individuel, imprescriptible,' and a *collective* right to revolution, which he denied. Both questions are treated in Book XVIII of the *Principes*. Lucien Jaume has provided an extensive analysis of Constant's views on individual resistance. See *L'individu effacé*, 91-108. See also Iain McDaniel, 'Representative Democracy and "the Spirit of Resistance" from Constant to Tocqueville,' *History of European Ideas*, 44/4 (2018), 433-448. This section concentrates on Constant's views on revolution, which have remained virtually unstudied so far, and shows how these were connected to Constant's ideas about opinion and legitimacy.

<sup>477</sup> *PdP* (1806), 678.

<sup>478</sup> Ibid. 679.

counter a growing sentiment of dissatisfaction to bodies struck by lightning: ‘de quelques moyens physiques que les dépositaires du pouvoir soient environnés, c’est toujours l’opinion qui crée, rassemble, retient autour d’eux, et dirige ces moyens.’<sup>479</sup> One could easily predict that violence would not, in the long run, succeed in taming public opinion: ‘Etouffer dans le sang l’opinion mécontente est la maxime favorite de certains hommes d’Etat. Mais on n’étouffe pas l’opinion. Le sang coule, mais elle surnage, revient à la charge et triomphe. Plus elle est comprimée, plus elle est terrible.’<sup>480</sup> To prevent upheavals, rulers would be well advised to let public opinion be and act upon its expectations, rather than attempting to quench it.<sup>481</sup>

When a revolution erupted, the key role was incumbent upon enlightened individuals. Developing the argument he had sketched in *Des réactions politiques*, Constant distinguished between two different types of ‘devoirs des hommes éclairés durant les révolutions.’<sup>482</sup> First, once a truth that was still only within reach of a small number of people emerged (and they did so recurrently, according to Constant’s view of history) amongst institutions ‘qui doivent reposer sur l’assentiment général,’ intellectuals had to rally public opinion around them as quickly as possible so as to prevent both a counter-reaction that sought to maintain error and a revolutionary zeal that would ‘porter la vérité au delà des bornes.’<sup>483</sup> Intellectuals orchestrated popular passions to make sure the people’s deep but confused aspirations would find an institutional echo without degenerating into violence. In so doing, intellectuals kept revolutions within their proper limits – what Constant called its first epoch – and prevented them from reaching that second epoch where the initial objective was sacrificed to the ambition of factions.<sup>484</sup> Second, when revolutions started and opinions warmed up, intellectuals played the role of mediator between opposing parties, reminding them of the principles that made community life possible – civil liberties, best enshrined in a constitution. ‘Les hommes éclairés sont placés entre tous les partis pour les préserver de l’arbitraire.’<sup>485</sup> These enlightened men were thus assisting the march of history, by making the people conscious of what they strove for, and were engaged in a battle of ideas against unscrupulous party leaders that sought to cover their own interests with the name of public opinion. In this respect, they served as watchmen to remind people, in times of upheavals, of principles that

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<sup>479</sup> Ibid. note a.

<sup>480</sup> Ibid. 680.

<sup>481</sup> Ibid. 682.

<sup>482</sup> See chapters 4 and 5 of Book XVIII.

<sup>483</sup> Ibid. 693.

<sup>484</sup> Ibid. 685.

<sup>485</sup> Ibid. 695.

were in the interest of all, and hence should not be violated.

More than the effervescence of opinions in revolutionary times, however, what puzzled Constant was just how silent public opinion had become since Napoléon's rise to power. On a superficial level, Napoléon's empire could be described as a despotic state, but this was a type of despotism that had managed to secure for itself, through different channels, some form of popular assent. In Constant's view, the revolution had shown that, in addition to a minimal standard of individual freedom, what the nation aspired to was some form of political liberty. On this understanding, opinion would stop supporting government if the latter failed to protect independence or grant it sufficient influence upon political affairs. And yet, the nation seemed to have grown disturbingly accustomed to the new state of affairs, as if it had resigned itself to arbitrary measures and a curtailment of its political influence. Peace and order under the laws had indeed been the motto of the new ruling elite. In his 1799 speech, Cabanis had argued that, in the new state apparatus, the people 'vit tranquille sous la protection des lois.'<sup>486</sup> During the hundred days, Napoléon would declare to Constant that 'la nation s'est reposée douze ans de toute agitation politique.'<sup>487</sup> To account for what he saw as a distasteful spectacle while insisting on the fact that the nation never entirely relinquished its twin interest in individual liberty and political liberty, Constant distinguished once again between two types of opinion – a debased type of opinion and an opinion educated to its task.

In both scenarios, the opinion of the masses had to be distinguished from the opinion of enlightened individuals. In the aftermath of violent revolutions, Constant explained, two phenomena were usually observed. The people, weary of being oppressed in the name of freedom gave the impression of settling for another type of oppression, provided that it offered 'repos' and security.<sup>488</sup> Indifference became the order of the day amongst the populace. Simultaneously, most of the intelligentsia rallied the new regime in place out of interest and ambition, and started lending some sort of respectability through newspapers and public declarations.<sup>489</sup> Intellectuals thereby became 'instruments' in the hands of the powerful – they renounced the use of individual judgment to become the blind spokespersons of the regime in place.<sup>490</sup> These were the two faces of a debased opinion. To dodge the problem that faked opinion might play a legitimizing role nonetheless, Constant argued that behind the façade of assent to the regime, a real and sturdy type of public opinion always

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<sup>486</sup> Pierre-Jean George Cabanis, *Quelques considérations sur l'organisation sociale en général et particulièrement sur la nouvelle constitution* (Paris, 1799), 27.

<sup>487</sup> Quoted in Jaume, *L'individu effacé*, 33.

<sup>488</sup> *PdP* (1806), 702.

<sup>489</sup> *Ibid.* 703.

<sup>490</sup> *Ibid.* 702-703.

kept on lurking in the background. To describe this latter type of opinion, Constant came back to Necker's concept of 'voeu,' which he had already used in the 1790s to designate an enduring yearning for the public good. This *voeu*, Constant argued, never relinquished its attachment to individual independence:

En vain la fatigue des peuples, l'inquiétude des chefs, la servilité des instrumens forment un assentiment factice que l'on appelle l'opinion publique, et qui ne l'est point. Les hommes ne se détachent jamais de la liberté... Il n'est jamais exact de prétendre que le voeu du peuple soit pour l'arbitraire. Il peut tomber de lassitude et vouloir se reposer un instant, come le voyageur épuisé peut s'endormir dans un bois, malgré les brigands qui l'infestent. Mais cette stupeur passagère ne peut être prise pour un état stable.<sup>491</sup>

Similarly, Constant insisted that beyond the veneer of indifference to politics the people displayed, deep down they kept a desire for political liberty:

Il y a toujours un esprit public, c. à d. [c'est-à-dire] une volonté publique. les hommes ne peuvent jamais être indifférents à leur propre sort, ni se désintéresser de leurs destinées. mais lorsque les gouvernemens agissent en sens inverse du voeu du peuple, le peuple se lasse de l'exprimer, et come on ne peut pas, même par la terreur, forcer toute une nation à mentir à sa conscience, on dit que l'esprit public sommeille, tout en se tenant prêt à l'étouffer, pour peu qu'il laissat soupçonner qu'il est éveillé.<sup>492</sup>

Public opinion might become debased opinion; but behind the faked assent, the people's primordial aspirations remained intact. Here, Constant was offering once again an idiosyncratic reboot of Rousseau's general will, which could be led astray by factions but whose true voice remained latent and indestructible.<sup>493</sup> Constant's sleeping public spirit was of a different nature than the sleeping sovereign Richard Tuck has attributed to Rousseau.<sup>494</sup> The idea of a popular sovereign, retiring and reawakening at regular, key intervals to exercise its rights was a pipe dream in Constant's analysis. The Napoléonic experience had revealed that the people not only sometimes disturbingly embraced despotism but could also quite simply be *put to sleep* through skillful maneuvers. Plebiscites were, in Constant's eyes,

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<sup>491</sup> Ibid. 705 and note a.

<sup>492</sup> Ibid. 688.

<sup>493</sup> Compare with *Du contrat social*, Book II, chapter II, 'Si la volonté générale peut errer.'

<sup>494</sup> Tuck, *Sleeping Sovereign*, 124-145.

anaesthetics *par excellence*, destined to convince the nation that it had its say while rulers in fact had already decided the constitutional changes it wanted to operate. ‘La sanction du peuple, les adresses d’adhésion,’ Constant wrote, ‘ont pris naissance dans la tête de ces hommes, qui ne trouvant de point d’appui ni dans la Morale, ni dans la raison, en cherchent un dans un assentiment simulé, qu’ils obtiennent de l’ignorance, ou qu’ils arrachent à la terreur.’<sup>495</sup> Plebiscites were ways of faking assent to measures contrary to the general interest, when rulers could not find reasonable motives for them. As a general rule, Constant argued, ‘la sanction du peuple ne peut jamais être qu’une formalité vaine.’<sup>496</sup> Even when plebiscites were not prejudiced by manipulations or a display of power on the part of the government, civil dissensions inevitably ensued when voting did not happen as expected.<sup>497</sup>

This was where enlightened men intervened once again – those who had not joined the ranks of the ruling class. In a companion chapter to his two chapters on the ‘devoirs des hommes éclairés, durant les révolutions’ entitled ‘devoir des hommes éclairés après les révolutions violentes,’ Constant argued that when the nation was put to sleep through plebiscites, it was the role of opposition intellectuals to remind the people of their rights even if – and especially when – they were led astray by deceitful rulers, as happened after revolutionary turmoil. In *De la force*, Constant had argued that it was the government’s role, supported by intellectuals, to remind a capricious public opinion of its deep aspirations – its *voeu* – i.e. to live peacefully under a republic that recognized equality. This role was now incumbent upon intellectuals exclusively, who would have to reawaken a nation that had fallen asleep – to remind it of what it had aspired to before it had fallen under the yoke of despotism. Here, Constant’s insistence on the true character of rights such as political liberty and civil liberty was key. It meant that even if people forget them or rather gave the impression of giving upon them – that is to say, if public opinion became debased – these rights could be rekindled nonetheless. ‘Il n’y a point de prescription pour les idées utiles,’ Constant insisted. ‘Le courage peut revenir après l’abattement, la lumière après l’ignorance, et l’ardeur du bien public après le sommeil de l’indifférence.’<sup>498</sup>

At the end of the day, intellectuals were the true custodians of the people’s ‘voeu’: when popular opinions were led astray, conscientious writers kept their deeper aspirations intact. Their role was to bridge the gap between the people’s existing opinion and the principles they had formerly embraced. Just as in the case of revolutions, intellectuals found

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<sup>495</sup> *PdP* (1806), 222.

<sup>496</sup> *Ibid.*

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.* 706.

support in their enterprise in the march of history, which inevitably tended towards the discovery and spread of eternal principles:

Le despotisme n'est redoutable que lorsqu'il étouffe la raison dans son enfance. Il peut alors arrêter ses progrès, et retenir l'espèce humaine dans une longue imbécillité. Mais lorsque la raison s'est mise en marche, elle est invincible: ses partisans peuvent périr ; elle survit et triomphe. Il n'existe qu'un moment pour la proscrire avec fruit: ce moment passé, tous les efforts sont vains. La lutte intellectuelle est engagée, l'opinion se sépare du pouvoir, la vérité se fait jour dans toutes les têtes. Après l'avantage inestimable d'être citoyen d'un état libre, il n'est peut-être aucune situation plus douce que d'être l'interprète courageux d'une nation asservie, mais éclairée.<sup>499</sup>

Enlightened men embarked on a process of persuasion and education, whose goal was to turn degraded opinion into 'esprit public' – a type of public opinion educated to its task, which would harshly condemn arbitrary measures and trump factional attempts to seize power.<sup>500</sup> 'L'esprit public est le fruit du tems,' Constant observed in a way reminiscent of Necker. Public spirit was a mature type of public opinion, enriched by past experiences transmitted through generations.<sup>501</sup> Intellectuals would find the incentive to fulfill their task in the recognition they would receive, not from a present-day, mesmerized opinion that no longer recognized merit, but from the public esteem of enlightened individuals of past and present generations – 'les défenseurs de la liberté rencontrent alors l'assentiment de la meilleure partie de l'espèce humaine.'<sup>502</sup> The closing chapter of the *Principes* was a call to arms; an appeal to all 'missionnaires de la vérité' to rekindle, in times of despotism, the eternal principles coeval with the 'vieux éléments de la nature humaine.'<sup>503</sup>

In Constant's understanding, the end result of this process of persuasion was a constitutional reform. Such reforms, however, needed to occur without the people's direct intervention. These were best initiated by intellectuals, and delivered by the constituted powers. The people had no *pouvoir constituant* in Constant's view.<sup>504</sup> The people's constituent power was another dangerous fiction. In the manuscript of the *Principes*, Constant observed that 'il y a bien un droit, qu'abstraitement parlant, la société possède, et qu'elle ne délègue pas au Gouvernement, c'est celui de changer l'organisation de ce

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<sup>499</sup> Ibid. 705-706.

<sup>500</sup> Ibid. 220.

<sup>501</sup> Ibid. 688.

<sup>502</sup> Ibid. 706.

<sup>503</sup> Ibid. 706; 708.

<sup>504</sup> Constant never used the expression 'pouvoir constituant' in his writings.



gouvernement même.<sup>505</sup> Delegating this right would amount to a vicious circle, since the government could then use it to transform itself into a tyrannical authority. But this exception, Constant insisted, confirmed his general rule about the people's power: 'si la société ne délègue pas ce droit, elle ne l'exerce pas non plus. Autant le déléguer serait absurde, autant l'exercer est impossible, et le proclamer dangereux.'<sup>506</sup> Just as with popular sovereignty, deceitful rulers could use the concept of constituent power to increase their own power by putting themselves at the head of constitutional reform projects. As a result, it was best abandoned. When the people itself, on the other hand, reclaimed its supposed right to modify the constitution, such initiative always ended up in endless commotions and utopian projects of constitutional reforms.<sup>507</sup>

In the *Fragments*, Constant argued that since the ultimate goal of politics was to ensure that individuals could develop their faculties, a nation would be better advised to stick with the constitution they had, unless it was so vicious that inaction would prove worse than the 'secousse du changement':

En thèse générale une nation peut et doit s'abonner avec ses institutions, pour un espace de tems, durant lequel elle puisse se créer des habitudes, jouir du repos, et ne pas consumer perpétuellement toutes ses forces à des tentatives d'améliorations politiques qui ne sont que le moyen, ce qui lui ferait négliger les améliorations morales, l'acquisition des lumières, le perfectionnement des arts, la rectification des idées, choses qui sont le but.<sup>508</sup>

Constant's overall stress on stability translated into a theory of constitutional change that avoided popular upheavals while limiting the constituted powers' possibilities of constitutional reforms. A constitution, in Constant's definition, was the guarantee of principles.<sup>509</sup> Constant distinguished two different sets of dispositions within a constitutional text: a core set of unalterable principles, which constituted powers could never amend even if they concurred to do so, and a secondary set of dispositions that the constituted powers could amend without extraordinary procedure as soon as public opinion changed on these matters.<sup>510</sup> These principles were Constant's individual rights and political rights, and his

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<sup>505</sup> *PdP* (1806), 118.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Ibid.*, 226-230; 689-690.

<sup>508</sup> 'Additions Constitution républicaine,' 702. See also 759.

<sup>509</sup> *PdP* (1806), 224.

<sup>510</sup> *Ibid.*

hope was that these would be soon inscribed in a revised constitutional text. Since opinions changed over time, constitutional texts were bound to be updated continuously. True principles, however, had to remain intact, since they embodied the conditions of possibility of political life. As a general rule, constitutions needed to be brief, so as to allow opinion to bring about change without the need for constantly updating constitutions themselves:

Le gouvernement est stationnaire: l'espèce humaine est progressive. Il faut que la puissance du gouvernement contrarie le moins qu'il est possible la marche de l'espèce humaine, ce principe, appliqué aux Constitutions, doit les rendre courtes et pour ainsi dire, négatives, elles doivent suivre les idées, pour poser derrière les peuples des barrières qui les empêchent de reculer, mais elles ne doivent point poser devant eux des barrières qui les empêchent d'aller en avant.<sup>511</sup>

The problem of recent constitutions in France was not only their extended scope – they had attempted to regulate too many things, thereby leaving little room for governmental action – but also the latent impossibility to reform them easily.<sup>512</sup> With Constant's 'moyen régulier d'améliorations constitutionnelles,' constitutions could be easily amended without the need for changing the constitution itself.<sup>513</sup> Further, this legitimate mode of constitutional changes avoided empty plebiscitary procedures, only designed to extort from the people a 'assentiment factice.'<sup>514</sup> In principle, the people contributed *indirectly* to constitutional reforms through elected representatives.<sup>515</sup> Once opinion, led by intellectuals, was ripe, constitutional changes would be required, and best implemented by the power in place, according to a procedure Constant detailed in his *Fragments*.<sup>516</sup> This view of constitutions implied that the people – or rather intellectuals – could refer themselves to constitutional principles to assess a government's regularity, and draw the people's attention upon the government's violation of its rights.<sup>517</sup>

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<sup>511</sup> 'Additions Constitution républicaine,' 702.

<sup>512</sup> *PdP* (1806), 224-225.

<sup>513</sup> *FCR*, 654.

<sup>514</sup> *Ibid.* 655.

<sup>515</sup> *Ibid.* 654-657.

<sup>516</sup> *Ibid.* 654-655.

<sup>517</sup> *PdP* (1806), 667-677.

## II. Representative Government as the Receptacle of Public Opinion

Scholars are split over Constant's theory of representative government. Nadia Urbinati has argued that Constant advocated an 'elitist view of representative government' reminiscent of Sieyès.<sup>518</sup> For Richard Whatmore, Constant was similarly closest to representative sovereignty. He designed a republican system 'in which sovereignty was held by an artificially created abstract being,' thereby 'depriving the people of political agency.' Constant, on this reading, was fearful of 'the extremism that he expected to accompany popular rule. Democracy in government, in the participatory sense, had to be curtailed.'<sup>519</sup> Others, often in line with their reading of Book I of the *Principes* (1806), have held that Constant's views on representative government rested on popular sovereignty. On this line of interpretation, Constant was no elitist, but on the contrary a 'democrat' or 'republican' who sought to design a representative system where political liberty, direct elections and a buoyant political life played a central role.<sup>520</sup>

Constant endorsed neither representative sovereignty nor popular sovereignty. As Staël had done in *Des circonstances actuelles*, Constant believed that the people's power in a representative government was best designated as public opinion, understood as the expression of society's interests. Constant agreed with the fundamental flaws Necker and Staël had highlighted about sovereignty: absolute power in the hands of either representatives or the people; a monolithic understanding of the general interest; the potential arbitrariness of consent-based decision making. The theory of representative government he fleshed out in the *Fragments* and the *Principes* consisted in making of elected chambers the *receptacle* of public opinion, through different institutional mechanisms (direct elections, petitions) designed in such a way that they ensured that society's diverse interests were duly reflected in the representative assemblies – something that the current institutional apparatus of the Constitution of year VIII strongly impeded.

In Constant's view, participation in political affairs was not an end itself – a sort of primal republican ideal – but a means to an end, destined to reach a specific result: the correct handling of the nation's needs or interests, with sound legislation as a primordial requirement.<sup>521</sup> 'Le But du Pouvoir Législatif' Constant observed in the *Fragments*, 'est

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<sup>518</sup> Urbinati, *Representative Democracy*, 143.

<sup>519</sup> Whatmore, 'Democrats and Republicans,' 47.

<sup>520</sup> Holmes, *Constant*, 131-138, Fontana, *Constant*, 49-52, Jainchill, *Reimagining Politics*, 280; Vincent, *Constant*, 185-187; Garsten, 'From Popular Sovereignty to Civil Society,' 243-254; 260.

<sup>521</sup> See the definition Constant gave of political liberty as a 'garantie' of individual liberty: 'Si la liberté

d'exprimer les besoins du Peuple et d'y pourvoir.'<sup>522</sup> The people, understood as an aggregation of diverging interests, should be the authors of the laws because, in Constant's understanding, they were always the best judges of what their interests were. They expressed these through different channels to make sure representatives did not substitute their own interests or some fictional general interest for society's real interests. This view implied a strong anti-voluntarist understanding of politics, which made of laws the product of a rational procedure of data extraction and subsequent proceeding through deliberation. It also relied upon an intellectualist type of political participation that effectively put the propertyless populace out of the game, while preventing representatives from substituting their own judgment to public opinion.

To have a full view of Constant's theory of representative government during the Napoléonic era, we need to add to the *Fragments* and the manuscript of the *Principes* two other manuscripts Constant worked on at around the same time: his translation of Godwin's *Political Justice* and the personal, revised copy he made of some key chapters of Staël's *Des circonstances actuelles*. I first show how Constant's antivoluntarist, public-opinion-based conception of representative government stemmed in part from his engagement with Godwin. I then consider how, in reaction to Roederer and Sieyès' defence of representative government as the government of experts, Constant sought to turn the representative assembly into the mirror image of public opinion through several institutional means: direct elections, petitions, property-based political rights and a mandate based on 'responsabilité d'opinion.'

### **Godwin's Lessons: Public Opinion, Truth and Representation**

From autumn 1798 to January 1800, Constant worked on a translation of the first edition of Godwin's *Enquiry Concerning Political Justice*. Several hypotheses as to why Constant embarked on such a project have been brought forward. The most plausible one was that Constant wanted to use Godwin's revolutionary credentials to attack both the neo-Jacobins and the Directory government, whose authoritarian manoeuvres increasingly

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politique ne fait pas partie des jouissances individuelles que la nature a données à l'homme, c'est elle qui les garantit...dans les associations humaines, le bonheur est le but, la garantie est le moyen. la garantie n'est donc pas un bien par elle même.' *PdP* (1806), 649 and note a. I further explore Constant's distinction between individual liberty and political liberty in the final chapter of part III of the dissertation.

<sup>522</sup> *FGA*, 524.

displeased him, without exposing himself to accusations of monarchism.<sup>523</sup> With the downfall of the Directory, these immediate contextual reasons vanished and Constant stopped working on his translation, but he kept enough interest in Godwin to include many of his reflections in his soon-to-be-written *Principes*. This suggests there were deeper theoretical reasons informing his translation and indeed, it has now become clear that Godwin's *Political Justice* was an important source of inspiration for Constant. Scholars have argued that what drew Constant to Godwin was his Protestant stress on private judgment, or his emphasis on the role of passions in politics.<sup>524</sup> What must have struck Constant more generally, however, was Godwin's choice to make of public opinion the basis of government, and the consequences he derived therefrom.

To Godwin, the fact that all governments rested upon opinion had two different meanings – a negative one and a positive one. In the first place, present opinion was still plagued by 'prejudices' that made people subservient to kings and aristocrats.<sup>525</sup> The weight of inherited customs made them blind to the basic truth that all men were essentially equal because they were all endowed with reason.<sup>526</sup> Existing opinion, however, could be progressively enlightened, to the point of reaching the conclusion that, in light of this fundamental equality, each individual ought to lead his personal affairs in the way he saw fit. In an idiosyncratic rewording of Hume's motto that all governments rested on opinion, Godwin wrote:

There is no such disparity among the human race as to enable one man to hold several other men in subjection, except so far as they are willing to be subject. All government is founded in opinion. Men at present live under any particular form, because they conceive it their interest to do so. One part indeed of a community or empire may be held in subjection by force; but this cannot be the personal force of their despot; it must be the force of another part of the community, who are of opinion that it is their interest to support his authority. Destroy this opinion, and the fabric which is built upon it falls to the ground. It follows therefore that all men are essentially independent.<sup>527</sup>

Public opinion in the positive sense Godwin designated both as 'public deliberation' or the ongoing collective inquiry that prevailed in any given society, and the product of that

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<sup>523</sup> See Mauro Barberis' 'Introduction' to *De la Justice politique*, in *OCBC II, I*, 33-53.

<sup>524</sup> See, respectively, Rosenblatt, *Liberal Values*, 67-69 and Vincent, *Constant*, 95-104.

<sup>525</sup> *An Enquiry Concerning Political Justice*, ed. Mark Philp (Oxford, 2013), 233-242; 246-259.

<sup>526</sup> *Ibid.* 64-66.

<sup>527</sup> *Ibid.* 65.

deliberation – the state of opinion or the stage of enlightenment at a given period of time. In other words, public opinion was, ambiguously, both a means and an end, or an instrument and a result. On this understanding, existing opinions were on a journey towards the discovery of truth.<sup>528</sup> This eternal truth he called ‘political justice,’ which he defined in utilitarian terms as the greatest happiness in society. Through the use of ‘individual judgment’ – the defining character of human nature – and the exchange of conflicting arguments, mankind would become gradually better at acting in conformity with ‘justice’ or ‘truth,’ since it was perfectible.<sup>529</sup>

At bottom, public deliberation was the only effective, gradual vector of reform. Godwin strongly opposed political violence as a way of reforming, on the ground that revolutions made progressive amelioration impossible.<sup>530</sup> Governments, on the other hand, should never attempt to impose their own reformist agenda upon society. A fundamental point of *Political Justice* was that power warped judgment. In Godwin’s view, each individual was always the best judge of his interest. Even if, from an external point of view, someone was erring in how to act, trial and error combined with enhanced reflection would inevitable yield some form of improvement.<sup>531</sup> Therefore, governmental attempts to substitute clumsy policies for the judgment of citizens were counterproductive and inevitably resulted in hampering the march of enlightenment. ‘The true principle of social improvement lies in the correcting public opinion. Whatever reform is stolen upon the community unregarded, and does not spontaneously flow from the energy of the general mind, is unworthy of congratulation.’<sup>532</sup>

A fundamental ambiguity of *Political Justice* was that *existing* public opinion was more than often disqualified in the name of Godwin’s abstract, absolute and eternal standard of morality.<sup>533</sup> Rather than making the established practice of the age the sole rule of justice as Hume had done, Godwin often insisted that current institutions could be assessed – and most often negatively – on the ground of a clearly extraneous standard of political justice.<sup>534</sup> In light of mankind’s perfectibility, a stage could be envisaged where governmental force was dispensed with, and social order was based on truth alone.<sup>535</sup> Hume’s argument about the

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<sup>528</sup> Ibid. 122-123.

<sup>529</sup> Ibid. 33-37.

<sup>530</sup> Ibid. 112-113.

<sup>531</sup> Ibid. 307-318.

<sup>532</sup> Ibid. 122.

<sup>533</sup> Ibid. 123.

<sup>534</sup> Ibid. 101-106; 260-265.

<sup>535</sup> Ibid. 51-57; 72-80.

need for positive institutions could accordingly be reversed: since individual mind could be shown to be the recipient of truth – *Political Justice* contained a lengthy, sensualist and strongly determinist account of the workings of the human mind – government no longer needed to play its role of compass in a world of fleeting passions.<sup>536</sup> Quite the contrary: for Godwin, reason was always superior to passions and could appropriately tame them.<sup>537</sup> The cause of the people's numerous misconducts was not human nature, but existing institutions, which should be strongly curtailed in the first placed, and eventually removed.

In Godwin's analysis, there was indeed only one right political arrangement in history, towards which all human communities were converging: 'democracy'.<sup>538</sup> With time, prejudiced opinion would become enlightened opinion, which would result in all human societies peacefully replacing antiquated monarchies by this type of regime form. For the time being, it was already possible to lay out the sort of political standards that should apply to any political society. Since all members of society were endowed with reason, Godwin's egalitarian argument went, each of them ought to have a voice about public concerns. Areas of common interests were necessarily in limited numbers, since society was nothing more than an aggregation of individuals, who each had specific interests that they could appropriately take care of.<sup>539</sup>

At the beginning of the *Enquiry*, Godwin acknowledged the necessity of representation and majority rule, going as far as offering arguments, *contra* Rousseau, in favor of delegation.<sup>540</sup> At the end of the book, however, he dedicated an entire chapter to denouncing what he saw as the noxious role of national assemblies.<sup>541</sup> Parliaments, Godwin now explained, were not the appropriate place for the search for truth. The rule of the majority ran directly against all precepts of reason and justice, by subjecting the minority to measures it deemed unjust.<sup>542</sup> Furthermore, Godwin complained, in the tumult of parliamentary discussion, passion prevailed over judgment. Reason and evidence were sacrificed to ambition and party rule.<sup>543</sup> Worst of all was that debates in national assemblies were 'distorted from their reasonable tenor by the necessity of their being terminated by a

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<sup>536</sup> Ibid. 154-203.

<sup>537</sup> See Mark Philp, *Godwin's Political Justice* (London, 1986), who connects Godwin's rationalism with his early engagement with rational Dissent: 'For Price, as for many other rational Dissenters, the true source of virtue and virtuous acts is the understanding – *contra* Hume, the passions are strictly subordinated to reason' (p. 28).

<sup>538</sup> Ibid. 260-265.

<sup>539</sup> Ibid. 90-93.

<sup>540</sup> Ibid. 90-91.

<sup>541</sup> Book 5, chapter 23.

<sup>542</sup> Ibid. 301.

<sup>543</sup> Ibid. 302-304.

vote’: ‘the whole is then wound up with that intolerable insult upon all reason and justice, the deciding upon truth by the casting up of numbers.’<sup>544</sup> Given these irreparable flaws, Godwin concluded, national assemblies had to be employed as sparingly as possible.<sup>545</sup> Hopefully, Godwin thought, the inevitable progress of reason would make the necessity of collective-decision gradually less indispensable, and ultimately redundant.<sup>546</sup>

In Godwin’s ultimate analysis, public opinion could never be properly institutionalized within any national assembly. Representatives inevitably tended to usurp the people’s judgment about their interests. Outside settled institutions, public deliberation had a better chance of remaining unspoiled in its search for truth. This concern for the result of collective-decision making, in *Political Justice*, went hand in hand with a strong distrust of legitimacy by consent:

Private judgment and public deliberation are not themselves the standard of moral right and wrong; they are only the means of discovering right and wrong, and of comparing particular propositions with the standard of eternal truth. Too much stress has undoubtedly been laid on the idea...of a nation deciding for itself upon some great public principle, and of the highest magistracy yielding its claims when the general voice has pronounced. The value of the whole must at last depend upon the quality of the decision.<sup>547</sup>

For Godwin, self-rule had little value in itself.<sup>548</sup> People being equal, they should decide together what ought to be done in matters of common interest, but this process should always be assessed on the basis of the results obtained – something that made the matter of political obedience potentially explosive.<sup>549</sup> What made a law legitimate was less the source from which it was derived than its conformity with an external standard of platonic truth.<sup>550</sup> As Pierre Rosanvallon has argued, for Godwin, democracy as the collective exercise of liberty was nothing more than the recognition of the superiority of a preexistent, superior moral law.<sup>551</sup> For Godwin, the people’s political power manifested itself in their strife for deciphering the general interest, which Godwin often conflated with ‘truth.’ Popular

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<sup>544</sup> Ibid. 301-302.

<sup>545</sup> Ibid. 304.

<sup>546</sup> Ibid. 306

<sup>547</sup> Ibid. 94. See also 93: ‘So far as consent has any validity, abstract justice becomes a matter of pure indifference.’

<sup>548</sup> See Godwin’s attack on Montesquieu’s definition of a republic as the type of regime where citizens govern themselves. Ibid. 95.

<sup>549</sup> Ibid. 96-99.

<sup>550</sup> Ibid. 93.

<sup>551</sup> Rosanvallon, *Le libéralisme économique*, 154.



sovereignty did make any sense to Godwin, and in fact he never used the term. Laws were never the product of a wayward popular will, but the result of an intellection process.<sup>552</sup> ‘Legislation, as it has been usually understood,’ Godwin insisted, ‘is not an affair of human competence. Reason is the only legislator, and her decrees are irrevocable and uniform. The functions of society extend not to the making, but to the interpreting of law; it cannot decree, it can only declare that which the nature of things has already decreed.’<sup>553</sup>

Constant shared a number of Godwin’s premises, but often drew different conclusions from them. The problem Constant had with Godwin was what he called his exaggerations, some of which he laid out in a commentary piece he must have written around 1810.<sup>554</sup> In his view, Godwin was too radical in his predictions about a potentially stateless, entirely rational mankind. His chiliastic theory of perfectibility made his otherwise interesting arguments about politics simply inapplicable. In his notes on perfectibility, Constant listed Godwin amongst those writers ‘qui se sont laissés emporter dans leurs conjectures sur le perfectionnement de l’espèce humaine.’<sup>555</sup> For Constant, there was no such thing as an eternal, objective, almost platonic truth that provided a comprehensive, universal criterion of politics and morality. There was only a small set of fundamental truths – equality of political rights and civil liberties – that had been gradually and tentatively rediscovered, and whose recognition did not throw irremediable discredit on political regimes that left some scope to them, for instance a constitutional, hereditary monarchy like England.

