

‘The Great Desideratum in Government’: James Madison,
Benjamin Constant, and the Liberal-Republican Framework
for Political Neutrality

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Table of Contents

Abstract	3
Declaration	4
Acknowledgements	5
Introduction – Liberalism, Republicanism, and the Idea of Political Neutrality	8
Part One – The Idea of Neutrality	28
Chapter One – A Shared Intellectual Heritage: Modernity, the Public Good, and the Foundations of Political Neutrality	29
<i>1.1: The Science of Politics at Edinburgh and Princeton</i>	32
<i>1.2: Virtue, Pluralism, and the Public Good</i>	42
<i>1.3: Neutrality and Political Science</i>	51
Chapter Two – Law, Sovereignty, and a Liberal-Republican Conception of Liberty	54
<i>2.1: Freedom and the State: Conceptions of Liberty in the Eighteenth Century</i>	56
<i>2.2: Madison: The Free State and Higher Law Foundations of Negative Liberty</i>	59
<i>2.3: Constant: Modern Liberty</i>	72
Part Two – Inventing the Neutral State	88
Chapter Three – Bicameralism and the Equilibrium of Interests in the Extensive Republic	89
<i>3.1: Hume, Montesquieu, and the Small Republic Debate</i>	93
<i>3.2: Nemo Iudex in Causa Sua: Balancing Popular and Impartial Governance</i>	98
<i>3.3: The Auxiliary Desideratum: The Invention of a Patrician Elite</i>	108
<i>3.4: An Effectual Remedy of Two Parts: Neutral Congressional Authority in Federalist Theory</i>	112
Chapter Four – The Common Interest, Decentralisation, and <i>L'élection sectionnaire</i>	116
<i>4.1: 'A Frequent Source of Error': Interests Common and Particular</i>	120
<i>4.2: Heterogeneity and Political Liberty in the Extensive Republic</i>	125
<i>4.3: A New Theory of Federalism?</i>	135
Part Three – Guaranteeing the Neutral State	139
Chapter Five – Legality and Legislation in the Neutral State	140
<i>5.1: Constant: Neutrality via Restraint Principles</i>	142
<i>5.2: Constant: The Illegitimacy of Social Improvement</i>	150
<i>5.3: Madison: Judicial Review and the Madisonian model of Coordinate Construction</i>	156
<i>5.4: Madison: Blending Popular Control and Judicial Oversight: The Council of Revision</i>	165
Chapter Six – Constitutional Monarchy and the Federal Negative	171
<i>6.1: Constant: Political Liberty and the Supreme Power</i>	174
<i>6.2: Constant: Inviolability and the Royal Power</i>	184
<i>6.3: Madison: Sovereignty and the States</i>	192
<i>6.4: Madison: Forging the Great Desideratum in Republican Government</i>	200
<i>6.5: The Primacy of Public Opinion and the Neutral Power</i>	207
Conclusion – Neutrality Before Liberalism?	209
Bibliography	218

Abstract

The liberal and republican traditions of political thought are commonly treated as divergent political-philosophical doctrines which existed in a state irreconcilable opposition in late eighteenth-century France and America. The present study challenges this notion through examining the concept of political neutrality as discussed and expounded in the political and constitutional writings of James Madison and Benjamin Constant. In seeking to account for not only why, but also how, both thinkers endeavoured to construct political systems geared toward securing the production of neutral laws, this thesis explores and highlights the complex interdependent relationship between the liberal and republican philosophical traditions in late eighteenth- and early nineteenth-century political theory.

It is argued that in their desire to construct political-constitutional systems tailored toward guaranteeing the materialisation of neutral laws, Madison and Constant incorporated republican, or ‘Real Whig’, concepts into their respective constitutional strategies. Their shared objective, it is shown, was to form limited and neutral states through exploiting the diversity of public opinion in such a way that would render popular sovereignty self-neutralising. More specifically, this thesis suggests that both Madison and Constant placed considerable emphasis on de-legitimising particular *justifications* for legislative action, and that their respective efforts in this area were motivated by a desire to restrict the legislature to the promotion of objective, and impartially-conceived, accounts of the public good.

Thus through examining Madison’s and Constant’s attempts to form neutral states, this thesis challenges the traditional account of the development of modern liberalism through pointing to the existence of an autonomous *liberal-republican* philosophy in post-revolutionary French and American political thought. It is argued that this hybrid political philosophy – which underpinned the constitutionalisms advanced by both Madison and Constant – had as its principal objective the reconciliation of the practice of popular governance with the restoration and maintenance negative individual liberty. Both thinkers, in other words, exploited republican concepts and institutions in order to realise the distinctly liberal end of forming limited and neutral states.

Declaration

No portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

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I

Over the past two decades, the historiographical debate over the conceptual relationship between the liberal and republican traditions of political thought has gradually entered into a new and refreshing phase. Where these two modes of thought and political discourse were once considered to have existed in a state of irreconcilable conflict in post-revolutionary France and America,¹ a new body of scholarship has emerged which points to the ways in which modern liberalism was cultivated within the shell of classical republicanism.² In challenging the hegemony of the dualistic and once-widely accepted ‘revisionist’ interpretation of the relationship between liberalism and republicanism, this new breed of scholarship has been forced to deconstruct the argument that the French and American republics of the late eighteenth-century served as sites of a decisive ideational struggle that resulted in the triumph of an individualistic and modern liberalism over a distinctly classical mode of thought rooted in a set of civic humanist principles and values.

Though most would, of course, continue to recognise the glaring discord between the two traditions over a range of important subjects, recent interpretative efforts centred on uncovering processes of derivation and transformation – as opposed

¹ For examples of scholarship emphasising the conceptual differences between liberalism and republicanism, see: Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1999); J.G.A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975); Neil Reimer, ‘The Republicanism of James Madison’, *Political Science Quarterly*, Vol.69, No.1 (March, 1954), pp.45-64; Ralph Ketcham, ‘Publius: Sustaining the Republican Principle,’ *The William and Mary Quarterly*, Vol.44, No.3 (July, 1987), pp.576–82; Isaac Kramnick, ‘Republican Revisionism Revisited’, *The American Historical Review*, Vol.87, No.3 (Jun., 1982), pp.629-664; Lance Banning, ‘Jeffersonian Ideology Revisited’, *The William and Mary Quarterly*, Third Series, Vol.44, No.1 (Jan., 1986), pp.3-19.

² Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1998), xi; Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge, 2008); Jean Yarbrough, ‘Republicanism Reconsidered: Some Thoughts on the Foundation and Preservation of the American Republic’, *The Review of Politics*, Vol.41, No.1 (Jan.1979), pp.61-95 (p.63); Maurizio Viroli, *Republicanism* (New York, 2002); Andrew Jainchill, *Reimagining Politics After the Terror: The Republican Origins of French Liberalism* (Cornell, 2008); Helena Rosenblatt, ‘Why Constant? A Critical Review of the Constant Revival’, *Modern Intellectual History*, Vol.1, No.3 (Nov., 2004), pp.439-453 (p.441).

to replacement – have cast light on the deeper compatibility between the liberal and republican modes of thought.³ An important corollary of this interpretative shift has been the development of the idea that modern liberalism began not as a full-scale assault on traditional republicanism, but that it instead emerged as an intellectual reaction to the widespread realisation that classical republicanism was ultimately unfit to handle the rapidly-changing social and economic climates of late eighteenth-century nation-states. In fact, it is now increasingly common to suppose the existence of a distinctive and transitional ‘liberal-republican’ philosophy in late eighteenth- and early nineteenth-century Scottish, French, and American political thought; a doctrine pioneered by thinkers as diverse as Adam Ferguson, Germaine de Staël, and Thomas Paine.

Through painting late-eighteenth century France and America as sites of paradigm-transcending philosophical transactions, the relatively recent works of Andrew Jainchill, Jean Yarborough, Cass Sustein, Andreas Kalyvas & Ira Katznelson, and others have allowed scholars to appreciate the rich interplay between modern and classical concepts in late eighteenth-century French and American political discourse. In this sense, the idea that the new ‘extensive’ republics of the eighteenth century were home to zero-sum struggles between liberalism and republicanism has become increasingly out-dated. Instead, it is now for the most part understood that some form of convoluted transition took place whereby a doctrine that we would recognise as ‘political liberalism’ emerged from the rump of a somewhat anachronistic classical republican philosophy that was unable to meet the demands and realities of modern commercialism and interest group pluralism.⁴

³ Cass R. Sustein, ‘Beyond the Republican Revival’, *The Yale Law Journal*, Vol.97, No.8 (Jul., 1988), pp.1539-1590.

⁴ On the subject of the ‘transition’, the scholarship of Kalyvas and Katznelson has been most insightful. In their ‘Republic of the Moderns’ essay – which focuses on Madison’s liberalism – they argue that ‘the development of liberalism as a full-fledged, full-scale political and constitutional doctrine was the unplanned result of actors and thinkers situated within classical republicanism who sought to institutionalize a stable, well-functioning republic under the modern conditions of their time’. And in their study on Constant, ‘We are Modern Men’, they make a similar point, emphasising the ‘rich, complex, interplay’ between liberal and republican concepts in his political thought; Andreas Kalyvas and Ira Katznelson, ‘We are Modern Men: Benjamin Constant and the Discovery of an Immanent Liberalism’, *Constellations*, Vol.6, No.4 (1999), pp.513-539; Andreas Kalyvas and Ira Katznelson, ‘The Republic of the Moderns: Paine’s and Madison’s Novel Liberalism’, *Polity*, Vol.38, No.4 (October, 2006), pp.447-477.

Though the present study follows much recent scholarship in emphasising the interplay between liberal and republican concepts in eighteenth-century political discourse, it seeks to offer a new interpretation of the early development of modern liberalism. Motivated chiefly by the idea that scholars' understanding of the relationship between liberalism and republicanism is substantial but nonetheless incomplete, the present study focuses primarily on the concept of 'political neutrality' in an effort to further comprehend and explain not only why, but also how, the classical liberal approach to political theory emerged from the broader, and ancient, republican tradition of political thought. In other words, the rationale underpinning this study is born from my contention that the eighteenth-century emergence of the idea of political neutrality – that most quintessentially-liberal political-philosophical concept – holds the keys to understanding not only the nature of the gateway 'liberal-republican' doctrine but also the dynamics of the broader transition that took place from classical republicanism to modern 'political liberalism'.

Taking, then, the concept of political neutrality as *the* idea central to the development of liberal-republicanism, this thesis examines the political and constitutional doctrines of James Madison and Benjamin Constant – the foremost liberal-republican constitutional designers of the age. The chosen subjects of this study are of special importance and significance not only due to the originality of their respective doctrines, but also because of the concrete nature of their achievements as constitutional designers. Both thinkers were the principal architects of *formal* constitutions that sought to reconcile popular governance with the preservation of individual liberty, and in this sense, their respective efforts in the realm of constitutional theory remain pertinent to contemporary debates in political and legal theory. As the "Father of the United States Constitution", Madison's importance to the development of Western constitutional theory requires little elaboration. But although his political thought may appear especially, and perhaps even uniquely, transcendent and relevant to contemporary debate, Constant's is in fact no less so. His *De la liberté des Anciens comparée à celle des Modernes* (1819) remains a keystone text of the Western liberal tradition, and his writings on the nature of personal freedom have

been considered, and in some cases paraphrased, by thinkers as influential as Isaiah Berlin, Justice Stephen Breyer, and John Rawls.⁵

In focusing this study on the doctrines of Madison and Constant, I make the case that the first incarnation of modern ‘liberal-constitutionalism’ was built upon a set of conceptual foundations that had their roots in the ‘Real Whig’ strand of republican political thought – a doctrine often labelled ‘libertarian republicanism’.⁶ Broadly speaking, by investigating and reconstructing Madison’s and Constant’s efforts to forge political systems geared toward the production of ‘neutral’ laws, this study contends that both thinkers arrived at the conclusion that the advent of ‘extensive republics’ provided the modern constitutional designer with the opportunity to facilitate limited and neutral governance through encouraging widespread popular participation in the political process.

More specifically, this thesis argues that the constitutional strategies developed by Madison and Constant were grounded in the assumption that in the absence of an impartial monarch or virtuous patrician elite, the key to the preservation of negative individual liberty was the *institutionalisation* of diversity. Concerned that the republican form of government naturally lent itself to the twin phenomena of juridification and factionalism, Madison and Constant rejected the classical predilection for homogeneity, and instead resolved that objective accounts of the public good (albeit austere ones) could be best realised under constitutional systems that exploited the diversity of the ‘extensive republic’ to

⁵ Helena Rosenblatt, “Eclipses and Revivals: Constant’s Reception in France and America, 1830-2007”, in Helena Rosenblatt (ed.), *The Cambridge Companion to Benjamin Constant* (Cambridge, 2009), pp.351-378 (pp.374-375).

⁶ Following the interpretative path set out by David Mayer, I argue that in the constitutionalisms of Madison and Constant we can see the revival and subsequent continuation of a number of key ‘Whig’ assumptions about the nature of power and the importance of popular constitutionalism. I argue that, like the Whig publicists, Madison’s and Constant’s doctrines were informed by a deep distrust of political power, and that from this they understood that the key to the maintenance of personal freedom was to encourage and institutionalise the vigilance of the people. Crucially, I argue that both thinkers understood popular political control to be an alternative to the imposition of fixed constitutional restraints. David M. Mayer, ‘The Radical English Whig Origins of American Constitutionalism’, *Washington University Law Review*, 70, (1992), pp.131-208 (p.139); Joseph S. Stromberg, ‘Country Ideology, Republicanism, and Libertarianism: The Thought of John Taylor of Caroline’, *The Journal of Libertarian Studies*, Vol.6, No.1 (Winter, 1982), pp.35-48 (p.36).

neutralise the claims of competing interests. In this way, the present study urges that the liberal-constitutionalisms of Madison and Constant were centred on tailoring republican institutions to the realities of modern pluralistic society in order to shield individuals and minorities from the type of unjust and ‘interested’ laws that were seen to be inextricably associated with ‘popular’ legislative systems grounded in factional competition and strife.

As it pertains to the historiographical debate concerning the relationship between liberalism and republicanism in the eighteenth-century, this account of the ‘liberal-republicanisms’ of Madison and Constant suggests that the idea that liberalism emerged out of classical republicanism is an over-simplification. The argument presented here is that as constitutional designers, Madison and Constant consciously incorporated and exploited republican concepts and ideas in order to realise the attainment of the distinctly liberal end of preventing the emergence of laws intended to advance or indeed hinder particular interests. Of particular significance here is my broad contention that in their shared effort to counteract the effects of juridification and factionalism, both Madison and Constant looked beyond placing strict and formal limitations on the competence of the state. Instead they relied on the particularly modern assumption that by bringing a *multiplicity* of conflicting interests into the political arena, legislators would be effectively pressed into abandoning their factional claims, thus rendering the legislature as-a-whole *neutral* between the claims of competing interests.

Thus, the originality of this study lies in the way that it considers Madison and Constant not as pure liberals or pure republicans, but instead as thinkers rooted in a tradition of ‘political pessimism’ who sought to guarantee personal freedom through neutralising popular will. Though in their mature phases both thinkers prized the distinctly liberal ends of limited and neutral government, I argue here that Madison and Constant nonetheless endeavoured to realise their shared objective through constructing constitutional systems rooted in the primacy of public opinion, and arrived at this conclusion on the basis of their understanding that judicious institutional design could render popular sovereignty *self-neutralising*. Unlike the bulk of extant scholarship that points to either the

incompatibility or indeed to the interdependence of the liberal and republican modes of thought, the present study suggests that both Madison and Constant incorporated ‘libertarian-republican’, or ‘Real Whig’, concepts and institutions into their respective constitutional strategies primarily in order to realise the distinctly liberal aspiration of constructing political institutions that would remain neutral between conflicting interests. While, then, the production of political impartiality was their primary constitutional objective, it was one that both thinkers considered to be dependent upon the presence of widespread political engagement and the formulation of objective accounts of the public good through pluralistic deliberation.

In seeking to re-examine the development of modern liberalism through interrogating Madison’s and Constant’s theories of political neutrality, the thesis itself has two principal objectives. The first of these is to ascertain why both thinkers came to value the ideas of political neutrality and impartiality *ab initio*, and on this subject I make the case that they arrived at the conclusion that under modern conditions, only those laws which stopped short of privileging and hindering particular interests could be considered legitimate. More specifically, I propose that the emergence of modern ‘self-interested’ factionalism in post-revolutionary America and France pressed both Madison and Constant into constructing constitutional mechanisms capable of ensuring that pluralistic models of political deliberation would produce laws designed to advance the public good and defend individual and minority freedoms.

Emphasising their shared liberalism, this thesis argues that unlike thinkers of the classical tradition, both Madison and Constant saw the realisation of the ‘public good’ not as an end itself, but rather as a means toward both limiting the competence of the state and shielding individual rights and minority interests from coercive interference. Related to this, I advance the idea that both thinkers were concerned less with the content of law than with the *motivations* of legislators, giving their respective doctrines a particularly modern character. My principal contention on this point is that though they were not oblivious of ends, their deep distrust of political factions pressed them into placing overwhelming focus on guarding against the production of laws informed by particular claims

that were inconsistent with the public interest. Important here is that idea that both thinkers can be seen as early progenitors of the concept of ‘restraint principle liberalism’: both held that certain *reasons for justifying* political action were inappropriate, and in this sense neither thinker suggested that the political sphere possessed fixed and unalterable boundaries, beyond which certain matters were to remain outside the competence of the state in perpetuity.

Specifically in the case of Constant, I demonstrate that his understanding of the nature of legitimate legislation was centered on a complex differentiation between ‘common’ and ‘particular’ interests, and show that in the aftermath of the Terror his primary concern became to construct a political system geared toward ensuring that the interests of *particular* groups would be prevented from guiding and informing the legislative process. My analysis of Constant’s liberalism focuses on his efforts to promote equilibrium between competing interests, and I urge that he followed Madison in seeking to construct electoral systems geared toward balancing and neutralising conflicting interests through exploiting the heterogeneity of the extensive republic. Additionally, I pay close attention to Constant’s legal theory and point to the ways in which he sought to place formal limitations on the competence of the state, not through declaring certain matters to be beyond the political sphere, but instead through delegitimising certain motives often invoked to justify legislative actions.

Similarly, with respect to Madison I advance the argument that by the close of the 1780s he had developed a particularly pessimistic take on the nature of modern politics, and in turn began to view with scepticism the idea that the civic virtue could serve as the anchor of the modern republic. Concerned that self-interested factions generally tended to forgo the pursuit of the public good in their legislative gambits, Madison resolved that the key to safeguarding private rights under the republican form of government was to ensure the formulation of objective accounts of the public interest through transforming the legislature into an ‘impartial spectator’. In this sense, I make the case that the central aspiration that unified the respective philosophies of Madison and Constant was the idea that the neutralisation of the claims of competing factions would have the effect of preventing the passage of laws that constituted unnecessary expansions of

political authority. Their respective strategies were, in sum, attempts to realise distinctly liberal ends through reformulating distinctly classical republican concepts and institutions.

Underpinning much of my analysis pertaining to the question of *why* both thinkers came to prize the ideal of neutrality is the notion that the teachings of David Hume, Adam Smith, and Adam Ferguson were instrumental in shaping the foundations of the respective political worldviews of both thinkers. As is made clear in the first chapter, my position is that although Madison and Constant were animated by somewhat different ‘Scottish enlightenment’ principles, they nonetheless cultivated largely analogous understandings of the nature of modern politics. On this subject, I argue that Madison’s and Constant’s exposure to the philosophical works of Hume and Smith pressed both thinkers into taking seriously the ways in which the civic humanist understanding of politics was inconsistent with the realities of modern commercial society; and it was from this recognition, I urge, that Madison and Constant came to appreciate the importance of uncovering ways through which the public good could be advanced not on the basis of virtuous political engagement but instead through the neutralisation of conflicting interests.

The second objective of this study is to systematically reconstruct the constitutional systems developed by Madison (1783-1789) and Constant (1802-1815). Through such reproductions, I hope to exhibit the ways in which both thinkers revived and reformulated republican concepts and institutions in order to realise distinctly liberal ends. More precisely, this study demonstrates that far from seeking to undermine and mitigate the power of public opinion and popular sovereignty, both thinkers understood that neutral and limited governance could be achieved only through facilitating the primacy of the will of the people within the context of extensive republics. Neither thinker, I argue, chose to pursue the classical liberal path of *relying* on fixed and formal limitations on the competence of state to guarantee individual liberty, but that conversely, both sought to emphasise the importance of public engagement as a means toward transforming the sovereignty of the people into a self-neutralising force capable of advancing an *objective* conception of the public good.

In engaging with the question of *how* both thinkers sought to foster political neutrality, the thesis pays particular attention to two distinct aspects of the constitutional strategies developed by Madison and Constant. In the first place, special attention is given to their respective formulations of electoral systems centred on encouraging the clashing, and subsequent neutralisation, of particular interests within the legislature. I make the case that in as much as both thinkers were deeply sceptical of the ideal of political homogeneity encouraged by classical republican philosophy,⁷ they both advanced fundamental critiques of the ‘small republic thesis’ offered in Montesquieu’s *L’esprit de lois* (1748). In this sense, a contention central to the present study is that both Madison and Constant recognised that the emergence of interested factionalism could be mitigated not through efforts to encourage uniformity, but rather through the construction of constitutional channels geared toward bringing a multiplicity of interests into the political arena, as so to create what I term ‘factional equilibrium’.