There were, however, three main points on which Constant fundamentally agreed with Godwin, while deriving different conclusions from it – his belief that political power spoiled judgment, his anti-voluntarist approach to politics, and his conviction that opinion constituted the only guide to timely reform.

As Andrew Jainchill has shown, the Constitution of Year VIII consecrated the rule of the elite. The new constitutional system was marked by a ‘rejection of democratic practices’ and implemented ‘a rational political order with a single overarching power’ reminiscent of

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<sup>552</sup> Ibid.

<sup>553</sup> Godwin, *Enquiry*, 95.

<sup>554</sup> Constant’s dissatisfaction with some of Godwin’s arguments is perceptible in the reordering of chapters he made in his translation, as well as in the footnotes he added to correct some of Godwin’s assertions. An advertisement for Constant’s stillborn translation, published in the *Journal général de la littérature en France* in 1799 announced that ‘Le Traducteur a rectifié dans ses observations les idées exagérées ou bizarres qui déparent l’original anglais.’ See Barberis, ‘Introduction,’ 37. Constant wrote a first article on Godwin in 1810, ‘De Godwin, de ses principes et de son ouvrage sur la justice politique,’ which remained unpublished. He published a revised version of it in 1817 in the *Mercure de France*. A third, again slightly different version was published alongside other pieces in the *Mélanges de littérature et de politique* (1829). References are to *De la justice politique*, OCBC II, 2.

<sup>555</sup> ‘Fragmens d’un essai sur la perfectibilité,’ 439.

the Physiocrats' legal despotism.<sup>556</sup> In the new regime, in Cabanis' words, 'les choix doivent partir non d'en bas, où ils se font toujours nécessairement mal, mais d'en haut, où ils se feront nécessairement bien'<sup>557</sup> 'Il est facile d'affirmer que des lieux élevés doit partir la lumière, et qu'un gouvernement éclairé doit mener la foule,' Constant retorted vehemently.<sup>558</sup> As Lucien Jaume has shown, the manuscript of the *Principes* offered a thorough critique of the eighteenth-century belief that power and enlightenment were complementary.<sup>559</sup> It was in Godwin's *Political Justice* that Constant found some of the elements of this critique. Constant explicitly endorsed Godwin's argument that power inevitably warped judgment, making rulers less enlightened than they believed themselves to be and often prone to mistakes, insisting, like Godwin had done, that each individual always remained the best judge of his own interests.<sup>560</sup> Unlike Godwin, Constant did not believe that individuals would soon be able to act purely rationally. Accordingly, he insisted that 'les chances d'erreur des gouvernans' constituted an argument, not for wishing government away in an utopian fashion, but for reducing the scope of political authority to what was strictly necessary.<sup>561</sup>

Constant's epistemic concern for the possible mistakes of governors was central to his discussion of the 'droits de la majorité,' to which he devoted an entire chapter in the *Principes*. The latter opened up with a nod to Godwin's remarks about the 'inconvéniens' of collective decisions.<sup>562</sup> Following Godwin, Constant argued that the passions that prevailed in parliamentary assemblies 'peut conduire à l'erreur.' Even when the decisions of the majority were taken in a spirit of calm, he added, their accuracy remained questionable: 'Elles se forment d'une transaction entre les opinions divergentes. Or, si la vérité se trouvait dans l'une de ces opinions, il est évident que la transaction n'a pu se faire qu'au détriment de la vérité. Elle peut avoir rectifié sous quelques rapports les opinions fausses ; mais elle a dénaturé ou rendu moins exacte l'opinion juste.'<sup>563</sup> The product of parliamentary deliberation, Constant acknowledged, did not always coincide with truth. But this, he suggested, might prove to be an asset: the shortcomings of collective decisions were a decisive argument against the idea that majority decisions were infallible.<sup>564</sup> Because majority decisions were always forced transactions between diverging interests, none of them could ever claim to instantiate the

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<sup>556</sup> Jainchill, *Reimagining Politics*, 198-199; 202

<sup>557</sup> *Considérations*, 26.

<sup>558</sup> *PdP* (1806), 160.

<sup>559</sup> *L'individu effacé*, 70-73.

<sup>560</sup> *PdP* (1806), 169.

<sup>561</sup> *Ibid.* 164.

<sup>562</sup> Book II, chapter 2.

<sup>563</sup> *Ibid.* 136.

<sup>564</sup> *Ibid.*

truth about the general interest.

In its essence, the project of bridging the gap between legislation and some sort of abstract truth did not seem reasonable to Constant. Collective truths were to him a contradiction in terms. In the *Fragments*, Constant wrote: ‘toute décision d’une assemblée est une idée collective. or toute idée collective est toujours une idée fausse. qu’en conclure. qu’il faut des décisions des assemblées, comme des actes du gouvernement, ce qui est indispensable, mais que le moins est le mieux.’<sup>565</sup> Against the blindness of majority rule, Constant insisted on the importance of imposing clear boundaries to collective-decision making, in the form of individual rights, enshrined in a constitution. Majority rule, even if fundamentally unwarranted – ‘le droit de la majorité est le droit du plus fort, il est injuste’ – had to be reckoned with, Constant conceded: ‘Si, des erreurs possibles de la majorité, l’on concluait que l’on doit subordonner sa volonté à celle du petit nombre, l’on arriverait à des institutions violentes ou mensongères.’<sup>566</sup>

Yet Constant did not entirely give up on Godwin’s project of making laws as rational as possible. He was clearly as worried as Godwin about the potentially arbitrary character of laws, even when these respected the boundaries set within the constitution. On this point, Constant believed that Godwin’s idea that laws needed to conform to some form of pre-existent standard was noteworthy. In his 1829 article on Godwin, he insisted that his reflections on positive laws was ‘l’un des objets sur lesquels il a répandu le plus de lumière.’<sup>567</sup> In the same piece, Constant commended the work of Jean-Baptiste Salaville, a moderate republican who apparently had also embarked on a stillborn translation of Godwin, and had exchanged letters with Constant and Staël about human perfectibility.<sup>568</sup> In a brief essay published in 1799, *De l’Homme et la société* (the last three chapters of which Constant described as a well-done analysis of what could be useful amongst Godwin’s principles on positive laws), Salaville had offered an ‘empiricist’ account of laws.<sup>569</sup> His point of departure was a rejection of contractarianism and a pronounced skepticism vis-à-vis legitimacy by consent. Laws for Salaville were not the product of some form of arbitrary will, and on this point he followed Godwin. But rather than referring laws to some abstract truth, Salaville

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<sup>565</sup> ‘Additions Constitution républicaine,’ 744.

<sup>566</sup> *PdP* (1806), 169.

<sup>567</sup> Constant, ‘De Godwin, et de son ouvrage sur la justice politique (1829),’ 1434.

<sup>568</sup> ‘Godwin (1810),’ 1418. Salaville wrote in 1801 a booklet entitled *De la perfectibilité*. On the connections between Staël, Constant and Salaville, see Hofmann, ‘Perfectibility,’ 253-254. For biographical information on Salaville, see Michael Sonenscher, *Sans-culottes. An Eighteenth Century Emblem in the French Revolution*, (Princeton, 2008), 36.

<sup>569</sup> Minchul Kim, ‘Sociability, Natural Jurisprudence and Republicanism in the French Revolution: Jean-Baptiste Salaville’s Empiricist Science of the Legislator,’ *French Studies*, 72/4 (2018), 505-520.

insisted that laws needed to proceed from the observation of the facts of daily life.<sup>570</sup> Salaville was unclear about what these facts were, and somehow confusedly insisted on calling laws the product of a general will despite the strong antivoluntarist thrust of his argument.<sup>571</sup> Despite these inconsistencies, what Constant found worthy of recommendation in both Godwin and Salaville was their common antivoluntarist tack, which so clearly ran counter to the *légitimisme* of revolutionaries, most of whom took laws to be legitimate as long as they proceeded from the people's will.<sup>572</sup> In the *Principes*, Constant insisted that laws, *stricto sensu*, could not be described as the product of any kind of will:

L'on a défini les Loix l'expression de la volonté générale. c'est une definition très fausse. les Loix sont la déclaration des relations des hommes entr'eux. du moment ou la société existe, Il s'établit entre les hommes de certaines relations ; ces relations sont conformes à leur Nature, car si elles n'étoient pas conformes à leur nature, elles ne s'établiraient pas. les Loix ne sont autre chose que ces relations observées et exprimées...faire une loi nouvelle, c'est seulement une déclaration nouvelle de ce qui existoit précédemment. La Loi n'est point à la disposition du Législateur. elle n'est point son oeuvre spontanée. le Législateur est pour l'ordre social ce que le Physicien est pour la nature.<sup>573</sup>

This implied a minimalist understanding of lawmaking, where the government could never act spontaneously without running the risk of committing mistakes. If it acted out of its own volition, it constituted itself the sole judge of present needs without accurately knowing them.<sup>574</sup>

Godwin had seen in the moral law the reference for any sound legislation. References to some form of idealized 'nature' are not absent from the manuscript of the *Principes*, where Constant included laudatory mentions of members of the second generation of Physiocrats.<sup>575</sup>

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<sup>570</sup> Salaville, *L'homme et la société, ou Nouvelle théorie de la nature humaine et de l'état social* (Paris, an VII), 361.

<sup>571</sup> Ibid. 373-387.

<sup>572</sup> Jaume, *Le discours Jacobin*.

<sup>573</sup> *PdP* (1806), 177-178. Constant might be targeting article 6 of the *Déclaration des droits de l'homme et du citoyen*: 'La Loi est l'expression de la volonté générale.'

<sup>574</sup> Pierre Rosanvallon has called 'political rationalism' the idea that freedom proceeded, not from the people authoring the law, but from the laws' conformity with a pre-existent natural standard. See 'Political Rationalism and Democracy in France,' in *Democracy Past and Future*, ed. Samuel Moyn (New York, 2007), 127-146.

<sup>575</sup> *PdP* (1806), 555-556, esp. note a. The connection with Physiocracy may seem far-fetched, in light of Constant's rejection of enlightened despotism. On this point, perhaps Sieyès and Roederer can be counted as heirs of the Physiocrats, but on other points – *laissez faire*, small government and freedom of the press – it seems equally plausible that Constant was treading in their footsteps. The missing link here is *neo-Physiocracy*, which defended *laissez faire* without a legal despot. In Germany, Jakob Mauvillon, who had ghostwritten Mirabeau's *De la monarchie prussienne sous Frédéric le Grand* (1788) – a work Constant extensively quoted in the *Principes* – was a prominent representative of this new trend. Constant himself had met Mauvillon during

In general, however, it is clear that Constant did not believe that some form of universal, platonic truth should provide the standard to which laws should conform. Further, Constant was concerned about including some form of civic participation in the collective decision making process, without which laws could only with difficulty be said to be legitimate. In ‘public opinion,’ Constant found the concept to describe both the source from which laws should proceed and the standard to which they should correspond.

Laws had to be the expression of society’s needs, as expressed through public opinion. Constant followed Godwin in his affirmation that the only valid principle of reform was ‘l’amélioration de l’opinion publique.’<sup>576</sup> In his 1810 piece, Constant wrote that no author other than Godwin had more rightly condemned revolutionary violence, and ‘ne recommanda plus aux hommes d’attendre tout des efforts de la raison.’<sup>577</sup> But in Constant’s eyes, Godwin was not coherent enough in his progressivism. Godwin had not read enough Hume: what ultimately mattered, when it came to day-to-day legislation making, was current opinion. True principles as recognized by public opinion, for Constant, provided the fundamental, constitutional bases of collective decision making: respect for individual independence and some form of political equality. Beyond that, to determine the actual content of laws, only the opinion of the day mattered:

Nous blâmons les Novateurs de faire des loix en sens inverse de l’opinion existante, et nous avons raison: Ils préfèrent l’avenir ou ce qu’ils appellent l’avenir au présent, & ils n’en ont pas le droit. mais la loi qui se perpétue lorsqu’elle n’est plus l’expression du sentiment national, a un tort du même genre, avec cette seule différence que c’est devant le passé qu’elle veut faire plier le présent. or le tems n’y fait rien. l’opinion passée n’existe plus: elle ne peut motiver des loix. l’opinion à venir n’existe pas encore: elle n’existera peut être jamais. elle ne peut pas non plus motiver des loix. l’opinion présente est la seule qui existe réellement.<sup>578</sup>

Constant suspected that Godwin, in an attempt to make truth triumph over opinion, aspired to transcend the inevitable limitations representative government imposed upon deliberative

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his years in Brunswick, and saw him somewhat as a mentor in politics. Unlike the first generation of Physiocrats who took *évidence* to refer to their exclusively land-based economic conclusions and recurrently dismissed present-day opinion as a web of inaccuracies that needed to be taught in the light of reason, Constant, together with Mauvillon, equated *évidence* with *existing* public opinion. On Constant and Mauvillon, see Kloocke, *Constant*, 53-58. For further comments on Constant and Physiocracy, see Ghins, ‘Politics of reason.’

<sup>576</sup> ‘De la justice politique,’ 252.

<sup>577</sup> ‘Godwin (1810),’ 360.

<sup>578</sup> *PdP* (1806), 580, note a.

politics.<sup>579</sup> Under yet another complaint on the part of Godwin that factions in parliament obstructed the collective discovery of truth, Constant wrote in a footnote to his translation: ‘L’auteur a répondu d’avance à cette objection, en disant, Chap. XXI, qu’un pays devait être gouverné suivant l’opinion de la majorité de ses habitans, non que cette opinion fût un garânt certain de la vérité, mais parce que, quelque’erronnée qu’elle puisse être, elle est néanmoins la seule règle qui existe.’<sup>580</sup>

Constant explained at length how he envisaged public opinion as the guide to law-making in two complementary chapters of the *Principes*, ‘Des améliorations prématurées’ and ‘Des idées de stabilités,’ which immediately followed his account of representative government.<sup>581</sup> The cornerstone of his argument was that, mankind being progressive, the legislator had to pay attention to the continuous changes in society’s needs, as expressed through public opinion, and register these once what needed to be done had become clear enough. In the 1790s, Constant had shown a high degree of contempt for existing habits and customs, insisting that these would inevitably vanish under the march of reason. The *Principes* were less categorical. Constant now professed his admiration for ‘ce qui est ancien,’ because interests spontaneously crystallized around what existed.<sup>582</sup> But fetishizing what Constant generically called ‘institutions’ was counterproductive – soon there would be a hiatus between opinions and institutions, and the latter would collapse because they would no longer be in phase with existing needs. On the other hand, when the government spontaneously pushed forward and precipitately carried out improvements without paying enough attention to what public opinion desired, it constantly ran the risk of enacting laws that were not in perfect lockstep with the needs of the people:

Les loix qui portent l’empreinte de l’imperfection de l’esprit général sont proportionnées à l’époque pour laquelle elles existent. des Loix plus parfaites contrasteroient avec les idées. dans cette hypothèse, les besoins du peuple n’étant pas l’origine de ses loix, et leurs auteurs agissants spontanément et n’étant pas infaillibles, le peuple se voit exposé à tous les inconvéniens attachés à la disproportion des loix avec les idées, et à tous ceux qui peuvent provenir des méprises des Législateurs.<sup>583</sup>

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<sup>579</sup> ‘In a country in which universal truth was already established,’ Godwin had written, ‘there would be little need of a representative assembly.’ *Political Justice*, 293.

<sup>580</sup> ‘De la justice politique,’ 201.

<sup>581</sup> Book XV, chapters 5 and 6.

<sup>582</sup> *PdP* (1806), 581.

<sup>583</sup> *Ibid.* 584.

The origin of laws was important, but always best understood as the people's objective needs – the interests that existed at a given period of time in a given society. This conception drastically abridged the margin of appreciation of rulers, who were reduced to agents responsible for the mere execution of what public opinion had already decreed. The revolutionaries' Rousseauist ideal of self-government had to be replaced by a historicist understanding of politics, where the unceasing march of time – the swirl of opinions that reflected society's changing needs – dictated political reforms. 'L'opinion tend à modifier graduellement les lois et les institutions qui la contrarient. Laissez lui faire ce travail...Le tems, dit Bacon, est le grand réformateur. Ne refusez pas son assistance. Laissez le marcher devant vous, pour qu'il applanisse la route.'<sup>584</sup> When the government refused to take opinion as its 'guide,' it illegitimately substituted its own judgment for the judgment of the public, its flawed individual opinion to enlightened public opinion. 'L'utilité n'est pas susceptible d'une démonstration précise. C'est un objet d'opinion individuelle, et conséquemment de discussion indéfinie.' When rulers were allowed to act upon the vague pretext of utility, social authority became the 'seul juge de toutes ces possibilités,' at the expense of the people's real interests.<sup>585</sup>

Godwin had renounced the project of making representative assemblies the receptacle of public opinion, arguing that they were best disposed of altogether. Constant believed that they could be turned into a faithful echo chamber of the people's needs, provided that specific institutional means were in place.

### **The Government of Experts vs. the Government of Opinion**

Bryan Garsten has argued that Constant was concerned about the representatives' tendency to usurp the 'popular will.' His originality resided in finding 'ways of institutionalizing resistance to centralizing and usurping authority,' notably through direct elections.<sup>586</sup> Garsten has rightly highlighted usurpation as one of Constant's chief concerns. What was being usurped, however, was not an always-fictional popular will, but society's concrete and diverse interests, as expressed through public opinion. As Constant explained, the very nature of representative government implied that, as soon as candidates were elected,

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<sup>584</sup> Ibid. 590.

<sup>585</sup> Ibid. 156.

<sup>586</sup> Garsten, 'Representative Government.'

their interests began to diverge from those of their constituents.<sup>587</sup> An adequate balance of powers, he suggested, was one of the ways to ensure that the rulers' interests conformed to the general interest – a point we shall explore in part III of this dissertation.<sup>588</sup> Political participation properly understood was another manner of encouraging this correspondence.<sup>589</sup> The institutional measures Constant envisaged – direct elections and petitions – were designed as channels through which accurate information about specific interests could be communicated to the government. In that respect, Constant was less close in ultimate intention to Rousseau, as Garsten has argued, than to Godwin, with whom he shared the conviction that each individual – and by extension, for Constant, each constituency – always knew best how his interests ought to be conducted. The risk of usurpation pertained not to the people's democratic right to collectively exercise their liberty, but to the citizens' ability to analyze their interests and determine how best to administer these – not to self-government, but to efficient management. The legislative power was not the embodiment of the people's will, but a chamber of amelioration, destined to act upon the reforms a gradually more enlightened public opinion called for.

There was, however, one point on which Constant was indeed close to Rousseau: his stress on 'estime publique' among citizens as a way of preventing factional interests from getting the upper hand over the general interest. Constant's complement to his deep, Godwin-inspired mistrust of the representatives' ability to deliver rational legislation was a revamped version of *estime publique* in a representative system. In that regard, directly electing representatives and sending petitions to the chambers were not only a way of voicing local interests, but also a means of fostering *confidence* between citizens and their representatives through political participation. Constant's representative system was thus the repository of public opinion in two different senses – a rational and an emotional one. The representative assembly constituted the mirror image of society's present needs, and was irrigated by a general spirit of trust in the representative's ability to deliver sound reforms.

Constant's theory was an explicit answer to the type of representative government the Constitution of Year VIII had implemented. As Andrew Jainchill has shown, the Constitution was the brainchild of Roederer and Sieyès (helped by Boulay de la Meurthe), acting in

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<sup>587</sup> *PdP* (1806), 650-651: 'Le système représentatif ne lève point cette difficulté. Vous choisissez un homme pour vous représenter parcequ'il a le même intérêt que vous. Mais par cela même que vous le choisissez, votre choix le plaçant dans une situation différente de la votre, lui donne un autre intérêt que celui qu'il est chargé de représenter.'

<sup>588</sup> *Ibid.* 651.

<sup>589</sup> *Ibid.* 657.



concert with Napoléon.<sup>590</sup> Constant scholars have usually drawn a sharp contrast between Sieyès' theory of representative government and Constant's on two main grounds. First, while Sieyès defended an 'elitist,' 'authoritarian' and 'anti-political' model, based on a Hobbesian understanding of representation whereby the people was the principle of political authority without ever actually exercising it, Constant defended an 'active political life to thwart despotism.'<sup>591</sup> Second, while the drafters of the Constitution of Year VIII envisaged representation as a way of transcending individual interests and giving shape to a nation that had no existence outside the representative assembly, Constant advocated a 'pluralist' type of representation where individual interests were duly taken into consideration and integrated in the process of determining the general interest.<sup>592</sup>

These elements of comparison can be both accounted for and amended once we understand Constant and Sieyès' respective theories of representative government as two different, anti-voluntarist ways of making sure that laws were in conformity with the real interests of the nation. Whereas Constant endorsed a bottom-up approach that ultimately made citizens and intellectuals the spokespersons of public opinion, Sieyès believed that governmental experts were the privileged interpreters of the general interest.

In 1799, Cabanis had declared that 'sans le véritable système représentatif, tout se fait donc au nom du peuple et pour le peuple ; rien ne se fait directement par lui.'<sup>593</sup> This conformed to Sieyès' view that the nation was embodied in the representative assembly: 'hors l'élite représentative, nul n'a droit de représenter, nul n'a le droit de parler au nom du peuple.'<sup>594</sup> The people, in Sieyès' analysis, were unable to discern where the general interest resided, and needed to be shown the way: 'un des effets du système représentatif dans l'ordre politique,' he insisted, 'est de mettre chaque fonction dans les mains d'experts.'<sup>595</sup>

To ensure that the legislative power was indeed granted to experts, the Constitution of Year VIII had put in place a unique electoral body, in lieu of simply having different elections in different constituencies. In the latter system, Cabanis explained, sections were

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<sup>590</sup> Jainchill, *Reimagining Politics*, 197-242.

<sup>591</sup> Ibid. 275-285. On this basis, Jainchill opposes Sieyès' 'liberal authoritarianism' to Constant's 'liberal republicanism.' See also Garsten, 'From Popular Sovereignty to Civil Society,' 243-254; 260.

<sup>592</sup> Lucien Jaume, 'Le problème de l'intérêt général dans la pensée de Benjamin Constant,' in *Le Groupe de Coppet*, 159-177; Jaume, *L'individu effacé*, 78; Vincent, *Constant*, 176, 184; Garsten, 'From Popular Sovereignty to Civil Society,' 254-255.

<sup>593</sup> *Considérations*, 36. See also 'Discours prononcé par Roederer, conseiller d'État, orateur du gouvernement, dans la séance du Corps législatif du 13 ventôse an IX (4 mars 1801), concernant le projet de loi présenté par le Gouvernement pour la formation des listes de notabilité,' in *Oeuvres VII*, (Paris, 1857), 135-145. Constant explicitly targeted these texts in FCR, 559-561.

<sup>594</sup> *Théorie constitutionnelle de Sieyès. Constitution de l'an VIII. Extraits de mémoires inédits de Boulay de la Meurthe* (Paris, 1836), 6, quoted in Gauchet, *Révolution des pouvoirs*, 215.

<sup>595</sup> Manuscript of 1795, quoted in Rosanvallon, *Démocratie inachevée*, 13.

unable to communicate with each other and reach agreements. This would result in ‘choix sectionnaires.’ The electoral power had therefore to be given to a permanent Sénat conservateur (designated by the first Consul), which had to pick candidates amongst the locally established ‘listes de confiance.’<sup>596</sup> In Cabanis’ words, the electoral body had to be placed not at the base but at the summit of the political apparatus. The selection of elites was thus the result of a heavily centralized system, ultimately controlled by Napoléon, and complemented by a two-level voting system. Commenting upon these lists, Roederer explained that its inherent logic was that confidence came from below, while enlightened decisions were made by an elective aristocracy: ‘Que signifie le mot elective joint au mot aristocratie? Il signifie que ce petit nombre de sages qui sont appelés à gouverner ne tiennent leur droit que du choix, de la confiance de leurs concitoyens.’<sup>597</sup>

This screening process constituted, according to Cabanis, a guarantee of correct decision-making: ‘les choix doivent partir non d’en bas, où ils se font toujours nécessairement mal, mais d’en haut, où ils se feront nécessairement bien.’<sup>598</sup> This reflected Sieyès’ longstanding concern about the quality of legislation making. As Lucien Jaume has shown, Sieyès’ speeches of Thermidor, year III can be read as a radical critique of will, and a defense of a cognitive legislative process whereby the needs of the people were made explicit and synthesized before a decision could be made.<sup>599</sup>

Like Sieyès, Constant believed that everything in a large modern nation must ultimately be conducted through representatives. And, like him, he thought that the goal of representation was not to express the will of the people, but to allow the nation to become aware of its real interests and be able to articulate them through a peaceful and coherent process. Constant, however, had different thoughts about how this goal could be achieved. His answer to Hobbes’ problem of the modern state’s embodiment of the nation was, first, to limit the state within strict boundaries – it could only operate on issues of common interest.<sup>600</sup> Second, on these specific issues, Constant sought to find ways of ensuring the constant flow of information between constituencies and representatives. The premises of Constant’s project can be found in his personal copy of *Des circonstances actuelles*, in which Constant

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<sup>596</sup> Jaume gives details about this procedure in ‘Le problème de l’intérêt général,’ 161-165.

<sup>597</sup> ‘Discours du 13 ventôse,’ 140.

<sup>598</sup> *Considérations*, 26.

<sup>599</sup> Lucien Jaume, ‘Sieyès et le sens du jury constitutionnaire: une réinterprétation,’ *Historia Constitucional*, 3 (2002), 173; 188. For another reading of Sieyès as an antivoluntarist, see Stéphane Rials, ‘Sieyès ou la délibération sans la prudence,’ *Droits*, 13 (1991), esp. 127-128; 132.

<sup>600</sup> *PdP* (1806), 145.

duly reproduced and slightly updated the passages where Staël had made of public opinion the cornerstone of what he now called ‘le système représentatif’:

Les intérêts et la volonté nationale gouvernent *ils* librement et véritablement? Si ce résultat n’est pas obtenu, [...] étudiez à quoi tient le défaut de la représentation, *alors* l’opinion publique *deviendra* le pouvoir souverain d’un Gouvernement Représentatif. [...] *Lorsque* la loi *peut* se mettre au dessus de l’opinion, [...] il n’y a pas de gouvernement Représentatif... Si les Elus représentent [...] les intérêts nationaux, le gouvernement est Représentatif.<sup>601</sup>

Constant’s reformulation suggested that, in the current system (the copy was written between 1799 and 1806), public opinion was *not yet* duly represented. In a way, the institutional structure advocated in *Des circonstances* anticipated, in Constant’s eyes, the problems he associated with the Constitution of year VIII. The type of public opinion that now needed to be represented, Constant insisted, was *current* opinion. The problem was no longer to tame fashion through the promotion of some hoped-for nation’s wish, as in the 1790s, but to avoid the usurpation of the nation’s *actual* interests, by the government, in the name of some higher, *hypothetical* interest. Further, the gap Staël had established between the people and representatives had to be reduced, without identifying them completely. In another reboot of a passage of *Des circonstances*, Constant wrote:

Le système représentatif *a moins pour objet* que la volonté du Peuple, *en prenant cette expression dans le sens de libre arbitre, soit représentée qu’il n’a pour objet que ses interets et ses droits le soient*, autrement dit, ses interets [...] soient [...] défendus et protégés, comme si la nation elle même pouvait le faire En se réunissant.<sup>602</sup>

In the *Principes* and the *Fragments*, Constant accused Roederer and Cabanis of envisaging the national assembly as a place where the general interest could be abstractedly enunciated, and then passed on to the rest of the nation from top to bottom. Constant’s criticism was *not* that this was an unacceptably elitist position. His point was rather that this top-down approach was unlikely to yield well-informed decisions. The result of this unitary electoral body was to bring in the national assembly representatives that had no knowledge of the needs of their constituency. Representatives had to be *directly* elected, in *each constituency*, Constant pleaded, because this was the only way to ensure that they had the

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<sup>601</sup> ‘[Copie partielle de *Des circonstances actuelles* de Madame de Staël (1799-1906)], in *OCBC IV*, 863. Italics are from the editor, and reflect Constant’s changes to the original manuscript. Ellipses are Constant’s.

<sup>602</sup> Ibid. 900.

information required to make good choices.<sup>603</sup> His conception of direct elections was therefore an epistemic one:

Si vous renversez la gradation naturelle, si vous placez le corps électoral au sommet de l'édifice, ceux qu'il nomme, se trouvent appelés à prononcer sur un intérêt public, dont ils ne connaissent pas les élémens. Vous les chargez de transiger pour des parties dont ils ignorent, ou dont ils dédaignent les intérêts et les besoins réciproques<sup>604</sup>

The choice of representatives had to be made 'd'en bas, et non pas d'en haut' because individuals in each constituency always *knew* better their interests than supposedly enlightened deputies appointed by the Sénat conservateur.<sup>605</sup> Abstraction from local concerns was a recipe for disasters. Direct elections were an efficient way of collecting data about people's needs, before centralizing them in the national assembly. In the absence of such a direct access to the source of information, parliamentary discussion was bound to be ill-informed: 'Vous aurez sans cela des corporations délibérant dans le vague et concluant de leur indifférence pour les intérêts particuliers à leur dévouement pour l'intérêt général.'<sup>606</sup> Furthermore, direct elections also enhanced the quality of the decisions by multiplying the point of views expressed in the national assembly. The two-level voting system Cabanis had defended was meant to ensure a commonality of views amongst deputies. For Constant, representatives nominated by a central authority could never adequately represent the various, complex needs of the nation, precisely because they were all on the same wavelength:

Le but du pouvoir législatif est d'exprimer les besoins du peuple et d'y pourvoir, On confie ce pouvoir à une assemblée, parce que les membres de cette assemblée, pris dans le sein du peuple même, sont censés mieux connaître ses besoins. Quand il s'agit de faire une loi, la réunion d'un grand nombre de Législateurs est nécessaire; les lois doivent être le résultat d'une multitude d'idées. Il faut que des hommes différents par leurs habitudes, leurs rapports et leurs situations sociales, mettent en commun le tribut de leur réflexion et de leur expérience individuelles. Leurs propositions multipliées, la variété de la discussion éclaire et sur les inconvénients et les avantages.<sup>607</sup>

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<sup>603</sup> For his defence of direct elections, Constant might have taken inspiration from Necker's observations in his republican *Dernières vues de politique et de finances* (1802). See Sonenscher, *Before the Deluge*, 352-353.

<sup>604</sup> *PdP* (1806), 567.

<sup>605</sup> *Ibid.*

<sup>606</sup> *Ibid.*

<sup>607</sup> *FCR*, 524.

Necker and Staël had argued that society's diverse interests needed to be duly represented within the state apparatus. For Staël, these interests were conceived along anthropological lines, as the need to conserve and the need to acquire, which corresponded to the two different chambers. In his *Fragments*, Constant updated Staël's intuition, making each of his two chambers two different faces of opinion – 'l'esprit conservateur' and 'l'esprit progressif'.<sup>608</sup> In the *Principes*, he insisted that the diversity of interests he was advocating also had a geographical dimension. 'The people' or 'the nation,' Constant argued, was nothing more than an aggregation of particular interests.<sup>609</sup> Referring his readers to Montesquieu's reflections on the dangers of imposed uniformity, Constant explained that his argument could be transposed to the composition of national assemblies.<sup>610</sup> Each constituency had its specificities – customs, traditions, habits – that should be counted amongst its interests.<sup>611</sup> These needed to be transmitted, via local elections, to the chambers. The Constitution of Year VIII made all choices ultimately dependent upon Napoléon who, presiding at the head of the state, had no knowledge of what happened in each constituency. 'Le pouvoir législatif,' Constant observed in his *Fragments*, 'ne peut être exercé par un seul homme. Un seul homme ne peut ni prévoir ni connaître les besoins du peuple. Il faut un certain nombre d'hommes proportionné à l'étendue du pays.'<sup>612</sup>

The problem of large states, Constant explained, was that 'les lois partent d'un lieu tellement éloigné de ceux où elles doivent s'appliquer, que des erreurs graves et fréquentes sont l'effet inévitable de cet éloignement.'<sup>613</sup> Local elections would make of representative government a mirror-image of society's local interests, thereby preventing the legislator from making of the opinion of a Paris-based elite the source of laws that applied to a country made up of dozens of varying customs.<sup>614</sup> Constant's call for establishing a new type of 'fédéralisme' was similarly informed by his concern about decisions out of touch with local concerns. In a large country, the interests pertaining to certain level of responsibility – the commune, the region, the state – should be handled at each of these respective levels,

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<sup>608</sup> Ibid. 531. I give further insights into Constant's conception of bicameralism in part III, chapter 2, section a of the dissertation.

<sup>609</sup> *PdP* (1806), 139; 215: 'les peuples ne sont que des aggrégations d'individus.'

<sup>610</sup> Ibid. 559-564.

<sup>611</sup> *PdP* (1806), 562.

<sup>612</sup> *FCR*, 435.

<sup>613</sup> *PdP* (1806), 561.

<sup>614</sup> Ibid.

Constant argued.<sup>615</sup> The result was a pyramid of responsibilities, meant to respect and be attuned to, as far as possible, local interests.

If representatives were not free to change opinions, Constant acknowledged, deliberating would be pointless – this would simply amount to going back to the Jacobins' conception of the imperative mandate.<sup>616</sup> Constant however insisted that representatives had, if not a 'responsabilité légale,' at least a 'responsabilité d'opinion' vis-à-vis their constituents.<sup>617</sup> This 'responsabilité d'opinion' Constant conceived as an alternative both to the imperative mandate and the representative mandate. First, it meant that representatives never represented the interest of the nation as a whole, as the revolutionary legacy had consistently assumed, but the interests of their constituencies.<sup>618</sup> On this interpretation, the result of elections was an opinion that reflected the voters' interests, and representatives had to stay true to these. Indeed, if they did not stick to defending the interests of their section, representatives would start deliberating in the void, and the outcome would become both unpredictable and potentially unfair. Each representative acted as the privileged 'organe' of his constituents. 'Je veux que le représentant d'une section de l'Etat soit l'organe de cette section, qu'il n'abandonne aucun de ses droits réels, ou imaginaires, qu'après les avoir défendus, qu'il soit partial pour la section dont il est le mandataire, parceque si chacun est partial pour ses commettans, la partialité de chacun réunie aura tous les avantages de l'impartialité de tous.'<sup>619</sup> In Constant's model, representatives were not entirely free to change their mind, or adopt another representative's point of view, but only to renounce, if needed, to certain claims or 'intérêts momentanés' of their constituents so as to better satisfy their long-term interests.<sup>620</sup> Second, it meant that representatives were connected to their constituents by the ties of public esteem, and here we are reminded of Constant and Staël's 1790s reflections about voting as a way of showing appreciation for talents. Direct elections, Constant argued, created a form of 'électricité morale' between constituents and their

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<sup>615</sup> Ibid., 562; *FCR*, 644.

<sup>616</sup> 'Additions Constitution républicaine,' 748: 'Tous les inconvénients qui font préférer le Système représentatif à la Démocratie pure se reproduiroient avec plus de force dans un système qui réserverait au Constituant une inspection constante sur son mandataire, et le droit d'un désaveu perpétuel.' See also *FCR*, 522.

<sup>617</sup> *FCR*, 565. As is well known, Sieyès, for his part, was a vehement critic of the imperative mandate.

<sup>618</sup> Constant also called 'responsabilité locale' his 'responsabilité d'opinion.' Ibid. On the idea of a national mandate from which Constant was breaking, see Jaume, 'Le problème de l'intérêt général.'

<sup>619</sup> *PdP* (1806), 567. Constant's definition of the general interest can be read as an inversion of Rousseau's distinction between the general interest and the interest of all. Constant believed that what Rousseau had derided as 'l'intérêt de tous' could simply be left standing. No virtuous identification with the common good was needed to solve the thorny question of the translation of the interest of all into the general interest: the general interest was the result of individual preferences smoothly coagulating with each other – the partiality of each translating into the impartiality of all.

<sup>620</sup> *FCR*, 522.

representatives.<sup>621</sup> If they failed to reflect their constituent's expectations, representatives would find themselves blamed by the opinion that had first brought them to power. 'Confiance,' in Constant's mind, always came from free, direct elections, not from clinical, ill named 'listes de confiance.'<sup>622</sup> The opinion representatives were responsible to was thus at the same time the expression of objective interests and the more subjective, passionate appreciation of talents and achievements.

Electors, who Constant repeatedly called 'the people,' were property owners. Constant's threshold for political rights was part and parcel of his ambition to turn representative assemblies into chambers that gradually registered and translated people's desires into legislation rather than speculated about the general interest. 'Pour être membre d'une association, il faut avoir un certain degré de lumières et un intérêt commun avec les autres membres de cette association.'<sup>623</sup> In other words, electors needed to share some form of generic interest, combined with the ability of 'bien connaître ses intérêts.'<sup>624</sup> Land property was, in Constant's view, the only type of property that fulfilled this twofold condition. The *Principes* distanced themselves from the Physiocrats' idea that property was a natural right. Like Turgot, Constant thought that property was a convention.<sup>625</sup> He nonetheless retained the Physiocratic assimilation of citizenship with land property. A whole chapter of the *Principes* was devoted to demonstrate the 'préeminence' of land property over industrial property.<sup>626</sup> Unlike industrial property, land property bred 'l'esprit conservateur indispensable aux associations politiques.'<sup>627</sup> Constant argued that landed property, because it tied individuals to their home country, moreover created patriotism through interest. Industrial property, on the contrary, by making emigration easier, fostered indifference towards all nations, and thereby separated interests from patriotism. Amongst properties in land, Constant singled out farmland as the type of possession most likely to foster sound judgments. Mentioning Germain Garnier's Physiocratic-inclined translation of Adam Smith's *Wealth of Nations*, and Mirabeau's agrarian manifesto *L'Ami des hommes*, Constant explained that the cultivator was often superior to the artisan in terms of intellectual faculties. The division of labour condemned the latter mostly to mechanical operations,

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<sup>621</sup> Ibid. 548; *PdP* (1806), 574.

<sup>622</sup> *PdP* (1806), 569: 'Aux hommes qui commandent l'attention, qui attirent le respect, qui ont acquis des droits à l'estime, à la confiance, à la reconnaissance du peuple, appartiennent les choix de ce peuple.'

<sup>623</sup> Ibid. 323.

<sup>624</sup> Ibid. 324.

<sup>625</sup> On this debate, see Catherine Larrère, *L'invention de l'économie au XVIIIe. Du droit naturel à la physiocratie* (Paris, 1992), 201.

<sup>626</sup> Book X, chapter 7, 'Que la propriété territoriale réunit seule tous les avantages de la propriété.'

<sup>627</sup> *PdP* (1806), 338.

whereas the former developed a just and accurate judgment from the various experiences to which agriculture exposed him.<sup>628</sup>

The complementarity between interest and intellect was crucial to obtain decisions that conformed to the people's needs. This explains Constant's suspicion vis-à-vis intellectuals without property. During the revolution, he explained, some intellectuals had adopted the most exaggerated opinions because they did not have personal stakes in national prosperity. Enlightenment therefore needed to be 'contrebalancé' by landed property, because the latter forced representatives to take their own interests into account before adopting laws that affected public happiness and peace.<sup>629</sup> 'Elle les fait descendre du haut des théories chimeriques et des exagérations inapplicables, en établissant entr'eux et le reste des membres de l'association des relations nombreuses et compliquées, et des intérêts communs.'<sup>630</sup>

Even though Constant considered it desirable that wealthy men fill legislative positions, he insisted that the mere possession of riches was not valuable in itself. Constant recoiled from the oligarchy of landowners promoted by the Physiocrats, which had still constituted the model of the plutocratic government of *Des circonstances actuelles*. But he did not consider either that the restrictions he was setting upon political rights was incompatible with natural equality, since anybody could acquire land through his own efforts. Rather than the 'quotité' of property, it was indeed the 'nature' of land property, and the type of intellectual abilities it allowed to develop that mattered most.<sup>631</sup> This was consistent with his overall objective of having as many interests as possible active in the representative structure. Electors were, at a fundamental level, providers of information – conveyors of opinion through elections.

Our analysis of Constant's views on representative government during the Consulate and the Empire would not be complete without considering a neglected but important speech Constant gave at the Tribune on 1 February 1800. Constant suggested an additional way of making public opinion known to representatives: petitions.<sup>632</sup> This text shows how Constant attempted to institutionalize public opinion *inside* the existing constitutional structure of year VIII, through the intermission of the Tribune, which Napoléon had reduced to a deliberative

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<sup>628</sup> Ibid. 337-339.

<sup>629</sup> Ibid. 342.

<sup>630</sup> Ibid. 342-343.

<sup>631</sup> Ibid. 349-350.

<sup>632</sup> 'Sur le mode à adopter pour prendre en considération les pétitions adressées au Tribunat, séance du 12 Pluviose an 8,' in *OCBC IV*, 91-103. At the time Constant gave his speech, in 1800, he must have already started working on the *Principes*.



assembly without any proper legislative power. In his intervention, Constant gave his own interpretation of article 83 of the Constitution of Year VIII, which allowed anyone to send petitions to any constituted authority, and especially the Tribunal.

Constant insisted on how useful a careful collection and classification of all the petitions that were sent every day to the Tribunal would be.<sup>633</sup> He provided a typology of different types of petitions, amongst which stood out ‘petitions d’intérêt local,’ originating in communes and drawing attention upon local concerns, ‘petitions de redressement’ destined to draw the authorities’ attention to violation of rights and, last, ‘adresses d’amélioration’ coming from all departments, including most importantly the most remote ones, which would consist in suggestions of improvements on any political question, be it in matters of finance, economy, agriculture, industry, justice or administration.<sup>634</sup> Such petitions would establish a ‘communication journalière’ between all citizens and the government, Constant suggested, thereby providing ‘un moyen incalculable de perfectionnement pour les institutions, et de redressement pour les abus.’<sup>635</sup>

The government, Constant explained, building on Godwin’s remarks about how power warped judgment, was constantly dealing with pressing matters, and therefore had no time for reflection.<sup>636</sup> Furthermore, members of government were in small numbers, and often detached from local concerns, whose details they could never fully know. By contrast, members of the Tribunal, on Constant’s reading, had been delegated from various constituencies. They had various sensibilities and were more attuned to what was happening on the ground, and were therefore able to enlighten each other in discussions.<sup>637</sup> The role of the Tribunal, Constant suggested, should be to collect and analyse all petitions that it received, and transmit to the government the results of this screening process. In Constant’s words, the Tribunal had to ‘l’éclairer [the government] sur les besoins de la république,’ which ‘se composent des besoins de ses plus petites subdivisions.’<sup>638</sup>

The result was a thorough system of cataloguing, first through an *ad hoc* commission, of all the data garnered from all parts of France.<sup>639</sup> This interest-based system would replace the arbitrary, voluntarist and abstract lawmaking process that had prevailed so far:

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<sup>633</sup> Ibid. 99.

<sup>634</sup> Ibid. 94.

<sup>635</sup> Ibid. 92.

<sup>636</sup> Ibid. 97.

<sup>637</sup> Ibid. 94-95.

<sup>638</sup> Ibid. 95.

<sup>639</sup> Ibid. 98.

Ce moyen vous paraîtra d'autant plus précieux que, ne prenant pas son origine dans votre volonté particulière, mais dans l'expression des besoins du peuple, recueillie, au hasard, de tous les points de la République, il ne sera jamais accompagné de secousses; il n'aura jamais l'apparence hostile d'une opposition préméditée, ou d'un blâme plus ou moins direct contre le Gouvernement. Ce sera, pour ainsi dire, un compte rendu de l'état et des désirs de la France, et les résultats de ce compte, d'autant plus fidèle, que ses diverses parties n'auront pas été concertées, et qu'il sera formé d'éléments hétérogènes et indépendans de vous, n'encourront jamais le soupçon d'aucune espèce de partialité... Qui de vous ne sent pas, mes collègues, que l'un des plus grands obstacles à la régénération de notre patrie, c'est que nous ne savons pas assez de faits? Nous avons tous des idées générales sur la situation de la France; mais que de lacunes entre ces idées! que de vérités encore ignorées! et quel homme habitué à la réflexion ne sait pas que la place d'une vérité absente est presque toujours occupée par une erreur? Les pétitions pourront nous servir à remplir ces lacunes: elles nous fourniront des informations de détail qui, réunies, donneront plus de précision et plus d'exactitude à l'ensemble.<sup>640</sup>

The role of the Tribune was first and foremost to act as a receptacle of all the ameliorations suggested in petitions. The collection of all isolated petitions, Constant insisted, 'feront de toutes part jaillir la lumière.'<sup>641</sup> The inevitable effect of this 'démonstration irrésistible' was to reduce the executive power's scope of action. The government's role, Constant suggested, should be limited to the mere implementation of the evident conclusions reached by public opinion, as expressed in all petitions. 'Vous prononcerez nos vœux avec bien plus de certitude, et en connoissance entière de cause,' Constant indicated to the government.<sup>642</sup>

This system of petitions, Constant was adamant, should be carefully distinguished from the 'adresses d'adhésion' that had prevailed during the revolution. In an interesting implicit reference to Rousseau's general will, Constant argued that one advantage of petitions was that, being expressed in isolation, these could not be subject to imposture, because they stemmed from individuals who did not know each other.<sup>643</sup> Deliberation only intervened at a second stage, within the Tribune, which played a crucial screening role. Petitions had to be read in the absence of their authors, contrary to what had happened in revolutionary assemblies. They needed to be examined peacefully and independently by members of the Tribune, and reflect precise facts and not be the product of passions, as had occurred in the

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<sup>640</sup> Ibid. 92-93.

<sup>641</sup> Ibid.

<sup>642</sup> Ibid. 100.

<sup>643</sup> Ibid. 93.

recent past.<sup>644</sup> Thus understood, petitions would reflect the interests of the nation, rather than being nothing more than a smokescreen for private interests.

Petitions would thus achieve the fiction Constant longed for: the defense and protection of the people's rights and interests, *as if* it could do it by getting together. 'Ce sont elles,' Constant wrote, 'qui viendront dans cette enceinte porter les vœux, les besoins, les plaintes, les désirs des départemens et des communes éloignés. Elles viendront représenter au milieu de nous le peuple, au nom duquel nous discutons, et pour lequel nous sommes ici.'<sup>645</sup> By contrast with unruly 'addresses d'adhésion,' Constant's 'usage éclairé, mais prudent' of petitions provided a 'mode de surveillance, de préservation et de garantie moins violent, moins tumultueux, plus égal, plus efficace.'<sup>646</sup>

Last, Constant insisted that petitions would also stir up emulation amongst all citizens, by inviting each of them, be it in the most obscure part of France, to contribute to the advancement of his country, thereby contributing to the regeneration of 'l'esprit public.' 'Songez aux liens que vous établirez entre vous et tous les habitans de la France, liens qui ne seront pas des liens de faction, des associations de parti, mais des liens formés par la philanthropie, par l'amour du bien, par l'espoir du perfectionnement progressif et de la prospérité universelle.'<sup>647</sup>

In Constant's understanding, the role of the Tribune – but, more generally, the role of any deliberative representative assembly – was to be neither a chamber of permanent opposition, nor a servile chamber of eternal approbation, but a chamber whose members would make use of their judgment to determine the best course of action, depending on the type of information they received from citizens and the government's bills – 'une chambre d'approbation ou d'opposition, suivant les mesures proposées, et chambre d'amélioration.'<sup>648</sup> Thus understood as the receptacle of public opinion, Constant's conception representative government eschewed the unbounded harassment of representatives he associated with popular sovereignty: its action would not be 'inégaie et tumultueuse,' but 'tranquille et durable.'<sup>649</sup>

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<sup>644</sup> Ibid. 99-100.

<sup>645</sup> Ibid. 99.

<sup>646</sup> Ibid. 92; 97.

<sup>647</sup> Ibid. 100.

<sup>648</sup> Ibid. 101.

<sup>649</sup> Ibid.

### III. Conclusion

In this chapter, I have shown how Constant, in the first version of the *Principes*, updated the opinion-based theory of legitimacy he had already sketched in the 1790s. I have argued that Constant, rather than attempting to redefine popular sovereignty, as is often assumed, insisted that the principle should be banned from political theory. Instead, he replaced Rousseau's concepts of popular sovereignty and government with 'société' and 'autorité sociale'. The general will was the only concept he nominally retained from Rousseau, while thoroughly changing its meaning. Rousseau defined the general will as the *exercise* of *popular sovereignty*. Constant saw it as the *expression* of *society's* prevailing beliefs about who should rule and within what limits in the present-day historical configuration. The people had no constituent power, understood as the democratic power to change their constitution. Constitutional changes were the end result of gradual changes in opinion, as interpreted by public writers. When public opinion was led astray by charismatic rulers like Napoléon, writers had to reawaken it, and remind the people about its longterm 'wish', containing timeless principles of legitimacy.

I have also argued that the model of representative government Constant put forward in the *Fragments* and the first version of the *Principes* drew on Necker and Staël's earlier attempts to theorize a representative structure based on public opinion as a distinct conceptualization of the people's power. Popular sovereignty could not be relied upon as the basis of representative government, because it conceived of collective decision making in terms of willful self-rule, which on Constant's understanding always degenerated into arbitrary law-making. I have explained how and why Constant read Godwin and to what effect: namely, to theorize the implications of using public opinion as a distinct conceptualization of the people's power in ordinary politics. His aborted translation confirmed his opposition to the form of representative government then being advocated by Roederer, Cabanis and Sieyès.

Due to the political context, the *Fragments* and the *Principes* remained in Constant's drawers. But in October 1813, Napoléon was defeated at the battle of Leipzig. Waking up from his intellectual retreat, Constant turned himself once again into a political actor heavily involved in the politics of the day. The unfolding of political events provided him with further opportunities to refine and revise, if need be, his ideas about legitimacy and representation. Public opinion remained central to broach both questions.

### **Chapter 3 : The Restoration Years (1814-1830): Keeping Public Opinion Alive**

Constant's attitude during the years 1814-1815 has caused much ink to flow. He first put his hopes in Bernadotte as a candidate to the throne of France before offering his qualified support to the Bourbon regime. After having lambasted Napoléon as the new Cyrus upon his return, Constant rallied to the Emperor, and lent his hand to the *Acte additionnel aux constitutions de l'Empire*. With Napoléon's ultimate downfall, Constant backed the restored representative regime the Charter had instituted. Scholars now agree that, although there was undeniably some degree of opportunism in Constant's attitude, his theoretical commitments during the restoration years and the hundred days remained, at bottom, consistent.<sup>650</sup> In 1819, Constant offered some justifications of his shifting allegiances in his *Mémoires sur les Cent-Jours*, arguing that in politics one must always start by determining if the current regime offered chances for stability and liberty. If it did, Constant recommended starting working towards possible ameliorations from what existed. Political regimes, be they monarchies or republics, were only means to reach a set goal: freedom and self-development.<sup>651</sup>

In light of this consistency, it is often thought that, from 1814 onwards Constant only replicated – or updated on the margins – the arguments he had developed earlier, especially in his *Fragments* and the first version of the *Principes*.<sup>652</sup> It is true that Constant's prolixity from 1814 to 1830 has to do with the fact that he recurrently tapped into earlier unpublished manuscripts, sometimes going as far as reproducing entire paragraphs from previous texts. And it is also undisputable that the fundamental theoretical commitments he had developed earlier remained in place during the restoration years. Yet sanctifying the 1800-1810s writings runs the risk of blinding us to the genuinely original developments this period offers. As Helena Rosenblatt has shown, the restoration years are crucial for understanding Constant's views on religion.<sup>653</sup> It is also becoming clear that the 1820s, and the *Commentaire sur l'ouvrage de Filangieri* (1822-1824) especially, are one of the keys to unlocking Constant's views on political economy.<sup>654</sup> This is also true of Constant's views on public opinion, legitimacy and representative government.

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<sup>650</sup> Rosenblatt, *Liberal Values*, 155-158; Vincent, *Constant*, 163-167.

<sup>651</sup> *Mémoires sur les Cent-Jours*, OCBC XIV, 116. The *Mémoires* were initially published as letters in *La Minerve* in 1819, then in two volumes, with additions, in 1820 and 1822.

<sup>652</sup> Gauchet, 'Constant,' esp. 16; Hofmann, *Principes*; Jainchill, *Reimagining Politics*; Vincent, *Constant*.

<sup>653</sup> Rosenblatt, 'Re-evaluating Benjamin Constant.'

<sup>654</sup> This understudied subject is now gaining attention. See David Todd, *Free Trade and Its Enemies in France, 1814-1851* (Cambridge, 2015), pp. 45-54 and Gianna Englert, 'Usurpation and the "Social" in Benjamin Constant's *Commentaire*,' *Modern Intellectual History*, Online First, available at: <https://doi.org/10.1017/S1479244318000197>

From 1814 onwards, Constant regularly expressed himself on the legitimacy of successive regimes, trying hard to square analytical coherence with the shifting moods of French opinion. The texts of this period contained new elaborations in his opinion-based theory of legitimacy, including his typology of regime and his critique of popular sovereignty. In what follows, I chart Constant's unremitting and tortuous attempts to square his opinion-based theory of legitimacy with the ever-changing political situation. I submit that Constant's theory of legitimacy remained theoretically consistent, but that the return of the Bourbon also led him to make significant updates, most importantly on the question of heredity.

Constant's activity as a journalist and, from 1819 onwards, as a representative, made him one of the leading figures of the opposition.<sup>655</sup> After the assassination of the duc de Berry (1820) and the repression that ensued, Constant repeatedly stood up for an interpretation of the Charter that centered on constitutional freedoms and the role of the elected chamber. This new position as an opponent active *inside* the political system led him to comment extensively on the relationship between public opinion and representative government. While sticking to his initial ambition to turn it into the echo chamber of opinion, in the several constitutional treatises he published from 1814 to 1818 Constant nonetheless delivered the most comprehensive articulation of his views on representation, bicameralism, constitutional engineering, freedom of the press and political participation. I will discuss the elements of Constant's mature attempt to make public opinion the 'queen of representative government' in the second part of this chapter.

## **I. Legitimacy Expanded: the Spirit of the Age**

Constant's shift from his early republicanism to his late endorsement of constitutional monarchy has agitated scholars for decades. The crux of the debates revolves around the question of legitimacy: how could Constant so staunchly defend 'popular sovereignty' for years and denounce heredity as an anachronism, and then turn himself into an advocate of hereditary monarchy in one fell swoop? Three different types of interpretations have been brought forward. Some scholars have made the case for a significant evolution of Constant's thought, from the Directory to the second restoration. On this line of argumentation, Constant

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<sup>655</sup> On Constant's political activities under the second restoration, see Etienne Harpaz, *L'Ecole libérale sous la Restauration, le Mercure et la Minerve, 1817-1820* (Geneva, 1968) and Robert Alexander, 'Benjamin Constant as a Restoration Politician,' in *Cambridge Companion to Constant*, 147-172.

was not merely an opportunist, but was brought significantly to change his stance, from a republican to a monarchical position.<sup>656</sup> Others have attempted to downplay the extent of these changes, arguing that Constant's defence of hereditary monarchy was a matter of pure strategy – a superficial concession to the political circumstances in which he found himself involved, which bore no significant theoretical import. On this reading, Constant was committed to 'popular sovereignty' or 'democratic legitimacy' throughout, despite being forced to strategic accommodations with monarchy during the restoration.<sup>657</sup> More recently, a more comprehensive account has attempted to explain Constant's shifting views as part of an on-going quest for institutional stability: after 'popular sovereignty,' Constant acknowledged the need for a 'liberal' principle of legitimacy – limited authority – before finally recognizing a third principle: 'conservative tradition,' which further helped to 'guarantee stable authority and effective governance.'<sup>658</sup>

Each of these interpretations rightly captures one dimension of Constant's theory of legitimacy, while falling into a specific pitfall. The first one takes seriously the changes at work, but fails to see the underlying theoretical logic behind these. The second one rightly stresses the importance of 'equality' in Constant's early writings, but its twentieth-century obsession with Constant's 'democratic' or 'republican' credentials prevents it from seriously considering that Constant might have seen value in heredity at all. The last one is more satisfying in that respect: it rightly stresses Constant's concern with stability and his attempt to bring together diverging grounds of legitimacy, but does not provide a convincing account of how Constant articulated these. These traps can be avoided to a large extent, if we understand Constant's theory of legitimacy as being based on opinion.

This section considers Constant's texts chronologically, showing how he sought to adapt his opinion-based theory of legitimacy to new circumstances, first during the debate about candidates to the throne of France in 1814, then on the occasion of the first restoration and Napoléon's return in 1815, before delivering his last words on legitimacy in 1830. Finally, I also shed light on Constant's ambiguous views on the hereditary chamber.

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<sup>656</sup> Ephraim Harpaz, 'Introduction' to Constant, 'Entre la monarchie et la république' (1830), *Studi Francesi*, XXXI (1987), 427-433.

<sup>657</sup> Holmes, *Constant*, 233-240, Fontana, *Constant*, 65-67.

<sup>658</sup> Kalyvas and Katznelson, *Liberal Beginings*, 146-175.

### *De l'esprit de conquête et de l'usurpation*

Once it had become clear that the downfall of the imperial system was looming, three unequally credible scenarios emerged: keep the imperial dynasty and put Napoléon II on the throne, after his father's abdication (6 April), under the guard of a regent; restore the Bourbons in the person of Louis XVIII, either as the legitimate successor of Louis XVII or as the prince most likely to support liberal institutions; instate a new throne with Bernadotte, Prince of Sweden since 1811 and formerly Maréchal d'Empire.<sup>659</sup> From his retreat in Germany, Constant felt that the wind was changing. In early November, he decided to place his bets on Bernadotte.<sup>660</sup> After having joined Bernadotte's *cour* in Hanover in November, Constant put himself to work. The first edition of *De l'esprit de conquête* was published in January 1814, the second in March of that same year. Two further editions (April and June 1814) followed Louis XVIII's return to France, though omitting Book Two Chapter Five, in which Constant had implicitly defended the candidacy of Bernadotte.

*De l'esprit de conquête* is often read as a manifesto against Napoléon's despotism.<sup>661</sup> In fact, as Stephen Holmes and Kurt Kloocke have shown, central to this book was the issue of what makes a government legitimate.<sup>662</sup> To treat that question, Constant naturally returned to his opinion-based theory of legitimacy, which he now expounded in greater detail, giving special attention to Napoléon's empire as the quintessence of the illegitimate type of regime. As its full title indicated, *De l'esprit de conquête et de l'usurpation dans ses rapports avec la civilisation européenne*, Constant envisaged his work as an attempt to capture 'l'esprit général' of modern France and what this state of public opinion implied in practice. In the striking 'présentation' of the work, Constant highlighted his opinion-based approach, offering another recast of his earlier statements about how a government's legitimacy depended on its conformity with the people's needs:

La durée de toute puissance dépend de la proportion qui existe entre son esprit et son époque. Chaque siècle attend, en quelque sorte, un homme qui lui serve de représentant.

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<sup>659</sup> Stéphane Rials, 'La question constitutionnelle en 1814-1815: dispersion des légitimités et convergence des techniques' *Annales d'histoire des Facultés de droit et de la science juridique*, 3 (1968), 167-170.

<sup>660</sup> On this episode, see Gauchet's notes to *L'esprit de conquête* in his edition of Constant's *Ecrits politiques*, esp. 763-764.

<sup>661</sup> See, for instance, Rosenblatt, *Liberal Values*, 150 or Vincent, *Constant*, 182-183.

<sup>662</sup> Kloocke, *Constant*, 186-191. Stephen Holmes has rightly stressed that the successive editions of *L'esprit de conquête* offer a reflection about legitimacy, but has erred in trying to dismiss Constant's endorsement of heredity as merely ironical. See his 'Liberal Uses of Bourbon Legitimism,' *Journal of the History of Ideas*, 43/2 (1982), 229-248.



Quand ce représentant se montre, ou paroît se montrer, toutes les forces du moment se groupent autour de lui; s'il représente fidèlement l'esprit général, le succès est infaillible; s'il dévie, le succès devient douteux; et s'il persiste dans une fausse route, l'assentiment qui constituoit son pouvoir l'abandonne, et le pouvoir s'écroule.<sup>663</sup>

When a government faithfully represented the needs of the epoch, habits took shape and opinion supported existing institutions. When it failed to do so, the assent that undergirded institutions vanished, legitimacy was lost and sooner or later, rulers would be deposed. Constant's arguments were now focused on the legitimacy of the head of state, since this was the question now under dispute.

The bulk of *L'esprit de conquête* was intended to demonstrate that Napoléon had been an illegitimate ruler, *despite* the simulacra of assent it had managed to secure for itself. Constant focused, not on two, as its title indicates, but three phenomena: conquest, usurpation and despotism. All three were anachronisms, in Constant's analysis. In the long run, he suggested, an authentic opinion, in lockstep with the true expectations of the age – commerce and peace, regularity and a minimal standard of equality, respect for individual independence – would prevail over the faked, fundamentally out-of-phase opinion Napoléon had created. Throughout the work, Constant wavered between a eulogy for a sturdy if silenced public opinion and a confessed 'impatience' vis-à-vis a nation that seemed to have resigned itself quite too easily to Napoléon's yoke.<sup>664</sup> Constant suggested that, if Napoléon had lured the masses, his manoeuvres had however not succeeded in corrupting a section of the intelligentsia, which had kept the nation's voeu intact.<sup>665</sup>

Absent from the text was any reference to a popular sovereign. In 1813-1814, Constant did not feel obliged to discuss popular sovereignty to prove the inanity of the concept, since Napoléon, who had made dangerous rhetorical uses of popular sovereignty during his reign, was on the downslope. As a result, it is at the several editions of *L'esprit de conquête* that we need to look if we want to find Constant's own ideas about legitimacy, unclogged by the attacks upon popular sovereignty he had felt the need to make earlier.

In the manuscript of the *Principes*, Constant structured his typology of governments on the basis of two criteria – their source and object. While illegitimate governments on the first criterion stemmed from force or divine right, legitimate governments were sustained by a general will that could be expressed either through admiration for heredity or elections, on

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<sup>663</sup> *ECU (1<sup>st</sup>)*, 555.

<sup>664</sup> See the preface to the third edition, in *ECU (4<sup>th</sup>)*, 691-692.

<sup>665</sup> *ECU (1<sup>st</sup>)*, 673.

the understanding that the legislative power was at least in part elective. Illegitimate governments on the object criterion were those that trampled underfoot the moderns' craving for independence, while legitimate ones – modern monarchies or republics – respected individual rights, thereby leaving to their citizens the time required for self-development. *L'esprit de conquête* confirmed this typology, while providing further insights into what Constant took to be a valid regime on the 'source' criterion and the types of regimes he deemed irregular.

In the opening chapter of part II of the book on usurpation, Constant explained that the question of governmental forms had little importance. The real distinction was not between republics or monarchies, but between regular and irregular governments: 'je veux opposer un gouvernement régulier à ce qui n'en est pas un, mais non comparer les gouvernements réguliers entre eux.'<sup>666</sup> The dividing line ran between regimes attuned to the general spirit of the age, which respected 'repos,' individual autonomy and a minimal standard of political equality, and those which ran against it. Montesquieu's distinction between monarchies and republics no longer made sense: the distinction was between modern, commercial regimes and austere, ancient organizations.

On the object criterion – the scope it left to its citizens to develop their faculties – 'les monarchies de nos jours' could fare just as well as 'les républiques de nos temps modernes.'<sup>667</sup> The Swiss, Genevan and Dutch republics had greatly favoured their citizens' development of faculties, without relying on ancient-style virtue.<sup>668</sup> Reproducing a passage from his republican *Fragments*, Constant explained that modern monarchies such as England, on the other hand, equally provided the security necessary for the triumph of 'talent,' and were worthy of praise in that respect.<sup>669</sup> 'Nous n'en sommes plus aux temps où l'on déclarait la monarchie un pouvoir contre nature,' Constant insisted, 'et je n'écris pas non plus dans le pays où il est ordonné de proclamer que la république est une institution anti-sociale.'<sup>670</sup>

The irregular equivalent, on the object criterion, was 'despotisme,' which Constant subdivided into two different types. The first type of despotism was the republic of the revolutionaries. In chapters six and seven of part II, Constant offered a new take on the ancient-modern distinction he had first introduced in the manuscript of the *Principes*, suggesting that the Jacobins' attempt at reviving ancient style liberty had amounted to

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<sup>666</sup> Ibid. 601.

<sup>667</sup> Ibid. 602-603.

<sup>668</sup> Ibid. 603-604.

<sup>669</sup> Ibid. 604.

<sup>670</sup> Ibid. 601.

establishing freedom through despotism. This was the sort of popular, republican despotism Staël had already highlighted in *De l'influence des passions*, and Constant had equated to anarchy in the *Principes*. The second type of despotism was a government where the will of the master was the only law, and where intermediary bodies, if they existed, were subservient to the head of state. Here, Constant was distancing himself from Montesquieu's praise of the nobles as custodians of a customary body of laws that acted as a check upon the monarch. In Constant's analysis, Napoléon had shown that these hypothetical counterweights were all too often submissive to the despot.<sup>671</sup> Both types of despotism were characterized by 'l'arbitraire.' Irrespective of whether arbitrariness was exercised by an assembly or one man, citizens had no fixed guarantees against the encroachments of political authority.<sup>672</sup>

This stress on the 'object' of government amounted to relativize significantly the importance of their 'source,' as long as 'elections' were part of the institutional structure, as was the case with English monarchy.<sup>673</sup> There was, however, a major problem with the source criterion Constant had highlighted in the *Principes*. Assent could be faked, through plebiscites and false heredity titles, especially when the nomination of the head of the executive was at stake. Here Constant introduced a new subdivision between governments in which the people's assent had been extorted or manufactured, and governments where it had been spontaneously, albeit sometimes implicitly, given. Usurpation referred to the former, and defined irregular regimes on the source criterion. On this point, established hereditary lines had an advantage over elected magistrates. This Constant had already reluctantly acknowledged in his *Fragments*, but now readily embraced to throw discredit on Napoléon's claims to legitimacy.