In addition to this study’s focus on Madison’s and Constant’s electoral systems and shared desire to facilitate equilibrium between self-interested groups, renewed attention is paid to the ways in which they sought to establish equilibrium between political institutions. Here, I consider their respective efforts to construct extraordinary neutral *constitutional* powers, charged with ensuring the maintenance of constitutional balance and harmony. What I argue here, in short, is that following the collapse of monarchical governance in America and France, both thinkers became embroiled in efforts to manufacture constitutional, or extra-political, powers that possessed the type of neutrality thought to exist in the British model of constitutional monarchy.

In pursuing these two objectives together, the present study advances a number of conclusions that have significant implications for the way in which we consider the emergence of modern liberalism in the late eighteenth- and early nineteenth centuries. In one sense, the findings presented here suggests that the liberal ideal of political neutrality has its origins in the schism between Scottish

⁷ Linda K. Kerber, ‘Making Republicanism Useful’, *The Yale Law Journal*, Vol.97, No.8 (July, 1988), pp.1663-1672 (p.1665). Peter S. Onuf, ‘James Madison’s Extensive Republic’, *Texas Tech Law Review*, 21 (1990), pp.2375-2387 (p.2378).

enlightenment philosophy and civic humanist tradition. I make the case that in developing an appreciation for the emergence of modern interest-group pluralism, both Madison and Constant came to recognise that republican political systems had to be centred not on encouraging civic virtue, but instead on neutralising the claims of competing interests through encouraging factional equilibrium. On this subject, the present thesis points to the ways in which Madison, and later Constant, emphasised the importance of a number of libertarian-republican concepts that gave their respective constitutional programmes a ‘Real Whig’ character.⁸ Additionally, I make clear that both thinkers looked to the idea of neutrality not solely as a way to advance the public good under modern conditions, but rather that both saw considerable value in constructing neutral constitutional powers in order to guarantee the smooth functioning and harmony of the state more broadly.

Aside, then, from contributing to the longstanding historiographical ‘liberal-republican debate’, it is hoped that through paying renewed attention to the doctrines of political neutrality developed by Constant and Madison, the conclusions reached in this thesis will have significant implications for the way in which we consider the nature of the idea of ‘neutrality’ as a central tenet of modern liberalism. Following the publication of John Rawls’ *A Theory of Justice* in 1971, the notion that the state ought to remain neutral between competing conceptions of the good has come to occupy a central space in contemporary analytical political philosophy, and in this sense the idea of ‘liberal neutrality’ has generally been received as an ideal unique to late twentieth- and early twenty-first-century liberal theory.⁹

⁸ Though it is clear that the Real Whig tradition of political thought was fundamentally distinct from civic humanist philosophy, I suggest that the Real Whiggism was a strand of republican thought on the grounds that it was based upon an appreciation for the rule of law (and an hostility to arbitrary governance), a commitment to popular sovereignty, an emphasis on the importance of political engagement, and an opposition to standing armies; Mayer, ‘Whig Origins of American Constitutionalism’; Robert E. Shalhope, ‘Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography’, *The William and Mary Quarterly*, Third Series, Vol.29, No1 (Jan., 1972), pp.49-80 (pp.57-59); Stromberg, ‘Country Ideology, Republicanism, and Libertarianism’; James H. Hutson, ‘Court, Country, and the Constitution: Antifederalism and the Historians’, *The William and Mary Quarterly*, Third Series, Vol.38, No.3 (July, 1981), pp.337-368.

⁹ Will Kymlicka describes ‘liberal neutrality’ as a ‘distinctive feature of contemporary liberal theory’ and appears to view it as an extension of the long-standing liberal tenet that civil liberties ought to be protected on the grounds that ‘they make it possible that the worth of different modes

Considering the ways in which the liberalism of John Locke and John Stuart Mill were more or less freestanding of a commitment to liberal neutrality, it is largely unsurprising that contemporary liberal theorists have come to treat the idea of liberal neutrality as a relatively recent theoretical innovation.¹⁰ But what this study seeks to emphasise is that although the concept of liberal neutrality – or more specifically the idea of ‘neutral political concern’ – may not have been a feature of nineteenth-century liberal philosophy, a concern for state neutrality was very much central to the liberal-constitutionalisms of Madison and Constant in the late eighteenth- and early nineteenth-centuries. Thus, it is hoped that through casting renewed light on the constitutional strategies developed by Madison and Constant, this study will facilitate the advancement of contemporary political liberalism through pointing to the ways in which political neutrality can be institutionalised through liberal-republican constitutional design.

II

The present study is, of course, not alone in seeking to engage with doctrines of political neutrality advanced by both thinkers. In their recent study, *Liberal Beginnings: Making a Republic for the Moderns* (2008), Andreas Kalyvas and Ira Katznelson portray Constant and Madison as thinkers engaged in a shared endeavour.¹¹ Paying close attention to the relationship between classical republicanism and modern liberalism, Kalyvas and Katznelson contend that Constant and Madison were united in recognising the presence of a key deficiency in the republican form of government – namely that unreconstructed

of life should be proved practically’; Will Kymlicka, ‘Liberal Individualism and Liberal Neutrality’, *Ethics*, Vol.99, No.4 (July, 1989), pp.883-905 (pp.883-884). Similarly, Peter de Marneffe treats liberal neutrality as a recent innovation in analytical political philosophy; Peter de Marneffe, ‘Liberalism, Liberty, and Neutrality’, *Philosophy & Public Affairs*, Vol.19, No.3 (Summer, 1990), pp.253-274 (p.253).

¹⁰ Charles Larmore correctly notes that although Kant and Mill stressed that the state should not promote certain conceptions of the good above others, the ideas of autonomy and individuality which underpin their philosophies are far from uncontroversial ideas; Charles Larmore, ‘Political Liberalism’, *Political Theory*, Vol.18, No.3 (Aug., 1990), pp.339-360 (p.343.).

¹¹ *Liberal Beginnings* considers Constant and Madison alongside Adam Smith, Adam Ferguson, Germaine de Staël, and Thomas Paine. Kalyvas and Katznelson identify these six thinkers as the architects of ‘liberal-republican’ doctrines of political thought.

republicanism could not compensate for the empty constitutional space left behind by the crown that had once provided neutrality.¹²

Although this study shares with *Liberal Beginnings* the contention that the concept of political neutrality was born out of Madison's and Constant's appreciation for irreconcilability of tradition forms of republican government and the defence of negative liberty, I take issue with the 'Kalyvas-Katznelson thesis' for two reasons. In the first place, they present the case that the liberal-republicanisms of both thinkers were cultivated 'within the broader intellectual and political space defined by republicanism', suggesting that political liberalism emerged out of classical republicanism.¹³ In contrast to this characterisation, I advance the argument here that both Madison and Constant developed political philosophies that were ultimately freestanding of classical republicanism, but which incorporated certain republican – or more accurately, Real Whig – concepts only in order to realise their shared aim of instilling neutrality into the modern state. In this sense, I argue that after witnessing the rise of factionalism and the apparent inability of republican institutions to safeguard rights, both thinkers became, and remained, always liberal, and always pragmatic, recognising the capacity of typically-republican concepts such as popular political participation, the rule of law, and the construction of co-equal and distinct governmental branches to bolster their political liberalisms.

An additional criticism of the 'Kalyvas-Katznelson thesis' advanced in this study is more conceptual and focused specifically on the concept of 'political neutrality'. *Liberal Beginnings*, I argue, errs in treating the idea of neutrality as a unified and consolidated concept in the political doctrines of both thinkers, and in contrast to this contention, the present study argues that both Constant and Madison conceived of neutrality in two distinct ways: firstly, as an ideal, or meta-legal rule, related to the production of law; and secondly, as a distinct constitutional force related solely to institutional management. More precisely, my position is that though both thinkers constructed neutral *institutional* powers charged with guaranteeing the integrity of the Constitution, they simultaneously

¹² Kalyvas and Katznelson, 'The Republic of the Moderns', pp.458-459; Kalyvas and Katznelson, 'We are Modern Men', p.513.

¹³ Their position here, it is important to note, is consistent with thesis presented in Jainchill's *Reimagining Politics*.

upheld the idea of neutrality in a different, and more theoretical way, looking to it as a concept capable of determining the limits of legitimate legislative interdictions.¹⁴

Kalyvas and Katznelson are not alone in confusing these two distinct concepts of neutrality. In his landmark study, *Benjamin Constant and the Making of Modern Liberalism* (1984), Stephen Holmes alludes to Constant's desire to secure the 'general impartiality of the state itself', but regrettably pays scant attention to the legal rules developed in *Principes de politique* (1806) that were centred on ensuring the production of neutral laws.¹⁵ The problem with Holmes' reading is that he sees the 'king' as a symbol of state neutrality, rather than as a '*pouvoir neutre*' invested only with a constitutional jurisdiction.¹⁶ Due largely to the one-sided nature of his reading, Holmes claims that Constant's conception of neutrality is 'untenable', yet resists engaging in a systematic analysis of the strategies employed by Constant in order to render the modern state neutral between conflicting interests. Additionally, Holmes focuses on the idea of 'moral conflict', and in this way overlooks Constant's engagement with the problem of how to impartially manage conflicting economic interests in the context of modern politics.

Holmes' misreading is part of a broader trend within scholarship pertaining to Constant's constitutionalism. For the most part, both Anglophone and Francophone scholarship focuses almost exclusively on Constant's *institutional* formulations of neutral powers designed to facilitate the smooth functioning of

¹⁴ As it pertains to Constant, Kalyvas and Katznelson's oversight is of particular significance. In examining each of Constant's major political studies in isolation from one another, they come to treat his pursuit of neutrality as a process consisting of three distinct phases, of which each involved a revision of the conclusions fostered during the prior stage. In approaching the body of Constant's work in this way, they miss the rich interplay between his abstract political theories and formal constitutional designs; most importantly, Kalyvas and Katznelson suggest that Constant's elective '*pouvoir préserveur*' of *Fragments* was 'dropped' in *Principes* and replaced with proceduralist and insentient '*pouvoir neutre*', suggesting that the two formulations were mutually exclusive. In response to this mis-reading of Constant, I make the case that the 1806 *Principes* stands alone in Constant's oeuvre in that it outlined an abstract and exhaustive philosophy of liberalism consistent with each of the institutional proposals advanced in the more constitutionally-focused *Fragments* and the *Principes de politique* of 1815.

¹⁵ Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, CT., 1984), pp.145-149.

¹⁶ Holmes, *Benjamin Constant*, p.146. As Kalyvas and Katznelson have pointed to, the problems inherent in Holmes' account can be put down to the way in which he endeavours to draw links between Constant's thought and the concepts and assumptions now central to contemporary liberal theory; Kalyvas and Katznelson, 'We are Modern Men', pp.515-516.

government, and due to this, many analyses of Constant's conception of neutrality are inherently one-sided.¹⁷ For instance, as part of her otherwise excellent account of Constant's post-revolutionary liberalism, Biancamaria Fontana notes that his formulation of a '*pouvoir neutre*' was unrelated to the idea of securing neutral governance more broadly.¹⁸ Similarly, the scholarship of Patrice Rolland treats Constant's conception of neutrality as something associated solely with maintaining constitutional balance, harmony, and equilibrium, despite helpfully noting it was something that preceded institutional formulations.¹⁹

In one sense, they are both right. The neutral powers developed in Constant's *constitutional* treatises were indeed unrelated to his desire to neutralise conflicting interests within the political process, but importantly, this fact does not preclude the possibility that Constant's broader constitutional strategy was grounded in a desire to encourage the production of laws that were neutral between the claims of competing interests. To appreciate this aspect of Constant's political philosophy, I argue, we must look beyond his institutional studies and instead engage with the liberal philosophy expounded in *Principes*. The present study thus treats Constant differently, in that it finds in his *oeuvre* two distinct conceptions of neutrality. I argue that both Madison and Constant developed two principal constitutional objectives. The first was to make sure that the state as-a-whole remained neutral between conflicting interests and produced only those laws consistent with the public good and private rights; and the second was to fashion neutral *powers* charged with guaranteeing the integrity of a neutral *state*.

A central facet of this study's engagement with Madison is my reconsideration of his 'extensive republic thesis' as espoused in *Federalist* No.10 and elsewhere. Broadly, my position is that after decades of debate among the text's commentators, neither of the two leading schools of interpretation – the

¹⁷ Biancamaria Fontana, *Benjamin Constant and the Post-Revolutionary Mind* (New Haven, CT., (1991), pp.63-65. Patrice Rolland, 'Comment Préserver les Institutions Politiques? La Théorie du Pouvoir Neutre Chez B. Constant', *Revue Française d'Histoire des Idées Politiques*, No.27 (2008), pp.43-73.

¹⁸ Fontana, *Post-Revolutionary Mind*, p.65.

¹⁹ Rolland, 'La Théorie du Pouvoir Neutre Chez B. Constant'.

‘pluralist’ and ‘republican’ readings – have produced an account that conclusively explains why Madison understood the ‘extensive republic’ of the United States to be necessarily less congenial to factionalism than the multitude of smaller republican polities that had gone before it.²⁰ My exposition of the ‘extensive republic thesis’ seeks to go beyond both the ‘Lockean-liberal’ and ‘civic humanist’ readings in emphasising Madison’s pragmatism and appreciation for the way in which the institution of monarchy constituted a neutral sovereign power. In short, I make the case that Madison fully expected a ‘multiplicity of interests’ to be reflected in the composition of the House of Representatives, and, moreover, I argue that he understood the establishment of *equilibrium* between competing factions to be the most effectual way to infuse the broader constitutional superstructure with the type of political *neutrality* ordinarily associated with the institution of monarchy.

Notwithstanding, however, the plentitude of scholarly interest in Madison’s ‘extensive republic thesis’, his broader desire to forge a political system capable of providing for impartial governance has been largely overlooked by scholars concerned with the development of liberalism during the creation of the American republic. Despite this oversight, the recent work of Kalyvas and Katznelson has drawn attention to Madison’s quest to instil the American constitutional system with impartiality. They note that his search for a non-monarchical site of neutrality was at the ‘centre of his republicanism’, yet conclude simply that Madison came to the recognition that a republican

²⁰ Professors Morgan, Wood, and Gibson have been most successful in articulating the republican reading of the document, and the findings of each have contributed to the formation of the now-widely held hypothesis that *Federalist* No.10 contained the chief justificatory argument for a system of representation that was expected to produce an enlightened and impartial class of legislators, reminiscent of the patrician elites of antiquity. Their assessment contrasts with what was, up until the 1970s, the consensus view: that Madison expected the ‘multiplicity of interests’ present in an extensive republic to clash with one another, preventing any one particular faction from forming an *interested* majority. Alan Gibson, ‘Impartial Representation and the Extended Republic: Toward a Comprehensive and Balanced Reading of the Tenth *Federalist* Paper’, *History of Political Thought*, Vol.12, No.2 (Summer, 1991), pp.263-304 (p.265-266); Colleen Sheehan, ‘The Politics of Public Opinion: James Madison’s “Notes on Government”’, *The William and Mary Quarterly*, Third Series, Vol.49, No.4 (Oct., 1992), pp.609-627 (pp.609-611); Robert Dahl, *A Preface to Democratic Theory* (London, 2006), pp.4-33; Judith Shklar, ‘Publius and the Science of the Past’, *Yale Law Journal*, Vol.86, No.6 Federalism, pp1286-1296 (p.1290); Lance Banning, ‘The Hamiltonian Madison: A Reconsideration’, *The Virginia Magazine of History and Biography* Vol. 92, No. 1 (Jan., 1984), pp. 3-28 (p.14).

government could yield impartial governance only if it took the form of a ‘compound constitutional configuration’.²¹

The present study seeks to go beyond that presented by Kalyvas and Katznelson in uncovering and detailing the precise nature of the institutional configurations formulated by Madison as part of his effort to encourage impartial law-making in the modern republic. In this way, I devote considerable space to investigating a number of Madison’s constitutional schemes that were rejected by delegates at the Convention and which therefore remain theories. My position is that like Constant, Madison sought to encourage not only equilibrium between interested factions, but also equilibrium between political institutions. Through engaging with his twin proposals for a ‘federal negative’ and a ‘council of revision’ I hope to show that he endeavoured to exploit public opinion in such a way that would neutralise the various institutions of the extensive republic.

III

Broadly speaking, the present study argues that the theories of political neutrality developed by Madison and Constant can be best understood by examining three key areas of their respective political and constitutional philosophies. Accordingly, I have divided the thesis into three distinct sections, each comprising of two chapters. The first such section considers the philosophical foundations of the idea of neutrality and pays close attention to both thinkers’ considerations on the subjects of modernity, the public good, and personal freedom. Chapter One makes the case that Madison’s and Constant’s respective political philosophies rested upon a number of assumptions and methodological strategies that they borrowed from Scottish Enlightenment thought. It considers, moreover, the distinctly ‘Scottish’ educations enjoyed by both thinkers, and considers their respective understandings of human nature and the public good in light of the works of David Hume and Adam Smith. In sum, the opening chapter posits that although Madison and Constant held differing views on man’s nature, their shared appreciation for ‘modernity’ brought them to the distinctly ‘Real Whig’ conclusion that modern political systems had to be structured around the

²¹ Kalyvas and Katznelson, ‘The Republic of the Moderns’, p.459.

inescapable realities of ‘interestedness’ and the distinctly modern desire for privacy from the political sphere.

Building on the conclusions advanced in the first chapter, Chapter Two considers Madison’s and Constant’s thoughts on the nature of liberty under modern conditions. It argues that in the writings of both thinkers we can discern the existence of a distinctly liberal-republican conception of liberty which took seriously the threats posed by arbitrariness and juridification. My position is that both thinkers can be seen as innovators of what was in essence a distinct way of thinking about personal freedom. I argue that both Madison and Constant dispensed with the classical equation of freedom with authority, and instead saw value in political liberty on the basis that it could be used to restrain the competence of the state. Crucial here is my reconstruction of Constant’s and Madison’s understandings of the nature of modern commercialised societies; what I advance is the claim that both theorists held that the triadic combination of modern interestedness, political liberty, and representative government would produce a political culture within which each individual and faction would employ their political rights in ways that would result in a deceleration of legislative action. In other words, I make the case that both thinkers remained committed to the republican belief in the importance of widespread political participation, but only because they held that this would ultimately maximise and preserve the negative liberty of individuals.

The second section of this study, which explores a set of electoral systems geared toward the production of neutral laws, considers Madison and Constant in isolation of one another. My reasoning for this shift in strategy is that although both thinkers designed and advocated for similar extensive federalist systems of representative government, their efforts can only be understood in light of the largely dissimilar political contexts within which each thinker operated. Thus, Chapter Three takes the form of a major re-consideration of Madison’s ‘extensive republic thesis’ as expounded in *Federalist* No.10. Through moving beyond his writings in *The Federalist*, the chapter argues that Madison not only sought to fashion an equilibrium between institutions, but that he also sought to encourage what I term ‘factional equilibrium’. In this sense, I take issue with the

republican revisionist reading of Madison's extensive republic thesis, and argue in response that his principal aim was to transform the federal government into an entity capable of remaining neutral between the claims of competing interests. More specifically, my position is that far from seeking to encourage virtuous patrician government, Madison in fact sought to bring a multiplicity of competing interests into the federal government as part of a strategy of neutralisation.

Chapter four mirrors chapter three both in terms of structure and argument. It draws renewed attention to Constant's *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, and argues that although his extensive republic thesis was ostensibly developed independently of Madison's, Constant nonetheless resolved that neutral governance could be achieved through creating factional equilibrium. The chapter contends that Constant's '*constitution républicaine*' was an intellectual response to post-revolutionary French political history and the philosophy of Rousseau and Jeremy Bentham. In short, my conclusion is that as part of a wider effort to remove the 'particular' and 'factional' from the legislative system, Constant set about designing an electoral and constitutional system centred on achieving political *neutralisation* through the encouragement of factional competition. Furthermore, I argue that the strategies of neutralisation developed by both thinkers were predicated upon their shared conviction that under modern conditions, political rights would invariably be employed along the lines of self-interest, and that the advent of the extensive republic provided the constitutional designer with the opportunity to manufacture political neutrality organically.

The final section of the thesis explores Constant's and Madison's efforts to further institutionalise political neutrality through means other than the encouragement of factional equilibrium. Considering both thinkers alongside one another once again, Chapter Five engages with their respective efforts to guarantee the limitation and neutralisation of political power. In the case of Constant, it proposes that his *Principes de politique (I)* contained a sophisticated meta-legal theory which provided an original justification of neutral government. More specifically, I argue that Constant can be seen to be developing a 'restraint

principle liberalism' which denied the appropriateness of certain *reasons* capable of justifying legislative action. Returning to his understanding of the nature of the public good, the chapter suggest that Constant's idea of the 'common interest' served as a philosophical tool capable of restricting the competence of the state in a way that did not involve the institutionalisation of natural rights. The common interest, in other words, denied the legitimacy of laws formed on the basis of particularity and utility, and it was in this way that Constant sketched a legal system capable of guaranteeing the production of laws which stood neutral between the claims of competing interests and which advanced only an austere conception of the public good.