As an illustration, Constant contrasted Napoléon's rise to power with time-honoured monarchies. Following Necker, whom he had uncompromisingly criticized in his earlier writings, Constant explained that, in hereditary monarchies, the king was sustained by an implicit assent to age-old rules of succession, which prevented upheavals and contests for power.<sup>674</sup> By contrast, the usurper attempted to cope without this temporal capital. When he

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<sup>671</sup> Ibid. 642: 'J'entends par despotisme un gouvernement où la volonté du maître est la seule loi, où les corporations, s'il en existe, ne sont que ses organes, où ce maître se considère comme le seul propriétaire de son empire, et ne voit dans ses sujets que des usufruitiers.'

<sup>672</sup> Ibid. 642-643.

<sup>673</sup> Ibid. 601, note a; 604.

<sup>674</sup> A monarchy, Constant observed in a way strongly reminiscent of Necker, was 'une institution modifiée par le temps, adoucie par l'habitude,' whose regular and peaceful transmission of power, from king to legitimate heir, 'rend la soumission plus facile et la puissance moins ombrageuse.' Ibid. 605. On Constant's reception of Necker during the restoration, see Henri Grange, 'De l'influence de Necker sur les idées politiques de Benjamin Constant,' *ABC*, 2 (1982), 73-80 and, from the same author, 'De Necker à Benjamin Constant ou du libéralisme

seized power, all ambitions were stirred up, and from then onwards, he had to work to create for himself a simulacrum of assent, with deleterious results in terms of stability and freedom.<sup>675</sup> Faking heredity titles, Constant insisted, was of no use: heredity only worked when it was ‘déjà reconnue’: ‘une hérédité qu’on voudrait édifier, sans qu’elle reposât sur aucune tradition respectable et presque mystérieuse, ne dominerait point l’imagination.’<sup>676</sup> A hereditary mode of designating the head of state generated predictability, and hence stability.

More than the *nature* of the grounds of legitimacy – elections or heredity – it was the *established* character of the process through which legitimacy was conferred upon rulers that was central to *L’esprit de conquête*. Resuming the line of argumentation Hume and Necker had developed about the antiquity of monarchies, Constant suggested that a government’s longevity, irrespective of its form, gradually increased its capital of legitimacy, no matter how this growing assent was measured. Without dwelling on the difficulties tied to the election of the head of state in a republic – a problem he had attempted to solve in the *Fragments* – Constant insisted that republics could acquire ‘un héritage de traditions, d’usages et d’habitudes,’ with similar results to monarchies in terms of permanency.<sup>677</sup>

When such an assent prevailed, the government’s stability usually yielded positive results in terms of individual independence. The ‘source’ and the ‘object’ criteria were thereby intimately linked. These two criteria – a regular type of assent combined with a respect for individual independence, which implied a renunciation of belligerent enterprises – throw light on Constant’s arguments about who was the most legitimate candidate to the throne of France in 1814.

Given his father’s faked legitimacy, Napoléon II stood no chance. The Bourbon Louis XVIII, with his long hereditary line, might seem a more plausible candidate. The problem with his candidacy was twofold. First, the Revolution had interrupted the regular transmission of power that had prevailed so far. As a result, the implicit assent from which the Bourbon line had benefitted for centuries was fading away. Interests had started detaching themselves from a dynasty dispossessed of their presumption to political authority. Should power come back into the hands that had lost it, Constant suggested, a violent counter-reaction was likely to occur.<sup>678</sup> In the present circumstances, the stability that usually derived from a hereditary line would become a cause of upheavals. Second, at the time the first

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ploutocratique au libéralisme démocratique,’ in *Le Groupe de Coppel et la Révolution française*, ed. Etienne Hofmann and Anne-Lise Delacrétaz (Lausanne, 1988), 63-71.

<sup>675</sup> *ECU (1<sup>st</sup>)*, 606.

<sup>676</sup> *Ibid.* 610.

<sup>677</sup> *Ibid.* 612.

<sup>678</sup> *Ibid.* 623.

edition of his work came out in January 1814, Constant was unsure about the intentions of Louis XVIII in terms of political equality and individual liberty. In fact, he was rather suspicious that the legitimate heir of the Bourbon line would wish to turn back the clock to an Ancien Régime style monarchy based on divine right. This Constant suggested indirectly in chapter five of Book II, in which he drew an implicit parallel between Charles I, Cromwell, and William III on the one hand, and Louis XVIII, Napoléon and Bernadotte on the other.

The difference between Louis XVIII and Bernadotte was that the latter, at least in Constant's understanding, was a modern king, in line with the current aspiration for 'repos,' individual liberty and political equality.<sup>679</sup> In Constant's understanding, the parallel with William III revealed that such a candidate could avail himself of a legitimacy derived from both (indirect) heredity and election. At this point, Constant established a comparison between Napoléon and Bernadotte, who had been called from France and elected by the Swedes before being adopted by the Swedish King in 1810:

Voyez ces deux hommes, l'un que le voeu d'un peuple et l'adoption d'un roi ont appelé au trône, l'autre qui s'y est lancé, appuyé seulement sur sa volonté propre, et sur l'assentiment arraché à la terreur. Le premier, confiant et tranquille, a pour allié le passé: il ne craint point la gloire de ses aïeux adoptifs, il la rehausse par sa propre gloire. Le second, inquiet et tourmenté, ne croit pas aux droits qu'il s'arroge, bien qu'il force le monde à les reconnoître.<sup>680</sup>

Constant knew very well that Bernadotte's claims to the throne of France were relatively thin, but he nevertheless tried to make up for his lack of obvious legitimacy. If this combination of heredity and election might have been theoretically coherent, Constant was soon to realize that, in practice, when it came to the head of state, ancient heredity fared better than a lopsided patchwork of legitimacy titles à la Bernadotte.

### **The 1814 Charter**

After the Declaration of Saint Ouen was issued in May 1814, Constant rushed to publish the *Réflexions sur les constitutions*. This work was initially meant to influence the Commission in charge of writing the Charter, but it ultimately arrived too late to play this

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<sup>679</sup> Ibid. 624.

<sup>680</sup> Ibid. 608.

role.<sup>681</sup> In the introduction to this work, Constant attempted to square his own theory of legitimacy with the restoration of the Bourbon King. There was no doubt some degree of opportunism in Constant's shifting allegiances but, at bottom, his stance remained consistent. In the meantime, the spontaneous enthusiasm the population had displayed towards the prospect of the King's return had provided ample evidence that the French were still supportive of the Bourbons.<sup>682</sup> Bernadotte no longer being a plausible candidate, Constant, both in his *Réflexions* and subsequent editions of *L'esprit de conquête*, withheld his earlier negative comments about a broken hereditary line. In the *Réflexions*, Constant commented on how the population's assent, in the present case, had been secured through veneration for the past – 'la puissance des souvenirs.' The new king, he wrote, 'réunit aux yeux des Français tout ce qui peut fonder les espérances et parler aux émotions intimes de l'âme, je veux dire, de grands souvenirs, l'habitude des lumières, la bonté, la sainteté d'un long malheur: et cette légitimité, garantie la plus sûre d'une stabilité paisible, cette légitimité, dont les peuples sont contraints de se passer quelquefois, mais dont la privation leur fait éprouver une douleur qui ressemble au remords.'<sup>683</sup> On the other hand, in the Declaration of Saint-Ouen, Louis XVIII had also made known his intention of giving a 'constitution libérale' to France, a nation that now longed for 'repos.' This constitution, he announced, would keep intact the existence of two chambers, including an elected one, and would secure 'la liberté publique et individuelle.'<sup>684</sup> This was probably enough evidence for Constant that the new regime would act in a way that reflected the nation's current needs. Later in 1814, Constant explained that a republic was not a plausible hypothesis in the present circumstances, given that a revered dynasty was now on the throne, and the constitutional structure protected individual independence and left room to the exercise of political liberty: 'La République? Mais la Charte observée nous assure les avantages d'une République, l'égalité des droits, les garanties contre le pouvoir, la libre manifestation de nos opinions, une part légitime à l'administration de nos intérêts, et toutes espérances que peut exiger une raisonnable et noble ambition.'<sup>685</sup>

Constant's shifts of allegiances reflected the movements of French opinion, when he

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<sup>681</sup> The *Réflexions sur les constitutions* (1814) should not be confused with its second, amended edition of 1817-1818, published as part of Constant's *Cours de politique constitutionnelle*, which contained lengthy additions, most of which were taken from the *Principes de politiques* of 1815.

<sup>682</sup> Rials, 'La question constitutionnelle,' 169.

<sup>683</sup> *RsC* (1814), 959.

<sup>684</sup> On the Declaration of Saint-Ouen and the drafting of the Charter, see Stéphane Rials, 'Essai sur le concept de monarchie limitée (autour de la charte de 1814),' *Revue de la recherche juridique*, 2 (1982), 331-357.

<sup>685</sup> 'De la responsabilité des ministres. 13 décembre 1814 – 1er février 1815,' in *OCBC IX*, 493.

believed they were rightly giving their assent to institutions in place. Only regimes that recognized, in addition to individual freedom, some degree of political liberty, which was now part and parcel of the people's needs, could count as legitimate. As a matter of fact, any type of regime that fulfilled these conditions at the present stage of history would, on Constant's terms, inevitably be supported by opinion. On *how* this assent was conferred in founding moments, Constant was pragmatic. In his *Mémoires sur les Cent Jours*, he explained retrospectively that the 'octroi' of the Charter to the French had been a mistake, because it flied in the face of twenty-five years of practice whereby constitutions were submitted to 'l'acceptation du peuple.' No doubt, this had deprived the Charter from 'l'appui que l'assentiment populaire confère à ce qu'il sanctionne.'<sup>686</sup> Constant, however, was not sanguine about the alternative. Plebiscites being always orchestrated by the power in place, he argued, there had never been an example in recent history where the people had refused a constitution.<sup>687</sup> What ultimately counted, he insisted, was the actual, growing attachment a population developed for its constitution. The long-term objective – the stability and rest provided by a decent constitutional text – mattered more than dogmatic attachment to all too often manipulated popular forms in founding moments.

In a crucial addition to the fourth edition of *L'esprit de conquête*, published in July 1814, one month after the promulgation of the Charter, Constant came back one last time to the question of the legitimacy of the head of state. He acknowledged that it was always difficult to determine when a general 'assentiment' existed, and when it did not. This was the reason why, he explained, he was suspicious of new dynasties or leaders that put themselves at the head of the people in revolutionary times. Constant argued that, in any case, when a nation was forced to express a 'vœu' that was not its own, it knew very well that this wish was not real, just like the usurper knew he was not legitimate. This climate of reciprocal diffidence encouraged the usurper to fake opinion and stray from the rule of law, with deleterious results.<sup>688</sup> Leaving the question of usurpation aside, Constant argued that the people's assent could take two different forms: 'j'admets deux sortes de légitimités: l'une positive, qui provient d'une élection libre, l'autre tacite, qui repose sur l'hérédité; et j'ajoute que l'hérédité est légitime, parce que les habitudes qu'elles fait naître, et les avantages qu'elle procure, la rendent le vœu national.'<sup>689</sup> The legitimacy derived from election was 'la plus séduisante en théorie,' Constant further argued in a way reminiscent of the republican line of

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<sup>686</sup> *Cent-jours*, 86.

<sup>687</sup> *Ibid.* 87.

<sup>688</sup> *ECU (4<sup>th</sup>)*, 815-816.

<sup>689</sup> *Ibid.* 816.

argument he had developed in the 1790s, but it had the inconvenience that it could be counterfeited as had been the case in England with Cromwell and in France with Bonaparte.<sup>690</sup> Building on Necker's idea that the people were often more driven by imagination than reasoned arguments, Constant explained that a quick look at the English enthusiasm for the Stuarts after the fall of Cromwell showed that the people had a tendency to 'préférer la légitimité héréditaire.'<sup>691</sup> The most legitimate head of state, he insisted again, would derive legitimacy from both heredity and election. This had been the case of Bernadotte, but also of William III, in whom the English had found the closest relative to the king they had been forced to depose. In either case, the prince 'élu librement par la nation s'est trouvé fort, à la fois, de sa dignité ancienne et de son titre nouveau':

Il a contenté l'imagination par des souvenirs qui la captivoient, et la raison par le suffrage national dont il étoit appuyé. Il n'a point été condamné à n'employer que des élémens d'une création récente. Il a pu disposer avec confiance de toutes les forces de la nation, parce qu'il ne la depouilloit d'aucune partie de son héritage politique. Les institutions antérieures ne lui ont point été contraires; il se les est associées, et elles ont concouru à le soutenir.<sup>692</sup>

Although this argument was made with reference to the head of state, it testified to a broader readjustment of Constant's theory of legitimacy, which now put heredity and elections on equal grounds. This revision implied a pronounced toning down of Constant's earlier conviction that ideas such as equality had irremediably triumphed over prejudices such as heredity. Necker had shown the benefits a hereditary monarch could yield in terms of stability and hence liberty, and Constant now followed him on this point. What mattered at bottom was the conformity between the state of opinion – both in its irrational and rational dimensions – and the institutions in place. The best form of government was the one that, in each specific instance, was most adapted to its present needs:

Toutes les institutions sociales ne sont que des formes, adoptées pour le même but, pour le plus grand bonheur, et surtout le plus grand perfectionnement de l'espèce humaine. Il y a toujours une de ces formes qui vaut mieux que toutes les autres. Si on peut l'introduire paisiblement, et obtenir pour elle un assentiment général et

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<sup>690</sup> Ibid. 817.

<sup>691</sup> Ibid. 818.

<sup>692</sup> Ibid. 817.



volontaire, nul doute que le gain ne soit réel.<sup>693</sup>

There was, however, a fresh risk with the Restoration: the resurrection of the doctrine of sovereignty under another form – the divine right of kings, which threatened to overrun one of the key achievements of the Revolution, i.e. the recognition of a minimal standard of political equality. The Preamble of the Charter, adopted in June 1814, stipulated that divine Providence had called the King back to the throne. The Charter further suggested that sovereignty ultimately resided in the person of the King (without the word sovereignty being used), despite the fact that he had now conceded to sharing his authority with the two chambers.<sup>694</sup> In his addition to the fourth edition of *L'esprit de conquête* (July 1814), Constant argued that 'il y a quelqu'imprudance à reproduire des systèmes que le progrès des lumières a frappés de nullité.'<sup>695</sup> The doctrine of divine right was now out of phase with the state of opinion, Constant suggested, because it implied absolute, unchecked power in the hands of one individual. Taking the example of Bonaparte's indoctrination campaign to resurrect the 'dogme du droit divin' – but in fact targeting the ultras who were pushing for a rehabilitation of divine right – Constant explained that after his downfall, not a voice was heard amongst the nation to defend such an outdated 'profession de foi politique.' Divine right did not prove anything, Constant insisted: it could be claimed by anyone, and in that respect, the source of legitimacy was nothing else but force.<sup>696</sup> In a concluding comment, Constant expressed the hope that France had now reached a stage where the page of obsolete and dangerous theories of legitimacy, based on either popular or divine sovereignty, had been turned to focus on the people's actual needs instead: 'enfin, qu'a-t-on besoin de ce genre d'argumens dans une nation où il n'y a pas un seul homme qui ne fasse le voeu sincere de jouir d'une liberte sage sous une dynastie auguste, garant du repos, et preservatif desire contre toute agitation nouvelle?'<sup>697</sup>

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<sup>693</sup> Ibid. 809.

<sup>694</sup> The constitutional project the Senate had sent to Louis XVIII in April 1814 stipulated, somehow ambiguously, that the French people had freely called back the King upon its throne. Louis XVIII soon demurred: in May, he opened his Declaration of Saint Ouen with a reminder that he was King 'par la grâce de Dieu.' See Rials, 'La question constitutionnelle,' 171 and Alain Laquièze, *Les origines du régime parlementaire en France, 1814-1848* (Paris, 2002), 38-39.

<sup>695</sup> *ECU* (4<sup>th</sup>), 816.

<sup>696</sup> Ibid.

<sup>697</sup> Ibid.

## The *Acte Additionnel* and the *Principes* of 1815

When Napoléon landed in Golfe-Juan in March 1815, Constant sided with the supporters of Louis XVIII, not simply for base, opportunist reasons, but because this was the government that was in place and, in that respect, the one most likely to provide stability against Bonaparte's by now well-known anachronistic politics. This had been the chief argument of *De la force*: existing governments should be preferred to possible alternative, mostly because the implementation of the alternative often went together with upheavals and violence. Napoléon came back to power nonetheless and after a brief flight, Constant came back to Paris in late March, and started making contact with supporters of Napoléon. No doubt personal ambition played a role in this episode, but Constant only supported Bonaparte once it had become clear to him, not only that he had chances of staying in place, but also that he *might* rule in accordance with the principles of freedom Constant held dear.

In an article published on 4 April 1815, Constant reacted to the purported intention, expressed at the on-going Congress of Vienna, of restoring Louis XVIII. Constant argued, as he had done in the 1790s and in the first edition of *L'esprit de conquête*, that since the king was no longer on the throne, such a course of action would amount to 'faire une révolution contre un état déjà stable et tranquille.'<sup>698</sup> Of course, it could not easily be argued that the once-usurper now benefitted from the kind of legitimacy Constant had desired for the head of state: the flight of the eagle could hardly be compared to a people spontaneously and willingly calling back a ruler whose hereditary titles Constant himself had been deriding for years. Constant therefore shifted the focus exclusively onto the expectations the French had in terms of individual independence and stability. The 'sentiment national' had abandoned the Bourbons, he argued, because they had failed to provide the French with constitutional 'garanties' that protected individual freedoms.<sup>699</sup>

As a matter of fact, soon after the Charter was adopted, the ultras had generated widespread discontent by pushing for restrictions upon the freedoms enshrined in the constitutional text. In such a context, Napoléon's return had appeared to many as the promise of a reaffirmation of the achievements of the French revolution against the ultras' attempts to reinstate the Ancien Régime.<sup>700</sup> From his conversations with the Emperor's advisors, Constant had moreover convinced himself that Napoléon now wanted a liberal constitution

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<sup>698</sup> 'Observations sur une déclaration du congrès de Vienne. 31 mars – 4 avril 1815,' in *OCBC IX*, 549.

<sup>699</sup> Ibid. 552.

<sup>700</sup> See Guillaume de Bertier de Sauvigny, *La restauration*, (Paris, 1992) and Benoit Yvert and Emmanuel de Waresquiel, *Histoire de la restauration (1814-1830)* (Paris, 2002).

and peace with France's neighbours.<sup>701</sup> On this analysis, Napoléon had some grounding in the 'sentiment national': he had at last decided to do justice to the people's desire for peace and rest, both inside and outside the country.<sup>702</sup> Napoléon, as conqueror, despot and usurper had been an anachronism; perhaps the new Napoléon, Constant hoped, would be more in phase with the established practice of the age, and could play the role of constitutional monarch that Louis XVIII had failed to fill.

With these thoughts in mind, Constant wrote, at the Emperor's request, a constitutional draft that placed heavy emphasis on individual freedoms. After a complex process of re-writing to integrate Napoléon's own wishes, the final text became the *Acte Additionnel aux Constitutions de l'Empire*, only parts of which can be attributed to Constant.<sup>703</sup> To defend his course of conduct, Constant published his *Principes de politique* of 1815. That Constant intended this partial recasting of his earlier *Principes* as a commentary of the *Acte Additionnel* is crucial for understanding its first chapter, 'De la souveraineté du peuple,' which is often quoted as evidence of Constant's endorsement of popular sovereignty.<sup>704</sup> In the manuscript of the *Principes*, Constant had presented his own theory of legitimacy in dialogue with Rousseau, not only because he believed Rousseau's 'popular sovereignty' had served as a pretext for revolutionaries and Napoléon to exercise absolute power, but also because his name could act as a reminder of a minimal standard of political equality. His point had then been to show that popular sovereignty was better disposed of, and replaced by an opinion-based theory of legitimacy couched in Rousseau's vocabulary of the general will.

Napoléon's declarations upon his return convinced Constant that a clarification was once again needed on this subject. In several speeches, Napoléon intimated that he had the intention of reviving his eclectic conception of legitimacy – proto-traditional, charismatic and popular.<sup>705</sup> Weary of breaking with the Bourbons, Napoléon nevertheless operated a 'recours plus net à la souveraineté du peuple' than he had done earlier.<sup>706</sup> In the wake of several imperial declarations, both the preamble and article 67 of the *Acte additionnel* re-established,

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<sup>701</sup> Alain Laquière, 'Benjamin Constant et l'Acte additionnel aux Constitutions de l'Empire du 22 avril 1815,' *Historia Constitucional*, 197 (2003), 202-204.

<sup>702</sup> 'Observations,' 552-553.

<sup>703</sup> For details about Constant's involvement in the drafting of the *Acte additionnel*, see Kurt Kloocke, 'Introduction' to 'Acte additionnel aux constitutions de l'Empire 14 – 22 avril 1815,' in *OCBC IX*, 561-624 and Laquière, 'Constant et l'Acte additionnel,' 204-211.

<sup>704</sup> Manent, *Histoire intellectuelle*, 184-185; Fontana, *Constant*, 50; Pasquino, *Sieyès*, 136; Vincent, *Constant*, 178-180; Garsten, 'Representative Government,' 98-99; Rosenblatt, *Liberal Values*, 156.

<sup>705</sup> On Napoléon's legitimacy during the hundred days, see Bluche, *Bonapartisme*, 118-121; Rials, 'La question constitutionnelle,' 182-186; Laquière, 'Constant et l'Acte additionnel,' 199-200.

<sup>706</sup> Bluche, *Bonapartisme*, 119.

without expressly naming it, popular sovereignty.<sup>707</sup> The people delegated its powers to the Emperor and his dynasty. It also delegated them, in principle, to representatives in the Chamber. This concession, as Bluche has shown, was only a smokescreen. Through the orchestration of a fourth plebiscite to enact the constitutional text, Napoléon made clear that he intended to use the appeal to the people as a way of establishing a direct communication between the ruler and the people. In this way, the people were deprived of their sovereignty, and the ruler would exercise it in their name. As Bluche puts it, ‘en 1815, il [Napoléon] semble accepter de se replonger aux sources vivifiantes de la souveraineté populaire, mais il hésite à limiter son autorité, élément vital du bonapartisme.’<sup>708</sup>

In reaction, Constant recycled the bulk of the observations about legitimacy he had developed in the *Principes* of 1806 to make the point, now in a published work, that popular sovereignty was a dangerous, unhelpful concept. Since Napoléon had put popular sovereignty so clearly back on the political agenda, Constant decided to fight him upon his own terms. This is why he opened the *Principes* with the statement that ‘notre constitution actuelle reconnaît formellement le principe de la souveraineté du peuple,’ to which he immediately added ‘c’est à dire la suprématie de la volonté générale sur toute volonté particulière.’<sup>709</sup> He then restated his idiosyncratic definition of the general will. Any exercise of political authority was a privilege accorded to a small number of individuals. The source of this privilege was either force or the general will: ‘si vous supposez le pouvoir d’un petit nombre sanctionné par l’assentiment de tous, ce pouvoir devient alors la volonté générale. Ce principe s’applique à toutes les institutions. La théocratie, la royauté, l’aristocratie, lorsqu’elles dominent les esprits, sont la volonté générale.’<sup>710</sup> As we have seen, Constant had already attempted to distinguish his conception of the general will from the concept of popular sovereignty in 1806. In light of the context, he now equated his definition with popular sovereignty so as to better denounce Napoléon’s use of the concept as a masquerade meant to lure the people into lending support to the new regime. At the same time, Constant’s definition also acted as a reminder that, following the French revolution, if popular sovereignty had any sense at all, it simply meant that laws should not in principle be the product of one single individual.<sup>711</sup>

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<sup>707</sup> Acte additionnel, ed. Godechot, 232; 238-239.

<sup>708</sup> Bluche, *Bonapartisme*, 121.

<sup>709</sup> PdP (1815), 679.

<sup>710</sup> Ibid.

<sup>711</sup> Ibid. 681.

In 1806, Constant had sought to replace Rousseau's use of the term 'sovereign' by the term 'society,' and government – the institutions that made binding decisions for the political community – by 'social authority.' In 1815, Constant no longer had the luxury of choosing his own vocabulary, and this is why he put back the term 'sovereignty' in place of the alternatives he had coined in the manuscript of the *Principes*.<sup>712</sup> This reintroduction of the vocabulary of sovereignty created some terminological confusion, since he now used the same expression to designate both Rousseau's idea of a popular sovereign and the government's power. Constant's point, however, was that behind existing institutions, there was no such thing as an underlying sovereign. He intimated again that Rousseau, by stating that sovereignty was inalienable, had aptly suggested that it could not be exercised.<sup>713</sup> At the end of the chapter, Constant reintroduced his own concept of 'assentiment' to make the point that the latter was more than often extorted by princes or assemblies. Even when understood as assent, the people's power was limited, Constant insisted: 'l'assentiment du peuple ne saurait légitimer ce qui est illégitime, puisqu'un peuple ne peut déléguer à personne une autorité qu'il n'a pas.'<sup>714</sup> Constant also reiterated his conviction that the limitation of what he had once called 'social authority' but now had to call 'sovereignty' was dependent on the state of opinion. Once the opinion of an unlimited sovereign that had prevailed for too long would have been dispelled, no ruler would be able to claim absolute power without alienating a public opinion aware of its real needs, thereby running the risk of precipitating his own collapse.<sup>715</sup>

In the remainder of the *Principes*, Constant reintroduced his opinion-based theory of legitimacy, describing the constitutional apparatus of the *Acte additionnel* as being composed of different powers underpinned by a general assent, each of them benefiting from a certain type of legitimacy. Besides the hereditary king, there were, in Constant's ideal constitutional system, ministers responsible before the chambers, a hereditary assembly (for which Constant militated, as we shall see), an elected chamber and an independent judicial power.<sup>716</sup> The discrepancy between the body of work, from which popular sovereignty was absent, and the introductory, polemical chapter only reinforced the impression that chapter one had been forced upon Constant by pressing circumstances.

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<sup>712</sup> Compare, for instance, the following passages from the two editions of the *Principes*: 'La limitation de l'autorité sociale est donc possible' (1806, 144) and 'la limitation de la souveraineté est donc véritable, et elle est possible' (1815, 689).

<sup>713</sup> Ibid. 683.

<sup>714</sup> Ibid. 688.

<sup>715</sup> Ibid. 688-689.

<sup>716</sup> Ibid. 691.

This he made abundantly clear retrospectively, when in his re-edition of his *Réflexions sur les constitutions* in 1818, Constant explained that he had intended the chapter on popular sovereignty as a rhetorical effort to dismiss Napoléon's use of this concept:

En 1814, je n'avais aucune raison de traiter de ce qu'on a nommé la souveraineté du peuple, parce qu'il n'était pas à craindre que ce fût là le prétexte dont on pourrait vouloir se servir pour attenter à nos libertés. En 1815, c'était autre chose. Bonaparte, qui avait toujours reconnu la souveraineté du peuple en principe, s'en était souvent prévalu pour justifier l'excès du pouvoir dont il s'était emparé, et qu'il représentait comme lui ayant été délégué par le peuple même. C'était donc cette théorie qu'il fallait attaquer, afin de briser cette arme dangereuse entre les mains d'un homme qui n'en avait que trop abusé. Le sentiment de cette nécessité me fit commencer mes *Principes de politique* par le chapitre suivant, que je rapporte ici avec quelques développemens nouveaux.<sup>717</sup>

In the remainder of the recasting of the first chapter of the *Principes* of 1815, Constant reintroduced his own notion of 'social authority.' He also included his 1806 reflections on how important it was to refute false opinions to prevent unscrupulous leaders from using them to mask their personal ambitions, and create by the same token a public opinion aware of its real needs.<sup>718</sup>

When Louis XVIII returned to the throne of France, Constant did not express himself on the subject of his now-further-damaged hereditary legitimacy.<sup>719</sup> It is likely that the quick succession of events had made him weary of taking a position on what made a new government legitimate. Already in 1814, he had written that he did not like to dwell on the question of the 'origine de la souveraineté,' not only because false notions plagued such debates, which usually played into the hands of unscrupulous rulers, but also because he was aware that his recognition of heredity alongside elections as a valid source of political right was bound to displease radicals on the left.<sup>720</sup> In 1829, he retrospectively summarized his argument about the advantages of a hereditary king, as long as he ruled in conformity with the needs of the epoch: 'lorsqu'une dynastie ancienne ne veut pas des institutions nouvelles, il se peut qu'une nation tourne ses regards vers des hommes nouveaux. C'est ce qui a eu lieu sous les Stuarts; mais lorsqu'une dynastie ancienne accepte et observe les institutions

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<sup>717</sup> *RsC* (1818), 1160. See also Constant's explanations in *Cent-Jours*, 212.

<sup>718</sup> *Ibid.* 1170.

<sup>719</sup> After Napoléon's return in 1815, Constant had observed that the King's hereditary legitimacy had not helped him to stay on the throne for more than a year. 'Observations sur le congrès de Vienne,' 551-552.

<sup>720</sup> *RsC* (1818), 956. See also *ECU* (4<sup>th</sup>), 816.

nouvelles, c'est un avantage pour la liberté.<sup>721</sup> After 1815, Constant no longer referred to popular sovereignty, except in some rare instances in which he used it, as he had done before, as a foil to present his own ideas about the need of recognizing a limited social authority.<sup>722</sup> With the ultimate downfall of Napoléon, the need for a refutation of the concept had passed, and popular sovereignty therefore disappeared from Constant's works.<sup>723</sup>

Constant presented his theory of legitimacy one last time in the fourth lecture he gave on the English Constitution at the Athénée Royal in 1819, in which he explained he would treat in turn the question of the 'origine du pouvoir social...d'après les opinions consacrées chez les Anglais,' before talking about the limits of social power.<sup>724</sup> In other words, he was making a case for a theory of political right rooted in established practices rather than based on abstract notions such as popular sovereignty. Today, in England, in Constant's analysis, sovereignty, in the sense of the ultimate decision-making agency, resided in the king, the peers and the Commons taken all together.<sup>725</sup> Such government was underpinned by 'l'assentiment des peuples.'<sup>726</sup> Building on his earlier idiosyncratic definition of 'the general will,' Constant wrote that, besides voting, the people's adherence to hereditary institutions could be counted as a legitimate expression of this general will or assent:

L'hérédité n'est pas une cause, mais un effet, si elle est un effet de la force, elle n'est pas plus un droit que la force elle-même, si elle est un effet de la volonté générale, elle n'est autre chose que la volonté générale transmise de génération en générations. Tout se réduit donc à la volonté générale.<sup>727</sup>

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<sup>721</sup> 'Preface,' in *Cent-Jours*, 69. The preface was added in a late 1829 reissue.

<sup>722</sup> 'Idées sur la souveraineté, l'autorité sociale, et les droits individuels,' *Lettres normandes*, XI, 1820, in *OCBC XIII*, 613: 'Depuis long-temps les publicistes s'agitent et se combattent sur le terrain de ce qu'on a, par une erreur première, appelé la souveraineté du peuple; dogme inintelligible, quand on le prend dans l'étendue que les mots qui l'expriment semblent indiquer, et funeste quand on veut le faire passer de la théorie à l'application.'

<sup>723</sup> On rare occasions, some amongst the most radical of the ultras sought to reaffirm that the origins of royal authority were divine. In one his speeches in reaction to a minister who had quoted Rousseau to support a bill for a law of exception in the wake of the assassination of the duc de Berry in 1820, Constant felt compelled to dismiss both absolute popular sovereignty, which he associated with Rousseau, and divine right as two dangerous dogmas. 'Sur la même loi d'exception (10 mars 1820),' in *Discours de M. Benjamin Constant à la Chambre des Députés*, 1, (Paris, 1828), 211.

<sup>724</sup> *LCA*, 327. On Constant's assessment of the English constitution, see Jeremy Jennings, 'Conceptions of England and Its Constitution in Nineteenth-Century French Political Thought,' *The Historical Journal*, 29/1 (1986), 65–85 and Alain Laquièze, 'Benjamin Constant et les lectures à l'Athénée Royal consacrées à la constitution anglaise,' *ABC*, 23-24 (2000), 155-171.

<sup>725</sup> *Ibid.* 333.