With respect to Madison, Chapter Five makes the case that his efforts to *guarantee* neutral laws relied more heavily on institutional design. Through framing this examination into Madison's constitutional strategy around the concept of judicial review, I show that he was reluctant to employ independent institutions when attempting to ensure the production of neutral and legitimate laws. More specifically, the chapter argues that Madison rejected the legitimacy of judicial *supremacy* largely on the grounds that popular sovereignty could indeed be a self-limiting and self-neutralising force, and that in the context of the extensive republic neutrality could be best ensured through encouraging widespread popular participation in the formation of the laws. Running parallel to this line of argument, I make the case that it was his attachment to the 'Real Whig' branch of philosophy that pressed Madison into rejecting the concept of judicial supremacy. In short, I argue that Madison's constitutional strategy was one which revolved around encouraging both factional and institutional equilibrium, and that he understood such a combination to be capable of restricting the state to the production of neutral laws. The final chapter explores Constant's and Madison's efforts to construct neutral *institutions*. Considering the efforts of both thinkers side-by-side, I make the case that both were impressed by the theoretical ability of the British crown to serve as a neutral arbiter in conflicts between the active branches of government, and that both endeavoured to construct 'controlling' powers, endowed with the trait of neutrality.

Throughout the thesis, I seek to place Constant and Madison within their proper contexts, but I aim to do this in such a way that allows for the identification of common ground between their respective historical and political experiences. Although Madison and Constant operated within distinct contexts, I hope to show that they were in many ways grappling with similar sets of challenges. Ultimately, in their respective endeavours to construct political institutions amiable to personal freedom, both were grappling with the same, largely unresolved, problem: managing the force of factions and interested groups under the popular institutions of a large, diverse, and commercialised republic. Thus, what I hope to show is that the concept of political neutrality emerged as a distinctly liberal-republican idea that was thought to be capable of managing factional politics within the context of an extensive republic. Both Madison and Constant, I argue, recognised that political liberty and widespread political participation could – within large republics – be used to not only thwart arbitrariness, but also the modern phenomenon of juridification. In sum, the conclusion advanced by both thinkers was a simple one: preventing the emergence of oppressive laws could be achieved through encouraging political neutrality, and that this end could be achieved through encouraging factional equilibrium.

On occasion, the thesis strays somewhat from its contextualist methodological foundations when concepts central to contemporary analytical political philosophy are introduced for the purposes of juxtaposition. However, at such points my aim is not to identify instances of ‘anticipation’, but is instead to point to instances of ideational convergence which support my broader claim that Madison and Constant were architects of *political* liberalisms. Thus, while the subjects of this study could not have anticipated the concepts and principles born out of Rawls’ work, an underlying contention is that broadly speaking, Madison and Constant share with Rawls a rough understanding of the legitimate ends of the state, and can in a sense guide contemporary political theorists concerning with institutionalizing the principles of political liberalism. As Kalyvas and Katznelson have argued, Rawls’ work can in many ways be seen as a continuation of Constant’s original project to institutionalise political neutrality in an organ of the state.

Part One

The Idea of Neutrality

Chapter One | A Shared Intellectual Heritage: Modernity, the Public Good, and the Foundations of Political Neutrality

- 1.1 The Science of Politics at Edinburgh and Princeton
- 1.2 Virtue, Pluralism, and the Public Good
- 1.3 Neutrality and Political Science

The political careers of James Madison and Benjamin Constant were in some respects as dissimilar as the political realities with which they were forced to grapple. In the case of the former, his gradual elevation to the summit of American public life was in many ways an emblematic reflection of the relative political stability with which his young nation had seemingly been blessed. Starting out as a legislator in his home state of Virginia at the age of twenty-five, Madison embarked on an orthodox path of career development which closely tracked the constitutional development of the United States – resulting in his eventual election to the Presidency in 1809. Finding himself a perennial occupant of a chair at the proverbial top-table of American political life, Madison was able to directly craft and shape the nation’s brave experiment with republican government conducted during final decades of the eighteenth-century. For this reason, his contributions to western political philosophy did not take the form of grand philosophical treatises and dissertations; rather, Madison shaped modern liberalism in a much more concrete and long-lasting manner, devising laws and constitutions that remain with us two centuries later.

In stark contrast, the melancholic temperament and volatile career of Benjamin Constant mirrored the tumult and commotion which marked the politics of the French revolutionary period. As an oppositional thinker hostile to the political programs of each of the period's dominant political actors, Constant was never quite able to follow the 'Madison-prescription' and influence the French republican experiment in the way he earnestly desired. While witnessing with regret and horror the decline and fall of regime after regime, the Swiss retreated to the world of letters and high political theory in the hope of delivering for his adopted nation the type of liberal-republican regime he saw across the Atlantic.²² Thus, in a manner entirely unlike Madison, and not to mention in a way that would have been the cause of considerable personal frustration, Constant was at his most original and penetrative during his periods spent on the fringes of French political scene; periods during which he was accorded the space and freedom to engage in the production of major philosophical tracts.

But though the lives and careers of Constant and Madison contrasted sharply, the fundamentals of their respective political philosophies did not. For reasons that will be uncovered in the ensuing chapter, both thinkers presented political philosophies that were at once grounded in a number of significant assumptions and hypotheses concerning the nature of modern commercialised political societies, and which held-up the ideal of political neutrality as the foremost end of the modern state. Broadly speaking, the purpose of this chapter is to cast light on the range of contextual and philosophical factors motivating Constant's and Madison's shared belief that in the context of the modern era the cultivation of political neutrality had to be the principal end of republican government. It begins with an examination into what I consider to be a shared intellectual heritage, rooted in the distinctly 'Scottish' educations that conditioned the philosophical worldviews of both thinkers. I make the case that their formal and

²² Constant made his appreciation for the principles of American republicanism clear in the additional notes to Livre I of the 1806 *Principes de politique*. After quoting from Thomas Jefferson's *First Inaugural Address* – a speech which eulogised what can be considered distinctly liberal-republican principles – Constant wrote: '*Ces principes, mis en pratique avec tant de succès dans une république vaste et flourishing, sont ceux que j'ai tâché d'établir dans cet ouvrage*'. More specifically, the principles Jefferson spoke of were the protection of minority rights, 'equal and right justice for all men, the 'maintenance of the governments of the individual states in all their rights', and the 'scrupulous attention to the right of election by the people'; Benjamin Constant, *Les Principes de politique de Benjamin Constant*, Tome II (ed.) Etienne Hofmann (Geneva, 1980), pp.511-517 (pp.515-516). (Hereafter referred to as *Principes*).

informal tutors encouraged both thinkers to conceptualise politics through the prism of modernity, emphasising the inevitability of pluralism, the importance of privacy, and the challenge presented to the very idea of republican government by the emergence of modern commercialism. Here, I show that through being educated in hotbeds of Scottish Enlightenment thought, Constant and Madison became attached to particular methods of enquiry and assumptions about the nature of politics and society which would go on to profoundly shape their respective approaches to political theory and constitutional design.

Next, I explore in more depth precisely how the fundamental precepts of Scottish enlightenment thought shaped the foundations of the political philosophies of Constant and Madison. My aim here is to ascertain how an appreciation for pluralism, individuality, and ‘interestedness’ translated into the development of a distinctly liberal-republican doctrine – advanced by both thinkers – which had as its principal conclusion the hypothesis that republican government could be sustained in the modern era only if governmental actions could be rendered neutral between conflicting interests. It ought to be said, however, that this opening chapter does not seek to determine precisely how both thinkers endeavoured to encourage political neutrality – such an endeavour is the focus of the final four chapters of the thesis. Instead, what I hope to show in this chapter is that Constant and Madison stood somewhere between two competing intellectual worlds. Neither pure liberals nor civic republicans, both thinkers, I argue, exhibited an appreciation for the importance of the republican ideal of active citizenship but recognised with equal measure that such a concept had to be reformulated so as to remain consistent with the realities of modern commercialism. Original here is my contention that the socio-political philosophy of the Scottish Enlightenment served as something of an avenue or gateway between the liberal and republican paradigms of political thought; an avenue which allowed Constant and Madison to re-fit classical republicanism for the modern age in such a way that would produce the desired end of political neutrality.

1.1 The Science of Politics at Edinburgh and Princeton

Though throughout the course of their political careers Constant and Madison were forced to grapple with unique sets of political challenges, from an early point in their respective processes of intellectual development they each cultivated a distinctly modern, and almost scientific, way of thinking about politics, society, and the nature of man. That both thinkers paid significant attention to the subject of history (particularly the conjectural variant of the discipline) – as well as to what might today be termed sociology – when considering political-philosophic questions ought to come as no surprise. As young men, both attended institutions of higher education which had been profoundly influenced by the towering eighteenth-century figures of the Scottish Enlightenment.

Eschewing the traditional educational path traversed by most educated Virginians of his day – one which would have seen him follow Thomas Jefferson in enrolling at the College of William & Mary – Madison matriculated at the College of New Jersey (now Princeton University) in 1769.²³ In terms of his intellectual and political development, Madison's decision to travel to Princeton for his education proved to be immensely fortuitous for two reasons. In the first place, he found himself within riding distance of Philadelphia, the then-epicentre of revolutionary politics and the city in which he would later compose his principal contribution to western political thought.²⁴ Madison's proximity to the future national capital allowed him to develop an appreciation for the tradition of religious toleration practiced in the mid-Atlantic states; and of no less importance, he and his contemporaries in Princeton's Nassau Hall were accorded valuable access to the radical anti-British literature produced by the city's Whig publicists.²⁵

But perhaps more significantly, throughout Madison's stay in Princeton the college stood as the leading outpost of Scottish Enlightenment thought in the colonies. As presidents, Samuel Davies and John Witherspoon set about modelling the College of New Jersey in part on the University of Edinburgh both

²³ Kevin R.C. Gutzman, *James Madison and the Making of America* (New York, NY., 2012), p.2.

²⁴ Ralph Ketcham, *James Madison: A Biography* (Charlottesville, VA., 1990), pp.26-27.

²⁵ Gutzman, *James Madison*, pp.4-6; Ketcham, *James Madison*, pp.36-37.

in terms of its formal structure and academic ethos.²⁶ Witherspoon in particular brought with him to New Jersey a principled hostility to ecclesiastical hierarchy, and his typically-Scottish blend of Calvinism and ‘common sense’ philosophy became a central pillar of the intellectual climate at the college.²⁷ The trend toward secularisation, which became a hallmark of Witherspoon’s tenure as President, had profound implications for the institution’s curriculum and political culture.²⁸ Not only did he introduce to Princeton a distinctly Scottish predilection for experimentation and science, Witherspoon also made radical English Whig political thought a core part of the political education offered to the gifted minds residing in Nassau Hall.²⁹ The charge of radicalism often levelled at the college during his tenure was one that Witherspoon welcomed and cherished. Though many of his formal lectures focused on the limitations of metaphysics, as well as the ‘ridiculous’ idealism of Berkley, Witherspoon utilised his position to advance the Lockean conception of the nature of civil society and what he termed the ‘doctrine of resistance’ – a concept found not only in the writings of the English ‘Real Whigs’, but also in those of Hume.³⁰

Underpinning the Whiggism taught at the College of New Jersey was, then, a fundamental distrust of the holders of political authority – an edict indicative of the ‘tradition of political pessimism’, and one which would go on to shape Madison’s constitutional philosophy and produce his almost pathological suspicion of political power. It seems that the strain of Whiggism that most

²⁶ Douglas Adair, ‘That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist’, *Huntington Library Quarterly*, Vol. 20, No.4 (Aug., 1957), pp.343-360 (p.346).

²⁷ James H. Smylie, ‘Madison and Witherspoon: Theological Roots of American Political Thought’, *American Presbyterians*, Vol.73, No.3 (Fall, 1995), pp.155-164 (p.156); Ketcham, *James Madison*, p.38.

²⁸ Francis L. Broderick, ‘Pulpit, Physics, and Politics: The Curriculum of the College of New Jersey, 1746-1794’, *The William and Mary Quarterly*, Vol.6, No.1 (Jan., 1949), pp.42-68 (p.55), (p.59).

²⁹ Broderick, ‘The Curriculum of the College of New Jersey’, p.59.

³⁰ In his notes, Witherspoon declared that: ‘Though the people have actually consented to any form of government, if they have been essentially deceived in the nature and operation of the laws, if they are found to be pernicious and destructive in the ends of the union, they may certainly break up the society, recall their obligation, and resettle the whole upon a better footing...if the supreme power, wherever lodged, come to be exercised in a manifestly tyrannical manner, the subjects may certainly if in their power, resist and overthrow it’, John Witherspoon, ‘Lectures on Moral Philosophy’, in *The Works of the Rev. John Witherspoon Volume III* (ed.) John Rogers (Philadelphia, 1802), pp.367-592 (pp.432-436); Ronald Hamowy, ‘Jefferson and the Scottish Enlightenment: A Critique of Gary Wills’ *Inventing America: Jefferson’s Declaration of Independence*’, *The William and Mary Quarterly*, Vol.36, No.4 (Oct., 1979), pp.503-523 (p.509).

impressed Madison was a rationalistic and philosophical one, distinct from the more legalistic and historical branches of Whig thought.³¹ Though he may, at times, have embraced the idea of a higher, fundamental, law, Madison's political thought was for the most part underpinned by a belief in the idea that the purpose of constitutionalism was to restrain political power so as to protect man's *natural* and inalienable rights. In *Federalist* No.51, Madison famously declared:

What is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither internal or external controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.³²

Revealing here was Madison's rationalistic appeal to human nature. Following the lead of writers like Trenchard, Gordon, and Sidney, the central component of Madison's justification for republican government was the idea that freedom under government consisted in the primacy of a non-arbitrary rule of law, the authority of which was derived solely from the people. As it pertained to Madison's cultivation of this distinctly Whiggish view of the purpose of constitutionalism, Witherspoon's influence was instrumental. His lectures delivered under the heading 'Moral Philosophy' – a discipline which he defined simply as the 'knowledge of human nature' – touched on a number of important questions central to eighteenth-century political enquiry, and his broader political doctrine was deeply imbued by the radical Whig teachings of Locke and Sidney.³³

Of paramount importance to Witherspoon was the 'nature of man', and his abiding interest in this subject was linked to a broader desire to utilise history in order to determine the laws of nature upon which a new social order could be

³¹ As Mayer notes, there were three distinct strands of Whig thought: (1) Common law Whiggism, which defended the rights of parliament, (2) historical Whiggism which defended the 'rights of Englishmen' against encroachments made by the crown, and (3) a philosophical Whiggism which sought to defend the natural and inalienable rights of all men from the encroachments of power'; Mayer, 'Radical Whig Origins', p.175.

³² James Madison, 'Federalist No.51', in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Isaac Kramnick (ed.) (London, 1987), pp.318-322 (Collection hereafter referred to as *The Federalist*).

³³ Importantly, for Madison, such insights into the leading Scottish ideas of the eighteenth century did not stop after his graduation; during his postgraduate years at Nassau Hall which began in 1772, he was instructed by Witherspoon to engage with the *Essays* of Hume; Smylie, 'Madison and Witherspoon', p.156.

constructed.³⁴ Underscored by the idea of a ‘dominion of providence’, Witherspoon cautioned against extreme characterisations of man, but nonetheless emphasised his naturally sinful state; and for Princeton’s president, the nature of man necessarily translated into political interestedness, rendering the realisation of *widespread* public virtue a practical impossibility.³⁵

For the leaders of the Scottish Enlightenment, however, the utilisation of history in determining the nature of man was not an end in and of itself. Hume, in particular, was concerned with assessing the implications of man’s natural selfishness and interestedness for the science of government. In a sense, Hume’s efforts to ‘reduce’ politics to a science resulted in a fundamental repudiation and reversal of the central premise upon which the civic humanist tradition rested. Where the masters of the classical republican tradition had endeavoured to construct political systems consistent with the promotion of virtue through the encouragement of political participation, Hume effectively argued that the end of constitutional government had to be the accommodation of man’s true nature: his interestedness and vulnerability to corruption.³⁶ Through pursuing this line of argument in conjunction with his contention that the private wealth of individuals and families constituted happiness of society, Hume opened the door to the modern, liberal, way of thinking about politics.³⁷

The influence of Hume’s conclusions and methods on the minds of the leading architects of federalist theory is unmistakable. Throughout the corpus of his political writings, Madison adhered to Hume’s characterisation of the unchanging ‘self-interested’ nature of man, and moved beyond the civic humanist theorem that history could be best understood as an inescapable cyclical process through which even the most well-constituted republic would eventually descend into corruption. Like Hume and Witherspoon, Madison then cultivated a nuanced view of human nature, grounded in his appreciation for the diversity that existed within all societies. As a foundational pillar of his broader

³⁴ Broderick, ‘The Curriculum of the College of New Jersey’, p.65.

³⁵ Smylie, ‘Madison and Witherspoon’, p.157.

³⁶ James Moore, ‘Hume’s Political Science and the Classical Republican Tradition’, *Canadian Journal of Political Science*, Vol.10, No.4, pp.809-839 (pp.833-834).

³⁷ John Robertson, ‘The Scottish Enlightenment and the Limits of the Civic Tradition’, in *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, Istvan Hont (ed.) (Cambridge, 1983), pp.137-178 (p.156).

political philosophy, Madison's belief in the natural interestedness of man had profound implications for the way in which he would go on to approach constitutional design. Most significantly, it seems that Madison employed the 'Scottish' conception of human nature in his efforts to grapple with the problem of factionalism, choosing to eschew the civic humanist prescription of improved 'political education' through instead consciously engaging in efforts to *accommodate* political factions through institutional design.

Crucially, the Humean belief in the necessity of constructing governmental forms centred on societal *realities*, rather than an ideal society – one latched onto by Madison as well as Witherspoon and Alexander Hamilton – was developed on the basis of historical research.³⁸ As Hume wrote in his *An Enquiry Concerning Human Understanding*:

Mankind are so much the same, in all times and places, that history informs us of nothing new or strange in this particular. Its chief use is only to discover those constant and universal principles of human nature by showing men in all varieties and situations, and furnishing with materials from which we may form our observations and become acquainted with the regular springs of human action and behaviour.³⁹

It is thus telling that a core part of Madison's preparation for the *Virginia Plan* was his authorship of the *Notes on Ancient and Modern Confederacies*. In it, Madison can be seen applying the methodology of Scottish conjectural history to the realm of political theory. Where philosophers like Hume and Smith engaged in historical analysis both in order to further understand social phenomena and trace human progress,⁴⁰ Madison, it seems, looked to the histories of confederate regimes in order to glean universal lessons regarding the nature of multi-layered government and constitutional design more broadly. From a methodological perspective, Madison's comparative-historical enquires were of utility, or in his words 'valuable instruction',⁴¹ precisely because he adhered to Hume's assertion

³⁸ Adair, 'That Politics Can be Reduced to a Science', p.353.

³⁹ David Hume, *An Enquiry Concerning Human Understanding* Peter Millican (ed.) (Oxford, 2007), p.60

⁴⁰ H.M. Hopfl, 'From Savage to Scotsman: Conjectural History in the Scottish Enlightenment', *Journal of British Studies*, Vol.17, No.2 (Spring, 1978), pp.19-40 (pp.19-22); A Skinner, 'Economics and History – The Scottish Enlightenment', *Scottish Journal of Political Economy*, Vol. 12, No.1 (Feb., 1965), pp.1-22 (p.3).

⁴¹ James Madison, 'Federalist No.18', in *The Federalist*, pp.159-164.

that the same set of human virtues and frailties constituted the sources of all political and social actions.⁴²

In *The Federalist*, moreover, Madison and Hamilton leaned heavily on both the idea of an unchanging human nature and examples of ancient confederate republics to reassure their readership that ‘extensive’ republicanism was indeed possible.⁴³ Thus, for Madison, much as for Hume, historical analysis constituted ‘experimental instruction’ – an almost scientific method of enquiry capable of yielding universal lessons concerning society and politics. As Douglas Adair has astutely pointed to, the aspect of Madison’s approach to political theory that set him apart from his contemporaries was indeed his methodology.⁴⁴ Through maintaining that human nature was indeed unchanging, he was able to look beyond the specific institutional configurations of particular political systems in order to glean universal lessons concerning the nature of government.

The Scottish philosophers’ interest in the relationship between political institutions and societal development was one with which Constant was also well acquainted. After leaving the University of Erlangen in 1783, a sixteen-year-old Constant matriculated at the seat of the Scottish Enlightenment, the University of Edinburgh, at his father’s insistence.⁴⁵ Despite the regrettable fact that relatively little is known about the nature of the formal studies undertaken by Constant at Edinburgh,⁴⁶ it is clear that during his time in Scotland’s capital, he was introduced to the ‘science of politics’ which had become that city’s intellectual hallmark. As was indicative of an eighteenth-century Scottish education, Constant drew on the model of conjectural history when conducting his political

⁴² In his *Enquiry*, Hume argued that ‘Ambition, avarice, self-love, vanity, friendship, generosity, and public spirit’ were the ‘source of all actions and enterprises, which have been observed among mankind; Hume, *Human Understanding*, p.60.

⁴³ See: Alexander Hamilton, ‘Federalist No.9’, in *The Federalist*, pp.118-122; Madison, ‘Federalist No.18’.

⁴⁴ Adair, ‘That Politics Can be Reduced to a Science’, pp.343-360.

⁴⁵ Dennis Wood, *Benjamin Constant: Benjamin Constant* (London, 2002), pp.44-45.

⁴⁶ Though there is little documentary evidence regarding Constant’s formal studies, Kurt Kloocke holds that it is highly likely that he studied under both Adam Smith and Adam Ferguson while in Scotland’s capital. Irrespective, however, of whether or not he was indeed personally educated by Smith and Ferguson there can be little doubt that he was receptive to their writings; Kloocke, *Une biographie intellectuelle*, p.300.

researches, particularly those expounded in the 1806 *Principes de politique* and *De l'esprit de conquête et de l'usurpation* (1814).⁴⁷

Firmly persuaded by the idea that mankind was set on a progressive path – a trajectory driven by man's supposed natural capacity for amelioration – Constant came to cultivate an appreciation for the irreversibility of historical change which translated into an intellectual attachment to the doctrine of 'historicism', as expounded by thinkers like Smith and Ferguson.⁴⁸ As it pertained to the development of his *political* philosophy, Constant's appreciation for the historicism of Smith was significant in that it served as one of the foundational elements of his broader effort to sharply distinguish between state and society. Building upon Smith's antimercantalist justification for a non-interventionist state, Constant applied this belief in society's autonomous development to the realm of politics and morality. Undoubtedly galvanised by Robespierre's disastrous tenure at the summit of the French state, Constant became increasingly hostile to the concept of moral legislation and the broader belief – one advanced not only by the Jacobins, but also by Rousseau and Mably – that the political sphere extended to all aspects of society.⁴⁹ As Stephen Holmes has helpfully alluded to,⁵⁰ Constant's historicism was closely wedded to his preoccupation with the idea of neutrality: provided societal development and the march toward equality were indeed autonomous processes, government was, in Constant's model, simply required to abstain from the performance of any actions capable of interfering with what were natural processes of development.

Thus, while Constant's time as a student in Edinburgh certainly occasioned in him a belief in man's 'perfectibility', his considerations on this subject were to a significant degree further refined upon his return to France.⁵¹ In 1798, he began working on a translation of William Godwin's *Enquiry Concerning Political Justice*, and in that text Constant was exposed to a theory of perfectibility which supposed that man's progress was dependent upon the rational discovery of

⁴⁷ Biancamaria Fontana, *Benjamin Constant and the Post-Revolutionary Mind* (New Haven, Conn., 1991), p.30.

⁴⁸ Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, CT., 1984), pp.182-183.

⁴⁹ Holmes, *Benjamin Constant*, pp.187-192.

⁵⁰ Holmes, *Benjamin Constant*, p.201.

⁵¹ Fontana, *Post-Revolutionary Mind*, p.30

absolute truths.⁵² This was a theory of perfectibility that differed from that advanced by Condorcet, but only in terms of where it placed emphasis; whereas for Condorcet, amelioration could be seen in material progression, Godwin focused overwhelmingly on intellectual progression and the cultivation of ideas.⁵³ Though he distanced himself from Godwin's 'anarchism', the thesis offered in *Political Justice* was of considerable importance to Constant's intellectual development. Most significantly, he became deeply attentive to the realities of historical change, viewing political ideas as autonomous entities to which political *institutions* had to be reconciled *ex post*. In other words, Constant understood civil society to be something that was naturally progressive and liable to outgrow prevailing governmental forms. In short, this realisation amounted to an historicist explanation for why the revolutions were often necessary socio-political events.

Thus, the idea that social and political institutions were appropriate only in as much as they conformed to the prevailing ideas of a particular epoch was central to Constant's assessment of the French revolution.⁵⁴ Convinced that historical change was ultimately beyond the control of men, he argued strenuously in each of his revolutionary pamphlets that the objective of a revolution ought to be the simple reconciliation of political institutions with '*les idées régnantes*', and that when revolutionary action went beyond realising this straightforward aim, destructive '*réactions politique*' would follow.⁵⁵ Whereas then in the Scottish capital the debates concerning the nature of man took on a distinctly academic character, the idea of 'perfectibility' was a highly political, and not to mention

⁵² F.E.L Priestley, 'Platonism in William Godwin's Political Justice', *Modern Language Quarterly*, Vol.4, No.1 (March, 1943), pp.63-69 (p.65).

⁵³ Priestley, 'Godwin's Political Justice', p.65.

⁵⁴ Etienne Hofmann, *Les Principes de Politique de Benjamin Constant: La Genèse d'une Oeuvre Et L'évolution de la Pensée de leur auteur, Tome I*, (Genève, 1980), p.342.

⁵⁵ In *Des réactions*, Constant wrote: '*lorsqu'une révolution dépasse ce terme, c'est-à-dire lorsqu'elle établit des institutions qui sont par delà les idées régnantes, ou qu'elle en détruit qui leur sont conformes, elle produit inévitablement des réactions... La révolution de France, qui a été faite contre les privilèges, ayant de même dépassé son terme en attaquant la propriété, une réaction terrible se fait sentir*'; Benjamin Constant, "Des réactions politique", in *Cours de politique constitutionnelle, ou collection des ouvrages publiés sur le gouvernement représentatif par Benjamin Constant*, Tome II, M. Édouard Laboulaye (ed.) (Paris, 1872), pp.71-128. (pp.71-72) (Hereafter referred to as *Cours de politique*).

subversive, one in Paris.⁵⁶ The notion of perfectibility as advanced by thinkers such as de Staël and Condorcet was inextricably associated with the idea that human progress could effectively occur only under free institutions which reconciled private individual liberty with majoritarian collective decision-making.⁵⁷ Of course, this take on the idea of progress brought its proponents into direct conflict with Bonaparte during the early years of the nineteenth century as the Consulate regime began taking on a distinctly authoritarian character.

As it pertained to the fundamentals of Constant's political philosophy, his assessment of the revolution and its excesses imparted a great deal. He understood that given its progressive nature, human history ultimately possessed an autonomy of its own, rendering the outcomes of mandated social change beyond the control of not only individuals, but of the social authority more broadly. From this historicist perspective, Constant was able to conclude that it was the job of political actors to bend and re-shape political institutions only in ways that would render them consistent with the spirit of the age. In this sense, he was able to denounce the objectives and actions of both the Jacobins and ultra-royalist right through an appeal to history, rather than on the basis of an account of man's 'natural' needs.

There was an important political corollary to Constant's historicism and progressive theory of man that points to why he held up the ideal of political neutrality as the primary end of *modern* government. Through emphasising man's inherent tendency toward progress, a core tenet of his philosophy became a sustained rejection of any governmental initiative intended to expedite processes of improvement and progress.⁵⁸ His position was that legitimate political and social changes were those brought about by the natural progression

⁵⁶ Etienne Hofmann, 'The Theory of the Perfectibility of the Human Race', in *The Cambridge Companion to Benjamin Constant*, Helena Rosenblatt (ed.) (Cambridge, 2009), pp.248-272 (p.252).

⁵⁷ Hofmann, 'Theory of Perfectibility', p.252; Michael Sonenscher, 'Sociability, Perfectibility, and the Intellectual Legacy of Jean-Jacques Rousseau', *History of European Ideas*, Vol.41, No.5 (Jan., 2015), pp.683-698 (pp.691-693).

⁵⁸ Intriguingly, one of the lecture courses we know Constant attended was that organised and delivered by Alexander Fraser Tytler. As his *Plan and Outlines for a Course of Lectures* suggests, Tytler introduced his students to a distinctly whiggish approach to the study of history, emphasising man's gradual and natural march toward progress. As Bryan Garsten notes, Tytler's lectures constituted the primary source of inspiration behind Constant's major work on the history of polytheisms; Bryan Garsten, 'Religion and the Case Against Ancient Liberty: Constant's Other Lectures', *Political Theory*, Vol.38, No.1 (2010), pp.4-33 (p.7).

of ideas which corresponded to the realities of the time. Such changes were, in Constant's view, imperceptible and beyond the cognisance of political actors,⁵⁹ and consequently, for amelioration to take place, government was required to remain neutral between conflicting ideas:

*si l'autorité reste neutre et laisse parler, les opinions se combattent et de leur choc naît la lumière. Le jugement nationale se forme et la vérité réunit bientôt un tel assentiment, qu'il n'est plus possible de le méconnaître.*⁶⁰

As Etienne Hofmann has suggested, on this point Constant was clearly influenced by the teachings of Smith and Jean-Baptise Say who both exhibited faith in 'providence' and an opposition to political interference in natural processes.⁶¹ But Constant's appeal for legislative restraint was not, however, a straightforward demand for governmental passivity. There were, in fact, two sides to his critique of governmental interference in the natural process of amelioration. Though governmental action intended to directly foster progress often yielded destructive outcomes, Constant warned, total political passivity also undermined the attainment of progress. As it pertained to the idea of amelioration, he stressed that government could legitimately *facilitate* human progress only through providing the means by which individuals could cultivate a higher level of understanding. More concretely, this translated into a tempered acceptance of the idea of public education; for Constant, government could assist the process of human amelioration by merely providing, rather than managing education. '*En education comme en tout*', Constant wrote, '*que le gouvernement veille et qu'il preserve; mais qu'il reste neutre. Qu'il écarte les obstacles, qu'il aplanisse les chemins. L'on peut s'en remettre aux individus pour y marcher avec succès*'.⁶²

⁵⁹ Constant's pessimism regarding the capacity of the political class to sufficiently advance human progress was grounded in his belief that since the governors were merely a fraction of the enlightened class, their opinions and judgments could not be considered intellectually superior to that held by the remaining educated members of society not in possession of political authority. That the governors would naturally possess a level of knowledge in accordance with the most prevalent ideas of the age, led Constant to insist that while suitable for conservation and protection, the government was not equipped for intellectual and moral leadership; Constant, *Principes*, pp.71-72.

⁶⁰ Constant, *Principes*, p.411.

⁶¹ Hofmann, *Les Principes de politique de Benjamin Constant*, p.344.

⁶² Constant, *Principes*, p.377. In a similar vein, he argued elsewhere in *Principes* that '*Pour qu'un peuple fasse des progrès il suffit que le pouvoir ne les entrave pas... Enfin toute*

Constant's understanding of the nature of man thus differed significantly from Madison's. In the case of the former, human nature was from fixed and static and instead existed in a constant state of flux, driven by immense, irreversible, and gradual historical change. But irrespective of how they got there, both recognised that modern politics was firstly underpinned by the ideal of privacy, and secondly, driven by the pursuit of self-interest. Both Constant and Madison drew important lessons from Scottish social and political thought, albeit in different ways. They each accepted the realities of modernity and fought against efforts to enforce anachronistic modes of political thought.

1.2 Virtue, Pluralism, and the Public Good

Though it can well be said that early-Scottish social and political thought was to some degree cultivated within the linguistic and philosophic paradigms established by the civic humanist tradition, the responses offered by Hume and Smith to the emergence of modern commercialism constituted a critical juncture in eighteenth-century political philosophy that can be seen as opening something of a gateway toward the modern liberal mode of political thought.⁶³ Though Hume may have argued in a linguistic tone reminiscent of the civic humanist approach to political enquiry, a central pillar of his philosophy was a rejection of the notion that the advent of modern commercialism threatened to make impossible the attainment of personal freedom.⁶⁴ Hume's position, in short, was that while seventeenth- and eighteenth-century civic thinkers had been right to hold up self-interested commercialism as a condition inconsistent with the attainment of civic virtue, they had erred in idealising a highly positive conception of liberty, inconsistent with man's private nature.⁶⁵

In line with Hume's sentiments, Smith exhibited little in the way of any regret concerning the perceived unattainability of civic virtue in the commercial age.

amélioration, toute innovation contraire aux habitudes d'une partie nombreuse du peuple doit être le plus possible ajournée quant à l'époque'; Constant, *Principes*, p.409, p.412.

⁶³ Daniel Walker Howe, 'Why the Scottish Enlightenment was Useful to the Framers of the American Constitution', *Comparative Studies in Society and History*, Vol.31, No3 (July, 1989), pp.572-587 (pp.577-579).

⁶⁴ Edward J. Harpham, 'Liberalism, Civic Humanism, and the Case of Adam Smith', *The American Political Science Review*, Vol.78, No.3 (Sept., 1984), pp.764-774 (p.766).

⁶⁵ Harpham, 'Liberalism, Civic Humanism, and Adam Smith', p.766.

Grounded in an understanding of the nature of society that contrasted sharply with that espoused in the civic humanist canon, Smith's political economy was rooted in the proposition that modern societies were divided into three distinct *economic* orders, comprised of individuals committed to the advancement of the interests of the particular economic group to which they belonged.⁶⁶ The corollary of Smith's thesis was that economic interests would drive public deliberations and condition political decision-making.⁶⁷ The significance of the analysis presented in *The Wealth of Nations* lay in the way in which it denied the plausibility of the civic humanist supposition that the public good could be advanced and realised only through the political actions of a virtuous and enlightened elite – one consisting of men capable of transcending their own particular interests when considering political questions. Charting something of a path to the emergence of modern liberal thought, Smith unreservedly accepted the inevitability of self-interest and concluded that the public good could be indeed attained through the pursuit of what civic humanist thinkers typically termed 'particular wills'.⁶⁸

There is a wealth of textual evidence to suggest that Smith's political economy was of considerable importance to the shaping of the political philosophies of Constant and Madison. One of the former's 'estimable writers' that guided his intellectual development, Smith is cited in the *Principes de politique* as much as any other thinker, and the tome's chapters pertaining to economic matters were unabashedly grounded in the central arguments advanced in *The Wealth of Nations*. Madison's debt to Smith is less glaring, but still discernible. Though it was not until 1791 that the Virginian publically referred to Smith directly, his writings of the 1780s pertaining to matters of political economy were grounded in ideas and linguistic tools that had been introduced to American political

⁶⁶ Harpham, 'Liberalism, Civic Humanism, and Adam Smith', p.770.

⁶⁷ Harpham, 'Liberalism, Civic Humanism, and Adam Smith', p.770; Fleishacker, 'Adam Smith', p.908.

⁶⁸ Christopher J. Berry, 'Adam Smith: Commerce, Liberty, and Modernity', in *Philosophers of the Enlightenment*, Peter Gilmour (ed.) (Edinburgh, 1990), pp.113-132 (p.122). Smith was confident that the cohesiveness of the modern society was dependent not upon benevolence, but rather on the advancement of personal interest and the regulatory power of justice, and from this, he developed the highly modern view that under the guise of the 'invisible hand', the promotion of individual interests would necessarily further the realisation of the collective public good.

discourse through the dissemination of Smith's major writings in the late eighteenth-century.⁶⁹

The links between the political philosophies of Constant and Madison and the political economy of Smith are most perceptible in their respective considerations regarding the attainment of the public good under modern conditions. In the first place, Madison, and especially Constant, recognised that the natural competition found in fragmented and pluralistic societies contributed toward the advancement of the public good. As part of his discussion concerning '*privilèges et prohibitions*' in *Principes*, Constant leant heavily on Smith to challenge the efficacy of the governmental intervention in the market-place. Following the tenets of Scottish political economy, the contention central to Constant's appeal for *laissez-faire* was that broadly-unrestricted competition was the principal driver behind socio-economic progress and fairness.

Constant's considerations on the extent of legitimate government intervention is explored in considerable depth in Chapter Five, but it is nonetheless important to note at this point that he approached the question of economic interventionism from two intriguing angles. In the first place, he argued from a consequentialist perspective that the bestowing of economic privileges undermined the market's natural ability to institute a form of economic progress consistent with the public good.⁷⁰ Thus, while by no means perfect, the market could, in Constant's view, be relied upon to advance the broader public good through the encouraging of competition and continual improvement.

Importantly, however, he expounded the benefits of free economic practices not only through the deployment of consequentialist arguments.⁷¹ Central to his considerations regarding the relationship between commerce and government was the principle of justice and the distinctly jurisprudential concept of the harm

⁶⁹ Samuel Fleishacker, 'Adam Smith's Reception Among the American Founders, 1776-1790', *The William and Mary Quarterly*, Vol.59, No.4 (Oct., 2002), pp.897-924 (p.908).

⁷⁰ Constant wrote: *La nature de l'industrie*, he wrote, '*est de lutte contre l'industrie rivale, par une concurrence parfaitement libre et par des efforts pour atteindre une supèriorité intrinsèque*'; Constant, *Principes*, p.276.

⁷¹ Constant in fact declared in Livre XII that even if there was a branch of industry that could not to be established in the absence of privileges, its inherent drawbacks would be such that its establishment would have a negative impact on the morals and freedom of society; Constant, *Principes*, p.278.

principle. Adopting a more deontological position, Constant made clear that not only did political interventions in the market undermine efforts to maximise the public good, but that economic regulation of any sort was a fundamentally unjust practice, irrespective of its outcomes. Reviving the argument which had underpinned his earlier forays into the subject of criminal justice, in Livre XII Constant claimed that society possessed no political prerogatives over individuals except in cases where the actions of one constituted harm against another.⁷² Thus, according to Constant's doctrine, while government would be justified in the use of its force to prevent the harm occasioned by corruption, this prerogative could not extend to the usage of force in ways that would advance the interests of one individual at the expense of another.⁷³

Whether or not then Constant pitched his argument from a deontological or consequentialist perspective, he was all the while appealing for state *neutrality*, rather than governmental passivity. Exhibiting a marked consistency in his understanding of the nature and value of political neutrality, he intimated that the social authority could legitimately intervene in ways that merely opened up new economic possibilities and opportunities. Citing Smith once again, Constant remarked that when a group of individuals engaged in trade with '*peuples lointains et barbares*', the state would be justified in granting the company a temporary monopoly as compensation for the dangers faced by the merchants.⁷⁴ The caveat, however, was that such intervention would be legitimate provided that it was not permanent.⁷⁵ Far from an aberration from his broader understanding of the legitimate role of government, Constant's acceptance of the legitimacy of governmental intervention in the promotion of *opportunity* was entirely consistent with his belief that the legitimate end of the neutral state was

⁷² In Ch.2 of Livre XII, Constant wrote: '*La société n'ayant d'autres droits sur les individus que de les empêcher de se nuire mutuellement, elle n'a de juridiction sur l'industrie qu'en supposant celle-ci nuisible. Mais l'industrie d'un individu ne peut nuire à ses semblables, aussi longtemps que cet individu n'invoque pas en faveur de son industrie et contre la leur des secours. La nature de l'industrie est de lutter contre l'industrie rivale, par une concurrence parfaitement libre et par des efforts pour atteindre une supériorité intrinsèque. Tous les moyens d'espèce différent qu'elle tenterait d'employer ne seraient plus de l'industrie mais de l'oppression ou de la fraude. La société aurait le droit et même l'obligation de la réprimer. Mais de ce droit que la société possède, il résulte qu'elle ne possède point celui d'employer contre l'industrie de l'un, en faveur de celle de l'autre, les moyens qu'elle doit également interdire à tous*'; Constant, *Principes*, p.276.

⁷³ Constant, *Principes*, p.276.

⁷⁴ Constant, *Principes*, p.280.

⁷⁵ Constant, *Principes*, p.280.

to create conditions whereby each individual would be free to choose and pursue a particular '*genre de vie*'.

At an earlier point in *Principes*, Constant had made an appeal for the state to remain neutral between competing opinions and philosophic ideas on the grounds that government possessed no legitimate right to compel individuals to adopt a certain life-plans or beliefs. In much the same way as his statement concerning the legitimacy of market interventions, however, this was not a straightforward appeal for state passivity. Employing the example of the monastic lifestyle, Constant claimed that '*Il y a deux manières de supprimer les couvents: l'une d'en ouvrir les portes, l'autre d'en chasser les habitants. Le premier fait du bien, sans faire du mal. Il brise des chaînes et ne viole point d'asile. Le second...porte atteinte à un droit incontestable des individus, celui de choisir leur genre de vie*'.⁷⁶

Constant's reasoning here was justified on the basis of his belief that individuals possessed '*un droit incontestable*' to enter into lifestyle arrangements – such as communal living – that conflict with the principles of individuality and autonomy; principles to which he himself accorded significant value. His remarks here were highly significant in that they suggest that Constant's liberalism was strictly *political*, and in contemporary parlance 'non-comprehensive'; in other words, he appeared to accept, without contrition, the reality of pluralism and in turn favoured the construction of a political system centred on allowing individuals to pursue a variety of life-plans consistent with the freedoms enjoyed – and choices made – by others.⁷⁷

It ought to be noted that while the concept of communal living (through the sharing of property and doctrine) was anathema to Constant, he was consistently attentive to the natural diversity which existed in modern society. Individual happiness, Constant argued in *Principes*, was to a large extent formed on the

⁷⁶ Constant, *Principes*, p.355.