<sup>726</sup> *Ibid.* 332.

<sup>727</sup> *Ibid.* 330.

His final and perhaps most interesting piece on the subject, however, came only in February 1830, a few months before the July Revolution. Upon the request of the editor of the liberal newspaper *Le Temps*, Constant wrote a short article entitled ‘de la souveraineté.’<sup>728</sup> In this little known text, Constant made clear what he had been suggesting for years, without being able to voice it properly because of Napoléon’s rhetorical tricks: that the concept of popular sovereignty should be abandoned. ‘Deux systèmes se sont de tout temps partagés le monde: la souveraineté du peuple que je nie, le droit divin que j’abhorre,’ Constant began.<sup>729</sup> Divine right was nothing more than blind submission to a random authority, on the supposition that that all power came from God. It amounted to government *de facto*. Popular sovereignty was another matter. Constant did not deny that the people were the origin of political right, but he insisted that this source was best understood as assent, general opinion, or ‘vœu.’ Laws could not be imposed by force by a handful, but had to proceed from a political authority assented by all, and acting in accordance with the people’s needs: ‘la loi doit exprimer le vœu, satisfaire les besoins de la société.’ ‘Cette suprématie du vœu general sur les volontés particulières,’ Constant was quick to add, ‘n’est pas ce qu’on a entendu jusqu’à present par souveraineté du peuple.’ Popular sovereignty implied absolute power – something the spirit of the age now clearly opposed. The people’s expectation was the standard by which to gauge who should rule and within what limits. ‘Rayons de notre vocabulaire le mot de souveraineté proprement dite. Il y a dans la société des besoins à satisfaire, des facultés à exercer, des libertés à garantir.’<sup>730</sup>

The competency required from social authority depended, Constant concluded, on the present stage of opinion, informed by past experiences. ‘La théorie, qu’est ce, sinon la pratique réduite en règle.’<sup>731</sup> Today, after centuries of tyrannies of diverse types, ‘l’opinion’ had starting realizing that political authority had to be limited. He promised to explain what this competence involved ‘dans notre état de lumière, de propriété, d’individualité toujours plus énergique’ in a future article that he never wrote, but it is easy to infer that he would have insisted on the need to preserve individual independence in an age of commerce.<sup>732</sup>

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<sup>728</sup> ‘De la souveraineté. *Le Temps*, 12 février,’ with an introduction by Ephraim Harpaz, in *Ideology and Religion in French Literature. Essays in Honour of Brian Juden*, eds. Harry Cockerham and Esther Ehrman (Camberley, 1989), 173-179.

<sup>729</sup> Ibid. 176.

<sup>730</sup> Ibid. 177.

<sup>731</sup> Ibid. 175.

<sup>732</sup> Ibid. 178.



## The Problem with the Hereditary Chamber

Constant's opinion-based theory of legitimacy explains his shifting views on the *pairie*. Scholars who have touched upon the subject have assumed that Constant's support for a hereditary chamber was opportunistic at bottom, arguing that he purely and simply surrendered it as of 1818.<sup>733</sup> This claim must be nuanced in light of Constant's belief that grounds of legitimacy were contingent upon historical and national specificities.

In 1814, the Charter had created *ex nihilo* the *Chambre des pairs*, which it presented as 'une portion essentielle du pouvoir législatif.'<sup>734</sup> Given his conviction that titles of legitimacy changed over time, Constant soon reconciled himself with the existence of a hereditary Chamber, as long as it existed alongside an elected chamber. When he was called to draft the *Acte additionnel*, he pushed for maintaining a hereditary chamber, against Napoléon's will, because he believed it could be used both as a rampart against the despotic tendencies of Napoléon and a counterweight to the elected chamber – a point to which we shall return.<sup>735</sup> Constant then thought that a hereditary chamber was in phase with the state of opinion, and could therefore be useful to foster stability. As he observed retrospectively, the introduction of the 'pairie' in 1814 had not been met with opposition – it had excited neither envy, nor irritation.<sup>736</sup> In other words, it had an implicit support across the population. To avoid collusion between the hereditary assembly and the king, in the *Acte additionnel* Constant had made nominations to the *pairie* hereditary, rather than for life as had been the case with Napoléon's *Sénat conservateur*.<sup>737</sup> Nominations implying heredity, Constant believed, made peers less dependent from the power to which they owed their appointment, thereby rendering them more apt to play their role as an intermediary power.<sup>738</sup> In the model Constant defended in his *Principes* of 1815, the *pairie* was composed of members of the ancient aristocracy and the new post-revolutionary elite, appointed upon merit alone.<sup>739</sup> This

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<sup>733</sup> Holmes, *Constant*, 233; Fontana, *Constant*, 68-80; For a more nuanced view, see George Armstrong Kelly, 'Liberalism and Aristocracy in the French Restoration,' *Journal of the History of Ideas*, 26/4, 1965, 509-530.

<sup>734</sup> Articles 24-34, ed. Godechot, 220-221.

<sup>735</sup> 'Comparaison de l'Ordonnance de reformation de Louis XVIII avec la Constitution proposée à la France le 22 avril 1815,' in *OCBC IX*, 631: 'La pairie est une sauvegarde de l'institution représentative, et une limite à l'autorité.'

<sup>736</sup> *Cent-Jours*, 233.

<sup>737</sup> Articles 3-4, ed. Godechot, 232.

<sup>738</sup> *PdP (1815)*, 714. While the 1814 Charter had left it to King to choose between hereditary or *viager* appointments to the *pairie*, in practice most nominations were made for life. See Jean-François Jacouty, 'Une aristocratie dans la démocratie? Le débat politique sur la chambre des pairs au début de la monarchie de Juillet,' *Revue d'histoire du XIXe siècle*, 20/21 (2000), 93-116. On the debate around the 'pairie,' see also Jaume, *L'individu effacé*, 288-319.

<sup>739</sup> *PdP (1815)*, 712-715.

blend of social classes, he believed, would prove less irritating to a people generally inclined towards equality.

As soon as the *Acte additionnel* was promulgated and Constant's *Principes* published, political writers on the left heavily criticized his insistence on the need of a hereditary chamber.<sup>740</sup> After the re-establishment of the *pairie* along the Charter model after the hundred days, Constant kept on defending his earlier position, expressing gradually stronger doubts, not so much about its intrinsic, theoretical merit, but about its sustainability in light of the general disposition of the French. Between 1815 and 1818, Constant's observations on the subject can be read as a report of the increasing disaffection of the French public for a hereditary chamber. 'De toutes nos institutions constitutionnelles, la pairie hereditaire est peut etre la seule que l'opinion repousse avec une persistance que rien n'a pu vaincre jusqu'ici,' he observed in a note on the subject to the 1818 re-edition of his *Réflexions sur les constitutions*.<sup>741</sup> Napoléon, he recalled, had warned him in 1815 that the *pairie* was now in disharmony with the present state of mind: it would clash with military meritocracy and hurt the feelings of the partisans of equality.<sup>742</sup> From 1816 onwards, as the royalist party was trying to gain ascendancy over the government through an aggressive campaign for electoral reform, Constant started referring anew to his history of equality.<sup>743</sup> The ancient aristocracy, he observed, still had a legitimate place in the institutional apparatus of restoration France, but also had to come to terms with the fact that opinion now supported first and foremost elected mandates: 'L'esprit du siècle, et plus encore celui de la France, est tout entier à l'égalité.'<sup>744</sup> In 1818, Constant further observed that the basis that formed the hereditary chamber's legitimacy – the power of memories – was gradually crumbling. This was coherent with his own vision of history as a convergence of opinions towards equality – a vision he in fact now recalled in a long footnote.<sup>745</sup>

In 1819, in his lectures on England, Constant denied that the hereditary chamber in France had a representative role at all, arguing that this role was incumbent to the elected assembly only – the sole true organ of the nation's opinion and interests.<sup>746</sup> Election, he now

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<sup>740</sup> See the references provided by the editors in the footnotes to *RsC (1818)*, 1190, note 2.

<sup>741</sup> *Ibid.*

<sup>742</sup> *Cent-Jours*, 232-233.

<sup>743</sup> On the dwindling support for an hereditary chamber accross the 'liberal party' from 1815 onwards, see De Dijn, *French Political Thought*, 71-74.

<sup>744</sup> 'De la doctrine politique qui peut réunir les partis en France (1816),' *OCBC X*, 326.

<sup>745</sup> *RsC (1818)*, 1191, note a.

<sup>746</sup> *LCA*, 313. This move has in part to do with the ongoing ultras maneuvers to amend the electoral law. In March 1819, under the instigation of the ultras, Barthélémy introduced a bill destined to re-introduce indirect

argued, had clearly become the sole valid basis for the designation of representatives. It had not always prevailed and was still in balance with modes of selection that were not ‘le résultat du raisonnement ou de l’examen,’ i.e. heredity, because the present situation was a transitory stage: ‘dans la plupart des choses humaines le passé conserve ses droits; tout ce qui a cessé d’être ne cesse pas d’influer, & presque toutes les combinaisons nouvelles se ressentent de la lutte qui a précédé leur victoire & de la transaction qui l’a sanctionnée.’<sup>747</sup> In England, this ‘empreinte des tems’ was clearly visible and much less problematic. ‘Sous le rapport de l’opinion,’ the historical role of aristocracy in England had been dramatically different from what it had been in France.<sup>748</sup> Aristocracy, in England, had defended fundamental liberties and supported the Charter, while in France aristocrats had sided with the Ancien Régime in 1789. The English aristocracy had resisted Cromwell; the French aristocracy had paid lip service to Bonaparte. The Restoration had been the occasion to reconcile the two parts of the French heritage – monarchical affections with the principles of freedom – but the aristocracy had shunned this opportunity, choosing instead to start again its ‘lutte obstinée contre les vœux unanimes de la France.’ This explained why the English aristocracy still benefited from a high credit amongst the English people, while it was completely discredited in France.<sup>749</sup>

In 1819, however, despite all of Constant’s qualms, the *pairie* was still standing in France. This created a hiatus between what was *possible* in light of circumstances – the existing state of opinion – and an institution that, *at a theoretical level*, Constant believed could play a role in the preservation of the harmony between the different constitutional powers. It also created a gap between public opinion and a constitutive element of the Charter which Constant was willing to defend in light of his own preference for existing institutions. These conflicting thoughts shed light on Constant’s ultimate assessment, in 1822, of his earlier defense of the *pairie*, in which he gestured at an inextricable tension between his own vision of history as progress and his concern for stability:

Aujourd’hui mon opinion, en thèse générale, est très ébranlée. Je dis en thèse générale, de peur qu’on ne se prévale de quelques-unes de mes paroles pour m’attribuer des intentions opposées à la Charte. Assurément, je suis loin d’attaquer, dans une de ses parties les plus importantes, cette Charte dont je voudrais conserver jusqu’aux dispositions les plus minutieuses, parce que la stabilité me semble, dans nos circonstances, préférable à tout.

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suffrage and raising the franchise. The bill failed, but the project eventually became the law of June 1820, which Villèle presented as the restoration of aristocracy within the elected chamber.

<sup>747</sup> *LCA*, 316.

<sup>748</sup> *Ibid.* 321.

<sup>749</sup> *Ibid.*

Mais je ne puis nier que, spéculativement parlant, des considerations qui se sont graduellement offertes à mon esprit, et des réflexions que m'ont suggérées beaucoup d'expériences, ne m'aient jeté dans une grande incertitude, moins peut-être sur la nécessité que sur la possibilité de la pairie. Avec notre disposition nationale, notre amour pour l'égalité presque absolue, la division de nos propriétés, leur mobilité perpétuelle, l'influence toujours croissante du commerce, de l'industrie et des capitaux en porte-feuille, devenus des élémens au moins aussi nécessaires à l'ordre social actuel, et sûrement des appuis plus indispensables aux gouvernemens que la propriété foncière elle-même, une puissance héréditaire qui ne représente que le sol, qui repose sur la concentration du territoire dans les mains d'un petit nombre, a quelque chose qui est contre nature. La pairie, quand elle existe, peut subsister, et on le voit bien, puisque nous en avons une; mais, si elle n'existait pas, je la soupçonnerais d'être impossible.<sup>750</sup>

## II. Representative Government and the Cooperation of Powers

Although Constant had already exposed the fundamentals of his constitutional theory in the *Fragments*, the successive constitutional debates of the restoration years gave him the opportunity to develop and refine his views in a number of key texts, in which he alternatively commented upon the Charter and the Acte Additionnel. Constant interpreted both texts as providing a satisfactory basis for a constitutional monarchy, more or less inspired from the British model, while insisting on pitfalls and areas of improvements. His comments do not always match the letter of the two constitutional texts, and reveal that Constant was projecting his own conception of constitutionalism onto them.

The first version of his *Réflexions sur les Constitutions* was published just before the adoption of the Charter (May 1814). After having contributed to drafting the Acte additionnel, Constant offered his views on the text not only in the *Principes de politique* (1815), but also in a set of important, less-well known articles in which he clarified why he deemed the Acte additionnel to be superior to the Charter.<sup>751</sup> In 1818, Constant published a second edition of his *Réflexions sur les Constitutions*, augmented by a series of notes taken from the *Principes* of 1815, in which he pleaded for a number of constitutional improvements he had introduced in the Acte Additionnel. That same year, Constant gave his lectures on the

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<sup>750</sup> *Cent-Jours*, 233.

<sup>751</sup> 'Comparaison,' op. cit.; 'A sa majesté l'Empereur Napoléon. 30 avril 1815,' in *OCBC IX*, 639-644. The latter text is a commentary of the Acte additionnel Constant addressed to Napoléon, in part to justify his conduct to the French public.

English Constitution, which he introduced as a series of considerations on representative government.<sup>752</sup>

Taken together, these texts reveal an objective that was already present in earlier texts: to make of representative government the mirror image of society's diverse interests, and therefore, to turn it, as much as possible, into a faithful receptacle of public opinion, as expressed through elections, petitions and newspapers. In 1815, in a brief commentary of the *Acte Additionnel* addressed to the Emperor, Constant argued that since 'le dogme de la souveraineté du peuple' Napoléon cherished was 'd'une application difficile,' it was better replaced by public opinion as a way of conceptualizing people's power: 'je ne conçois de manière pratique de l'exercer qu'en organisant la représentation nationale, tellement qu'elle soit l'interprète fidèle de l'opinion.'<sup>753</sup> On this objective, there was a remarkable consistency between Constant's comments on the Charter and the *Acte additionnel*, although Constant believed that the *Acte additionnel* he had helped to draft offered institutional means – elections, the publicity of debates, parliamentary initiative – more likely to ensure the conformity between the laws and people's opinion.

Constant's constitutional theory has often been interpreted as part of a broader agenda to curtail political authority by dividing sovereignty into different powers with diverging interests.<sup>754</sup> It needs to be properly understood in light of his theorizing of the people's power as public opinion. Since representative government was to be the receptacle of opinion, Constant designed a constitutional structure that ensured that the people's ever-changing opinions would be duly and faithfully transmitted to the institutional apparatus, without the legislative or the executive power being able to resist the translation of the people's opinion into legislative reforms, should that opinion be well-demonstrated and persistent. The constitution, in Constant's understanding, was not 'un acte d'hostilité,' but 'un acte d'union' that elucidated the relationship between the people and their government.<sup>755</sup> Rather than conceiving powers as merely separate, à la Montesquieu, as is usually thought, Constant pleaded for a well-understood cooperation between them, much in the spirit of what Necker

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<sup>752</sup> *LCA*, 289: 'Le Gouvernement Représentatif sera le véritable objet de mes recherches: Le Gouvernement anglais, un point de comparaison, un moyen d'éclaircir les questions difficiles ou de développer les vérités importantes.'

<sup>753</sup> 'A sa majesté,' 640.

<sup>754</sup> Craiutu reads Constant's constitutionalism as part and parcel of Constant's strategy of 'limiting political.' *Moderation*, 221. See also Vincent, *Constant*, 212, and, from the same author, 'Benjamin Constant and Constitutionalism,' *Historia Constitucional*, 16 (2015), 19-46, in which he argues for Constant's 'liberal pluralist constitutional philosophy,' based on 'the protection of rights' and 'the separation and balance of power.'

<sup>755</sup> *RsC* (1818), 1073.

and Staël had defended earlier.<sup>756</sup> ‘Les trois pouvoirs politiques,’ he wrote, ‘tels qu’on les a connus jusqu’ici, le pouvoir exécutif, législatif et judiciaire, sont trois ressorts qui doivent coopérer, chacun dans sa partie, au mouvement général’ – that is to say, the movement of opinion.<sup>757</sup> When this cooperation functioned well, the government could be said to be truly representative of the people’s desires.

There were, Constant insisted, not three powers, as political writers often assumed, but five different powers of ‘nature différente,’ with various functions and diverging grounds of legitimacy that allowed them to fulfill these: 1° the royal power (hereditary); 2° the executive power (best indirectly elected); 3° the representative power of duration (hereditary chamber); 4° the representative power of opinion (directly elected chamber); 5° the judicial power (independent).<sup>758</sup> The two chambers constituted ‘le pouvoir représentatif.’<sup>759</sup> The legislative power resided in the representative assemblies, with the sanction of the king. Ministers – not the king – exercised the executive power, while tribunals were in charge of the judiciary. The king acted as the mediator between the executive, the legislative and the people. He ensured that ‘harmonie’ prevailed between the executive and each of the two chambers, so as to make sure that the modifications desired by public opinion would be smoothly implemented.<sup>760</sup>

The following sections act as a complement to the section on representative government exposed in the second part of the dissertation. I first discuss Constant’s views on ‘representative power,’ including bicameralism and parliamentary initiative. I then reinterpret Constant’s neutral power, before reconsidering Constant’s views on freedom of the press. Finally, I suggest that the 1819 lecture on ancient and modern liberty should be read as an attempt to define the type of political liberty Constant believed to be consonant with public opinion understood as the only type of conceptualization of the people’s power that was adequate for a representative government.

### **The Representative Power**

In his *Fragments*, Constant had defended a type of bicameralism comprising two chambers elected at different intervals and according to distinct conditions of eligibility

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<sup>756</sup> Annelien De Dijn, for instance, connects Constant’s theory of powers with Montesquieu’s separation of powers. See *French Political Thought*, 69-70.

<sup>757</sup> *RsC* (1814), 962; *RsC* (1818), 1077-1078.

<sup>758</sup> *PdP* (1815), 691.

<sup>759</sup> *RsC* (1818), 1077.

<sup>760</sup> *Ibid.* 1078.

(which he did not specify). His objective, very much in the fashion of *Des circonstances actuelles*, was then to ensure that each chamber reflected two different faces of opinion: one chamber, which Constant probably envisaged as being made up of older representatives with higher property qualifications, embodied ‘l’esprit conservateur.’ The other chamber represented ‘l’esprit progressif.’<sup>761</sup> Constant possibly saw it as composed of younger owners of smaller properties, eager to distinguish themselves in politics.<sup>762</sup> Staël had reified the interests represented in each chamber – the need to acquire coexisted with the need to preserve. Constant conceived these two ‘esprits,’ not in anthropological terms, but as being contingent upon the practice of the age. The background to this conception of bicameralism was his belief in perfectibility. Opinions were growing more enlightened each day. The balance between the two chambers was not simply meant as a way of fostering stability. It ensured that the diverse types of sensibilities present in society at a given period of time were duly taken into account before proceeding to legislative reforms. If this was done properly, reforms would not happen without widespread support across opinion – a recipe for discontent and upheavals.

During the restoration, Constant’s conception of bicameralism remained consistent, although the presence of a non-elective *pairie* required further specifications. Despite his conviction that the hereditary chamber’s legitimacy was withering away, Constant defended it as a counterweight to the constant swirl of present-day opinions that were represented in the second chamber.<sup>763</sup> Constant insisted that, in order to stabilize a monarchy, it was indispensable that the hereditary chamber ‘oppose son élément de durée à l’action perpétuellement rénovatrice de l’élection populaire, action qui, par là même qu’elle prépare ce qui doit être, court toujours le risque d’ébranler plus ou moins la solidité de ce qui est.’<sup>764</sup> Two popular chambers, he warned, would run the risk of reviving the ‘agitations’ that had alienated the people from representative assemblies in the recent past.<sup>765</sup> In such a configuration, a militant and supposedly enlightened minority of representatives could impose its own political agenda despite the fact that public opinion did not back it.

The gap between Constant’s two conceptions of bicameralism had to do with the fact that he never considered that, strictly speaking, the hereditary chamber could be said to represent any dimension of the people’s interests. It represented what he called an abstractly

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<sup>761</sup> *FCR*, 531.

<sup>762</sup> *Ibid.*

<sup>763</sup> ‘Je ne conçois aucun moyen,’ he wrote in 1815, ‘de ne pas donner des représentants à la durée, quand on en donne à l’opinion de si populaires.’ ‘Comparaison,’ 631.

<sup>764</sup> *Cent-Jours*, 232.

<sup>765</sup> ‘Comparaison,’ 631.

defined ‘element de durée,’ but not really society’s conservative interests. In the 1790s, Necker had argued that, if the elected chamber might be said to represent people’s short-term interests, it was truly the hereditary assembly that played a representative role, because, being hereditary, it embodied the nation’s long-term interests and, on this ground, constituted a privileged interpreter of the nation’s. In 1815, Constant inverted Necker’s picture. The hereditary chamber, he insisted in 1818, had no representative mission.<sup>766</sup> As a ‘corporation intermédiaire,’ it definitely had a function of ‘préservation,’ but its conduct since 1814 had unfortunately shown that it was unwilling to rally itself to the general spirit of the age, choosing instead to side with the Ancien Régime.<sup>767</sup> As a result – and here Constant revived the rhetoric of *Des circonstances actuelles* – it had become a ‘corporation aristocratique’ with interests distinct from those of the nation, despite the fact that it still survived on a gradually fading capital of opinion.<sup>768</sup> Representation strictly speaking, Constant insisted, was alive ‘exclusivement’ in the elected assembly: having a mandate from the nation, elected representatives ‘sont les organes de ses besoins, de ses vœux, de ses opinions.’<sup>769</sup> Representatives, elected directly by the people, knew their needs and interests, and were in that respect solely entitled to defend them. The hereditary chamber had an indispensable procedural role of counterweight – its anchorage in tradition was useful in that respect – but not a representative one, since it was clearly not in phase with the people’s everchanging interests. Necker’s hierarchy between the two chambers had to be reverted: the elected chamber should be given pre-eminence, and be considered as the privileged interpreter, not of some long-term, transgenerational ‘vœu,’ but of the people’s opinion, understood as the reflection of their current interests.

To ensure that present-day, existing interests were duly reflected in the elected assembly, Constant militated, as he had already done in the *Fragments* and the manuscript of the *Principes*, for direct elections in each constituency. As we have seen, elections for Constant were channels designed to convey useful information about what kind of interests were prevalent across society at a given moment of time, in a specific constituency. Selected representatives, on this understanding, were the ‘organes’ of local interests in the legislative assembly. To that end, it was crucial that interests on the ground found a direct route into the Chamber, without being distorted through an arbitrary screening process, supposedly meant to ensure the quality of voting.

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<sup>766</sup> *LCA*, 314.

<sup>767</sup> *Ibid.* 315; 322.

<sup>768</sup> *Ibid.* 315-316.

<sup>769</sup> *Ibid.* 313.



The Acte additionnel re-established the system of electoral colleges first implemented in the Constitution of year X. This system, itself a successor to the system of ‘listes de confiance’ (Constitution of Year VIII) Constant had denounced earlier, was similarly intended as a way of filtering candidates through different assemblies, with heavy censitary conditions for potential members of the Corps législatif.<sup>770</sup> In his *Principes* of 1815, Constant lamented that the Acte additionnel had stuck with this deleterious system, which prevented opinion from finding a straight route to the representative chamber.<sup>771</sup> The Charter, for its part, initially maintained and reinforced the system of electoral colleges with tighter eligibility for the franchise, while leaving future modifications of the electoral regime to an ordinary law.<sup>772</sup> As a result, during the second restoration, the law on election changed repeatedly, depending on who held the majority in the Chamber of deputies. In 1817, at the instigation of Guizot, the Lainé Law put a temporary end to the two-level voting system that had prevailed under Bonaparte, and established direct elections. In practice, the law suppressed the hierarchy of colleges through which the choice of representatives had been operated since 1789.<sup>773</sup> Soon after, Constant heartily celebrated ‘la loi qui sauvera la France.’<sup>774</sup>

In the wake of the left’s victory in the 1818 elections, the ultras sought to reintroduce indirect suffrage as of February 1819. The debate reached its peak in the Chamber of deputies when Decazes introduced in February 1820 the bill of what would become the law of 9 June 1820, which reestablished a two-stage election, and gave greater political weight to landowners through the reintroduction of two electoral colleges organized along differences in wealth. Constant feared this system would cut off representatives from the real interests of the nation. Reacting to the ultras’ bid, Constant asked: ‘de quel droit vous opposez-vous à l’expression de la véritable opinion publique?’<sup>775</sup> For Constant, the only meaningful vote was the one that truly reflected the state of local interests, irrespective of whether these conformed to the views of those in power before the election.

There was, however, a minimal standard of shared interest with the community that each representative ought to have, besides the specific interests he defended: a generic desire

<sup>770</sup> For details, see ‘La constitution de l’an X’ in *Les constitutions de France*, ed. Godechot, 165.

<sup>771</sup> *PdP* (1815), 716-717.

<sup>772</sup> Article 35, ed. Godechot, 215.

<sup>773</sup> See Pierre Rosanvallon, *Le sacre du citoyen. Histoire du suffrage universel en France* (Paris, 1992), 209-230.

<sup>774</sup> *RsC* (1818), 1099.

<sup>775</sup> See his speech ‘Opinion sur le projet de loi relatif aux élections (23 mai 1820), in *Discours*, I, 336-384 (quote on page 348).

for stability revealed by the possession of a minimal share of property belongings.<sup>776</sup> In 1818, in line with his belief that grounds of legitimacy changed with the times, and observing the progress of commerce and industry, Constant came to the conclusion that opinion was ready to champion, in elections, not just land property owners, but also industrial property owners.<sup>777</sup> There was also a degree of political tactic in this move: amidst the debates around changes in electoral laws in 1818, Constant championed, against the ultras' landowning aristocracy, 'une sorte d'aristocratie mobile' based on industry, which had become the true, perhaps even the sole source of wealth.<sup>778</sup>

The 'but' of elections, in Constant's view, was to 'établir l'empire de l'opinion, par le renouvellement périodique et libre de ses interprètes.'<sup>779</sup> Because opinion changed, elections were needed at regular interval to take the pulse of fluctuating interests. Since 1795, constitutions in France had opted for a partial renewal of legislative assemblies at each election, on the ground that it avoided the political upheavals sweeping changes of majorities brought.<sup>780</sup> The Charter stipulated that one fifth of the Chamber would be renewed each year.<sup>781</sup> When drafting the Acte additionnel, Constant defended an alternative mode of renewal that would bring, every five years, a wholly new set of representatives to the Chamber.<sup>782</sup> In the *Principes*, Constant explained that the renewal of assemblies served primarily as a way of 'donner aux améliorations qui ont pu s'opérer dans l'opinion, d'une élection à l'autre, des interprètes fidèles.'<sup>783</sup> Elections were, to use an anachronism, opinion polls: ways of assessing variations in opinion. 'Si l'on suppose les élections bien organisées, les élus d'une époque représenteront l'opinion plus fidèlement que ceux des époques précédentes.'<sup>784</sup> The system of partial renewal prevented *existing* opinion – the opinion of the day – from being fully and faithfully represented, as a whole, in all its diversity, in the

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<sup>776</sup> Should direct elections be recognized, Constant wrote in 1815, at a time when the Acte additionnel had maintained indirect elections, property requirements would become all the more important. See *PdP (1815)*, 733.

<sup>777</sup> *RsC (1818)*, 1139, note a. Constant never envisaged that non-property owners would one day become electors, but expected *laissez faire* and historical progress to contribute to the spread and gradual division of property belongings. See CF, 234-248. In 1829, Constant depicted a stage where all citizens, being property owners, would be able to vote and claim the suffrage of their peers. See 'Préface' to *Mélanges de littérature et de politique*, in *OCBC XXXI*, 147. In a late set of notes on perfectibility, Constant made of the advent of industrial property an additional step in his history of progress. See 'Suites d'idées' in *OCBC III, 1*, 389.

<sup>778</sup> 'Des aveux échappés aux ennemis de la loi des élections' in *OCBC XIII*, 338.

<sup>779</sup> *RsC (1814)*, 1110.

<sup>780</sup> Rosanvallon, *Sacre du citoyen*, 185-195.

<sup>781</sup> Article 37, ed. Godechot, 221.

<sup>782</sup> Article 13, *ibid.* 233.

<sup>783</sup> *PdP (1815)*, 726.

<sup>784</sup> *Ibid.*

assembly.<sup>785</sup> It made of the elected assembly the receptacle of snapshots of opinion taken at different electoral times, with paradoxical results: ‘N’est-il pas absurde de placer les organes de l’opinion existante en minorité devant l’opinion qui n’existe plus?’<sup>786</sup> The counterweight to existing opinion, was, in any case, to be found in the hereditary assembly. Albeit it did not represent current interests, because of its traditional legitimacy it nevertheless embodied the conservative spirit Constant had attributed in his *Fragments* to an elected chamber with higher age and property requirements:

Nous avons d’ailleurs une assemblée héréditaire qui représente la durée. Ne mettons pas des élémens de discorde dans l’assemblée élective qui représente l’amélioration. La lutte de l’esprit conservateur et de l’esprit progressif est plus utile entre deux assemblées que dans le sein d’une seule; il n’y a pas alors de minorité qui se constitue conquérante; ses violences dans l’assemblée dont elle fait partie, échouent devant le calme de celle qui sanctionne ou rejette ses résolutions.<sup>787</sup>

Stability would come from elections in full, every five years. This was the necessary span of time for public opinion to make new discoveries, and here we are reminded that Constant believed, together with Godwin, that opinion was essentially a collective enquiry meant to foster the advances of enlightenment. The added value of representative government, as opposed to ancient style democracy, was that, between electoral intervals, it left time to individuals to develop their intellectual faculties and share their thoughts with their peers, thereby contributing to give shape to public opinion. By contrast, partial renewal at very close intervals stirred up all ambitions and agitations, at the expense of stability and restful intellectual inquiry.<sup>788</sup> ‘La stabilité est sans doute désirable, aussi ne faut-il pas rapprocher à l’excès ces époques de renouvellement; car il est encore absurde de rendre les élections tellement fréquentes, que l’opinion n’ait pu s’éclairer dans l’intervalle qui les sépare.’<sup>789</sup>

Since it was the repository of existing opinion, and, in that respect, the most apt institution to know and express the needs of the people, Constant was adamant that the

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<sup>785</sup> See ‘Comparaison,’ in which Constant blamed the Charte’s electoral system on the ground that it impeded a truthful representation of opinion: ‘des renouvellements partiels empêchaient l’opinion d’être jamais pleinement représentés. Le passé pesait sur le présent; les abus conservaient en majorité leurs défenseurs; les améliorations ne trouvaient pas leurs qu’en minorité’ (631).

<sup>786</sup> *PdP* (1815), 726.

<sup>787</sup> *Ibid.* 727. See also Constant’s reaction to what would become the ‘loi de septennalité,’ which suppressed the yearly renewals of a fifth of representatives, and fixed to seven years the length of the legislative mandate. ‘Sur la septennalité (5 juin 1824),’ in *Discours de M. Benjamin Constant à la Chambre des Députés*, 2 (Paris, 1828), 243-273.

<sup>788</sup> *RsC* (1818), 1125.

<sup>789</sup> *PdP* (1815), 726-727.

chamber of deputies should be given an unambiguous right to initiate legislation.<sup>790</sup> According to the Charter, the king was the main bearer of such a right, each chamber merely having the faculty of ‘*supplier le roi*’ of proposing a law.<sup>791</sup> In practice, this faculty was impeded by secrecy requirements and time limits.<sup>792</sup> In the *Acte additionnel*, Constant lifted these conditions, making it easier for the chambers to propose a law.<sup>793</sup> The *Acte additionnel*, Constant explained, ‘*trace à cette expression des désirs nationaux une route simple, franche et claire, qui la porte rapidement et dans le public et auprès du trône.*’<sup>794</sup> A proposed law coming from the elected chamber was a privileged expression of the people’s opinion. Despite the fact that the head of state could always leave the latter unanswered, even in the *Acte additionnel*, Constant was hopeful that this course of conduct would only rarely occur, given how pressing the people’s desire for a proposed reform could be: ‘*quand l’opinion publique réclame l’adoption d’une proposition populaire, un gouvernement représentatif peut-il long-tems lui opposer le silence? Le caractère d’un tel gouvernement n’est-il pas d’être dirigé par l’opinion?*’<sup>795</sup>

Ministers had to keep their right of initiative, Constant conceded: just like representatives ‘*indiquent les vœux du peuple,*’ ministers had to indicate the desires of the government.<sup>796</sup> If ministers wanted to propose a law, Constant argued, they would be better advised to do it as members of the elected Chamber. From 1814 onwards, Constant insisted on the positive effects of having ministers that had been previously elected as representatives. This would foster cooperation rather than competition between the executive and the legislative.<sup>797</sup> Ministers, sitting in the assemblies, in the ranks of the representatives, would make the proposals the State’s needs required. When they did so, they were directly confronted by the state of opinion that prevailed in the chamber. In any case, it was always better, in Constant’s view, that the government acted *after* the elected chamber had taken the initiative. The elected chamber being the repository of a manifold opinion made up of diverse interests, the proposals it put forward were less likely to represent vested interests. The impetus had to come from the people, understood as public opinion. The latter was transmitted to the chamber, which then activated the executive whose role consisted, not in

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<sup>790</sup> *RsC (1818)*, 1111.