⁷⁷ This is particularly significant in that it suggests that Constant's liberalism was fundamentally distinct from that espoused by John Stuart Mill in *On Liberty*. Though Constant was entirely committed to the preservation of individual rights, in *Principes* he came across as agnostic on the question of whether individual autonomy was a necessary precondition of a good, or worthwhile, existence. In this sense, Constant's liberalism shares more in common with that advanced by John Rawls than with that expounded in *On Liberty*; Jonathan Quong, *Liberalism Without Perfection* (Oxford, 2001), pp.16-17.

basis of habits and customs, unique to particular locales, and in this sense he strenuously resisted governmental efforts to instil doctrinal uniformity throughout the nation.⁷⁸ For Constant, however, non-action did not necessarily constitute political neutrality – both in economic and social matters. Instead, it is evident that he considered legitimate interventionist action on the part of the government to be the establishment of *conditions* under which each individual would be unencumbered in their pursuit of a particular way of life or economic enterprise, whether or not the concept of autonomy was central, or indeed foreign, to their particular choice. Notwithstanding the ways in which Constant's comments here offer a considerable level of insight into the reasoning behind his insistence on state neutrality, they ought also to be of interest in that they suggest that Constant was in a sense grappling with a set of philosophical questions and problems similar – though not entirely analogous – to those dealt with by Rawls in *A Theory of Justice* and elsewhere.

Outlined briefly, Rawls argued that under the idea of 'neutrality of aim' (a concept distinct from both 'procedural neutrality' and 'neutrality of outcome'), the state could, at least theoretically, act in one of three ways: (1) through ensuring for all citizens the opportunity to pursue *any* conception of the good, (2) by resisting efforts *intended* to promote or hinder any comprehensive doctrine, or (3) through resisting any actions that make it more likely that individuals will accept one comprehensive doctrine.⁷⁹ Rawls went on to make clear that the first option was untenable on the grounds that some ways of life are necessarily inconsistent with his 'priority of right' principle, and that option three was not viable on the grounds that it was indeed 'futile' to attempt to counteract the unintended effects of policy decisions on particular life choices.⁸⁰ Thus, according to Rawls, neutrality of aim is satisfied if government refrains from engaging in efforts *intended* to promote or hinder particular comprehensive doctrines.

Intriguingly, it appears that Rawls' take on the limits of legitimate state action with regard to life choices converged with that advanced by Constant. For

⁷⁸ Constant, *Principes*, p.385.

⁷⁹ John Rawls, 'The Priority of Right and Ideas of the Good', *Philosophy & Public Affairs*, Vol.17, No.4 (Autumn, 1988), pp.251-276 (p.262).

⁸⁰ Rawls, 'Priority of Right', p.262.

instance, in his extensive discussion concerning ‘premature ameliorations’ in *Principes* Constant drew upon the example of Alexander I of Russia to emphasise the advantages of governmental agnosticism with respect to individual thought, but at no point did he deny the legitimacy of governmental actions that could *affect* particular life choices. More specifically, in his example of the monasteries, Constant embraced the idea that government could legitimately ‘break chains’ (justified on the basis of the principles of justice), suggesting that he stopped short of endorsing the idea that government ought not to engage in actions liable to make it more likely that individuals would accept one comprehensive doctrine, or life-plan, over other competing doctrines. The corollary of his argument was thus that the principles of justice allowed for instances of state action which merely *facilitated personal choice* with respect to competing ways of life. In this sense, we can see that Constant developed a distinctly political liberalism which stopped short of taking stances on what constituted a worthwhile existence, but which was nonetheless wedded to the defence of principles of justice such as the harm principle.

In developing such a distinctly *political* liberalism, the concept of religious pluralism and the political economy of Smith were central to Constant’s rationale.⁸¹ In his *De la religion considérée dans sa source, ses formes, et son développement* (1824), he advanced the claim that the implementation of conditions of absolute religious freedom would result in the gradual improvement of religion, ultimately guaranteeing its perfectibility.⁸² But more specifically, Constant was arguing that under conditions of religious pluralism the competition between particular sects would produce new forms of religion more consistent with the current stage of the development of society and civilisation.⁸³ We must, of course, be cautious not to attribute Constant’s theory entirely to the teachings of Smith, but there are nonetheless undeniable links

⁸¹ Smith argued that the public interest would be best served by a policy of absolute religious toleration on the grounds that competition between the various religious sects would result in the freeing of religion from ‘absurdity, imposture, or fanaticism’; Glenn R. Morrow, ‘Adam Smith: Moralist and Philosopher’, *Journal of Political Economy*, Vol.35, No.3 (June, 1927), pp.321-342 (p.334).

⁸² Arthur McCalla, ‘The Free Market in Religion and the Metaphysical Invisible Hand: Benjamin Constant and the Construction of Religion as Private’, *Religion*, Vol.42, No.1 (Jan., 2012), pp.87-103 (p.98).

⁸³ McCalla, ‘Invisible Hand’, p.98.

between the theory advanced in *De la religion* and Smith's contention that under the condition of marketplace competition (in this case what Rawls might have called a 'marketplace of ideas'), the dogma advanced by particular religious sects would be naturally weakened in a way that would lead to the betterment of society.⁸⁴

Similarly, despite the palpable, and well-documented, links between the Humean and Madisonian theories of faction (a subject which is explored extensively in Chapter Three), it also seems clear that Madison's understanding of the benefits occasioned by religious pluralism owed much to Smith's teachings. Putting to one side for a moment questions concerning the advantages of large and small republics, it is evident that Madison was clearly persuaded by the idea that free market competition occasioned a process of ideological and doctrinal retrenchment which naturally correlated with the advancement of the public good. This was most clear in Madison's reaction to Virginia's proposed General Assessment – a levy from which the proceeds were to support all religions equally. Though viewed by its proponents as a middle-ground between Establishment and absolute religious liberty, as well as something that would translate into *non-preferential* treatment, Madison found the General Assessment to be an entirely noxious proposal.⁸⁵ Emphasising his belief in the importance of political equality, legal generality, and neutrality, Madison noted in his *Memorial and Remonstrance Against Religious Assessments* that government had no right to subject some to 'peculiar burdens' and to grant others 'peculiar exemptions'.⁸⁶

Thus, while it might be said that it is Constant's political philosophy that most clearly reflects the political economy of Smith, there was one particularly important idea that he advanced that was picked up only by Madison. In *The Theory of Moral Sentiments*, Smith developed the idea of an 'impartial spectator' as a notional entity capable of resolving moral disputes, and at points in both of

⁸⁴ Fleishacker, 'Adam Smith', p.912.

⁸⁵ Daniel L. Dreisbach, 'Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations', *North Carolina Law Review* 69 (1990-1991), pp.159-212 (pp.164-165); Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville, 1977), pp.35-39.

⁸⁶ James Madison, 'Memorial and Remonstrance Against Religious Assessments', in *The Papers of James Madison*, Robert Rutland *et al.* (eds.) (Chicago, 1973), VIII, pp.295-306. (Volume hereafter cited simply as *PJM*, VIII).

his major treatises argued that certain political disputes could be best resolved by the judgment of actual impartial spectators.⁸⁷ Much like Smith, Madison was sceptical of the capacity of virtuous elites to guide the political process, but nonetheless hoped that on occasion impartial decision-making would be a feature of government, allowing the public good to be realised through the deliberative processes of an enlightened and virtuous group of legislators.⁸⁸ Importantly, however, Madison appeared to hold the view that far from existing naturally, civic virtue could be fashioned by careful constitutional design. In a contribution to the Virginia Ratification Convention, Madison offered a particularly revealing account of his nuanced and measured assessment of the tenability of civic virtue and its relationship to the promotion of good governance:

I have observed, that Gentlemen suppose, that the General Legislature will do every mischief they possibly can, and that they will admit to do every good which they are authorised to do. If this were a reasonable suspicion, their objections would be good. I consider it reasonable to conclude, that they will as readily do their duty, as deviate from it – Nor to do I go on the grounds mentioned by Gentlemen on the other side that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. I go on this great republican principle that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no – no form of Government can render us secure.⁸⁹

⁸⁷ Elias L. Khalil, 'Beyond Self-Interest and Altruism: A Reconstruction of Adam Smith's Theory of Human Conduct', *Economics and Philosophy*, Vol.6, No.2 (Oct., 1990), pp.255-273 (p.258-260). Fleishacker argues that especially within *The Wealth of Nations* we see 'a hope that legislators will sometimes act out of an impartial concern... along with a general pessimism about how often that ideal is achieved'; Fleishacker, 'Adam Smith', pp.912-913.

⁸⁸ In *Vices*, Madison wrote: 'Representative appointments are sought from three motives: 1. Ambition, 2. Personal interest, and 3. Public good. Unhappily the first two are proved by experience to be the most prevalent'; James Madison, 'Vices of the Political System of the United States', in *The Papers of James Madison*, William T. Hutchinson *et al.* (eds.) (Chicago, 1975), IX, pp.3-23 (Volume hereafter cited simply as *PJM*, IX). Similarly, when speaking of the effects of clashing ideological interests in *Federalist* No.10, Madison explained that 'it is vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole'. James Madison, 'Federalist No.10', in *The Federalist*, pp.122-128.

⁸⁹ James Madison, 'Speech in the Virginia Ratification Convention', in *The Documentary History of the Ratification of the Constitution* (eds.) John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenlauer, Margaret A. Hogan (Charlottesville, 2009).

When read alongside his scathing attack on the legislators of the thirteen states as expounded in his *Vices of the Political System of the United States*,⁹⁰ it seems that Madison understood civic virtue to be an important ingredient in a republican regime, but one which could be cultivated and encouraged only by careful constitutional design. Related to this was the concept of political refinement and filtration – the idea that properly constructed electoral channels could filter popular opinions in such a way that produced a set of political objectives consistent with the public good – which had been central to Hume’s thesis in *The Idea of a Perfect Commonwealth*. This Humean conclusion – that man’s natural avarice and interestedness could be, and had to be, accommodated in modern constitutional theory – had far-reaching implications for the development and trajectory of American constitutional theory. As part of what was a broader critique of classical republicanism, the chief corollary of his argument was that governmental structures ought to be designed in ways that reflected the realities of modern society, most importantly the absence of ‘disinterestedness’ in commercially-orientated societies.⁹¹ There was, then, in Madison’s political thought an abiding attachment to the idea of virtue, but this was coupled with a pragmatic recognition that the public good would be, for the most part, realised on the basis of a process of competition which would in effect *simulate* impartiality.

1.3 Neutrality and Political Science

Though Madison’s reluctance to fully discount the capacity of virtue to harness and promote the public good distanced his philosophy from that of Constant, both thinkers nonetheless shared a distinct vision for the legitimate ends of modern government. Considering the centrality of free market principles to the political philosophies of both Constant and Madison, it should come as no surprise that they each looked to institutionalised political neutrality as a way to ensure the advancement of the public good. Thus, while both thinkers can rightly be thought of as architects of the emergent liberal mode of political thought,

⁹⁰ In *Vices*, wrote: ‘Representative appointments are sought from three motives: 1. Ambition, 2. Personal interest, and 3. Public good. Unhappily the first two are proved by experience to be the most prevalent’; Madison, ‘Vices of the Political System’.

⁹¹ Moore, ‘Hume’s Political Science’, p.839.

neither denied entirely the idea that there existed a substantive conception of the public interest. It was in this sense that the broader doctrines of Madison and Constant were underpinned by distinctly liberal-*republican* convictions; both held that the realities of pluralism and competition would result in the promotion of the broader public good, and they each saw value in simulating the neutrality of the market in the political arena through encouraging factional competition.

Through excavating and examining the foundational tenets of Constant's and Madison's political philosophies, it becomes clear that both thinkers were drawn to the scientific approach to political enquiry indicative of eighteenth-century Scottish thought. In the case of Constant, the lessons derived from the method of conjectural history occasioned in him an appreciation for the concept of progress that would in turn go on to form the basis of his argument for limited and neutral government. Though his historicism may have distanced him, at least methodologically, from the Real Whig school, Constant's interrelated theories of progress and modernity produced distinctly Real Whig conclusions about the nature, purpose, and limits of government. Thus, while his case for state neutrality was freestanding of natural rights arguments, Constant's understanding of the realities of modern society pressed him into cultivating a theory of government centred on the assumption that under modern conditions, the protection of intellectual and economic diversity constituted the primary means toward the realisation of progress, societal amelioration, and the advancement of the public good.

The most significant corollary of Constant's approach to political enquiry was the idea that the modern constitutional designer ought to take on a responsive and reactive role when constructing the institutional edifices of the state. Through placing such emphasis on the importance of historical *awareness*, he found himself consciously repudiating the 'civic humanist' approach which involved attempting to cultivate a certain type of politics through institutional design. Contra this line of reasoning, a principle central to Constant's constitutional philosophy became the idea that legitimate political institutions were those which existed in accordance with the prevailing ideas and social mores of the particular historical moment. On this point, Constant fell directly into line with the

philosophy of Hume; the assumption that united both of their philosophies was that constitutional designers had to abandon their efforts to construct institutions fit for ideal societies, and instead had to form models of constitutional government that accounted for social realities, such as individualism and the absence of widespread civic virtue.

The idea that competition served as the principal driver of social progress stood as the foundational principle upon which the philosophies of Constant and Madison were constructed. Both thinkers were deeply reluctant to facilitate – through constitutional design – any factional or ideological efforts to instill habits, customs, or beliefs. Though later chapters will explore in more depth the ways in which both thinkers attempted to thwart the passage of ideological legislation, it is important to note at this point that Madison and Constant can be seen as thinkers concerned more with political neutrality than with the idea of limited governance.

- 2.1 Freedom and the State: Conceptions of Liberty in the Eighteenth century
- 2.2 Madison: The Free State and Higher Law Foundations of Negative liberty
- 2.3 Constant: Modern Liberty

Though the political philosophies of Constant and Madison were centred on promoting an objective, and in some respects austere, conception of the public good, their primary focus was to secure the preservation of personal freedom under popular governance. In the following chapter I am chiefly interested in determining precisely how Constant and Madison reconciled their respective commitments to the principle of popular sovereignty with their overriding understanding that true freedom consisted in the silence of the law and an absence of interference. In short, this chapter holds that while both thinkers did indeed conceive of liberty as an absence of interference, they recognised with equal measure that the ideal of non-interference could be realised only if the various interests present in society were able to guide the actions of the state through political participation.

In the aftermath of the French and American revolutions, arbitrary monarchical authority had been replaced by governmental structures grounded in the sovereignty of the people, but in 1780s America and 1790s France, individual liberty appeared to be no more secure than it had been under the pre-

revolutionary regimes.⁹² Rampant juridification in post-revolutionary France and America did not, however, deter Constant and Madison from accepting, and indeed celebrating, popular representative government. But both remained aware that the emergence of popular sovereignty – and its manifestation through political liberty – had brought with it a new range of challenges to personal freedom as an absence of coercion and interference. Though they accepted popular sovereignty, neither thought of freedom as something tied to democratic participation. They were, it seems, caught in between two conflicting worlds.

Through exploring this tension in their respective political philosophies I aim to show that both thinkers offered reformulated accounts of the efficacy of republican liberty while consistently maintaining that personal freedom consisted in an absence of legislative interference. By examining their writings pertaining to law, liberty, and sovereignty, I uncover a core conviction which casts light on Constant and Madison's belief in the importance of state neutrality. Both thinkers, I posit, held that liberty consisted in an absence of interference, but simultaneously recognised that within a republican government, this type of personal freedom could be realised only through the political institutionalisation of interestedness as a means toward securing the realisation of an objective conception of the common good.⁹³ Put differently, Constant and Madison held that the republican ideal of political liberty was valuable only in as much as it encouraged – by ensuring *equilibrium* – the various interests in society to restrain government and remove themselves from the purview of the legislature. Later chapters explore the practical realisation of this theory.

The present chapter will begin by briefly describing the three dominant conceptions of liberty in the eighteenth century in an effort to provide the reader

⁹² For France see: Howard G. Brown 'Echoes of the Terror', *Historical Reflections/Réflexions Historiques*, Vol.29, No.3 (2009), pp.529-558; Jacques Godechot, *Les Institutions de la France Sous le Révolution et l'Empire* (Paris, 1951); Martyn Lyons, *France under the Directory* (Cambridge, 1975); Dennis Woronoff, *The Thermidorean Regime and the Directory, 1794-1799* (Cambridge, 1984). For America (particularly Virginia and Pennsylvania) see: Isaac Kramnick, 'Introduction', in *The Federalist Papers* (ed.) Isaac Kramnick (London, 1987), pp.11-82; John Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (New York, 1950); CE Ambler, *Sectionalism in Virginia from 1776-1861* (Chicago, 1910).

⁹³ There exist striking similarities between this understanding of the efficacy of republican concepts and the 'instrumental republicanism' as identified by Alan Patten; see Alan Patten, 'The Republican Critique of Liberalism', *British Journal of Political Science*, Vol.26, No.1 (Jan., 1996), pp.25-44 (p.35).

with sufficient knowledge regarding ideas concerning freedom to which Constant and Madison had access. I will then explore Madison and Constant's considerations regarding the nature of freedom in turn. Beginning with Madison, the chapter argues that he, along with the other leading minds of the revolutionary generation, placed enormous value on the ideals of popular sovereignty and the 'free state' but did not associate freedom with the right to exercise political power. Rather, my treatment of Madison demonstrates that he valued the concept of popular will for the reason that it constituted a restraint on political authority, making possible the realisation of negative liberty and the formation of a state charged with remaining neutral between competing interests.

Next, I explore Constant's much discussed conception of modern liberty and insist that scholars have erred in neglecting his development of a theory I term 'bourgeois negative republican liberty'. Constant, like Madison, valued civic participation, but did not espouse a positive conception of personal freedom. His understanding of the nature of liberty was in fact quite the reverse. The chapter posits that in *Principes* we can see that he understood freedom in a negative way but consistently argued that political liberty was essential for the reason that it placed restraints on the political authority by ensuring the *de facto* removal of particular interests from the competence of the legislature.

2.1 Freedom and the State: Conceptions of Liberty in the Eighteenth Century

Proponents of the classical tradition of political thought posited that liberty and participatory democracy were inextricably linked. The ancient, or classical republican, way of thinking about freedom and politics equated *libertas* with *imperium*, or freedom with authority.⁹⁴ This tradition which idealised the ancient city states presented the nature of liberty in a 'positive' way, viewing freedom as something connected to exercise rather than opportunity.⁹⁵ It associated freedom with self-government and demanded from individuals a commitment to the public good if they were indeed to possess personal freedom and realise their

⁹⁴ John Pocock, 'Virtues, Rights, and Manners: A Model for Historians of Political Thought', *Political Theory*, Vol.9, No.3 (Aug., 1981), pp.353-368.

⁹⁵ Charles Lamore, 'Liberal and Republican Conceptions of Freedom', *Critical Review of International Social and Political Philosophy*, 6:1, pp.96-119 (pp.99-102).

human good. This notion of liberty was thus tied to the idea that an individual should, as Quentin Skinner explains, engage in the ‘pursuit of certain determinate ends’; the individual ought to devote himself to the public good and cultivate the virtue necessary for political engagement.⁹⁶ Thus, while undoubtedly a ‘positive’ conception of liberty, the ancient understanding of freedom was inherently ‘public’. Political life was, in the neo-Athenian republican doctrine, the primary domain in which the human good could be realised. An individual could only be considered free if he had the appropriate capacity (i.e. a political outlet) to realise his own personal good; man was *zōon politikon*, or a ‘political being’.⁹⁷

Against this ancient understanding of liberty emerged what John Pocock has called ‘the juristic presentation of liberty’ which was inherently ‘negative’ for the reason that it distinguished between *libertas* and *imperium*.⁹⁸ For adherents of the negative conception of freedom - articulated most famously by Thomas Hobbes in *Leviathan* (1651) - one’s possession of liberty was largely unrelated to the form of government under which he or she lived. Within this paradigm, then, liberty could co-exist with a government of the Few, or indeed of One, under which the people would have no political voice.⁹⁹ For John Locke, and Jeremy Bentham – as well as for the classical liberals of the nineteenth century who found truth in this Hobbesian conception – freedom consisted simply in an absence of interference and external impediments to the pursuit of one’s *chosen* ends.¹⁰⁰ For adherents of this paradigm, laws were valuable only in as much as they prevented others from interfering with particular rights; laws which did not perform this role thus necessarily diminished individual liberty.¹⁰¹ The classical liberal tradition, in short, generally equated liberty with an absence of law, and considered personal freedom to be unrelated to the act of participating with politics or indeed with any *formal* power structures.

⁹⁶ Quentin Skinner, ‘The Paradoxes of Liberty’, *The Tanner Lectures on Human Values* (Cambridge, MA., 1984), pp.233

⁹⁷ Lamore, ‘Liberal and Republican’, p.101; Skinner, ‘Paradoxes’, p.233.

⁹⁸ Pocock, ‘Virtue’, p.375.

⁹⁹ Lamore, ‘Liberal and Republican’, p.100. Pocock informs us that before his execution, Charles I was heard to declare that the people’s liberty under the law had nothing to do with their having a voice in government; Pocock, ‘Virtues’, pp.356-357.

¹⁰⁰ Skinner, ‘Paradoxes’, p.228

¹⁰¹ Skinner, ‘Paradoxes’, pp.244-245; Lamore, ‘Liberal and Republican’, p.99.