<sup>791</sup> Article 19, ed. Godechot, 220

<sup>792</sup> Articles 20 et 21, *ibid.*

<sup>793</sup> Articles 23-25, *ibid.* 234.

<sup>794</sup> ‘*Comparaison,*’ 632.

<sup>795</sup> *PdP (1815)*, 751.

<sup>796</sup> *Ibid.*

<sup>797</sup> *Ibid.* 748.

deciding for itself what the people's opinion was, but in making concrete the information garnered in the elected chamber: 'le gouvernement sentira qu'il est de sa dignité d'attendre plutôt que de devancer.'<sup>798</sup>

### **The Executive and the King as Neutral Power**

Constant's neutral power has been subject to numerous commentaries.<sup>799</sup> In a recent contribution, Bryan Garsten has given a compelling interpretation of the neutral power. On his reading, the king's faculty of dissolving the elected chamber was a way of combating the potential usurpation, by representatives, of the people's sovereignty. In that respect, Constant could be said to give an institutional shape to Rousseau's sovereign-government distinction, which Garsten analyzes as a potent reminder that representatives are not sovereign – the people are and always remain sovereign.<sup>800</sup> Garsten rightly captures a core element of Constant's understanding of constitutional engineering: ensuring that representatives did not substitute themselves for the people. As mentioned in part II, however, in Constant's mind, the risk of usurpation pertained not to popular sovereignty, but to the people's capacity to judge their interests. The neutral power was part of an institutional structure intended to ensure that the people's constantly changing interests found their way into well-timed and well-informed legislative reforms, without unsettling political stability. These laws had to be, as far as possible, accurate expression of their interests, as expressed through public opinion, not arbitrary products of a popular will. The danger to be avoided was legislative error, in the sense of the absence of correspondence with existing needs, far more than domination *per se*.

The different functions Constant attributed to the king – the dismissal of ministers, the dissolution of the elected chamber and the nomination of new peers – were designed to give to the branch of government that was preventing reforms a new configuration that was better in line with the current state of public opinion. In a way, the king was for Constant a reset button destined to put back institutions into conformity with existing interests. In practice, the king's interventions would bring to power individuals that were faithful 'organes' of public opinion, and would therefore deliver (or at least no longer block) the reforms the people expected. They guaranteed that 'harmonie' prevailed between the different branches of power, since

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<sup>798</sup> Ibid. 751.

<sup>799</sup> Amongst these, Holmes has seen in the neutral power as a prefiguration of 'the neutrality of the liberal state.' *Constant*, 145. Craiutu analyzes the neutral power as a 'prudential tool for solving constitutional crises.' *Moderation*, 227-234.

<sup>800</sup> Garsten, 'Representative Government,' 100.

each of them, containing members in tune with the existing set of interests, would be willing to cooperate to deliver the reforms these interests required. When the representatives' course of action no longer conformed to the people's expectations, the king could call for new elections so as to put back the elected assembly in phase with the existing state of opinion. 'Comme cette représentation peut s'égarer,' Constant wrote in 1819, 'comme les vœux qu'elle exprime peuvent ne pas être ceux de la nation, le Roi est revêtu du droit de la dissoudre, c'est-à-dire, d'en appeler à la nation même, de l'erreur présumée de ses mandataires.'<sup>801</sup> Such elections brought new life to the political body and avoided the danger of 'étouffer l'esprit national,' which should be the surest path to adopting measures that had no grounding in the people's opinion.<sup>802</sup>

Similarly, the king could dismiss the minister who had lost the confidence of the people, precisely because he had failed to act in a way that conformed to the people's interests.<sup>803</sup> Ministers could not act without a majority in both chambers, and in that respect, were ultimately responsible before the people's opinion, via the elected chamber. If the government erred and ultimately fell, new elections would make the people's opinion clear enough to allow the new one to act in accordance with its interests: 'si le gouvernement s'est trompé sur le vœu du peuple, l'élection, en l'éclairant, fera triompher ce vœu légitime, et rétablira l'harmonie entre les pouvoirs.'<sup>804</sup> Considering the case that the king might make use of his prerogative of granting mercy to absolve a minister who had been found guilty, Constant argued that, in any case, elections would never bring back to the chamber a majority that supported such a minister, should he remain in place. 'L'autorité échappe au coupable, car il ne peut ni continuer à gouverner l'Etat avec une majorité qui l'accuse, ni se créer, par des élections nouvelles, une nouvelle majorité, puisque dans ces élections, l'opinion populaire remplacerait au sein de l'assemblée la majorité accusatrice.'<sup>805</sup>

Last, if the hereditary chamber was impeding desired reforms, 'le roi lui donne une tendance nouvelle, en créant de nouveaux pairs.' If a small faction was formed within the hereditary chamber 'sans être appuyé de l'assentiment ni du government, ni du peuple,' the appointment of new peers diluted this small faction amongst a wider group that was in lockstep with the people's wish. Hence, Constant insisted, the importance of not limiting the number of peers – if their number was limited, they could form a unit of resistance that would

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<sup>801</sup> *LCA*, 313.

<sup>802</sup> *PdP (1815)*, 711.

<sup>803</sup> *Ibid.* 692.

<sup>804</sup> 'Comparaison,' 631.

<sup>805</sup> *PdP (1815)*, 766.

block the institutional apparatus, despite the fact that the king's will and the people's wish were in agreement.<sup>806</sup>

The king himself could not substitute his own political views for the people's opinion. When conflicts erupted between the branches of government or the people's expectations were trumped, his role was not to adjudicate on the substance of the matter at hand, or on the quality of the ministers, representatives or peers involved. He had to make sure that harmony prevailed between the branches of government on the one hand, and those branches and the people on the other. To that end, the king ensured that individuals who were in tune with people's opinion filled executive and legislative functions.

Of course, the king himself could be in disagreement with his people's general opinion, as translated into the policies that his ministers, for instance, put forward. Here, the distinction between the executive power of ministers and the king's neutral power was key. Constant took the recent example of George III who, in 1807, had opposed the emancipation of Catholics that his minister Grey was pushing for. The right of maintaining what already existed necessarily belonged to the king as '*autorité neutre et préservatrice*,' while the right of proposing the establishment of what did not yet exist belonged to ministers. In the present case, the king was seeking to maintain what existed, since laws against Catholics already prevailed. Since no laws could be abrogated without the participation of the king, for the time being this specific exception would remain standing. Constant deplored such a decision, because he thought it was no longer in sync with the established practice of the age, but at the level of constitutional engineering, he maintained that this course of action was perfectly valid. He did not dwell on this point, even though he probably believed that, as this law would grow more unpopular, the king would be eventually compelled to follow his minister.<sup>807</sup> On the other hand, supposing that such law against Catholics did not exist, Constant argued, in light of the present state of opinion, the king's personal will could not have forced any minister to propose such law; in fact he would not have been able to find such a minister proposing such laws in the present circumstances.<sup>808</sup> Further, the king's opposition to his minister was not always a disadvantage. In the event a minister – rather than the king – refusing to implement the reforms people desired, the king would dismiss him, so as to make sure that this reform was delivered by another minister.

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<sup>806</sup> Ibid. 692; 712-713.

<sup>807</sup> Ibid. 703.

<sup>808</sup> Ibid.

In both scenarios, the king acted in the way ultimately prescribed by the state of opinion and, sometimes, enlightenment, when true principles of liberty were at stake:

En même tems qu'un roi d'Angleterre rencontrerait dans le refus d'agir de son ministère, un insurmontable obstacle à proposer des lois contraires à l'esprit du siècle et à la liberté religieuse, cette opposition ministérielle serait impuissante, si elle voulait empêcher le pouvoir royal de faire proposer des lois conformes à cet esprit et favorables à cette liberté. Le Roi n'aurait qu'à changer de ministre, et tandis que nul ne se présenterait pour braver l'opinion, et pour lutter de front contre les lumières, il s'en offrirait mille, pour être les organes de mesures populaires, que la nation appuierait de son approbation et de son aveu.<sup>809</sup>

Ministers, like representatives, were agents of opinion. Of course, ministers could attempt to dodge or manipulate public opinion. The 'respect' – or rather the 'condescendence,' Constant corrected – the English ministers had for 'l'opinion nationale' was not always complete. For instance, the renewal of war with France, Constant argued, was clearly showing that the present ministry had consulted, 'ni l'inclination des peuples, ni sa raison, ni ses intérêts.' They should have known better: the people's real opinion was against conquest and in favour of peace and rest.

The king's neutrality was twofold. First, he would avoid siding with any specific power when a conflict between them erupted: his own interest in institutional stability compelled him to seek to restore harmony.<sup>810</sup> Second, the king was also compelled to a strict impartiality vis-à-vis society's divergent currents of opinions.<sup>811</sup> This aspect appeared more clearly in Constant's republican *Fragments*. In the chapter entitled 'De l'esprit qui animerait le pouvoir préservateur,' Constant explained how he conceived the neutral power as the institutional counterpart of his vision of history as a constant change of opinions. As mankind was making use of its intellectual faculties, opinions changed. Institutions were the guarantees that provided the stability necessary for this collective inquiry, through which each individual was called to develop his innate faculties. The neutral power was the cornerstone of an institutional apparatus designed to allow public opinion to grow more enlightened each day. It avoided consecrating certain types of opinions, because it was at the service of the progressive movement of history, where free debate of opinions led, in Constant's words, to 'la

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<sup>809</sup> Ibid. 704.

<sup>810</sup> *RsC* (1818), 1078.

<sup>811</sup> As Marcel Gauchet has observed, the neutrality of Constant's neutral power was also a 'neutralité doctrinale.' *Révolution des pouvoirs*, 252.



rectification des idées, à la réforme des abus, à l'amélioration de la morale.'<sup>812</sup> In that respect, the neutral power was not a 'pouvoir conservateur' that sought to safeguard entrenched opinions or customs, but a 'pouvoir préservateur':

Le pouvoir préservateur, tel que nous l'entendons, n'est donc ni un pouvoir stationnaire qui frapperait d'immobilité l'organisation sociale, ni un pouvoir conservateur qui s'exercerait en faveur d'une masse d'opinions quelconques. Le pouvoir préservateur n'a aucune relation avec les individus; il n'entrave en rien la progression individuelle; il ne consacre aucune opinion, mais en préservant de leurs froissements réciproques les différentes branches du gouvernement, il contribue au bonheur et au perfectionnement des gouvernés, comme l'architecte qui raffermir tour à tour ou corrige les diverses parties d'un édifice, contribue au bonheur de ceux qui l'habitent, sans gêner leur indépendance, mais en garantissant leur sûreté.<sup>813</sup>

The neutral power could only fulfill its role if it was itself a permanent and impartial institutional point amidst the constantly changing swirl of opinions. By definition, it was fixed and remained unchanged over time, despite the constantly evolving state of habits and ways of thinking, which in turn inevitably triggered institutional and legal changes. In light of its enduring, a-historical character in a progressive history, the neutral power's own legitimacy became a particularly thorny question, with which Constant kept on struggling, from the 1800s to the restoration years.

In his *Fragments*, Constant attempted to square the immovability of his neutral power with his republican commitment to elections. The 'pouvoir préservateur' would be a small assembly of wealthy, wise men, whose members were elected for life through a complex process designed to safeguard their impartiality and foster respect.<sup>814</sup> Constant had however half-heartedly recognized, in a nod to Necker, that monarchies aptly solved the legitimacy problem through an unquestioned customary opinion – heredity.<sup>815</sup> Earlier still, in *De la force*, Constant had openly recognized the advantages heredity had in terms of furthering stability.<sup>816</sup> In 1796, he did not despair of recreating this advantage in a republic: through elections: partly renewing the custodians of authority at regular intervals, these would make of authority itself

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<sup>812</sup> *FCR*, 649.

<sup>813</sup> *Ibid.* 649-650.

<sup>814</sup> *Ibid.* 661-662.

<sup>815</sup> *Ibid.* 406.

<sup>816</sup> *FGA*, 371.

‘un être abstrait, immortel et immuable.’<sup>817</sup> In so doing, they could emulate the distinction between the temporal bearer of royal authority and the perennial institution of royalty itself, which had made hereditary monarchy such a longstanding institution.

With the restoration, the question was partially solved: ‘la monarchie constitutionnelle a ce grand avantage, qu'elle crée ce pouvoir neutre dans la personne d'un Roi, déjà entouré de traditions et de souvenirs, et revêtu d'une puissance d'opinion qui sert de base à sa puissance politique.’<sup>818</sup> The king could only play his role of neutral power precisely because his legitimacy was of a different nature than the elected representative assembly. In his *Fragments*, Constant had already dismissed the aptitude of an elected king (Napoléon) to fulfill the role of neutral power, on the ground that he was not independent enough from movements of opinion.<sup>819</sup> In the 1815 edition of the *Principes*, Constant drew attention to the shortcomings of a collective republican neutral power: being a product of elections, it could never constitute ‘un être à part’ because it ‘ne frappe en rien l’imagination.’<sup>820</sup> By contrast, a hereditary king represented more than his own individuality: he was the concrete, temporary embodiment of a long-standing dynasty with illustrious ancestors. This family-inherited dignity made his power ‘sacré,’ and made him indifferent to the daily passions that animated commoners.<sup>821</sup> This distinction made of him the perfect counterpart to the relentless clash of opinions that unfolded within society:

Le roi, dans un pays libre, est un être à part, supérieur aux diversités des opinions, n'ayant d'autre intérêt que le maintien de l'ordre, et le maintien de la liberté... Il plane, pour ainsi dire, au-dessus des agitations humaines, et c'est le chef d'oeuvre de l'organisation politique d'avoir ainsi créé, dans le sein même des dissentiments sans lesquels nulle liberté n'existe, une sphère inviolable de sécurité, de majesté, d'impartialité, qui permet à ces dissentiments de se développer sans péril.<sup>822</sup>

The neat distinction between the royal power, which was inviolable and hence irresponsible, and the ministerial power, which carried all the weight of responsibility, was intended to keep the king’s aura intact. Ministers were responsible vis-à-vis the elected chamber, and, through

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<sup>817</sup> Ibid.

<sup>818</sup> *RsC* (1818), 1078.

<sup>819</sup> *FCR*, 453.

<sup>820</sup> *PdP* (1815), 700.

<sup>821</sup> *RsC* (1818), 1077.

<sup>822</sup> *PdP* (1815), 696.

it, to public opinion. They were on the front line to take the blows of public opinion, while the king remained untouchable behind the ‘fiction légale’ of his inviolability.<sup>823</sup>

An obvious problem was that, on Constant’s own understanding of history, the progress of enlightenment was slowly eroding the aura of heredity that constituted the key to the king’s neutrality. As we have seen, Constant had observed this dynamic in the dwindling support, across the French population, for the hereditary chamber. From 1796 onwards, Constant had been adamant that a hereditary king could not endure without an aristocratic intermediary power. This, he often recalled, had been amply shown by Montesquieu, and around 1800, this need for a hereditary chamber constituted for Constant a sufficient argument to rule out a monarchy as incompatible with equality.<sup>824</sup> Yet, during the restoration years, Constant further suggested that the king could also derive his legitimacy, not simply from his ancestry, but from the proper fulfillment of his duties as a neutral power.

In *L’esprit de conquête*, Constant explained that, with the progress of equality, the role of the head of state was becoming increasingly difficult, because the number of apt candidates to the highest public function was constantly on the rise.<sup>825</sup> This is why, in the following years, Constant put so much effort into demonstrating that the king had in fact only negative powers, and indeed only a very limited, if crucial function. The king, on the one hand, had to realize that his own survival and the subsistence of his dynasty in an age of equality relied almost exclusively on reducing the active powers he had in the past. The growing number of candidates to positions of power, on the other, needed to understand that the role of embodying the neutral power was not so enviable. If the king’s *constitutional* role was central, its *political* impact was, strictly speaking, non-existent: he could not promote any conception of the good life – this was the role of representatives and ministers, and Constant repeatedly argued that these offices, in principle, should be the goal of any citizen seeking to satisfy his personal ambitions.<sup>826</sup> With time, Constant hoped, the French would realize how central such a power, inaccessible to personal ambitions was for institutional stability, and public opinion would henceforth support the king for objective reasons rather than out of admiration for his royal ancestry. In 1818, in one of his justificatory pieces on the subject, Constant explained that since in the present circumstances, the role of the king as neutral power was not

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<sup>823</sup> Ibid. 764.

<sup>824</sup> *Cent-Jours*, 232.

<sup>825</sup> *ECU* (4<sup>th</sup>), 748.

<sup>826</sup> *RsC* (1818), 1192.

sufficiently understood, a hereditary chamber was still needed to protect the king from the fever of personal ambitions.<sup>827</sup>

### **Freedom of the Press: Constant's 'Public Opinion' vs. Guizot's 'Public Reason'**

The Charter recognized freedom of the press in principle, but had left it to the legislator to determine the conditions under which it could be exercised.<sup>828</sup> As a result, the restoration years saw an increasing number of laws that aimed to restrict or expand press freedom, depending on who was at the government's wheel.<sup>829</sup> Each bill was the occasion for heated intellectual debates, in which arguments often revolved around the nature of public opinion, and the role it should play in restoration France. From 1814 to 1830, Constant took a position in almost every debate on the subject. The bulk of his argument was already fixed in 1814: complete freedom for any type of published text, irrespective of the number of pages. Pamphlets, journals and books should not be subject to any kind of preventive censorship. Caution-money systems that asked publishers of journals to deposit a substantial sum of money with the state should be banned likewise. In cases of defamation, a jury, composed of members selected directly from amongst the people should be in charge of the adjudication.<sup>830</sup>

Complete freedom of opinion was already at the heart of the 1806 version of the *Principes*. Constant then envisaged the question from two main standpoints: from a 'point de vue administratif,' freedom of the press guaranteed that violations of individual rights, be it in the most remote part of the country, did not go unnoticed by authorities.<sup>831</sup> But freedom of thought, Constant also insisted, must also be understood from a higher standpoint, that of 'le développement de l'esprit humain.'<sup>832</sup> By giving gifted individuals the opportunity to express themselves on public affairs, it allowed them to refine their intellectual skills and provided a powerful incentive to do so: the esteem of their peers, or the 'gloire' that would surround

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<sup>827</sup> Ibid. 1192-1193.

<sup>828</sup> Article 8 of the Charter, ed. Godechot, 219.

<sup>829</sup> On the history of press legislation under the restoration, see Charles Ledré, 'La presse nationale sous la restauration et la monarchie de Juillet,' in *L'histoire générale de la presse française* (Paris, 1969). See also Jeremy Jennings, 'A note on freedom of the press in Restoration France,' *Journal of Modern Italian Studies*, 17/5 (2012), 568-573.

<sup>830</sup> Constant's most important contributions on the subject include his articles of the first restoration, 'De la liberté des brochures, des pamphlets et des journaux, considérée sous le rapport de l'intérêt du gouvernement. 13 juin – 3 août 1814,' in *OCBC IX*, 57-116 and 'Observations sur le discours prononcé par S.E. le Ministre de l'Intérieur en faveur du projet de loi sur la liberté de la presse. 15-17 août 1814,' as well as his lengthy speeches on the three laws on the press of April-June 1819, available in *Discours*, 1, 1-80.

<sup>831</sup> *PdP* (1806), 237-247.

<sup>832</sup> Ibid. 248.

their contribution to political questions and, beyond them, to the progress of enlightenment.<sup>833</sup>

Scholars have usually highlighted the first of these functions – freedom for the press as a guarantee of other individual rights.<sup>834</sup> There was, however, a third function Constant attributed to a free press: acting as a proxy of public opinion, alongside elections and petitions, to reveal society's needs to rulers. In that respect, newspapers were one of the ways, for the government, to garner reliable information about the state of opinion, on which they would then be able to model their political conduct. This function became central in 1814, when Constant started considering freedom of the press 'du point de vue de l'intérêt du gouvernement.'<sup>835</sup>

This dimension should lead us to nuance the radical opposition scholars have established between Constant and the Doctrinaires' understanding of freedom of the press, which usually contrasts Constant's stress on resistance with Guizot's perception of it as a means of government.<sup>836</sup> As has been shown, the confrontation between Constant and Guizot constituted the crux of the two major debates on freedom of the press of the second restoration, which both occurred around bills sustained by the doctrinaires: the law of 21 October 1814 (where Royer-Collard and Guizot backed Montesquiou's project, then minister of the interior) and the three laws of April-June 1819, introduced by de Serre with the support of de Broglie, Guizot and Royer-Collard.<sup>837</sup>

'Publicité,' according to Guizot, was the essence of representative government. Newspapers, just like elections, deliberation and representation, were amongst the 'institutions' meant to ensure the revelation of the reason immanent to society to political authority. Just as representation was 'un procédé naturel pour extraire du sein de la société la raison publique, qui seule a le droit de,' 'l'objet définitif et constant' of freedom of the press was 'de développer et de manifester la raison publique qui veut tout ce qui est nécessaire, et qui n'est pas moins favorable aux besoins raisonnables du pouvoir qu'aux droits légitimes des

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<sup>833</sup> Ibid. 248-262.

<sup>834</sup> Tenenbaum, 'Public Opinion'; Jaume, *L'individu effacé*, 432-434. For a contribution that focuses on the second dimension – self-development – see Bryan Garsten, 'The 'Spirit of Independence' in Benjamin Constant's Thoughts on a Free Press,' in *Censorship Moments. Reading Texts in the History of Censorship and Freedom of Expression*, ed. Geoff Kemp (London, 2015), 117-124.

<sup>835</sup> 'De la liberté des brochures, des pamphlets et des journaux, considérée sous le rapport de l'intérêt du gouvernement.'

<sup>836</sup> Pierre Rosanvallon, *Le Moment Guizot* (Paris, 1985), 64-72; Jaume, *L'individu effacé*, 432-434; Craiutu, *Liberalism under Siege. The Political Thought of the French Doctrinaires* (Lanham, 2003), 261-262.

<sup>837</sup> Lucien Jaume, 'La conception doctrinaire de la liberté de la presse,' in *Guizot, les doctrinaires et la presse 1820-1830*, ed. Dario Roldan (Val-Rocher, 1994), 111-124.

citoyens.’<sup>838</sup> The press, he repeatedly insisted, was both a ‘garantie’ for individuals and an ‘instrument’ indispensable for the proper functioning of ‘la machine politique.’ It was one of these ‘thermomètres légaux’ that gave to the government ‘la mesure de la raison publique,’ without which it would be unable to rule effectively. Guizot was explicit that public reason was no random public opinion: it was a type of public opinion aware of its real interests – not the fleeting will of the uninformed populace, but the reliable interests of the nation.<sup>839</sup> To ensure the triumph of an enlightened rule of reason, government itself had to put in place ways of selecting the most rational types of interests, and sort them out from unenlightened, ill-informed interests.

In his text defending the bill of 5 July 1814, which restored preventive censorship and organized a regime of authorisation for newspapers, Guizot, who was then *secrétaire général* of the Ministry of the Interior, explained that given the state of chaos in which opinions had been left after Napoléon’s rule, freedom of the press had to be ‘doucement essayée,’ ‘pour l’intérêt même de la raison.’<sup>840</sup> In a speech given in May 1819 (Guizot had now become *conseiller d’Etat*), he similarly defended the recent series of laws proposed by the Decazes ministry, which despite their abolition of press offences and their instauration of the jury maintained a caution-money system for publishers. For Guizot, the latter provided a way of ensuring the triumph of society’s real interests. In a post-revolutionary society marked by equality but threatened by rampant levelling, he explained, the influence of newspapers should be placed into the hands of men who ‘donnent à la société des gages de leur existence sociale.’ Newspapers were not the simple expression of individual opinions, but the proper ‘organes des partis,’ around which the interests of the masses rallied. It was not safe that these public organs convey interests coming from the ‘région inférieure’ of society. It was wiser and more useful, Guizot argued, to force them instead to flow from ‘une sphère plus élevée,’ where individual interests were more closely knitted to the general interest. Good press laws, he insisted, were meant to lead society’s interests to ‘s’élever et s’épurer sans cesse,’ thereby ensuring the maintaining of order, liberty and progress.<sup>841</sup>

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<sup>838</sup> ‘Compte-rendu de *Annales de la session de 1817-1818*, par M. Benjamin de Constant, seconde partie’ in *Archives philosophiques, politiques et littéraires*, 2, (Paris, 1817), 261-262. See also *Histoire des origines du gouvernement représentatif*, 2, (Paris, 1851), 150. This text is a late edition of Constant’s lectures at the Sorbonne in 1820-1822.

<sup>839</sup> ‘Il est dans les nécessités du temps et dans la nature de nos institutions que l’opinion, *et j’entends par-là la raison publique*, exerce sur la conduite du pouvoir une continuelle influence.’ See ‘Des garanties légales de la liberté de la presse,’ in *Archives philosophiques, politiques et littéraires*, 5, (Paris, 1818), 234. My italics.

<sup>840</sup> *Quelques idées sur la liberté de la presse* (Paris, 1814), 31.

<sup>841</sup> ‘Discussion du projet de loi présenté le 22 mars 1819 sur les journaux et écrits périodiques (3 mai 1819),’ in *Histoire parlementaire de France* (Paris, 1863), 12-13.

Like Guizot, Constant thought hard about ways of channelling public opinion into representative institutions. Unlike him, he resisted Guizot's tendency to turn existing opinion into some form of reasonable doctrine meant to buttress the interests of the government in place. Constant and Guizot agreed on the fundamental logic of representative government: this was the government of opinion, from which the arbitrariness they both associated with popular sovereignty had to be banned. At a deep level, both political doctrines shared a pronounced anti-voluntarist aspect: laws should never be the product of a popular will, but grounded in society's objective interests, which already determined to a large extent the process of collective decision making.<sup>842</sup> But they disagreed about the nature of the opinion on which government needed to rely, and the best ways of discovering what that opinion was. While Guizot required a unitary, enlightened public reason orchestrated in part by the administration; Constant defended the opinion of the day, as shaped by as many citizens as possible and reflecting a variety of interests, taking form independently of authority.

In 1814, in his reaction to the bill the Doctrinaires supported, Constant made clear that his preferred criterion of legitimacy was the degree of conformity laws had, not with some form of abstract reason, but with the current disposition of the nation, as revealed by the organs of public opinion, 'la partie pensante de la nation':

C'est quand une loi est proposée, quand ses dispositions se discutent, que les ouvrages qui ont rapport à cette loi peuvent être utiles. Les pamphlets, en Angleterre, accompagnent chaque question politique jusques dans le sein du Parlement. Toute la partie pensante de la nation intervient de la sorte dans la question qui l'intéresse. Les Représentans du peuple et le Gouvernement voient à la fois et tous les côtés de chaque question présentés et toutes les opinions attaquées et défendues. Ils apprennent, non-seulement toute la vérité, mais ce qui est aussi important que la vérité abstraite, ils apprennent comment la majorité qui écrit et qui parle considère la loi qu'ils vont faire, la mesure qu'ils vont adopter. Ils sont instruits de ce qui convient à la disposition générale, et l'accord des lois avec cette disposition compose leur perfection relative, souvent plus essentielle à atteindre que la perfection absolue.<sup>843</sup>

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<sup>842</sup> Like Constant, Guizot denied that there existed such a thing as an underlying, popular sovereign. The sovereignty of the people, he argued, relied on a wayward, arbitrary notion of human will, and was ultimately nothing else than the 'despotisme du nombre.' The only sovereign, he often insisted, was some form of metaphysical reason. Since the latter was unattainable, it was the goal of representative government to muster all the remnants of reason spread across society, and act upon them. See Guizot's unpublished manuscript, 'Philosophie politique: de la souveraineté,' available in Rosanvallon's re-edition of *Histoire de la civilisation en Europe* (Paris, 1985), 316-389.

<sup>843</sup> 'De la liberté des brochures,' 72-73. In the 1820s, Constant developed the same type of argumentation about petitions. See his speech 'Sur une proposition relative aux pétitions (16 mars 1820), in which he explained that petitions, as 'un des organes de l'opinion publique,' contributed to making the *actual* state of opinion known to rulers, irrespective of how enlightened or sound it was. See *Discours*, 1, 224-228.

In Constant's eyes, the relationship between political writers and the government was not simply one of straight criticism, but could be one of respectful cooperation. The elected chamber was the receptacle of public opinion, where representatives alternately listened to society's expectations and acted as its spokespersons. In turn, the contributions of political writers threw light upon the discussions of the assembly, and encouraged government to consider political problems from a variety of angles.

What made a law's quality was the fidelity with which it translated society's diverse interests, both in terms of doctrines and geographical representation. In 1814, Constant warned the government, and incidentally Guizot, about the need for having a genuinely conflictual debate about public policies. When only the interests that favoured the government's intended measures made themselves heard through newspapers under the influence of government, Constant wrote, these were inevitably met with distrust:

C'est toujours comme si le Gouvernement seul parloit. On ne voit pas là de l'assentiment, mais des répétitions commandées. Pour qu'un homme obtienne de la confiance, quand il dit une chose, il faut qu'on lui connoisse la faculté de dire le contraire, si le contraire étoit sa pensée. L'unanimité inspire toujours une prévention défavorable, et avec raison; car il n'y a jamais eu, sur des questions importantes et compliquées, d'unanimité sans servitude...la nation est d'autant plus rassurée sur ses intérêts qu'elle les voit bien approfondis, discutés sous toutes leurs faces.<sup>844</sup>

By preventing the expression of contradictory opinions, the government was depriving itself from the advantage of an open and frank discussion of all the pros and cons of its intended policies. This would result in decisions that did not reflect society's manifold interests, which in turn would breed frustration.

In his intervention to defend the third of the three 1819 bills, Guizot insisted on centralizing opinions in order to ensure the emergence of the national interest. This could be achieved through cooperation between the administration in charge of screening opinions and the government, but also through imposing, once again, surety bonds.<sup>845</sup> In his reply, Constant urged Guizot to lower the sum he asked from publishers, especially for local *départements*. Having only a limited number of subscribers, and being therefore not profitable enough to pay the deposit, local newspapers would be unable to voice 'intérêts

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<sup>844</sup> 'De la liberté des brochures,' 78. See also LCA, 318.

<sup>845</sup> Jaume, 'Conception doctrinaire de la liberté de la presse,' 117.



locaux.’ ‘Il faut laisser aux localités le moyen d’exprimer leur vœu... Je m’oppose au monopole des lumières comme à tout autre monopole, je n’en veux pas le privilège pour Paris.’<sup>846</sup> What Guizot called the national interest was a chimera to Constant: another pretext, this time wrapped in a rational garment, for substituting a putative, chimerical conception of the common good for tangible interests.

In 1814, Constant’s reference to ‘la partie pensante de la nation’ suggested that the type of interests he considered the most relevant were those of the educated, property owning public. In 1819, however, in line with his shifting views on property and his renunciation of the connection he had previously established between landed property and enlightenment, Constant started broadening the social basis of opinion. In his answer to Guizot’s emblematic 1819 speech, in which he had gestured at the incapacity of a numerous class of citizens to discern the public interest, Constant vehemently denounced the suggested correlation between wealth and knowledge implied by the money-deposit system Guizot defended. Today, even in the lower ranks of society, Constant argued, one can find ‘un instinct admirable, un sentiment vrai, une raison formée, mûrie, une juste appréciation des choses.’ Notables had no monopoly of knowledge: ‘je me refuse à cette sorte d’aristocratie intellectuelle qui fait regarder les lumières et la raison comme le partage exclusif d’une partie de la société.’<sup>847</sup>

### **Modern Political Liberty**

In 1980, Stephen Holmes took aim at Isaiah Berlin’s individualist reading of Constant’s lecture on ancient and modern liberty. It was greatly mistaken, he argued, to understand Constant as being solely obsessed with the preservation of a private sphere: the lecture’s core message was that individual liberty needed to be combined with political liberty.<sup>848</sup> Since then, many Constant scholars have endorsed this revisionist reading, often with an explicit nod to Holmes’ interpretation.<sup>849</sup> In his wake, a burgeoning trend in scholarship has branded Constant’s emphasis on political engagement ‘democratic,’ arguing that the 1819 lecture provided evidence that liberalism was not an anti-democratic type of

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<sup>846</sup> ‘Sur le cautionnement demandé aux journaux de départemens (4 mai 1819),’ in *Discours*, 1, 78.

<sup>847</sup> ‘Sur le cautionnement demandé aux journalistes (3 mai 1819),’ in *Discours*, 1, 64.

<sup>848</sup> Holmes, *Constant*, 28-78.

<sup>849</sup> Jaume, *L’individu effacé*, 82-86; Rosenblatt, *Liberal Values*, 162-164; Vincent, *Constant*, 192-194.

political doctrine.<sup>850</sup> In parallel, scholars have associated Constant's stress on political participation with a 'neo-republican' or 'liberal republican' stance, which celebrated participation as a way of thwarting domination and fostering the moralization of political life.<sup>851</sup>

The problem is that Constant, following Staël, saw 'democracy' as a specific type of political organisation only fit for ancient times – the one he condemned as anachronistic in his 1819 lecture.<sup>852</sup> The alternative, for Constant, was representative government. Constant's lecture was part of a wider series of lectures he gave on the English Constitution at the Athénée Royal. In his first lecture, Constant explained that, beyond the specificities of English constitutionalism, the nature of representative government was the 'véritable objet' of his research.<sup>853</sup> In the introduction to his lecture on ancient and modern liberty, Constant argued that his main ambition was to understand why representative government – the only type of government able to provide 'repos' and freedom today – had been completely unknown to the ancients. This government was a discovery of the moderns. The defining criterion was the established practice of the age: the social state of the ancients implied certain types of needs, which in turn implied a certain type of liberty, which translated into a specific political system. 'Leur organisation sociale les conduisait à désirer une liberté toute différente de celle que ce système [representative government] nous assure. C'est à vous démontrer cette vérité que la lecture de ce soir sera consacrée.'<sup>854</sup> Tied to representative government was a specific, modern type of political liberty, whose nature should lead us to revise both Holmes' analysis and the 'neo-republican' reading, without for that matter falling into Berlin's trap of a de-politicized Constant.

It is often thought that Constant equated ancient liberty with political liberty, and modern liberty with individual liberty. Although Constant's use of these terms might be at times confusing, a close reading suggests that Constant did not take them to be exact synonyms. Both ancient liberty and modern liberty were two possible *articulations* or *combinations* of individual liberty and political liberty. In other words, individual liberty and political liberty were two subsets of ancient liberty and modern liberty respectively.

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<sup>850</sup> Holmes is adamant on calling Constant's political liberty 'democratic liberty,' and uses Constant's lecture as evidence that 'democracy' and 'liberalism' are not ill-assorted. See his *Constant*, 2, 43, 73. See also Rosenblatt, 'Re-Evaluating Benjamin Constant,' esp. 37 and Garsten, 'Representative Government.'

<sup>851</sup> De Dijn, *French Political Thought*, 95-101; Jainchill, *Reimagining Politics*, 289; 292-294.

<sup>852</sup> *CA*, 373. On the problem with labelling as 'democratic' late eighteenth and early nineteenth century political thinkers, see Philip J. Costopoulos and Pierre Rosanvallon, 'The History of the Word "Democracy" in France,' *Journal of Democracy* 6 (1995), 140-54.

<sup>853</sup> *LCA*, 289.

<sup>854</sup> *Ibid.* 293.

Individual liberty, in the 1819 lecture, Constant defined generically as independence. Political liberty Constant defined as the right for citizens to decide collectively upon issues of common interest.<sup>855</sup> As we have seen in Part II, Constant believed that individual rights and political rights, although they existed in all times and places, had been gradually rediscovered throughout history.<sup>856</sup> Constant's argument in his lecture was that (1) the relative importance accorded to individual liberty and political liberty, (2) the specific forms each of them took on and (3) their ultimate function depended on the established practice of the age.

Political liberty in ancient times had three main features: it consisted in exercising directly and as often as possible a significant share of political power.<sup>857</sup> The people voted laws, deliberated on the public square, examined public finances, and pronounced judgments on magistrates. These activities procured vivid pleasures, and occupied most of the citizens' time. As a result, in ancient times, individual liberty existed, but only virtually: the ancients conceded only very little, if anything, to individual independence.<sup>858</sup> The political system that corresponded to this type of liberty – a direct, permanent and extended type of political liberty, combined with a negligible degree of independence – was what Staël had called in *Des circonstances* a democracy.

In modern times, thanks to the growth of commerce, the abolition of slavery and the increase of nations' size, individual liberty and political liberty took on a different shape. The multiplication of the means and possibilities of personal 'jouissances' had generated a strengthened desire for individual independence.<sup>859</sup> Accordingly, individual liberty acquired an importance it did not have in ancient times. In light of recent scholarship, it must be repeated that Constant, both in 1819 and elsewhere during the restoration, was abundantly clear that, in modern times, the order of preeminence had inverted itself: individual liberty was first, political liberty only second.<sup>860</sup> This is important, because this new hierarchy sheds light on Constant's understanding of political liberty in modern times.

Not only was the articulation different. So was the way in which political liberty was exercised. Ancient political liberty could be exercised directly, in light of the size of the states; modern political liberty had to reckon with the practicalities of involving citizens in

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<sup>855</sup> This type of liberty Constant sometimes called collective liberty or 'partage du pouvoir social.' Ibid. 293-294; 299; 310.

<sup>856</sup> Ibid. 307-308.

<sup>857</sup> Ibid. 293; 294; 299.

<sup>858</sup> Ibid. 294.

<sup>859</sup> Ibid. 297-298.

<sup>860</sup> Ibid., 307: 'La liberté individuelle, je le répète, voilà la véritable liberté moderne.' See also, for instance, *CF*, 105.

large, commercial states. Ancient political liberty constituted the bulk of ancient citizens' occupations; modern political liberty had to leave time for modern citizens' cultivation of 'jouissances'. Ancient political liberty exercised itself on almost all realms of human affairs; modern political liberty had to be restricted to a limited number of matters of common interest in order to respect the moderns' desire for independence.

Consequently, in modern times the function of political liberty had changed. It no longer constituted a purpose in itself, as it had in ancient times, but became what he called a 'garantie': a means of preserving individual liberty and hence individual pleasures.<sup>861</sup> The 'administration' or management of interests had replaced self-determination for the sake of it.<sup>862</sup> Modern liberty, Constant insisted, being different from ancient liberty, required 'une autre organisation' – representative government – which rendered the exercise of political rights both less time-consuming and subsidiary.<sup>863</sup> As Staël had argued in *Des circonstances actuelles*, representative government was not just a technical expedient designed to make the people's rule practicable in a large country. Representative government implied a radically different type of politics, attuned to the needs of the modern age. Its objective was not popular self-rule but the efficient management of society's interests on the basis of the division of labour. Democratic self-determination was the goal of the ancients; the enjoyment of *jouissances* the objective of the moderns:

Le système représentatif n'est autre chose qu'une organisation à l'aide de laquelle une nation se décharge sur quelques individus de ce qu'elle ne peut ou ne veut pas faire elle-même. Les individus pauvres font eux-mêmes leurs affaires: les hommes riches prennent des intendants. C'est l'histoire des nations anciennes et des nations modernes. Le système représentatif est une procuration donnée à un certain nombre d'hommes par la masse du peuple, qui veut que ses intérêts soient défendus, et qui néanmoins n'a pas le temps de les défendre toujours lui-même.<sup>864</sup>

Moderns did not need to renounce political liberty, but needed *a different type of* political liberty, suited to their thirst for private *jouissances*: 'ce n'est point à la liberté politique que je veux renoncer; c'est la liberté civile que je réclame avec *d'autres formes de liberté politique*.'<sup>865</sup>

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<sup>861</sup> *LCA*, 300.

<sup>862</sup> *Ibid.* 293-294; 309; 312.

<sup>863</sup> *Ibid.* 309.

<sup>864</sup> *Ibid.* 309.

<sup>865</sup> *Ibid.* 307.

Constant defined this modern type of political liberty in a representative government as ‘le droit, pour chacun *d’influer sur* l’administration du government.’<sup>866</sup> This formulation – the right to influence – is worth highlighting, because it was exactly the way Jean-Louis Delolme had defined what he saw as a suitable exercise of political liberty. In *Constitution de l’Angleterre*, Delolme established a sharp distinction between representative constitutions and popular constitutions, that is to say, between the monarchical constitution of England and the republican constitution of direct democracies, whose paradigmatic model was the Roman republic.<sup>867</sup> In footnotes, Delolme repeatedly took issue with Rousseau, suggesting that his conception of popular sovereignty was a poor way of conceptualizing the people’s power.<sup>868</sup> In popular constitutions, the people exercised *directly* political power, but this was, in Delolme’s analysis, nothing more than ‘une apparence de souveraineté’: the people, divided into factions and manipulated by leaders, only ended up blindly ratifying what had been decided for him.<sup>869</sup> In the representative constitution, on the other hand, the people transferred to representatives ‘toute son autorité législative.’ The limited size of the assembly fostered a sense of responsibility and encouraged rational debate, thereby enhancing the quality of decisions and preserving, by the same token, the people’s real liberty.<sup>870</sup> The people were not condemned to passivity for that matter. They retained the right ‘d’influer sur le gouvernement’ in two main ways: through elections and ‘censure,’ i.e. writing in newspapers and sending petitions to the king or the two chambers.<sup>871</sup> When citizens examined the government’s conduct, the people’s power took the form of an ‘opinion générale.’<sup>872</sup> Once it had ‘une opinion véritablement à lui,’ the people could then act concretely, by reappointing or dismissing representatives when elections came.<sup>873</sup> In ancient times, Delolme observed, censorship was granted to a particular tribunal, which inevitably formed a distinct, arbitrary power inside the State.<sup>874</sup> In England, thanks to complete freedom of the press, it was the people itself that manifested public opinion. Through the press, each citizen could instruct himself about public affairs. This in turn generated widespread interest

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<sup>866</sup> Ibid. 294.

<sup>867</sup> *Constitution de l’Angleterre*, op. cit. 197.

<sup>868</sup> Ibid. 161; 191; 210.

<sup>869</sup> Ibid. 192.

<sup>870</sup> Ibid. 267.

<sup>871</sup> Ibid. 222: ‘en un mot, le grand nombre ne pouvant agir que pour être soumis ou pour détruire, la seule part avantageuse qu’il puisse avoir dans une Constitution, doit être, non pas d’intervenir, mais d’influer.’

<sup>872</sup> Ibid. 215.

<sup>873</sup> Ibid. 216; 218.

<sup>874</sup> Ibid. On Delolme’s condemnation of Roman censorship, and Rousseau and Montesquieu’s admiration for this institution, see Gauchet, *Révolution des pouvoirs*, 81-82.

in governmental matters.<sup>875</sup>

In some respect, Constant's ancient-modern lecture can be read as a more heavily historicized reworking of Delolme's arguments about representation and public opinion. This should not come as a surprise since Constant's lecture was part of a broader commentary on the English constitution. Less pessimistically than Delolme, Constant suggested that the direct exercise of political rights might have worked in ancient times given their particular ethos and the size of republics. Such exercise, however, had always come at the expense of individual independence, and this is why this type of political liberty helped generate atrocity when applied in modern times.<sup>876</sup> Today, Constant argued, in a twist of Rousseau's formula about representation, citizens were 'souverain qu'en apparence': in a representative government, the people's sovereignty, if any such thing existed, was 'presque toujours suspendue' and as a general rule 'abdiquée' to the government.<sup>877</sup> This was not a problem for Constant, as it had been for Rousseau, as long as the people kept an eye on how representatives took care of the interests it entrusted to them.<sup>878</sup> According to Constant, modern political liberty implied 'le droit d'influencer soit par des representations, des pétitions, des demandes, que l'autorité est plus ou moins obligée de prendre en considération.'<sup>879</sup> Elsewhere, Constant described it as 'un droit de contrôle et de surveillance par la manifestation de leurs opinions.'<sup>880</sup> This amounted to state what Constant had been saying elsewhere: that in modern France, the people's power was best understood as public opinion. Popular sovereignty, by contrast, was an outdated mode of framing the people's power. This conception he shared with Delolme and might have partly taken from him. Although Delolme was not referred to in the ancient-modern lecture, Constant quoted him elsewhere in his lectures at the *Athénée*, mentioning approvingly Delolme's understanding of people's power as 'assentiment général.'<sup>881</sup> In his texts on freedom of the press, Constant generously quoted Delolme's comments on how newspapers instilled across the nation a vivid political life.<sup>882</sup>

Modern political liberty for Constant consisted in activating the different channels that allowed the expression and communication of one's interests to representatives, to ensure

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<sup>875</sup> Ibid. 221. For a similar reading of Delolme on public opinion, and his influence on Sismondi, see Paulet-Grandguillot, *Libéralisme et démocratie*, 266-269.

<sup>876</sup> Ibid. 303-304.

<sup>877</sup> Ibid. 295.

<sup>878</sup> Ibid. 309.

<sup>879</sup> Ibid. 294.

<sup>880</sup> Ibid. 311.

<sup>881</sup> Ibid. 332.

<sup>882</sup> 'De la liberté des brochures,' 83-84.

that the laws they passed indeed conformed to their wish:

A moins d'être insensés, les hommes riches qui ont des intendants, examinent avec attention et sévérité si ces intendants font leur devoir, s'ils ne sont ni négligents, ni corruptibles, ni incapables; et pour *juger* de la gestion de ces mandataires, les commettants qui ont de la prudence, *se mettent bien au fait* des affaires dont ils leur confient l'administration. De même, les peuples qui, dans le but de jouir de la liberté qui leur convient, recourent au système représentatif, doivent exercer *une surveillance active et constante sur leurs représentants*, et se réserver, à des époques qui ne soient pas séparées par de trop longs intervalles, le droit de *les écarter s'ils ont trompé leurs vœux*, et de révoquer les pouvoirs dont ils auraient abusé.<sup>883</sup>

Constant's modern political liberty was a type of political liberty derived from a specific interpretation of the English model. It consisted in an active type of surveillance before and after elections, and a consubstantial right to renew or not the representative's mandate at regular intervals if they had failed to act according to their desires. This control was part and parcel of Constant's understanding of political liberty as a guarantee of individual liberty. But political liberty also had another function. Elections and the press were the two dimensions of people's power understood as public opinion: elections provided a sample, at a given period of time, of the people's interests and were conceived as ways to send to the chamber citizens reflecting these; newspapers and petitions, by manifesting, repeating, and sometimes updating the people's interests between elections, in principle ensured that representatives were constantly aware of these, and thereby kept under close scrutiny.

Moreover, these were also channels of public opinion in the sense of *estime publique* – a dimension Constant also reactivated in his 1819 lecture. The representatives and ministers' desire to keep their reputation intact, Constant suggested, was a potent way of keeping them on track. But in order to be effective, pressure had to come from public opinion – not the government. This was one of the mistakes the Jacobins had committed, and the ultras were currently replicating. The pitfall, in both instances, was to attempt to shape public sentiment by distributing blame and rewards, in order, for instance, to keep candidates they deemed 'dangereux' at bay at electoral times.<sup>884</sup> In so doing, the ultras were reenacting a type

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<sup>883</sup> Ibid. 309.

<sup>884</sup> Ibid. 305: 'De même, à une époque bien plus récente, lorsque des autorités craintives essayaient d'une main timide de diriger les élections à leur gré, un journal qui n'est pourtant point entaché de républicanisme, proposa de faire revivre la censure romaine pour écarter les candidats dangereux.' This might be a reference to the royalists' reaction to the election of the abbé Grégoire in September 1819 (i.e. at the time Constant was giving

of political measure Rousseau had greatly admired: Roman censorship.<sup>885</sup> Such control of public opinion, Constant argued, had become anachronistic. In ancient times, the simplicity of mores and the small size of states made it possible for each citizen to appreciate the equity and soundness of the censors' measures.<sup>886</sup> Today, the complexity of social life, coupled with an increased attachment to individual independence, made such a 'surveillance morale' intolerable. In modern times, governments should leave public opinion as the sole arbiter of the rulers' ability to rule: 'l'opinion seule peut les atteindre (moeurs); elle seule peut les juger, parce qu'elle est de même nature. Elle se soulèverait contre toute autorité positive qui voudrait lui donner plus de précision.'<sup>887</sup> In the introduction to his lecture, Constant targeted another example of ancient-style censorship that Delolme had derided: the Spartan Ephors. The type of control they exercised upon the kings was equally defective, Constant argued, because the Ephors were only limited in number and took part in the administration of the state, thereby increasing the risk of collusion and, ultimately, of tyranny.<sup>888</sup> In a representative government, the role of surveillance was incumbent upon public opinion, whose countless spokespersons and independence made it both more effective and more difficult to muzzle.

Modern political liberty was thus not meant to express a popular *will*, but consisted in expressing a *judgment* on two elements: the types of interests that needed to be dealt with at a given period of time and the electoral candidates' capacity to defend these.<sup>889</sup> This type of surveillance diverged sharply from the Montagnards' inspired type of political liberty, where the assembled people, directly exercising its sovereignty, monitored the national assembly while symbolically substituting itself for it. Constant's citizens exercised their political rights *rationaly* and *indirectly*, through the double screens of publications and votes cast at long intervals. In a journal article written later in 1819, Constant contrasted the use of newspapers in France with English hustings as well as clubs, where citizens respectively met to listen to orators and discuss public affairs with: 'les journaux suppléent parmi nous à ces

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his lectures), and their attempts to expel him from the Chamber. See Constant's speech on the subject, in which he opposed the Chamber's project of proclaiming Grégoire's 'indignité': 'Sur l'élection de M. Grégoire (6 décembre 1819),' 157-161.

<sup>885</sup> Ibid. 294. See *Du contrat social*, Book IV, chapter 2.

<sup>886</sup> *LCA*, 306.

<sup>887</sup> Ibid. 306. See, along the same lines, Constant's vehement reaction to the 1819 press laws' dispositions on libel: 'amendement relatif à la diffamation (24 avril 1819)' in *Discours*, 1, 41-53.

<sup>888</sup> Ibid. 292-293.

<sup>889</sup> It appears Sismondi also built on Delolme to develop a conception of political participation based upon public opinion as the expression of the people's power in his *Recherches sur les constitutions des peuples libres*. See Granguillot, *Libéralisme et démocratie*, 268-269. I come back to Sismondi and Constant in the conclusion of the dissertation.



rassemblemens tumultueux et à ces harangues, qu'écoute avidement une foule passionnée. C'est un moyen plus calme, et par conséquent préférable, de connaître l'opinion, cette reine des gouvernemens représentatifs, que doit étudier chaque homme d'état.'<sup>890</sup> The epistemic dimension was central: political liberty consisted in initiating the channels that made one's interests *known* to rulers. Further, modern political liberty was best exercised *individually* – as opposed to collectively, through clubs or political groupings of all sorts – in the silence of one's study, with the collectivity only intervening at a further stage, to assess the writer's talent and the quality of the contributions made to the public debate.<sup>891</sup> Further, if the citizens' surveillance had to be 'constant,' the form it took – writing and voting for representatives at long intervals – left citizens time to ponder their interests.

Constant's intellectualist understanding of political liberty also sheds light on one last, central dimension of the 1819 lecture: self-perfection. At the end of his lecture, Constant drew his audience's attention to the 'danger' to which moderns were exposed: public apathy, encouraged by the moderns' craving for private *jouissances*. Besides the Jacobins' popular despotism and Napoléon's despotism – two anachronisms Constant had denounced earlier – this was a third, distinctively modern type of 'despotisme,' which he associated with the ultras' curtailment of political participation through the double vote law.<sup>892</sup> Constant's answer to depolitisation was to give moderns an *interest* in political liberty. Constant developed two consequentialist arguments. First, moderns could not have *jouissances* when these were separated from 'garanties.' Giving up on political liberty would amount to ultimately sacrifice what moderns held so dear.<sup>893</sup> Second, moderns might find another incentive to engage in political affairs: perfecting themselves. Mankind's calling was not simply happiness, Constant stated:

Non, Messieurs, j'en atteste cette partie meilleure de notre nature, cette noble inquiétude qui nous poursuit et qui nous tourmente, cette ardeur d'étendre nos lumières et de développer nos facultés; ce n'est pas au bonheur seul, c'est au perfectionnement que notre destin nous appelle; et la liberté politique est le plus puissant, le plus énergique moyen de perfectionnement que le ciel nous ait donné.<sup>894</sup>

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<sup>890</sup> 'Aux auteurs de *la Renommée* (22 décembre 1819),' in *OCBC XI*, 530.

<sup>891</sup> *Ibid.* 530.

<sup>892</sup> This was the real threat, in Constant's analysis, since the other two types of despotism were out of phase with the established practice of the age. *LCA*, 308.

<sup>893</sup> *Ibid.* 310.

<sup>894</sup> *Ibid.*

The true goal of modern men was self-perfection or the full development of individual capabilities.<sup>895</sup> Individual liberty was the precondition for this flowering. Political liberty, Constant suggested, was an additional opportunity for the improvement of faculties. In other words, political liberty and individual liberty were two different means to reach the same goal – self-perfection. When Constant wrote ‘nous sommes des modernes, qui voulons jouir, chacun de nos droits; développer, chacun, nos facultés comme bon nous semble, sans nuire à autrui,’ he was referring to both individual and political rights.<sup>896</sup> Modern liberty consisted in a combination of the two types of liberty, both geared towards self-development. The difference between individual liberty and political liberty was that the latter, in modern times, offered higher types of opportunities to develop one’s faculties. The exercise of modern political liberty included, besides voting and writing about politics, being a member of a jury, running for elections, and debating about politics.<sup>897</sup> These activities permitted the use of individual judgment on complex matters, and this is the reason why, understood in this sense, political liberty was a more powerful means of self-development than individual liberty. In their absence, individual activity would be stifled and redirected towards baser, material interests.<sup>898</sup>

To prevent such lethargy, Constant called upon the government to buttress the existence of ‘institutions’ such as direct elections, the jury and freedom of the press that consecrated the individual’s influence on public affairs. These would realize ‘l’éducation morale des citoyens,’ by giving them ‘à la fois le désir et la faculté’ of influencing political affairs.<sup>899</sup> When they exercised political rights, citizens had the opportunity to distinguish themselves. Public recognition would be their reward, and a further reason why they should engage in politics. Citizens, as ‘dispensateurs de la reconnaissance nationale,’ would send back to the Chamber illustrious candidates who had stood for liberty, such as Lafayette.<sup>900</sup> This collective emulation would make the nation grow in terms of enlightenment, as each citizen made use of his intellectual abilities and strove for his own success: ‘La liberté politique soumettant à tous les citoyens, sans exception, l’examen et l’étude de leurs intérêts les plus sacrés, agrandit leur esprit, anoblit leurs pensées, établit entre eux tous une sorte

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<sup>895</sup> Holmes (*Constant*, 46) describes Constant’s justification of political liberty in terms of ‘self-perfection’ as ‘theoretically dubious,’ probably because the intellectualist elitism it implied did not fit with the democratic-egalitarian tack he wants to project onto Constant’s thought. Self-perfection was however central to Constant’s argument, as Garsten has shown in ‘Benjamin Constant’s Other Lectures.’

<sup>896</sup> *LCA*, 306.

<sup>897</sup> Jaume, *L’individu effacé*, 86.

<sup>898</sup> *CF*, 163-165.

<sup>899</sup> *LCA*, 311.

<sup>900</sup> *Ibid.*

d'égalité intellectuelle qui fait la gloire et la puissance d'un peuple.'<sup>901</sup> The type of political liberty Constant was advocating was attuned to a time of individual *jouissances*, because it gave to individuals a personal motivation to get involved in politics and was clear about the recompenses to be expected from political commitment. Addressing those who, like the ultras, wanted to curtail political liberties, Constant replied that they had misunderstood the meaning of political liberty in modern times: 'ce n'est point la garantie qu'il faut affaiblir, c'est la jouissance qu'il faut étendre.'<sup>902</sup>

### III. Conclusion

In this chapter, I have interpreted Constant's shifting positions in 1814-1815 as a series of efforts to adapt his theory of legitimacy to successive political regimes. Although I do not deny that Constant's rally to Napoléon smacked of opportunism, I submit that the way in which he sought to defend the legitimacy, first of the Bourbon monarchy, then of the restored Empire, was theoretically coherent. I have exposed Constant's discussion of popular sovereignty in the 1815 version of the *Principes* as a circumstantial effort to cast discredit on Napoléon's use of popular sovereignty to legitimize his seizure of power through another plebiscite. I have charted some of Constant's neglected remarks on legitimacy in the 1810s and shed light on his hesitations about the sustainability of the chamber of peers in an age of equality.

In the section on representative government, I have revisited Constant's mature constitutional theory. I have interpreted it as a reflection on how the reforms desired by public opinion could be smoothly turned into laws without suffering from legislative hastiness and institutional gridlocks. I have reinterpreted Constant's infamous 'neutral power' as the keystone of a larger vision of constitutional politics aimed at providing the institutional conditions that allows public opinion to gradually grow more enlightened. Representative government for Constant was truly *representative* when it represented the current state of opinion, understood as the expression of the interests that existed accross society at a given moment of time. Last, I have offered a new interpretation of Constant's lecture on the ancients and the moderns. I have suggested that in this text, Constant sought to define what *modern* political liberty involved. It consisted in the right to *influence* rulers through the shaping of public opinion. This not only allowed for the preservation of individual

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<sup>901</sup> Ibid.

<sup>902</sup> Ibid. 307.

independence, but also ensured that representatives did not substitute their own interests to society's interests. Constant's texts on freedom of the press, I have contended, should be read along the same lines, as a defence of modern political participation as a way of making one's interests known to rulers.

## **Conclusion**

The aim of this dissertation was not to offer a comprehensive survey of conceptions of ‘public opinion’ across Constant’s works. Rather, I attempted to show that paying attention to Constant’s ideas about public opinion can offer new perspectives on his theory of legitimacy and representative government. It is likely that future inquiries through the lens of ‘public opinion’ would deliver additional insights into Constant’s thought. An exhaustive survey of ‘public opinion’ in Constant’s writings would have to pay attention to uses of the notion in his voluminous works on religion.<sup>903</sup> It would also have to account for the role Constant ascribes to public opinion in his still little known *Commentaire sur l’ouvrage de Filangieri*.<sup>904</sup> In what follows, I summarize the core of my argument on the two main subthemes of this dissertation, and I highlight how my reinterpretation of Constant contributes to on-going debates about sovereignty and representation in modern history of political thought. In the third section of this conclusion, I suggest that further research on public opinion along the lines of this dissertation would probably lead to a thorough revision of the categories that still dominate debates around French liberalism.

### **I. Legitimacy, Sovereignty and Opinion**

Over the course of the dissertation, I have shown how Constant used various versions of public opinion to address the question of why the people owed allegiance to a political regime. Popular sovereignty, when recognized as the foundation of the state, was an abstract notion that could not account for how a regime’s legitimacy took shape over time, in concrete historical circumstances. It also suggested the people’s unconditional power to revolutionize the political order, and gave a pretext to charismatic leaders to legitimize constitutional alterations through referenda. For Constant, a government’s legitimacy did not hinge on the fiction of popular sovereignty, but depended on a concrete, general opinion about the identity

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<sup>903</sup> See, mainly, *De la religion considérée dans sa source, ses formes et ses développements*, ed. Tzvetan Todorov and Etienne Hofmann (Arles: 1999); *Du polythéisme romain, considéré dans ses rapports avec la philosophie grecque et la religion chrétienne*, 1, ed. Jacques Matter (Paris: 1833). For a study of these works, see mainly Fontana, *Constant*, 98-117; Rosenblatt, *Liberal Values* and Garsten, ‘Constant’s Other Lectures’ and ‘Constant and the Religious Spirit of Liberalism.’

<sup>904</sup> *Commentaire sur l’ouvrage de Filangieri*, OCBC, XXVI. On this text, see Pierre Cordey, ‘Benjamin Constant, Gaetano Filangieri et la ‘Science de la Législation,’ *Revue Européenne Des Sciences Sociales*, 18/50 (1980), 55–79; Clorinda Donato, ‘Benjamin Constant and the Italian Enlightenment in the *Commentaire sur l’ouvrage de Filangieri*: Notes for an Intercultural Reading,’ *Historical Reflections*, 28/3 (2002), 439-453 and Vincenzo Ferrone, *The Politics of the Enlightenment: Constitutionalism, Republicanism, and the Rights of Man in Gaetano Filangieri*, transl. Sophus Reinert (London, 2012), esp. chapter 10, 176-195.

of rulers (*who* should rule?) and the object of their assignment (*how* should they rule?). Rulers had to be chosen according to rules people believed in, the two main options in post-revolutionary France being elections and heredity. Different constitutional powers could be underpinned by different titles of legitimacy, depending on historical circumstances. On the other hand, the government's conduct had to conform to the people's opinion about minimal ruling standards, such as respect for individual independence. Regime forms – monarchies or republics – depended upon shifts in opinion over time. Legitimacy was a question of correspondence between a given political regime and the people's expectations, as shaped by historical experiences. The established practice of the age, however, was not totally contingent. Having witnessed the Terror and Napoléon's rule, Constant was sensitive to the fact that *current* opinion could easily be manipulated and embrace despotic regimes. Accordingly, they looked back at history to define what was the nation's *enduring* opinion about the fundamental conditions of the political order. Historical changes in opinion followed a clear path towards the discovery of timeless principles, embodying the nation's long-term interests, and captured in what they called the nation's 'wish.' Constitutions were the expression and constant reminder of this wish.

Constant designed the fundamentals of this theory of legitimacy early in his career, in the 1790s. Depending on the type of government he wished to disqualify or legitimize, however, he was led to slightly revise his conceptual framework, if the need presented itself. I have retraced how Constant re-articulated his distinctive opinion-based theories of legitimacy in shifting contexts, in response to contemporaneous appeals to popular sovereignty to champion constitutional changes.

In the first chapter, I showed how Constant relied on a revamped version of Hume's assertion that all governments ultimately rest on opinion to make the case for the Directory's legitimacy, despite the fact that the majority of the French was still far from supportive of the young republic. I have argued that Constant did not start with the concept of popular sovereignty to solve the crisis of legitimacy the French Directory was facing. In the name of popular sovereignty, contending parties – royalists and radical republicans – were reclaiming the right to reshape extant institutions, which perpetuated post-Terror anarchy. Answering both parties, Constant, alongside Staël, called attention upon the general state of opinion. The challenge was to rally a deeply divided public opinion around the extant government in the name of a few fundamental principles upon which parties could agree. These could be found by looking at opinion's embrace, throughout history, of gradually more rational organizational principles. The historical trajectory until the revolution substantiated the

people's 'wish': stability and respect for property, but also social mobility through self-development, and hence the rejection of heredity in favor of equality. These principles, couched in a constitution, provided a compass to rule out anachronistic regime forms – monarchies and ancient democracies – and justify the need for a modern, republican form of representative government, based on elections and geared towards the satisfaction of interests. Writers had to vulgarize this 'wish', so that present-day, unenlightened public opinion would realize where its true, long-term interests lied and support the Directory. Writers were builders of legitimacy: they would create rational 'assent' to institutions based on the principle of equality and the selection of rulers via elections.

In chapter 2, I have provided a dramatic reassessment of Constant's views on legitimacy. Scholars tend to think that Constant endorsed limited popular sovereignty, but I show that he urged that the concept be disposed of in light of Napoléon's uses of popular sovereignty to exercise absolute power through plebiscites. Like Necker and Staël before him, Constant used public opinion as the basis of an alternative theory of legitimacy. Constant's problem, however, was no longer how to secure allegiance to a tottering regime, but how to reawaken a public opinion that had become all-too subservient to a charismatic leader. To that end, Constant distinguished between a debased present-day opinion and the nation's long-term 'wish': the trans-generational opinion that had embraced true principles of politics – redefined as political equality and individual liberty – throughout a perfectibility-driven history. Writers had to reawaken a public opinion to the principles it had forgotten, so that an acceptable regime form – a partly hereditary, limited monarchy or, preferably, a representative republic – with a revised constitution would hopefully replace the illegitimate despotism that prevailed.