The wide conceptual gap between the republican and liberal understandings of personal freedom has been bridged somewhat by Quentin Skinner's discovery of the neo-Roman understanding of personal freedom. This conception was a negative one but it nevertheless placed enormous value on the ideal of civic participation within a 'free state'. According to the neo-Roman view, individuals were considered free to the extent that they did not enter into a state of political subjection, or 'domination'.¹⁰² Such a conception of personal freedom had its roots in Machiavelli's *Discorsi* (ca.1517) and was appropriated and articulated by the English Commonwealth thinkers of the seventeenth and eighteenth centuries in their campaigns against parliamentary corruption and the rule of the Court. They argued that it was essential for individuals to participate in political life but did not identify freedom as the *right* to civic participation as the ancients had.¹⁰³

The central claim of the neo-Roman argument was that while an autocratic sovereign power may accord individuals a significant degree of personal freedom, individuals would be nevertheless *dependent* upon the good will, or mercy, of the prince or king for their continued enjoyment of particular liberties.¹⁰⁴ Domination, as a condition of 'unfreedom', could thus occur *without* any actual instance of interference. This conception of liberty ultimately stipulated that personal freedom could be attained only when the arbitrary will of an individual or group was replaced by a just rule of law formed through the participation of citizens in politics.¹⁰⁵

The following chapter examines Constant and Madison's considerations on each of these conceptions of liberty and proposes that they pragmatically employed the classical republican and classical liberal understandings of freedom as analytical tools to determine precisely how individual liberty could be provided, threatened, and guaranteed. They knew *a priori* that freedom consisted in privacy and recognised *a posteriori* that political participation served as the precondition

¹⁰² Lamore, 'Liberal and Republican', p.97.

¹⁰³ Philip Petit, 'Keeping Republican Liberty Simple: One a Difference with Quentin Skinner', *Political Theory*, Vol.30, No.3 (Jun., 2002), pp.339-356 (p.340.); see also: Quentin Skinner, *Liberty Before Liberalism* (Cambridge, 1998).

¹⁰⁴ Lamore, 'Liberal and Republican', pp.97-99; Petit, 'Republican Liberty', p.341.

¹⁰⁵ Petit, 'Republican Liberty', pp.340-341.

of freedom. After making the case that their shared conception of liberty reconciled republican and liberal ideas concerning freedom, I ask, by way of a conclusion, whether they did not ultimately adhere to the neo-Roman conception of liberty. I postulate that Constant and Madison in fact regarded interference and domination to be two distinct threats to personal freedom which required two distinct remedies; their understanding of personal freedom was, then, liberal-republican, rather than neo-Roman.

2.2 Madison: The Free State and Higher Law Foundations of Negative Liberty

Enquiries into James Madison's political philosophy tend to be conducted with the liberal-republican dichotomy in mind. Given that studies concerning political thought in the early American republic have typically charted what James Young adroitly describes as 'the strained dualism of liberalism and republicanism', such a trend is hardly surprising, but it is in many ways regrettable. For a thinker as nuanced and pragmatic as Madison, attempts to identify his thought as *either* liberal or republican often generate inaccurate or one-sided interpretations of his sophisticated, and at times opaque, political thought. That said, the recent and impressive scholarship of Kalyvas and Katznelson has exhibited a way out of this injurious trend. Their studies pertaining to Madison's political thought posit that the founder's philosophy was emblematic of an eighteenth-century process whereby classical republicanism was transformed into modern liberalism: 'The more [Madison] sought to retrofit [republicanism] for modern conditions', they write, 'the more [he] advanced predominantly liberal formulations'.¹⁰⁶

The following investigation into Madison's conception of personal freedom is best thought of as an inversion of the Kalyvas-Katznelson thesis, but one which, like theirs, rejects the idea that republicanism and liberalism existed in an irreconcilable state of antagonism and opposition during the eighteenth century. It postulates that Madison always conceived of the nature of personal freedom in a liberal way, but that in an effort to construct the *political neutrality* he deemed necessary for the preservation of negative liberty, he borrowed extensively from

¹⁰⁶ Andreas Kalyvas and Ira Katznelson, 'The Republic of the Moderns: Paine's and Madison's Novel Liberalism', *Polity* Vol.30, No.4 (Oct., 2006), pp.447-477 (p.453).

the republican tradition of political thought. Thus despite recognising that the advent of popular sovereignty in America had brought with it a wide range of challenges to individual liberty, Madison understood that personal freedom and political neutrality could be realised only within a political system grounded in certain republican principles.

These republican elements of his political thought, I argue, were carefully selected based on their capacity to restrain the competence of the state and instill neutrality into the political process. Madison's republicanism was, then, remarkably pragmatic. By turning to the Virginian's considerations on the ideas of the 'higher law', 'juridification', and the 'equilibrium of interests', I hope to show that Madison understood political liberty to be valuable only in as much as it could advance what he considered to be true freedom: an absence of interference and coercion under limited and neutral government. In short, the ensuing study contends that Madison held that the neutralisation of the political sphere and the meaningful limitation of government – the two principal preconditions of personal freedom – could not be achieved without recourse to republican political concepts and ideals.

Though Madison accepted and championed the supremacy of the will of people, he declared there to be certain matters which necessarily escaped the jurisdiction of the political authority on the grounds that there existed a higher law, independent of the will of the legislature. For Madison, this higher, or fundamental, law was grounded in both the natural rights bestowed on men by God and a set of 'eternal' principles of justice that were, in his mind, entitled to prevail regardless of the attitude or edicts of the political body. His commitment to the idea of a higher law as a source of political limitation can be seen most clearly in the *Memorial and Remonstrance Against Religious Assessments* (1784), a tract composed as a systematic attack on the proposed 'General Assessment Bill' which reflected the general sentiment of John Locke's *Letter on Toleration* (1685).¹⁰⁷ It is important to note, however, that while Madison may

¹⁰⁷ In contrast to both Jefferson's appeal for absolute freedom of religion and the Episcopalian demand for a church-state tie, the idea of a General Assessment emerged in 1779. This proposal was a scheme which called for the taxing of citizens in order to support a *variety* of Christian denominations; Dreisbach, 'Thomas Jefferson and Bills Number 82-86', pp.164-165; Buckley, *Church and State*, pp.35-39.

very well have been indebted to Locke for many of the ideas central to *Memorial*, he strayed from Locke's wisdom over one key point – namely the use of the term 'toleration'.¹⁰⁸ Like Thomas Paine, Madison found the term toleration to be invidious and itself a form of despotism; instead, Madison reasoned, it would be salutary to pursue complete liberty in matters of religion.¹⁰⁹ His thinking, here, was foreshadowed by Philip Furneaux, whose *Essay on Toleration* – a tract which Madison read during the 1770s – argued that the civil magistrate had no right to restrain expressions of *conscience*.¹¹⁰

This repudiation of the adequacy of religious toleration brought Madison into direct conflict with Samuel Davies, the spokesman *par excellence* for the English Toleration Act (1689) and former President of Madison's *alma mater*, College of New Jersey (now Princeton University).¹¹¹ While aware of that act's limitations, Davies believed that the legal practice of toleration would be sufficient for the protection of Presbyterians and other dissenters from religious persecution.¹¹² He, and other advocates of the Toleration Act, held that members of dissenting *Protestant* sects would find adequate protection under an edict of toleration in that they would be free to express their respective faiths provided that such expressions were consistent with certain legal stipulations.¹¹³ It was precisely this understanding of church-state relations – one which sanctioned governmental interference in matters of opinion - which Madison sought to challenge in the

¹⁰⁸ There are a number of striking textual similarities between Madison's *Memorial* and Locke's *Letter*; see: Robert Rutland's and William Rachal's Editorial Note in Madison, 'Memorial', pp.295-298.

¹⁰⁹ Ketcham, *James Madison*, p.72; Robert S. Alley, *James Madison on Religious Liberty* (Amherst, New York., 1985), p.148: Alley importantly notes that in the context of eighteenth-century America, the term toleration essentially meant an acceptance of *Protestant* dogma.

¹¹⁰ In a letter to William Bradford, Madison announced that he had requested from 'Mr. Smith' a copy of Furneaux's essay; James Madison, 'From James Madison to William Bradford (28 July, 1775)', in *The Papers of James Madison*, William T. Hutchinson *et al.* (eds.) (Chicago, 1962), I, pp.159-162; Ketcham, *James Madison*, p.66; Charles Mullet, 'Some Essays on Toleration in Late Eighteenth-Century England', *Church History*, Vol.7, No.1 (March, 1938), pp.24-44; Philip Furneaux, *Essay on Toleration* (London, 1773).

¹¹¹ In an effort to protect protestant dissenters, Davies famously campaigned for the English parliament's Toleration Act (1689) to be recognised in Virginian law.

¹¹² George William Pilcher, 'Samuel Davies and Religious Toleration in Virginia', *The Historian*, Vol.28, No.1 (Nov., 1985), pp.48-71.

¹¹³ Alley, *Religious Liberty*, p.142; Pilcher, 'Samuel Davies and Religious Toleration'. Davies interpretation of the Toleration Act (1689) insisted that under such a provision: the state would possess the right tolerate religious groups and would thus, by that same right, possess the authority to restrict expressions of faith which it found to be unacceptable; dissenting protestant religious groups would thus be free to express their respective faiths provided that they adhered to legal stipulations.

Memorial; within the anonymous essay, he espoused a doctrine which stretched far beyond Davies' theology and belief system.¹¹⁴

The *Memorial* has been strangely neglected by many of Madison's commentators, and those who have paid attention to the text have generally found within it a repudiation of republican principles and a powerful defence of the Lockean-liberal doctrine.¹¹⁵ What scholars have generally failed to grasp is that a commitment to republican principles was central to his defence of what could be considered an exclusively liberal doctrine which constituted an appeal for the neutrality and passivity of the state in matters of conscience. He wrote in Article One of *Memorial* that:

we hold it for a fundamental and undeniable truth, 'that religion or the duty which we owe to our Creator and the manner discharging it, can be directed only by reason and conviction, not by force or violence'...This right is in its nature an unalienable right. It is unalienable, because the opinions of men...cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the creator...Before any man can be considered as a member of the Civil Society, he must be considered as a subject of the Governour [*sic*] of the Universe'.¹¹⁶

Otherwise stated, some issues, with individual conscience being the prime example, stood well outside the purview of the legislature, constituting a higher law of private rights superior to political will. This dissolution of *summa lex*, or supreme law, into the natural rights of individuals points not only to the influence of Locke and the Real Whigs on the eighteenth century American mind, but also to the manner in which Sir William Blackstone's doctrine of absolute legislative power had been fundamentally transformed in the new republic.¹¹⁷ Madison was arguing that there did exist a supreme authority but reasoning was contrary to that presented by Blackstone in the *Commentaries of the Laws of England* (1765) in that he believed that the supreme authority existed anterior to the will of the legislature.¹¹⁸ This was in itself a hugely important

¹¹⁴ Alley, *Religious Liberty*, p.147.

¹¹⁵ Robert Martin, 'James Madison and Popular Government: The Neglected Case of the 'Memorial'', *Polity* Vol.42, No.2 (April, 2010), pp.185-209 (p.187).

¹¹⁶ Madison, 'Memorial', p.299.

¹¹⁷ E.S. Corwin, 'Debt of American Constitutional Law to Natural Law Concepts', *Notre Dame Law Review*, 258 (1949-1950), pp.258-284 (p.262).

¹¹⁸ John V. Jezierski, 'Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty', Vol.32, No.1 (Jan.-Mar., 1971), pp.95-106.

consideration, but the manner in which Madison justified this conviction is of deeper significance, and it is within this justification of the higher law that we can see his delicate blend of liberal and republican ideas concerning the nature of personal freedom.

In the *Memorial* he occupied positions on both sides of a seminal debate in legal history concerning the idea of legal supremacy. This dispute had its roots in classical legal and constitutional theory – a subject with which Madison was particularly well acquainted.¹¹⁹ On one side of this controversy stood the legal theorists of antiquity who declared that true law was that which corresponded with nature. Marcus Tullius Cicero was the quintessential exponent of this doctrine. In *De legibus*, he declared the laws of the republic to be ‘the highest reason, rooted in nature’, and noted in *De re publica* that true law was that which was harmonious with nature, warning that it was a ‘sacred obligation not to attempt to legislate in contradiction to this law’.¹²⁰ Against this classical republican understanding of the basis of the higher law emerged a distinctly modern, and more liberal, strand of legal theory which held *constitutional law* to be supreme for the reason that its source was the popular will of the people, issued directly.¹²¹ This rationale, which visibly emerged in late eighteenth-century America, constituted a dramatic shift from the earlier belief that the supremacy accorded to fundamental law was the result of its embodiment of eternal and immutable justice.¹²² In other words, the leading minds of the revolutionary generation, including Madison, Jefferson, and James Wilson, had all grasped a crucial idea that a constitution could establish a body of supreme

¹¹⁹ See: James Madison, ‘Notes on Ancient and Modern Confederacies’, in *PJM*, IX, pp.3-23. The study of classical political philosophy was a central component of the education Madison received at New Jersey College (Princeton University); Ketchman, *James Madison*, p.24-33.

¹²⁰ Corwin, ‘The Higher Law’, p.157; Elizabeth Amis, ‘Cicero on the Natural Laws and the Laws of the State’, *Classical Antiquity*, Vol.27, No1 (April, 2008), pp.1-33 (pp.7-8); Cicero, *De legibus*, 1-18.

¹²¹ In *Federalist* No.49, Madison argued that: ‘the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived’; Madison, ‘Federalist No.49’, in *The Federalist*, pp.312-316 (p.313).

¹²² Corwin, ‘The Higher Law’, p.152; Helen K. Michael, ‘The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of ‘Unwritten’ Rights?’, *North Carolina Law Review*, 421 (1990-91), pp.421-490 (p.457).

law for the reason that the document had been enacted by the people.¹²³ The influence of Locke on this mode of thinking is, of course, unmistakable.¹²⁴

In *Memorial*, Madison cleverly, but not cynically, placed himself on both sides of this schism. Though he eschewed explicit appeals to natural law, Madison certainly recognised the existence of natural rights which constituted a *summa lex* superior to political will. Though it may be tempting to argue that this aspect of Madison's thought was derivative of the Lockean doctrine, the Virginian departed from 'the great Mr. Locke' in understanding natural rights to be checks on legislative power and not merely moral and political justifications for revolution.¹²⁵ In this sense then his understanding of the role of natural rights in the shaping of political authority was more consistent (although by no means wholly) with the classical republican tradition than it was with the philosophy of Locke. Ever the pragmatist, however, Madison fused this natural law doctrine of limitation with a belief in the capacity of popular sovereignty to limit government. In an effort to counteract juridification and thus preserve civil liberties, Madison declared that private rights were inalienable for two reasons: one, because they existed pre-politically and naturally;¹²⁶ and two, because such rights were recognised in constitutions which had achieved the consent of the people.¹²⁷

The *Memorial* was replete with references to the existence of natural rights and the eternal principles of justice associated with those rights. The idea that religious freedom was an inalienable right bestowed on men by nature, or God, was at the nexus of his argument against the General Assessment. Like Jefferson, Madison understood that natural principles of justice engendered natural rights

¹²³ Michael, 'The Role of Natural Law', p.457; Suzanna Sherry, 'The Founders' Unwritten Constitution', *University of Chicago Law Review*, Vol.54, No.4 (Autumn, 1987), pp.1127-1177 (pp.1152-54).

¹²⁴ Corwin, 'The Higher Law', p.180; Donald L. Doernberg, "'We the People': John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action', *California Law Review*, Vol.73, No.1 (Jan., 1985), pp.52-118.

¹²⁵ Thomas C. Grey, 'Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought', *Stanford Law Review*, Vol.30, No.5 (May, 1978), pp.843-893 (p.860); Wood, *Creation*, p.292.

¹²⁶ Madison declared in Article One of *Memorial* that the right to freedom of opinion was 'in its nature an unalienable right'; Madison, 'Memorial', p.299.

¹²⁷ Helen Michael argues that Madison and others recognised that a constitution could create positive fundamental law precisely because it had achieved the consent of the people; Michael, 'The Role of Natural Law in Early American Constitutionalism', p.457.

and that these inalienable rights necessarily restrained the competence of the legislative body.¹²⁸ But his declaration that the legislature had ‘no such authority’ to dispense with religious liberty was grounded in an additional argument concerning popular sovereignty. Madison’s leading assertion in *Memorial* was that it would be entirely wrong to allow government the right to interfere with liberties expressed in a higher document, namely the *Virginia Declaration of Rights* (1776) which formed part of the Virginia Constitution, promulgated in the same year.¹²⁹ Here, he made the case that a *man-made* document containing an enumeration of rights constituted a body of fundamental law superior to the will of the legislator.

As it pertains to this study regarding the concept of political neutrality and the relationship between liberalism and republicanism, Madison’s recognition of the presence of a higher law capable of restraining government is hugely significant for two related reasons. Firstly, we can see that the ideal state he envisioned would be one considerably limited in its capacity to promulgate law; and secondly, it appears evident that Madison considered the limitation of the state to be vital for not only the maintenance but also for the establishment of individual liberty. Additionally, the manner in which Madison justified his appeal for the limitation of the state is indicative of the ways in which he incorporated republican and Whig concepts in the pursuit of liberal ends. Whether he did so consciously, Madison grappled with an enduring problem in Anglophone constitutional theory: the tension between fundamental law and sovereignty. Though his solution might have been more Lockean than Blackstonian, Madison nonetheless found room for the existence of a fundamental law, grounded in the natural rights of the people, which could be considered superior to the demands of the sovereign people.¹³⁰

Madison revisited the idea of constitutional supremacy in *Federalist* No.49. In this essay he invoked the sovereignty of the people to declare that the federal

¹²⁸ James Madison and Thomas Jefferson, ‘Act for Establishing Religious Freedom’, in *PJM*, 8, pp.399-402 (p.401).

¹²⁹ Madison, ‘Memorial’, p.304

¹³⁰ Indeed, it could be argued that Madison’s reluctance to include a declaration of rights in the Philadelphia Constitution was indicative of this line of reasoning. The limitations of the state were defined positively, presumably in response to the multifarious natural limits that existed as part of the higher law.

legislature could not legitimately violate elements of the constitution: '[T]he people are the only legitimate fountain of power', Madison wrote, 'and that it is from them that the constitutional charter, under which the several branches of government hold their power, is derived'.¹³¹ He reiterated this point in *Vices of the Political System of the United States* (1787) where he explained that '[t]he express authority of the people alone could give due validity to [a] constitution'.¹³² We can see, then, that in Madison's political thought, the sovereignty of the people was a foundational principle of free and *limited* government. This constituted an inversion of the classical republican orthodoxy. Unlike republicans of the neo-Athenian persuasion, Madison understood popular sovereignty to be essential for the maintenance of a constitutional higher law of *limitation* which could prevent the promulgation of laws contrary to individual rights.

In his model, the positive and active power of the *popularly-elected* legislature would be constrained by the negative and passive power of a constitution which had achieved the *popular consent* of the people. In other words, popular *control* would be offset by popular *sovereignty* as manifested through a fixed constitutional document. A constitution developed along these lines, Madison reasoned, would also give voice to natural rights and eternal principles of justice which existed anterior to the political association. He thus not only insisted that a higher law existed, but he also affirmed that such a higher law of private rights was essential for the limitation of government. Private rights and limited government thus shared a reciprocal relationship; one made possible the other. It is from here that we can ascertain that Madison considered freedom in a negative way; individual liberty consisted in an absence of interference and could be achieved only under a government of limited power.

During the 1780s Madison's principal aim was to ensure that the sovereignty of the people contributed to the limitation of government and not to the elevation of the legislature to a supreme position within the constitution and society. Though Madison was a consistent defender of some of the leading principles of

¹³¹ Madison, 'Federalist No.49', p.313.

¹³² James Madison, 'Vices of the Political System of the United States', in *PJM*, IX, pp.345-358 (pp.352-353).

republican government, he was one who also realised that the advent of popular sovereignty – and its manifestation through political liberty – constituted a significant threat to individual liberty when taken to mean relief from interference and coercion.¹³³ It has been established so far in this section that a central tenet of Madison thought was that political authority ought to be limited by a higher law in order to provide personal freedom, but it nonetheless remains unclear precisely why he believed that individuals needed security and privacy from the political. In an effort to correct this, it is of prime importance to engage with his considerations regarding the problems generated by representative government; it is from here that we will clearly see his conception of liberty and rationale for insisting on the neutrality of the state.

While Madison frequently championed the idea of popular political control, he did not consider political rights or the institution of elections to be sufficient guarantees of personal freedom; experience, after all, had taught him that illiberal legislation could emerge from an elected legislature just as easily as coercive interdictions could materialise from the authority of an unaccountable and arbitrary monarch. Citing Jefferson's classic treatise, *Notes on the State of Virginia* (1785), Madison explained in *Federalist* No.49 that the concentration of authority in the hands of the legislature constituted an 'elective despotism', a condition which both he and Jefferson understood to be the very definition of tyranny, and practically tantamount to a monarchical despotism.¹³⁴

Despite quoting Jefferson's claim that '[o]ne hundred and seventy-three despots would surely be as oppressive as one', Madison importantly argued that individuals perhaps had more to fear from a supreme legislature than from an omnipotent executive. His leading observation in supporting this claim was that the constitutional powers of the legislature were 'at once more extensive, and less susceptible to limitation' than those of the executive and judicial powers, allowing the legislative body to conceal with greater ease encroachments made on the rights of other governmental powers.¹³⁵ The validity of this claim was

¹³³ As Martin explains, Madison had greater faith in the efficacy of public opinion than did most of his contemporaries; Martin, 'James Madison and Popular Government', p.187.

¹³⁴ James Madison, 'Federalist No.49', pp.310-311; see also: Thomas Jefferson, *Notes on the State of Virginia* (1785).

¹³⁵ James Madison, 'Federalist No.48', in *The Federalist*, pp.308-312 (p.310).

entirely evident from the practices of the various state legislatures during the 1780s; Madison was able to draw on a range of examples to bolster this observation, but in *Federalist* No.48 he singled out the example of Pennsylvania to support his assertions regarding the ease with which legislative bodies had been able to assume a supreme position within the political systems of the states.¹³⁶

Parliamentary supremacy was, for Madison, not detrimental *eo ipso*, but the natural *consequences* of such a supremacy were, he noted, hugely injurious to personal freedom. It was apparent to Madison that the principal consequence of legislative supremacy was the proliferation of the law, or juridification – a phenomenon which he and many others argued had escalated in the aftermath of the revolution; Madison bemoaned this development in *Vices*:

The short period of independency has filled as many pages [with laws] as the century which preceded it. Every year, almost every session, adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will show that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.¹³⁷

That legislative bodies throughout the thirteen states had legislated excessively and on matters outside their jurisdiction was, in Madison's view, incontestable. Throughout the 1780s he kept a close eye on the proceedings of the Pennsylvania legislature; it seems evident that his insistence that the post-revolutionary period had witnessed a massive expansion in legislative activity emanated, at least in part, from his examinations of political life in Pennsylvania.¹³⁸ In 1783 a Council of Censors was convened to determine whether the unicameral legislature had violated the constitution.¹³⁹ Their findings were particularly damning and Madison invoked them at length in *Federalist* No.48. The Council concluded that

¹³⁶ Madison drew on the findings of the Pennsylvania Council of Censors – a body instituted to determine whether the Pennsylvania Constitution (1776) had been violated by any of the departments – to claim that the Pennsylvania legislature had consistently violated the constitution through both contravening the principle of trial-by-jury and assuming extra-constitutional powers; Madison, 'Federalist No.48', pp.311-312.

¹³⁷ Madison, 'Vices of the Political System', p.353.

¹³⁸ Madison, 'Federalist No.48'.

¹³⁹ Section 47 of the Pennsylvania Constitution (1776) stipulated that every seven years a Council of Censors was to be convened in order to determine whether the constitution had been violated.

a significant number of laws had been passed which violated constitutional principles and recommended in consequence that a bicameral legislature be established.¹⁴⁰

Madison argued that the ‘luxuriancy of legislation’ within the legal codes of the several states was an affront to individual liberty and, ultimately, a product of the establishment of governments dominated by the legislative branch. Clearly a pronounced and leading defect of the political systems of the various states, Madison devoted more than half of *Vices* to the issue of the profusion of unjust law, writing in article nine that ‘[a]mong the evils then of our situation may well be ranked the multiplicity of laws from which no state is exempt’.¹⁴¹ That the various state governments had allowed laws to multiply so severely led Madison to question to the efficacy of the core principles of republican government. In a particularly striking passage of *Vices*, he explained that:

[the multiplicity, mutability, and injustice of the laws] calls into question the fundamental principle of republican government, that the majority who rule in such government, are the safest Guardians both of the public good and of private rights.¹⁴²

In other words, the emergence of juridification was a natural consequence of the establishment of republican systems of government. But Madison’s leading claim was that the profusion of unjust law presented a direct and alarming threat to both the preservation of individual liberty and the advancement of the public good – the two central ends of legitimate republican government. For Madison, the multiplicity of law was, then, incompatible with legitimate and neutral government. ‘When an apparent interest or common passion unites the majority’, Madison wrote, ‘what is to restrain them from unjust violations of the rights or interests of the minority, or of individuals?’¹⁴³

His solution to this enduring problem was the modification of sovereignty so as to render it ‘neutral between different interests and factions’. This ‘great desideratum’, he explained, was the only way to ‘control one part of the society

¹⁴⁰ Madison, ‘Federalist No.48’, p.311; Lewis Hamilton Meader, *The Council of Censors* (Providence, 1899).

¹⁴¹ Madison, ‘Vices of the Political System’, p.353.

¹⁴² Madison, ‘Vices of the Political System’, p.354.

¹⁴³ Madison, ‘Vices of the Political System’, p.354.

from invading the rights of another'.¹⁴⁴ Personal and minority freedom was, then, dependent upon the neutrality of the state, indicating that his conception of liberty was ultimately negative and that this conception of liberty motivated his pursuit of a neutral political authority. Precisely how Madison sought to construct this great desideratum in republican government is the subject of a later chapter, but at this point it is sufficient to note that he considered neutral governance to be the primary means toward ensuring the preservation of individual liberties. Of equal significance was his recognition that the preservation of private rights was dependent upon the manner in which the particular interests of society were represented in, and managed by, the legislature. In an effort to understand this relationship between interests and rights we must pay closer attention to Madison's considerations on the purpose and value of political liberty.

Though certainly a cause for alarm, Madison did not view the proliferation of the law as grounds for relinquishing the principles of republican government. Juridification was, in his reckoning, merely one possible product of unlimited government, with the other variant being arbitrariness. Additionally, he understood that the sovereignty of a republican legislature could be rendered neutral and limited in a way that the authority of a prince could not. And he, like many others of his generation, also held that it was the will of the people which gave the constitution its supremacy. The presence of a higher (constitutional) law made possible the limitation of government, and it was this limitation which made possible the preservation of private rights. While his hostility to the phenomenon of juridification points to the negative nature of his conception of liberty, he consistently argued for a form of republican liberty, claiming that political rights were essential both in order to ensure against domination and to assist in the *limitation* and *modification* of sovereignty.

In his notes to a Federal Convention (1787) speech regarding the subject of the suffrage, Madison wrote that a fundamental principle of republican government demanded that 'men cannot be justly bound by laws in making which they have no part', echoing one of Montesquieu's famous maxims as delivered in *l'Esprit*

¹⁴⁴ Madison, 'Vices of the Political System', p.357.

de lois (1748). Less an insistence that man was *zōon politikon* and could achieve self-fulfilment only through civic participation, Madison was in effect arguing that political rights were essential in order to guarantee against the condition of domination. His understanding of the purpose and value of political liberty was, then, more neo-Roman than it was Athenian. A belief, however, in the importance of a type of neo-Roman liberty was only one reason why he favoured the widespread issuance of political rights.

In an additional speech to the Convention, as well in as in several *Federalist* essays, Madison exhibited a far more liberal rationale for supporting the institutionalisation of political liberty. He proclaimed at the Convention that if popular elections were not instituted to at least one branch of government ‘the people would be lost sight of altogether’ and the ‘necessary sympathy’ between citizens and their rules would be ‘too little felt’.¹⁴⁵ Madison’s invocation of the term ‘sympathy’ strongly suggests that he believed it to be prudent for the federal legislature to operate, at least partially, in accordance with the express wishes of the people. That he understood the people to be broken into a multiplicity of interests indicates that under his model, the state would be necessarily charged with the management of *interests*.

Anticipating the central thesis of *Federalist* No.10, he expanded on this point in *Vices* and revealed the importance of interestedness to both the preservation of individual liberty and the construction of political neutrality. He avouched that by enlarging the electoral sphere, and thus expanding the number of politically engaged citizens, ‘[t]he society becomes broken into a greater variety of interests, of passions, which can check each other, whilst those who have a common sentiment have less opportunity of communication and concert’.¹⁴⁶ Furthermore, he claimed in his *Notes on Government* (1791-92) that ‘[t]he best provision for a stable and free Govt. is not a balance in the powers of Govt. tho’ that is not to be neglected, but an equilibrium in the interests and passions of the Society itself’.¹⁴⁷ In other words, freedom was dependent upon the balancing of interests in society; Madison reasoned that this was the only way to ensure that

¹⁴⁵ James Madison, ‘Popular Election to the First Branch of the Legislature (31 May, 1787), in *PJM*, X, pp.19-20 (p.19).

¹⁴⁶ Madison, ‘Vices of the Political System’, p.356.

¹⁴⁷ Sheehan, ‘The Politics of Public Opinion’, pp.615-616.

the interested factions in society could check one another and prevent the emergence of oppressive legislative interdictions imbued by majoritarian sentiment.

Madison's interpretation of the value of popular will was, then, composed of two considerations, each geared toward the prevention of coercion, whether it be arbitrary or consistent with a rule of law. Political rights would ensure both that individuals had a role in the authorship of law and that the various interests in society would check and *neutralise* one another. For Madison, political liberty was inextricably tied to the modern notion of interestedness, and political rights were, in his model, only valuable if they ensured the negative liberty of individuals. His conception of liberty was, then, republican only in as much as he understood arbitrary interference and the condition of domination to be enduring threats to personal freedom. But it was simultaneously, and ultimately, negative and liberal for the reason that he viewed excessive interference, even when consistent with a rule of law, to be, like domination, fundamentally noxious and inimical to personal freedom.

Though in the state Madison envisioned political rights and popular sovereignty would play an important role in limiting the state, he did not hold that individual freedom consisted in an individual's ability to exercise political authority. For Madison, the attainment of true freedom was dependent upon the establishment of a government of limited power which would pursue an objective common good. This would only be possible, he argued, if the various interests in society could be balanced and neutralised through the political process; only then could the problem of faction be offset and the negative liberties of individuals be secured.

2.3 Constant: Modern Liberty

The traditional interpretation of Constant's conception of personal freedom is that his political philosophy was part of a broader nineteenth-century movement which divorced questions of freedom from particular governmental forms. Scholars interested in Constant's understanding of personal freedom generally look to his *De la liberté des Anciens* lecture of 1819 and see an anticipation of

Isaiah Berlin's positive-negative liberty dichotomy as well as general repudiation of republican ideas concerning freedom.¹⁴⁸ In the 'Two Concepts of Liberty', Berlin himself identified Constant as one of the first thinkers to warn against confounding democracy and liberty.¹⁴⁹ Others have looked to Constant's *Principes de politique* (1806) and have drawn similar conclusions.

Kalyvas and Katznelson, for instance, claim that during the initial years of the nineteenth century Constant regarded 'the arbitrary will of the majority of citizens' to be the principal threat to individual liberty; they insist that this recognition prompted Constant's efforts to institutionalise privacy through postulating the existence of pre-political and eternal rights.¹⁵⁰ Stephen Holmes and Steven Vincent have similarly downplayed Constant's sympathy for republican ideas concerning freedom. They highlight his less than absolute commitment to the rule of law to posit that his conception of freedom was undoubtedly one of the liberal variety.¹⁵¹ Kalyvas and Katznelson have in many ways gone further in their treatment of Constant's understanding of liberty. They postulate that in his 'mature phase' of the early nineteenth century (a phase to which this chapter also pays considerable attention), Constant adopted a 'purely liberal position' which is evidenced by his rejection of the universal suffrage.¹⁵²

This traditional interpretation of Constant's conception of liberty has recently become the subject of criticism from scholarship which postulates that Constant's writings on the nature of personal freedom did not in fact constitute a discrediting of the republican tradition in France, and that a hallmark of his political thought was an opposition to arbitrary rule and belief that it was only possible to be free within a free state.¹⁵³ Jean-Phillipe Feldman, Pasquale

¹⁴⁸ Philip Pettit, 'Negative Liberty, Liberal and Republican', *European Journal of Philosophy* Vol.1, No.1 (April, 1983), pp.15-38 (p.15).

¹⁴⁹ Rosenblatt, 'Why Constant?', p.440; Isaiah Berlin, *Four Essays on Liberty* (New York, NY., 1975).

¹⁵⁰ Kalyvas and Katznelson, 'We are Modern Men', p.523.

¹⁵¹ K. Steven Vincent, *Benjamin Constant and the Birth of French Liberalism* (New York, NY., 2011), pp.180-181.

¹⁵² Kalyvas and Katznelson, 'We are Modern Men', p.524.

¹⁵³ Quentin Skinner, 'On the Liberty of the Ancients and the Moderns: A Reply to my Critics', *Journal of the History of Ideas*, Vol.73, No.1 (Jan., 2012), pp.127-147 (p.130); see also: Skinner, *Liberty before Liberalism*; Bryan Garsten, 'Liberalism and the Rhetorical Vision of Politics', *Journal of the History of Ideas*, Vol.73, No.1 (Jan., 2012), pp.83-93 (p.86); Charles Larmore, 'A Critique of Philip Pettit's Republicanism', *Philosophical Issues*, Vol.11, No.1 (Oct., 2001), pp.229-243 (p.236).

Pasquino, and Bryan Garsten have identified the republican characteristics of Constant's understanding of freedom most cogently. Pasquino finds in *Des Anciens* an understanding of liberty inextricably linked to the ideals of political participation and self-government, and Garsten goes as far as to say that Constant considered it possible to be free *only* within a free state.¹⁵⁴ The present examination argues that in his 'mature phase', Constant consistently understood the nature of personal freedom in a liberal way, and that *Principes* contained within it a repudiation of the positive conception of personal freedom. It contends, however, that like Madison, Constant recognised the importance of certain republican concepts and ideals to the establishment and maintenance of negative liberty. The conception of liberty advanced by both thinkers was less a liberal-republican amalgam but more a liberal conception guaranteed by a republican theory of the free state.

The enquiry follows Etienne Hofmann's interpretation of Constant's intellectual development and posits that the process by which Constant arrived at his understanding of the nature of personal freedom was the reverse of Madison's. Constant emerged in the 1790s as a distinctly republican thinker before embracing liberal ideas concerning freedom and the state in consequence of the revolutionary experience. Though their paths were asymmetrical, I argue, Constant, like Madison, held on to the republican principles he deemed capable of limiting the state, neutralising faction, and supporting negative individual liberty.

A free state, or one in which citizens shared in the exercising of political power, was considered by Constant to be a necessary precondition of individual liberty. But he did not hold that personal freedom consisted in an individual's *capacity* to exercise political authority. Where Rousseau and the political theorists of antiquity had insisted that an individual's ability to share in the exercise of political power acted as a means toward the realization of his personal freedom, Constant's understanding of the relationship between civil and political freedom was more nuanced and complex. At the root of his considerations regarding the

¹⁵⁴ Pasquale Pasquino, 'Emmanuel Sieyès, Benjamin Constant et le « gouvernement des modernes ». Contribution à l'histoire du concept de représentation politique', *Revue française de science politique* Vol.37, No2 (1987), pp.214-229 (p.215-217); Skinner, 'Ancients and Modern', p.130.

importance of political participation was a very modern recognition, based on *a posteriori* reasoning, that political liberty was valuable only in as much as it ensured that citizens and the various *interests* of civil society could guide the actions of the state and prevent *l'autorité sociale* from escaping its defined constitutional jurisdiction.

Unlike the ancients, Constant did not consider political liberty and civic participation to be intrinsically valuable ideals; instead, he held that political engagement was beneficial only if it contributed to the promotion of particular designated ends. The central thesis of his classic lecture, *De la liberté des Anciens*, was that despite the modern predilection for privacy, the exercising of political liberty was essential in order to restrain the authority of the governors and prevent the abuse of political power.¹⁵⁵ The republican element of Constant's understanding of personal freedom was not, then, without teleological focus, but where the classical republican doctrine lauded the capacity of participation to promote *personal* fulfilment, Constant offered the rather more pragmatic, and ultimately less metaphysical, postulation that political engagement was necessary in order to promote constitutional security and the preservation of privacy.

Constant's political philosophy and considerations regarding the value of political participation were profoundly shaped by his experiences of both the Jacobin's Reign of Terror and the despotism of Louis XVI. Within both regimes Constant found political systems entirely incompatible with personal freedom for the reason that they could not be subject to control, limitation, and mitigation. Where the arbitrariness of the Committee for Public Safety consisted of '*l'absence des règles, des limites, des définitions, en un mot, l'absence de tout ce qui est précis*', monarchical despotism was, he argued, tantamount to the former condition for the reason that it 'destroys public safeguards and tramples on due process'.¹⁵⁶ Constant's complaint was not that under the *Comité de salut* individuals were deprived of the ability to shape their lives through political participation; rather, Constant's chief concern was that when individuals were deprived of political freedom, there was little to guard against their liberty being

¹⁵⁵ Benjamin Constant, 'De la liberté des Anciens comparée à celle des Modernes', in *Œuvres politiques*, Tome 2 (Paris, 1874).

¹⁵⁶ Constant, *Des réactions*, p.116; p.142; Constant, *Principes*, pp.22-24.

destroyed through *interference*. For Constant, political liberty served a negative purpose.

He claimed that the political realities and failures of 1790s were far from unpredictable. One of his more astute and penetrative considerations on the revolutionary period was his assertion that the arbitrariness which had permeated French political culture during the final years of the eighteenth century was a foreseeable consequence of the widespread exaltation of Rousseau's classical republican philosophy – which famously declared the sovereignty of the people to be unlimited. While his thoughtful coupling of the metaphysics of Rousseau and the horrors of Robespierre served as the basis for many of his postulations in *Principes*, his belief that excesses of the revolution emanated from the triumph of classical philosophy during the revolutionary period was one that he never relinquished.

He explained in *Principes* that Rousseau's theory – which, according to Constant's interpretation, declared that freedom consisted in the total subjection of the individual to the collective – formed the justification for the horrors committed by the factional tyrants of the revolutionary period.¹⁵⁷ Though abstract and metaphysical, Constant abridged, Rousseau's insistence that authority of the general will was unlimited with respect to individuals had been appropriated with ease by the political actors of the 1790s, resulting in the subjection of the people to countless iniquities and pandemic-like suffering. Long after the conclusion of the revolutionary period, Constant maintained that reverence for Rousseau's classical philosophy and ancient understanding of personal freedom had caused infinite suffering during the revolutionary period.¹⁵⁸

In the immediate aftermath of the revolution, Constant recognised that it was of prime importance to offer both a repudiation of the notion of unlimited political authority and statement concerning the inapplicability of ancient liberty to modern society. He accordingly began *Principes* with a systematic critique and denouncement of the notions of '*autorité illimitée*' and '*autorité absolue*', as

¹⁵⁷ Constant, *Principes*, p.31.

¹⁵⁸ Constant, 'De la liberté des Anciens'.

espoused and championed by Jean-Jacques Rousseau, the Abbé de Mably, and Thomas Hobbes.¹⁵⁹ Within each of the principal works of the aforementioned writers he found a parlous understanding of the nature of sovereignty which he deemed fundamentally inimical to personal freedom and the mores of modern society. Unsurprisingly, however, it was the articulation of the ideas of unlimited authority and ancient liberty in *Du contrat* that Constant found to be most damaging and in need of confutation.

The theory of sovereignty presented in *Du contrat* was understood by Constant to contain a toxic and injurious principle which was, in his view, responsible for many of the crimes of the revolution. According to Constant, Rousseau explained in *Du contrat* that in attaining the liberty provided by citizenship, an individual would be forced to renounce his natural liberty and private rights.¹⁶⁰ Central to Rousseau's theory was his claim that through alienating himself to the community, the individual was in reality surrendering himself to no one in particular; for Constant, such reasoning was chimerical in a system of representative government since, he reasoned, the governors necessarily possessed a set of *interests* distinct from those of governed.¹⁶¹

The focal point of Constant's critique of *Du contrat* was, however, his insistence that Rousseau's notorious principle had the effect of providing the majority in government with unlimited jurisdiction over individual actions.¹⁶² Despite recognising that '*le dogme de la souveraineté nationale*' had rightfully triumphed in the absence of arbitrary and autocratic rule, Constant held that the right of the majority to enact legislation was legitimate only up to a point.¹⁶³ There had to exist, he argued, fixed principles from which the majority could

¹⁵⁹ Constant, *Principes*, Livre I.

¹⁶⁰ Jean-Jacques Rousseau, *Du contrat social* (Paris, 1986), pp.14-15. For Rousseau, the attainment of citizenship required absolute obedience to the general will and thus the relinquishment of natural rights; Jason Andrew Neidleman, *The General Will is Citizenship: Inquiries into French Political Thought* (Lanham, MD., 2001), pp.35-36.

¹⁶¹ Rousseau, *Du contrat*, p.14. Constant urged that due to the nature of political power there inevitably existed discordance between the interests of the governors and those of the governed, he observed that: *qu'aussitôt qu'un homme passe, n'importe comment, de la classe de des gouvernés dans celle des gouvernants, il prend l'intérêt de ces derniers*; Constant, *Principes*, p.389.

¹⁶² Rousseau in fact declared in *Du contrat* that just as man possesses absolute power over his limbs, the social pact gives the body politic absolute power over its members; Rousseau, *Du contrat social*, p.31.

¹⁶³ Constant, *Principes*, p.53.

never deviate. Constant never abandoned this conviction; in *Réflexions sur les constitutions* (1814) – a text which will be examined in greater depth during later chapters – he urged that when no limits were placed on the authority of the legislature, representatives were not ‘*défenseurs de la liberté*’ but were rather ‘*candidats de tyrannie*’.¹⁶⁴

In addition to cautioning against majoritarian omnipotence, Constant offered a stark warning regarding the possibility of a small group of men arrogating the apparatus of the state in the name of the majority.¹⁶⁵ This was an unmistakable allusion to the Jacobin’s Committee for Public Safety; at the beginning of Livre II he cleverly juxtaposed his principle concerning the limitation of political authority with ‘*les horreurs de Robespierre et l’oppression de Caligula*’.¹⁶⁶ By examining the consequences of Rousseau’s philosophy for French political life in the 1790s, Constant arrived at the conclusion that, in application, any distinction between autocratic despotism and Rousseau’s theory of government was illusory. He went on to announce that despite grounding their theories in the notion of the general will, Rousseau and the Abbé de Mably had in effect advocated a method of governance not dissimilar from that expounded by ‘*les partisans du despotisme*’.¹⁶⁷ He further reproached Rousseau’s theory on the grounds that he, along with Montesquieu and others, had confused the principles of freedom with the principles of political authority. It was here that Constant most clearly articulated his departure from the republican tradition which he had championed during the 1790s.