In chapter 3, I have reinterpreted Constant's seminal text, *The Spirit of Conquest and Usurpation and their Relation to European Civilization* (1814), as providing Constant's definitive and improved theory of how a government's legitimacy depends on its conformity with 'the spirit of the age' – the present stage of 'civilisation' or 'social state' – which now embraced peace, stability and limited government. I have also explained how, witnessing the French opinion's embrace of heredity upon the Bourbons' return, Constant returned to Necker's intuitions by fully conceding that the nation could approve institutions that included a hereditary chamber and a hereditary monarch as long as these coexisted with an elected chamber. Dismissing the opposition between monarchies and republics as out-dated, Constant argued that the ultimate modern regime was a representative government, possibly underpinned by eclectic titles of legitimacy, which respected the nation's wish, as embodied

in the constitution. Constant's views on legitimacy thus reinterpreted provides a better understanding of his shifting political allegiances in 1814-1815. Bringing new textual and contextual evidence, I have additionally elucidated Constant's remarks upon popular sovereignty in 1815 as a forced effort to cast discredit on Napoléon's use of the concept to orchestrate a plebiscite to reclaim absolute power upon his return from Elba. In so doing, I have challenged the idea that this text could be read as evidence of Constant's positive endorsement of popular sovereignty.

The implications of Constant's theory of legitimacy are probably worth exploring further, now that its main elements have been elucidated. One of its most interesting aspects is that it offered a way of thinking about legitimacy that reconciled a strong awareness of established human practices with a robust concern for illegitimate rule. In that respect, it provides an interesting counterpoint to Paul Sagar's recent interpretation of Hume as a theorist of opinion. Theories of sovereignty, Sagar's argument goes, offer a justificatory answer to the problem of political obligation: they stipulate *a priori* who is entitled to rule and according to what standards, and make these twin elements derive from a social contract. Hume for his part shunned contractarianism as an unhelpful fiction and insisted that we look instead at what the people's existing belief about the government's legitimacy were. Sagar's argument has bred confusion, because he provocatively argued that Hume offered a theory of the state 'without sovereignty'.<sup>905</sup> Although some of Sagar's formulations might suggest that the very language of 'sovereignty' was redundant for Hume, in several instances he suggested that his reading does not imply that, for someone like Hume, there was no sovereign power in the state, in the sense of an ultimate decision-making agency – in England, this was the King-in-Parliament.<sup>906</sup>

As I have shown, Constant's immersion in Scottish thought during his early years of training in Edinburgh played a role in shaping his opinion-based theory of legitimacy. Like Hume, Constant thought that behind existing governments, there was no popular sovereign, but merely the people's ever-changing opinion. When he used the term 'sovereignty' in a positive sense, it was to designate the authority of the actual governmental structure, even if, most of the time, he replaced it with his own notion of 'social authority'. He agreed with Hume that grounds of legitimacy might and did change over time. He shared his preference

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<sup>905</sup> Ibid. 137. See Christel Fricke's review of Sagar's book for *Notre Dame Philosophical Reviews*, 8 October 2018, available at: <https://ndpr.nd.edu/news/the-opinion-of-mankind-sociability-and-the-theory-of-the-state-from-hobbes-to-smith/>.

<sup>906</sup> Sagar, *Opinion of Mankind*, 187; 207-208. For a helpful clarification on this point, see James A. Harris, "From Hobbes to Smith and Back Again," *History of European Ideas*, 45/5 (2019), 761-766.



for stabilized regimes around which interests had crystallized, and expressed a similar degree of indifference towards forms of government. Witnessing Napoléon's manipulation of referenda, Constant nurtured a Humean skepticism towards the notion of 'consent', preferring instead to write about the people's explicit or implicit 'assent' to constitutional arrangements.

Unlike Hume, Constant was writing after the French revolution, with major implications for his own opinion-based theory of legitimacy. Scholars have expressed doubts as to whether it was Hume's intention to break from a sovereignty theory tradition going back to Hobbes, as Sagar takes Hume to be doing.<sup>907</sup> Constant, for his part, had a clear reason to get rid of the concept of popular sovereignty, since he associated it with the unlimited power of Napoléon's rule. In its place, he envisaged an underlying general opinion – the people's 'wish' – that embodied not just the contingent, Humean 'practice of the age,' but the current stage of 'civilization.'<sup>908</sup>

One implication of Hume's way of thinking about political right, on Sagar's reading, was that the people cannot be mistaken in their opinions about legitimacy. On this view, there was no external justificatory criterion by which to assess existing governments, such as an ancient constitution or a social contract.<sup>909</sup> In Sagar's words, 'insofar as the opinion of mankind judges that some power possesses authority and is owed obedience, it therefore does and is.'<sup>910</sup> In Constant's analysis, the Terror and Napoléon had amply shown how easily opinions could be manipulated, to the point of making people forget the very principles that had been fought for in 1789. This showed that a bare appeal to *existing* general opinion did not always provide a satisfactory basis for politics.<sup>911</sup>

One had to take a broader view: to look at the achievements of the revolution and the kind of expectations it had roused amongst the population, and, should the people be lured astray, remind them of their true interests if need be. Like Hume, Constant believed that theory was always rooted in concrete experience, as observable in history. Unlike him, he saw history as moving in a certain direction – towards 'civilization,' or an ever-increasing recognition of equality and individual independence. Constant's belief in the existence of true principles implied that, even if opinions were manipulated to the point of giving up on them, these principles could be rekindled with the proper amount of persuasion. Political regimes

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<sup>907</sup> Harris, "From Hobbes to Smith," 764.

<sup>908</sup> "The established practice of the age" is an expression Hume used in *The History of England*. Quoted in Sagar, *Opinion of Mankind*, 134, note 122.

<sup>909</sup> Harris, "From Hobbes to Smith," 761.

<sup>910</sup> Sagar, *Opinion of Mankind*, 130; 138.

<sup>911</sup> On problems related to Sagar's "realist" approach to legitimacy, see Clifton Mark's review of Sagar's book for *Political Theory* 47/3 (2019), 409-413.

could thus be condemned for not living up to these principles, rather than being merely accounted for because they were in phase with the opinions of their subjects. No doubt, current opinion was determinant, but abstract theory was required to sort opinions out – to discriminate between fleeting passions and the people’s true, long-term interests.

Sagar presents his genealogy of ‘theorists of opinion’ – Hume and Smith, as well as Montesquieu and Burke as potential candidates – as an ‘alternative’ to the line of thinkers that had a theory of sovereignty, as highlighted by Istvan Hont and Richard Tuck.<sup>912</sup> Constant’s case suggests that such a stark dichotomy might be an overstatement. His reinvestment of Rousseau’s concept of the general will with a new meaning dodges the justification-explanation opposition Sagar uses. Constant’s general opinion could account for various types of regime forms, underpinned by different grounds of legitimacy, while retaining a minimal normative content that condemned political regimes that deprived citizens from any participation in ordinary law-making and trampled individual independence. This general opinion was historically rooted and attuned to political practice, but also embodied a set of true principles that could be used as a compass in times of disorderly political changes. As I have suggested, Constant was not an isolated case. Germaine de Staël, but also her father, Jacques Necker, saw in the nation’s ‘wish’ the standard by which to gauge the conditions of a just and stable political order. In that respect, members of what has come to be known as ‘the Coppet group’ may have designed a way of thinking about legitimacy that shared Rousseau’s concern with illegitimate rule without disregarding for that matter Hume’s vindication of established human practice.

We should also be aware that such a theory of legitimacy had a democratic price: constitutional amendments were never the product of the people’s sovereignty, understood as their capacity for fundamental self-rule, but the end-result of an extended historical process of shifts in opinion, as deciphered by public writers and implemented by constituted powers. Here Richard Tuck’s recent work provides another potent counterpoint.<sup>913</sup> Tuck has argued that there exists a fundamental split amongst modern political thinkers between those who, like Rousseau, defended the existence of a popular sovereign distinct from the government, and those who, like Sieyès, believed that sovereignty and government were best conflated – government being the sole and only effectual site of sovereignty. For the first strand of thinkers, including the Girondins, the people always remained the locus of sovereign power,

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<sup>912</sup> Sagar, *Opinion of Mankind*, 10-11.

<sup>913</sup> *The Sleeping Sovereign*.

reawakening at regular intervals to decide on the essential constitutional structure of the political association, especially through referenda, before going back to sleep.

Constant not only offered a damning critique of the idea of a lurking, popular sovereign, but also offered an alternative to it that trumps Tuck's dichotomy. Constant understood how politically effective calls upon popular sovereignty could be in a nation where *ancien régime* privileges had been unsettled in its name. With Napoléon, he witnessed how referenda could be an occasion for charismatic rulers to achieve absolute power while claiming to give the people a chance to act as sovereign. Referenda were never the manifestation of a legitimating popular vote, but the very occasion of a massive usurpation of the people's ability to express its collective voice. The only way to weaken deceitful leaders who appealed to popular sovereignty through referenda was to demonstrate that no such thing existed in the first place.

For Constant, if the existing set of institutions – during the restoration, the King and the chambers taken together – always got to enact extraordinary legislation, they never entirely substituted themselves to the people. The body of citizens, through the expression of its general opinion or 'wish' via publications, newspaper articles and petitions, always transcended governmental action. When freedom of the press was complete, contributions to the general opinion would stem from the citizens' multiple initiatives, in contrast with state-sponsored referenda. The people's 'wish' could never be reduced to caption made at a given moment of time: it consisted in the relentless flux of contradicting opinions about what form extraordinary legislation should take, informed by past opinions on the matter and forward-looking considerations. Constant's general opinion was quintessentially deliberative, as opposed to Rousseau's non-deliberative popular sovereign. When public opinion was sufficiently ascertained, the government would be well advised to turn it in due time into constitutional amendments, upon pain of seeing its legitimacy increasingly eroded. Constant did not deny that there were interest groups active in shaping opinion, but he believed that a general debate did a better job at dispelling vested interests than voting divorced from deliberation. Of course, rulers could for some time successfully muzzle up citizens through crackdown on freedom of the press or state-controlled propaganda, as Napoléon had more or less succeeded in doing. But Constant thought that in the long run, such a course of action would only widen the gap between the people's expectations and the constitutional structure of a political association, causing the government's ultimate downfall. Additionally, Constant's general opinion was a historically rooted reflection of the set of interests that prevailed at a given period of time. In that respect, it provided an objective content for the

government to work on to enact constitutional reforms. The people's wish had some core, minimal normative content, which consisted in the lessons of history properly reduced to two fundamental 'principles'. These limits to constitutional changes, which Constant believed writers should frequently remind rulers of, diminished the risks of conjectural changes in the name of an abstract and absolute concept that some have associated with Tuck's promotion of popular sovereignty.<sup>914</sup>

Yet, as Tuck has intuited, thinkers who stressed the importance of public opinion were undermining the idea that the politics of a society must be controllable from a specific site, according to identifiable procedures.<sup>915</sup> For Constant, there was no fundamental site of sovereignty properly speaking, since constitutional reforms were the product of an informal public sentiment initiated across society before formal institutions translated it into concrete constitutional dispositions. What Tuck sees as a dissolution of sovereignty was for Constant the price to pay to avoid the confiscation of the people's power through constitutional techniques purportedly designed as a way of giving back control. His theory of legitimacy reveals that institutional stability and radical collective self-determination are difficultly reconcilable values.

## **II. Representative Government and Public Opinion**

The second thread of this dissertation is Constant's rejection of popular sovereignty as a defective way of theorizing the people's day-to-day influence on a representative government, without falling into the alternative category of national or representative sovereignty. Instead, he used public opinion as a distinct way of conceptualizing the people's power. Sovereignty in ordinary lawmaking posed two main types of problems. First, advocates of popular or national sovereignty mistakenly conceived the goal of collective decision making as self-determination, and the people's will as the defining criterion of any legitimate law. On this view, laws were legitimate in so far as they could be traced to a popular majority. This amounted to consecrate arbitrariness without regard for the quality of decision-making. Second, the revolution had shown that sovereignty could result in binary interpretations of the people's political participation. Either the people were said to retain their sovereignty and were entitled to be *directly* involved in law making by imposing an

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<sup>914</sup> Mark Philp, 'Review of *The Sleeping Sovereign*,' *The English Historical Review*, 134/567 (2019), 469-472.

<sup>915</sup> Tuck, *Sleeping Sovereign*, 256-257.

imperative mandate on delegates. Or they were said to have delegated their sovereignty, contributing only *indirectly* to law making through the elections of representatives who had free rein to determine the general interest – this was the representative mandate.

For Constant, the objective of representative government was the administration of society's observable interests based on a division of labour. These interests needed to be integrated within the collective-decision making process through different channels to ensure that laws were of the highest possible quality. Laws derived their legitimacy from their degree of conformity with the needs of society. The correct way of conceptualizing the people's power to ensure the sound management of interests was public opinion. In order to avoid arbitrary or uninformed decisions, he insisted that representative government should be the receptacle of public opinion. Public opinion here he understood in two distinct but complementary ways: as the rational expression of society's diverse and concrete interests, and as public esteem – the moral judgment citizens made about the rulers' action. Voting and writing in newspapers were complementary channels of opinion: ways of making society's interests clear as well as showing appreciation for (or disapproval of) a representative or a minister's conduct, bearing in mind that it would always be up to constituted powers to make binding decisions. Political participation consisted in *influencing* rulers, by keeping them constantly under the eye of public opinion. Rulers were thereby bound by a 'responsabilité d'opinion.'

In addition to Constant's opinion-based theory of legitimacy, this dissertation has recorded how Necker, Staël and Constant successively designed competing accounts of representative government as the receptacle of public opinion. Depending on their analysis of the state of public opinion, they stressed the need to tame, enlighten or simply channel public opinion in representative institutions. This resulted in diverging ideas about the types of interests public opinion embodied and how to organize elections, freedom of the press, and the balance of constitutional powers, which they perceived as a way of guaranteeing that the proper expression of public opinion would be ultimately translated into legal texts without being impeded by gridlocks or legislative hastiness.

In chapter I, I have first explained how Necker derided the system of representation revolutionaries had built on the basis of popular sovereignty on the ground that it idolized the chamber of deputies as the locus of the general interest. Instead, Necker recommended that constitutional powers cooperated to subdue public opinion understood as the expression of the people's short-term interests in representative institutions. The experience of the Terror had shown that 'popular opinion' was malleable and unruly. Accordingly, it had to be taken

into account in the collective decision making process via the elected chamber, but ultimately tamed and enhanced through the intervention of a second chamber and the endorsement of the executive power. Ideally, these latter two would be hereditary (a chamber of peers and a king), and thereby in a position to make the people's current opinion consonant with the nation's long-term interests – its wish, as translated into a constitution. I have then turned to Staël's critique of the Jacobins' reliance on popular sovereignty as a basis for representation on the main ground that it endorsed self-determination as the objective of lawmaking. Ordinary laws when understood as the product of the people's will as disclosed by the majority, were arbitrary. She therefore argued that the goal of lawmaking consisted in the administration of society's objective interests (including respect for property and the conditions for self-development) through the monitoring of public opinion – the only correct way of conceptualizing the people's power in a representative government. Public opinion being presently undecided, Staël designed an institutional structure intended to progressively lead to its enlightenment. Well-organized elections and state-controlled newspapers would ensure that public esteem only recognizes 'the best' as fit to rule, and that public opinion only reveals the nation's true interests as the proper standard for law making. Additionally, relying on Necker's constitutionalism while purging it from its reliance on heredity, Staël recommended an apt cooperation of constitutional powers that would integrate present-day opinion through the elected chamber, while instructing this opinion through the intervention of the second chamber and the executive.

In chapter II, I have revisited Roederer, Sieyès and Constant's views on representative government as two variations on how to obtain a sound administration of society's interests through the registration of public opinion. Roederer and Sieyès argued that the people delegated their sovereignty to political experts – representatives and government officials – who were best placed to decipher the nation's general interest. To obtain rational-decision making, they recommended that the expression of public opinion through newspapers, elections and petitions be screened, organized and centralized. In reaction, rather than reclaiming popular sovereignty, as scholars have contended, Constant argued that this model created a *fictional* opinion: it prevented rulers from knowing the *actual* state of public opinion, which resulted in ill informed and out-of-touch decision-making. Revising Staël's representative model, Constant defended a bottom-up, transparent expression of public opinion through local, direct elections, as well as uncensored newspapers and petitions. Attacking Roederer's reliance on popular sovereignty on the ground that the latter's emphasis

on the general interest obliterated plurality, Constant argued that his model would reveal the nation's diverse interests, as present across all national constituencies.

In chapter 3, I have reconsidered Constant's mature constitutional writings – the *Réflexions sur les constitutions sur les garanties* and his *Principes de politique* (1815) – as offering an era-defining account of how representative government, if properly organized, could be turned into 'the faithful interpreter of opinion.' Further distancing himself from Necker's and Staël's earlier attempts to tame or enlighten public opinion, Constant believed that the post-1814 political climate provided a fruitful context to institutionalize public opinion as it currently stood. Public opinion kept rulers informed about the nation's ever changing, diverse and local interests, but also guided the actions of representatives and ministers through the verdicts of a fluctuating public esteem. I have shown how Constant, in various debates, battled for direct elections, free newspapers and complete transparency of parliamentary debates on the ground that these would make rulers compliant to the desires of public opinion. Building on my reinterpretation of Constant's theory of legitimacy, I have also demonstrated how Constant took advantage of the fact that, during the restoration, France's constitutional powers rested on diverging grounds of legitimacy – an elected chamber, a hereditary chamber and a hereditary king – to design a constitutional structure that balanced them in such a way that the reforms desired by present-day public opinion, as registered first and foremost in the elected chamber, would be smoothly and promptly implemented.

In making of public opinion 'the queen of representative government,' this dissertation suggests, Constant offered an original take on how to reconcile the principle that the people had legitimating authority with a concern for rational decision-making. Yet just like his theory of legitimacy sought to bypass founding moments of democratic redefinition, his substitution of public opinion for popular sovereignty in ordinary politics reveals an overall project of evacuating self-determination from political theorizing.

This interpretation could prove informative to contemporary debates on the democratic potential of polling, and to debates in democratic theory more generally. Students of opinion polls usually see in a heightened responsiveness of government policy to public opinion an assertion of popular sovereignty.<sup>916</sup> Liberal democratic theorists, on the other hand, typically use public opinion and popular sovereignty interchangeably, as if they were

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<sup>916</sup> Robert Shapiro and Lawrence Jacobs, 'The Democratic Paradox: the Waning of Popular Sovereignty and the Pathologies of American Politics,' in *The Oxford Handbook of American Public Opinion*, ed. Robert Shapiro and Lawrence Jacobs (Oxford: 2011), 713-732.

synonymous, or as complementary instantiations of the people's power to partake in the lawmaking process: while the people's sovereignty is manifested through elections, the people remain able to influence lawmaking through public opinion outside electoral times.<sup>917</sup> My interpretation of Constant shows that we should be wary of thinking that invocations of public opinion necessarily indicate sympathy for democratic politics. By revealing popular sovereignty and public opinion as two distinct way of framing the people's power, it suggests that the current conflation of popular sovereignty and public opinion obscures a lack of democratic self-agency in representative governments. For Constant, far from allowing the manifestation of popular sovereignty, the multiplication of channels of opinion was intended to substitute for the people's will the administration of interests known from various sources, including electoral and non-electoral ones. To find new ways of fostering congruence between changes in opinion and changes in policies, including through better-designed opinion polls, might benefit the quality of decision-making, but does not automatically amount to enforce popular sovereignty. Quite the contrary: it runs the risk of diluting the people's capacity to make authoritative choices. This may help explaining current dissatisfaction with representative governments at a time when conduits of opinion have never been so profuse.

Further, although this dissertation does not *start* with liberalism, its emphasis on Constant and public opinion is nonetheless able to illuminate current debates about the 'democratic' or 'undemocratic' nature of (French) liberalism and the history of liberalism more generally, assuming that readers want to see Staël and Constant, for instance, as part of that canon. Students of liberalism continue to dispute over whether liberalism favours a vivid political life or promotes de-politicization by emphasising individual rights, small government and the balance of powers. This dissertation suggests that the key to that puzzle lies elsewhere, in a distinctive conceptualization of the people's power. Liberals promote political participation, but conceive it as influence through elections, newspapers and the opinion mandate. This type of political liberty as influence they see as the only one compatible with the modern enjoyment of individual independence. Importantly, liberals identify a precise goal for collective decision-making: the management of interests through the registration of public opinion. Seen from this perspective, liberalism is not 'undemocratic' simply because it allegedly downplays political participation. It is so because it seeks to circumvent self-determination by promoting another model for law making. This

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<sup>917</sup> Manin, *Gouvernement représentatif*; Urbinati, *Representative Democracy*.



further suggests that the genealogy of liberalism cannot be simply one of blind resistance to extended political rights, as it is often suggested. It is a history about how liberals, because they envisaged representative government as geared towards the management of interests, continued to require a certain degree of enlightenment and a capacity to articulate one's interests, as attested by owning property, as prerequisites to be able to contribute to the shaping of public opinion. Their opposition to universal suffrage was not simply an exercise in bourgeois elitism: it was more profoundly a rebuke of a mode of collective decision-making they associated with popular sovereignty.

### **III. Re-thinking French Liberalism**

As I mentioned several times, this dissertation does not start with liberalism. More often than not, doing so results in retrojections of contemporary characterizations of liberalism onto past authors, sometimes coupled with a not-so-thinly veiled agenda to defend or attack liberalism through them. To avoid counter-productive assumptions, I have proceeded the other way around. I have taken authors such as Staël and Constant out from the liberal box in which they have been placed, before looking at what their priorities were in a post-revolutionary context, and the concepts – including public opinion – they used to address these. This approach had at least three main outputs, as far as our understanding of 'French liberalism' is concerned. First, it revealed distinct ways of thinking about legitimacy and representative government that have remained in the dark, not least because a focus on French liberals as 'liberal democrats' has led scholars to assume that at least Staël and Constant must have endorsed some version of popular sovereignty. Second, it has allowed me to uncover an understanding of the balance of powers as a cooperation between branches of government to ensure opinion-based political reforms, whereas most studies on French liberalism, because they see Constant, Staël and the doctrinaires as heirs to a freshly liberal-labelled Montesquieu, conclude that, like him, they advocated the separation of powers to achieve a liberal aim: avoiding the concentration of political authority. Third, because this dissertation has not presumed that Constant was a 'liberal' defending a certain type of 'liberalism,' I have been able to disclose unsuspected connections between Constant and political thinkers that are not usually associated with liberalism. The influence of Godwin upon Constant, for instance, has often been downplayed on the ground that an 'anarchist'

could only have but little in common with a moderate ‘liberal.’<sup>918</sup> Once we renounce to see their connection in binary terms – ‘liberalism’ vs. ‘anarchism’ –, we can start appreciating why Constant spent so much time translating Godwin. Public opinion was the way in which Godwin conceptualized the people’s power in *Political Justice*, and this was one of the chief reasons why Constant was drawn to this text. Likewise, the connection between Constant and Rousseau can be apprehended without falling into the trap of the opposition between ‘a liberal’ and ‘a democrat.’ Constant reinvested Rousseau’s categories with a new meaning, substituting for Rousseau’s concepts of popular sovereignty and the general will notions such as ‘society’ and ‘assent.’ His conception of collective-decision making was radically different from Rousseau: it did not consist in self-rule, but in the sound administration of objective interests as registered through public opinion. On the other hand, Rousseau was helpful to think about the role of public esteem as a way of recognizing and promoting talents in a representative structure. Through the lens of public opinion, Constant’s reception of Rousseau appears richer and more nuanced than usually assumed.

Beyond these three points, my reading of Constant suggests that his connections to Guizot and Tocqueville should be revised. This, in turn, should lead to a significant reconsideration of the categories that still dominate debates around French liberalism as a whole. In the remaining paragraphs, let me briefly sketch out what such a revised account of ‘French liberalism’ would look like, and how it differs from extant scholarship. In 1997, Lucien Jaume made the case for distinct strands of ‘French liberalism’ – the fringe, individualist and constitutional type of liberalism of Staël and Constant, the comparatively more mainstream, elitist and statist liberalism of the Doctrinaires, and, last, the Catholic liberals who struggled to accommodate individual freedoms with the teachings of the Church. Beyond Jaume’s interpretation, there is an agreement across students of French liberalism that Tocqueville was the liberal heir to Constant and/or Guizot.<sup>919</sup> If we start with a concept such as public opinion rather than ‘liberalism’, it soon becomes clear that the cards need to be reshuffled. Reconsidering Necker, Staël and Constant through the lens of public opinion reveals the existence of a strand of thinkers that designed public opinion as a substitute for popular sovereignty. From the 1790s to the 1820s, Necker, Staël and Constant battled against changing uses of popular sovereignty, and insisted that public opinion be put in its place. In

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<sup>918</sup> Hofmann, *Principes*; Rosenblatt, ‘Why Constant?’, 446.

<sup>919</sup> On the Constant-Tocqueville connection, see Kelly, *Humane Comedy*; Holmes, ‘Constant and Tocqueville: An Unexplored Relationship’ and Rosenblatt, ‘Two Liberals on Religion: Constant and Tocqueville Compared.’ On the influence of the Doctrinaires upon Tocqueville, see Aurelian Craiutu, ‘Tocqueville and the Political Thought of the French Doctrinaires,’ *History of Political Thought*, 20 (3), 1999, 456-493.

the wake of a revolution centred on popular sovereignty, public opinion allowed them to redesign political theory on alternative conceptual bases. For them, popular sovereignty and public opinion were two distinctive and antagonistic ways of addressing two key problems: the legitimacy of the state and the functioning of representative government. On both questions, they dismissed popular sovereignty as theoretically ineffective and politically dangerous. Instead, they resorted to the concept of public opinion to theorize what made a political regime acceptable and how the people's power was channelled in representative institutions.

Against this background, the doctrinaires and Guizot's intellectual project appears under a different light. Guizot's critique of popular sovereignty was not a doctrinaire idiosyncrasy, as is often thought, but the culmination of a long-standing project – initiated by Necker and continued by Staël and Constant – to replace a dangerous fiction with a trans-historical opinion as the only reliable standard of legitimacy. Reacting to restoration publicists who appealed to popular sovereignty against the regime instituted by the Charter (1814), Guizot derided it as both theoretically incoherent – it justified infallible and hence arbitrary power – and anachronistic: it had been used as a rallying flag against the privileges of a minority; its role had past.<sup>920</sup> Guizot intended his numerous historical works (he became chair of modern history at the Sorbonne in 1812) as an illustration of his alternative theory of legitimacy based on 'the sovereignty of reason.' The study of the development of 'civilisation' throughout Europe demonstrated the gradual replacement of brute force by reason as the basis of modern government. The 'wish' of European societies was not simply respect for property, order, individual freedom and equality, but 'the government of the best.'<sup>921</sup> Like Constant's, Guizot's theory of legitimacy effectively downplayed the importance of titles of legitimacy and government forms – elected republic vs. hereditary monarchy – in favour of representative government, now defined as the type of regime best able to promote rational decision-making. This theory of legitimacy explains the doctrinaires' apology or critique of the successive governments of the second restoration, depending on whether, in their judgment as political writers, their politics conformed to the nation's long-term wish.

In chapter III of the dissertation, I have hinted that the doctrinaires developed another significant theory of representative government as the repository of public opinion, this time

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<sup>920</sup> *Des moyens de gouvernement et d'opposition dans l'état actuel de la France* (1821), ed. Claude Lefort, (Paris, 2009), 142-146.

<sup>921</sup> *Histoire des origines du gouvernement représentatif en Europe* (Paris, 1851), 243.

described as ‘public reason’ – the antithesis of an arbitrary will Guizot associated with popular sovereignty. Public reason was public opinion aware of its real interests, understood as the interests of the proprietary middle class. Reconnecting with earlier attempts to rationalize public opinion – Guizot was an admirer of Napoléon’s reformist politics, if not of his despotic tendencies – the doctrinaires defended inventive views on how the administration could privilege a rational public opinion consonant with the government’s agenda. Elections and newspapers, when properly organized, could act as ways of sorting out reliable interests from unenlightened interests – those of the populace and aristocrats nostalgic of *ancien régime* privileges – and ensure that only the wisest amongst citizens, as recognized by public esteem, get a say in law-making. Such a reinterpretation suggests that Staël, Constant and the doctrinaires drew *different* opinion-based theories of legitimacy and models of representative government from a *common* intuition first articulated by Necker – public opinion, not popular sovereignty. This also means that Necker’s legacy would no longer be restricted to the Coppet group, as is usually thought.

But looking at public opinion rather than attempting to construct a liberal tradition also sheds light on two perennial puzzles of advocates of French liberalism: why was Tocqueville so ‘illiberal’ at times, and why was he so uninterested in Constant? Such an approach also provides tangible textual elements to measure what exactly set Tocqueville apart from Constant and Guizot. Tocqueville’s journey to America convinced him that the relationship between public opinion and popular sovereignty needed to be reconsidered. *Democracy in America* can indeed be read as a further attempt to think about what makes a government legitimate by looking at the ‘social state’, which Tocqueville believed was defined, in a democratic age, by a growing equality of conditions. Democracy as a *form of government* was the model towards which civilized countries were converging, since it was most consonant with democracy as a *social state*. Equality of conditions did not make hereditary monarchies or property-based representative governments illegitimate *per se*, but Tocqueville believed that once public opinion was infused with the idea of equality of conditions such regimes became increasingly difficult to sustain.<sup>922</sup> As soon as a society started thinking of itself as composed of equal citizens, both rulers and the people grew doubtful of the validity of heredity and property-based suffrage, embracing instead universal suffrage as the only acceptable mode of selecting rulers. The political writer’s role was to reveal these changing dynamics of opinion, but Tocqueville’s reluctance to acknowledge true

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<sup>922</sup> *De la démocratie en Amérique*, I, bilingual edition, ed. Eduardo Nolla, transl. James T. Schleifer (Indianapolis, 2010), 11; 19-20.

principles of politics led him to adopt an indecisive attitude vis-à-vis democratic despotism as both predictable and difficult to condemn on a firm basis.

Breaking with Necker, Staël, Constant and Guizot, Tocqueville reaffirmed that popular sovereignty was at the basis of human institutions. Its role in the advent of the equality of conditions, however, needed to be re-examined in light of national contexts. In France, popular sovereignty had been reclaimed *ex nihilo* as an abstract principle, first by philosophers, then by the people. Being a fiction, it had been manipulated to sanction the absolute, top-down power of a minority, from the Revolution to Napoléon's rule. In America, popular sovereignty was from the onset rooted in gradually established practices of self-government. It was directly exercised in a variety of townships, before being extended to the Union without for that matter depriving each township from its share of sovereignty. As Americans understood it, the corollary of popular sovereignty was indeed that each individual – and by extension, each township – had the right to be the judge of what concerns himself alone. In America, popular sovereignty as a foundational principle was the practical, historically rooted instantiation of the people's power.<sup>923</sup> Thus understood, it did not fall into the French traps associated with the concept: abstractness, monism and absolute power.

Likewise, in ordinary democratic politics, popular sovereignty, if understood in a pluralist and limited way, could be used as the appropriate expression of the people's power. This, Tocqueville acknowledged, meant that self-determination – not the administration of interests, as Staël, Constant and Guizot believed – needed to be recognized as the objective of collective-decision making. The American experience, on the other hand, demonstrated that public opinion was not a potent alternative to popular sovereignty, but one of the most pathological by-products of a democratic society.<sup>924</sup> In a social state marked by universal levelling, public opinion became a new religion that enforced social conformism, stifled public debate, and impeded democratic self-rule. To domesticate public opinion, Tocqueville advocated local self-government, a different role for newspapers and a revised balance of powers as ways of making effective the promise of self-determination embodied in popular sovereignty.<sup>925</sup> By offering a renewed interpretation of popular sovereignty that could thwart the deleterious effects of public opinion, Tocqueville broke with a significant strand of

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<sup>923</sup> *Démocratie en Amérique* I, 91-92. See also the developments of Lucien Jaume, *Tocqueville. Les sources aristocratiques de la liberté* (Paris, 2008), 35-44.

<sup>924</sup> See chapters 1 ('De la méthode philosophique des Américains') and 2 ('De la source principale des croyances chez les peuples démocratiques') of Volume 2 of *De la Démocratie en Amérique*.

<sup>925</sup> *Ibid.* I, second part, chapter 3: 'De la liberté de la presse aux Etats-Unis' and Volume II, second part, chapter 6: 'du rapport des associations et des journaux.'

thinking that had found in public opinion a distinct way of conceptualizing the people's power.

If we do not want to renounce ambitious narratives that bring together several 'French liberals' over a relatively long period of time, it seems more suitable to examine the concepts the authors themselves used, and show how these evolved over time, including on institutional issues. This would avoid the traps of finding out the exact connections between putative 'ancestors,' 'grand fathers,' 'champions' and 'heirs' of a dreamed tradition reduced to a handful of key principles palatable to the liberal tastes of the day. Depending on the subject chosen – popular sovereignty, representation, constituent power, individual rights or equality – stories would inevitably vary, include various sets of authors positioning themselves on specific sets of theoretical and institutional issues.<sup>926</sup> One of the outputs of this dissertation is that such a story could be told about public opinion.

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<sup>926</sup> Examples of such an approach include Rosanvallon's trilogy on democracy, Spitz's work on political liberty and equality, and Manin's opus on representation.

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