Most political writers, he argued, had mistakenly thought of social, or political, rights as principles of freedom. In Constant’s view, by contrast, political rights and the concept of popular sovereignty, in part guaranteed, but in no way added

¹⁶⁴ Benjamin Constant, *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties dans une monarchie constitutionnelle* (Paris, 1814), p.27.

¹⁶⁵ Constant, *Principes*, p.54; ‘*Aucune force en dehors ne met obstacle à ce que la majorité ne s’immole la minorité ou à ce qu’un petit nombre d’hommes ne s’intitule le majorité pour dominer sur le tout. Il est donc indispensable de suppléer à cette force extérieure, qui n’existe pas, par des principes immuables dont la majorité ne dévie jamais*’.

¹⁶⁶ Constant, *Principes*, p.52.

¹⁶⁷ Constant, *Principes*, p.34; S. Goyard-Fabre notes that Constant held Rousseau, Mably and Hobbes to be instigators of despotism in much the same way as Robespierre, Babeuf, and Napoleon; S. Goyard-Fabre, ‘L’idée de souveraineté du peuple et le « libéralisme pur » de Benjamin Constant’, *Revue de Métaphysique et de Morale*, 81e Année, No. 3 (Juillet-Septembre 1976), pp.289-327 (p.316).

to the sum of individual liberty.¹⁶⁸ He instead insisted that individual rights were composed of everything which existed independently of political authority and added that private rights acted as barriers to the expansion of political authority.¹⁶⁹ He rephrased this point with commendable clarity by characterising individual rights as a protective shield to be employed against the weapon of political power. The conception of liberty presented in *Principes* was, then, clearly of the negative variety.¹⁷⁰

Uniting once again the metaphysical and the *realpolitik*, Constant astutely combined his treatment of ancient political philosophy with a scathing critique of the National Constituent Assembly's implementation of Rousseau's theory of sovereignty:

*L'Assemblée constituante, à son début, parut reconnaître des droits individuels, indépendants de la société. Telle fut l'origine de la Déclaration des Droits. Mais cette assemblée dévia bientôt de ce principe. Elle donna l'exemple de poursuivre l'existence individuelle dans ses retranchements les plus intimes. Elle fut imitée et surpassée par les législateurs qui la remplacèrent...L'on peut donc regarder la théorie de Rousseau qui déclare illimitée l'autorité sociale, comme la seule adoptée jusqu'à ce jour.*¹⁷¹

Besides noting that the actions of *l'Assemblée constituante* were surpassed by subsequent governments, he appeared to suggest that to his knowledge, no government had conceded that certain aspects of individual existence remained independent of societal interference.¹⁷² It was the placing of certain individual actions beyond the competence of the legislature that Constant considered to be the primary approach to the provision of individual liberty. 'Notre liberté', he

¹⁶⁸ Constant, *Principes*, p.35.

¹⁶⁹ Constant, *Principes*, pp.384-386.

¹⁷⁰ Constant explained that: 'Une erreur singulière que nous avons indiquée en commençant cet ouvrage et dont on doit accuser surtout Rousseau et Mably, mais dont presque aucun publiciste n'a été exempt, a confondu toutes les idées sur cette matière. L'on n'a pas distingué les principes de l'autorité sociale des principes de la liberté...La liberté n'est une puissance que dans le sens lequel un bouclier est une arme'; Constant, *Principes*, pp.384-386. Kalyvas and Katznelson have also picked up on Constant's description of rights, and conclude that he thus considered rights to be independent of politics: Kalyvas and Katznelson, 'We are Modern Men', p.522.

¹⁷¹ Constant, *Principes*, p.36.

¹⁷² Constant did note that Thomas Paine, Benjamin Franklin and l'Abbé Sieyès had each claimed that the sovereign power had to be limited; he maintained, however, that those in favour of limited authority had been ignored in modern France; Constant, *Principes*, pp.35-36.

declared in his lecture of 1819, '*doit se composer de la jouissance paisable de l'indépendance privée*'.¹⁷³

That this distinctively classical-liberal ideal had been disregarded by the French political actors of the 1790s was, for Constant, sufficient evidence that Rousseau's conception of unlimited power had triumphed in modern France. By turning his attention to the actions of the Constituent Assembly it is clear that Constant was concerned not just with factional executives, such as the Committee of Public Safety, but with the actions of representative legislatures. Like Madison, he found little comfort in the idea of unlimited power being exercised by a greater number of men; and he in fact shared with Madison a suspicion that representative legislatures posed a threat to individual liberty just as severe and real as that presented by autocratic executives.

Such a recognition constituted a significant departure from Constant's position in *Fragments* in which he was principally concerned with the dangers of an unlimited and unified executive power.¹⁷⁴ Now, in the nineteenth century, he was primarily fearful of legislative omnipotence; he reasoned that the concentration of political authority in the hands of the legislature was particularly worrying for the reason that such a trend tended to stimulate the proliferation of the law. '*Les gouvernants veulent toujours gouverner*', Constant remarked, '*et lorsque, par la division des pouvoirs, une classe de gouvernants est chargée de faire des lois, elle s'imagine n'en pouvoir trop faire*'.¹⁷⁵ In other words, it was the natural inclination of the legislator to construct more laws rather than less.

As his remarks concerning the National Constituent Assembly indicate, the profusion of excessive laws almost always involved the violation of particular private rights. Not only did he understand liberty to be under threat from *arbitrary* interdictions, but he also believed *interference*, even when legally sanctioned, to have damaging consequences for individual liberty. At the centre of his considerations on freedom, then, was a seemingly Hobbesian recognition that the maintenance of individual rights depended upon the silence of the law. It was this admission which constituted a significant schism between Constant's

¹⁷³ Constant, 'De la liberté des Anciens'.

¹⁷⁴ Jainchill, *Reimagining Politics*, p.282.

¹⁷⁵ Constant, *Principes*, p.79.

understanding of freedom and that presented by his intellectual ancestor M. de Montesquieu in *l'Esprit de lois* (1748).

Although Constant recognised that attempts had been made in *l'Esprit* to place restrictions on political authority, he found Montesquieu's propositions to be '*trop vagues*' and incapable of meaningfully limiting political authority.¹⁷⁶ In Livre V Constant's criticism of *l'Esprit* became more targeted and specific; he challenged Montesquieu's maxim that liberty consisted of '*les droits de faire tout ce que les lois permettent*' through drawing it to the logical conclusion that '*les lois pourraient défendre tant de choses qu'il n'y aurait encore point de liberté*'.¹⁷⁷ Constant's repudiation of Montesquieu's republican maxim placed *Principes* firmly within the liberal canon; his objection to the notion that the rule of law facilitated personal freedom exposed his commitment to a negative conception of liberty which recognised the principal threat to liberty to be the proliferation of law.¹⁷⁸ For Constant, personal freedom resided not in what was prescribed by law but rather consisted in the individual actions which society had no right to prevent.¹⁷⁹

In his view, then, the preservation of personal freedom was dependent not solely upon the nature of the body or individuals charged with making the laws. Rather, the continued exercising of personal freedom was also dependent upon how many laws were made. This recognition necessitated his insistence on the limitation of political authority; when authority was not limited, he claimed, the organisation of government became a very secondary question. Here, he challenged the efficacy of the separation of powers to guard individual liberties, and demanded that for individual and minority rights to be secure, it had to be

¹⁷⁶ Constant, *Principes*, p.34; Crucially, Montesquieu was not excluded from Constant's declaration in Livre I of *Principes* that no political writer had formally rejected the idea that the '*volonté générale*' could legitimately exercise unlimited authority over individuals.

¹⁷⁷ Constant, *Principes*, p.35.

¹⁷⁸ Constant, *Principes*, p.79.

¹⁷⁹ Constant, *Principes*, p.35. Constant's criticism of Montesquieu was, however, unfair. In Livre XII of *l'Esprit* Montesquieu distinguished between '*la liberté philosophique*' as '*l'exercice de sa volonté*' and '*la liberté politique*' which consisted in '*la sûreté*'. It remains unclear as to why Constant omitted to reference Montesquieu's important discussion of the nature of *liberté philosophique* from his treatment of *l'Esprit*. However while Constant's assessment of Montesquieu's conception of liberty may remain incomplete, it nevertheless stands as a revealing and edifying critique of the neo-Roman understanding of the nature of personal freedom - demonstrating that Constant understood the principal antonym of individual liberty to be interference.

clearly established that there were certain matters upon which government had no right to legislate.¹⁸⁰

Did this mean, then, that Constant adhered to the classical liberal, or Berlin-Hobbes, understanding of negative liberty as the belief that personal freedom was entirely unrelated to, or at least logically disconnected from, self-government? It is clear that in the aftermath of the revolutionary period Constant came to care more about the extent of political power than with formal structures of political authority, but his fervent commitment to representative government - first articulated in *De la force*, but reinforced in each of his treatises of nineteenth century - indicates that he took seriously the republican conception of personal freedom as one which recognised the importance of self-government to the realization of personal freedom.

Though he devoted many of the early books of *Principes* to repudiating the republican understanding of personal freedom, Constant remained committed to the idea that the political engagement of citizens was a vital precondition of individual liberty. His thoughts on this subject were largely the product of *a posteriori* reasoning rather than an adherence to classical or renaissance republican philosophy; his experiences of both *ancien regime* despotism and the arbitrariness of the Reign of Terror affirmed to Constant that for individuals to meaningfully enjoy freedom, political power would have to be subject to *guidance* as well as to formal limitation. Within representative government, Constant discovered a political system which could perform this crucial function and allow individuals to guide the state, and thus ensure its *de facto* limitation, without sacrificing their enjoyment of modern liberty as privacy from the political. In *De la liberté*, he wrote that:

*Les peuples qui, dans le but de jouir de la liberté qui leur convient, recourent au système représentative, doivent exercer une surveillance active et constant sue leurs représentants, et réserver...le droit de les écarter s'ils ont trompé leurs vœux, et de révoquer les pouvoirs dont ils auraient abuse.*¹⁸¹

¹⁸⁰ Constant, *Principes*, pp.54-55.

¹⁸¹ Constant, 'De la liberté'.

Constant thus did not consider political participation to be intrinsically valuable as the ancients had done. Instead, he believed that political liberty was advantageous only if it served a purpose, and this purpose was to guide and limit the political authority. He explained in Livre XVII that the prime advantage of political liberty was its ability to draw around the government the *interests* of the various groups, allowing the citizenry to guide and moderate the political authority of the state.¹⁸² This was a radical reformulation of the republican ideal of civic participation. Constant's rationale for institutionalizing political rights would, in fact, have appeared entirely perverse to the theorists of antiquity chiefly because his exaltation of political freedom involved an acceptance and celebration of 'interestedness'.

Though he referred to the idea of 'guidance' as a prime advantage of political liberty, he saw civic participation as something related more to opportunity than to exercise; it was about ensuring that no political authority could overstep its defined jurisdiction and interfere with an individual's range of options. He did not posit then that political rights were valuable for the reason that they provided the community with an ability to exercise control over the shaping of its own existence.¹⁸³ Rather, Constant held that political liberty was valuable in a negative sense; it prevented the state from escaping its jurisdiction and engaging in acts which violated private rights and reduced *individual* autonomy. The *interests* of the community, he reasoned, would seek to avoid becoming victims of legislative encroachments and would thus guide and limit the actions of the state.

Constant broke so far from the classical republican tradition that he was in fact able to claim that an individual did not necessarily have to be in possession of political rights to enjoy the benefits of political freedom. Again, he saw political freedom as something associated with opportunity rather than exercise or condition. He declared in Livre X of *Principes* that no nation in history had regarded all the individuals living within its territory to be members of the political association and asserted that under modern conditions, citizenship ought

¹⁸² Constant, *Principes*, p.469.

¹⁸³ I am indebted to Charles Larmore for the phrasing here.

to be dependent upon property as well as age and nationality.¹⁸⁴ Constant proposed that the ownership of property was necessary for an individual to enjoy the level of leisure necessary to develop an informed outlook with regard to public affairs; he thus announced that in order to guarantee property rights and establish an informed citizenry, political liberty ought to be the reserve of the propertied, and summarised this position through explaining that '*la propriété seule rend les hommes capables de l'exercice des droits politiques*'.¹⁸⁵

This was a significant departure from his republicanism of the revolutionary period and one which insists that his conception of liberty was subject to change over time. In *Des réactions politique* (1797) Constant sided with Montesquieu in declaring that no man should be bound by laws to which he did not contribute.¹⁸⁶ His approval of this maxim indicates that his embryonic political thought of the 1790s took seriously the republican understanding of personal freedom which dictated that a precondition of one's liberty was his ability to engage in co-authorship of the laws and autonomously shape his existence through civic participation. Many of Constant's commentators, including Kalyvas and Katznelson, have viewed his abandonment of Montesquieu's maxim in the nineteenth century as evidence of his transformation into a spokesman for bourgeois interests.¹⁸⁷ Constant's demand that political rights be conferred only onto proprietors was, however, entirely consistent with his broader understanding of the benefits of political participation, and his renunciation of Montesquieu's maxim was also the product of his *a posteriori* recognition that property rights were entirely distinct from other civil liberties.

He was vigorous in his insistence that the imposition of property qualifications for the exercise of political liberty in no way restricted or undermined the general freedom of non-proprietors. Here, he offered a series of subtle arguments to justify his exclusion of non-proprietors for the exercise of political rights. Constant held that as property was merely a social convention, property rights were different from other civil liberties and thus demanded greater protection.¹⁸⁸

¹⁸⁴ Constant, *Principes*, pp.174-175.

¹⁸⁵ Constant, *Principes*, p.175.

¹⁸⁶ Constant, *Des réactions politique*, p.112.

¹⁸⁷ Kalyvas and Katznelson, 'We are Modern Men', p.524.

¹⁸⁸ Constant, *Principes*, pp.202-203.

In his view, all inhabitants of a country were united in their enjoyment of civil liberties, but he also recognised that a free nation would be necessarily divided into two classes: proprietors and non-proprietors, with the latter being greatest in number.¹⁸⁹ Constant's understanding that political liberty was essentially a mechanism for guiding the actions of the state prompted his insistence that non-proprietors be excluded from the enjoyment of political rights for the reason that their material interests may compel them to destroy property.¹⁹⁰

His reasoning here was entirely consistent with his understanding that political freedom ultimately served a negative purpose. Political rights were necessary in order to prevent the state from dispensing with particular civil liberties (such as property rights) and were therefore, to extend Constant's analogy, weapons rather than shields. It would, then, be unwise to provide particular individuals with weapons intended to guard rights which they did not possess. Constant reasoned that it would naturally not be in the interest of the property-less to employ their political rights in the defence of property and that in reality non-proprietors, following their material interest, would be inclined to destroy property rights. Less a bourgeois-*liberal* argument, here Constant was merely following his understanding of the value of political liberty. For its use to be advantageous, it had to be employed in the *defence* of civil liberties. It was not, he reasoned, in the interest of non-proprietors to defend *all* liberties (civil and property rights), and thus awarding political freedoms to those who did not enjoy property rights would negate the advantages of political freedom.

He declared, however, that the love of justice, order, and liberty would be necessarily shared by *all* inhabitants of a nation.¹⁹¹ The political freedom of *some* would, then, be sufficient to protect the civil liberties of *all*. It was in the interest of proprietors to protect the private rights of non-proprietors for the reason that such liberties were shared by every inhabitant of a free political community. Under Constant's model, non-proprietors would still benefit enormously from

¹⁸⁹ Constant, *Principes*, pp.204-205.

¹⁹⁰ Constant wrote: "*Sans doute, si vous supposez que les non-propriétaires examineront toujours avec calme tous les côtés de la question, leur intérêt réfléchi sera de respecter le propriété et de devenir propriétaires; mais si vous admettez l'hypothèse plus probable qu'ils seront souvent déterminés par leur intérêt le plus apparent et le plus immédiat, ce dernier intérêt le portera, sinon à détruire la propriété, du moins à en diminuer l'influence*"; Constant, *Principes*, p.205.

¹⁹¹ Constant, *Principes*, p.207.

political freedom, even though they themselves did not share in the exercising of political power. He thus understood that each individual in society possessed civil liberties and that it was therefore in the interest of each member of society, whether propertied or un-propertied, to prevent the government from encroaching on particular individual freedoms. The wealthy and the property-less shared particular civil rights, and from this, Constant reasoned that in order to secure the civil freedom of *all*, it was only necessary that the propertied members of the political association could exercise political liberty in order to restrain the ambitions of the governors and resist the expansion of *l'autorité sociale*.

Through exploring Constant's and Madison's considerations on the relationship between the state and individual liberty, we can detect a way of thinking about freedom which took seriously the notions of interference *and* domination as impediments to personal freedom. Particularly in the case of Constant, there was an attachment to the concept of political liberty that was justified on the basis of its *negative* value, or capacity to restrain the competence of the state. Related to his understanding of modernity, Constant appeared to hold that propertied and modern individuals would generally employ their political rights in ways that contributed to the protection of civil rights. In other words, political liberty was as more than a shield capable of guarding against arbitrariness, and was instead understood to be something capable of guiding the state into the performance of actions consistent with negative individual liberty.

A particularly striking facet of Madison's and Constant's shared conception of liberty was its focus on the emergence of juridification. Though both remained cautious of the spectre of arbitrariness, in the aftermath of their respective revolutionary epochs they adopted a more liberal way of considering the relationship between authority and liberty. Madison, and later Constant, grew increasingly suspicious of popular political control on the grounds that political factions were finding themselves increasingly able to produce oppressive laws through broadly legitimate constitutional channels. For Madison, the example of Patrick Henry's General Assessment bill was a case in point. During the religious liberty struggle, he began to recognise and comprehend the relationship between popular governance and proliferation of law, and in turn set about attempting to

exploit the idea of popular sovereignty to restrain the actions of a popularly elected government. The codification and institutionalisation of natural rights was something that Madison endeavoured to achieve through elevating the sovereignty of the people to a position of constitutional supremacy.

Part Two

Inventing the Neutral State

Chapter Three | Bicameralism and the Equilibrium of Interests in the Extensive Republic

- 3.1 Hume, Montesquieu, and the Small Republic Debate
- 3.2 *Nemo Iudex in Causa Sua*: Balancing Popular and Impartial Governance
- 3.3 The Auxiliary Desideratum: The Invention of a Patrician Elite
- 3.4 An Effectual Remedy of Two Parts: Neutral Congressional Authority in Federalist Theory

As the principles of republican constitutional theory were applied practically in late eighteenth-century France and America, Constant and Madison emerged as thinkers determined to unearth constitutional systems capable of protecting individual liberty under the weight of popular governance. In the eyes of both thinkers, early experiments with more democratic modes of governance had proved to be less than encouraging. In America, the efforts of the constitutional framers of 1776 were in many cases rushed, and their creations earned little in the way of praise from figures like Madison and Jefferson who would go on to become the nation's master constitutional theorists. For many, Madison included, the case of the Pennsylvania Constitution (1776) epitomised all that was wrong with post-revolutionary American constitutional design: annual parliaments, unicameral legislatures, and legally-codified legislative dominance were considered by Madison and his federalist allies to be features of maladroit constitutions under which the status of individual liberties would be precarious.¹⁹² But where the efforts of American constitutional framers in 1776

¹⁹² Robert F. Williams, 'The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism', *Temple Law Review* (1989), pp.541-585 (p.551); James Madison, 'Federalist No.48', p.311; see also: Benjamin Rush,

had at times bordered on the inept, the situation in France following the revolution of 1789 was near-disastrous. As Rousseau's legacy continued to hang over the French political landscape, the citizens of France were forced to endure over a decade of arbitrariness and extraordinary justice.¹⁹³ Though the revolutionaries were quick to establish the *Déclaration des droits de l'homme et du citoyen* (1789), the absence of strict and lasting constitutionalism in post-revolutionary France had the effect of eroding individual and minority rights.

Constant and Madison rose to political and intellectual maturity at times when the comprehensive preservation of private rights appeared an almost infeasible task. As liberal thinkers, they reasoned that while the doctrine of popular sovereignty had destroyed the arbitrary power of the crown, it had seemingly replaced monarchical government with something just as powerful and perhaps even more damaging to individual liberty. Intriguingly, however, neither Constant nor Madison saw this development as grounds for abandoning the principles of popular governance; both concluded that the problem of juridification could be best alleviated by developing a state which stood neutral between the claims of competing interests. The present section, composed of two chapters, examines how Madison and Constant attempted to establish political systems grounded in neutrality and impartiality. Before examining Constant's highly-theoretical system for neutral governance, the present chapter engages with the constitutional system proposed and defended by Madison at the Philadelphia Convention. The chief aim of the chapter is to uncover precisely how he attempted to ensure that governance in the new federal republic would remain neutral and operate in a manner consistent with his 'rules of justice'.

Determining precisely how Madison attempted to infuse his constitutional system with political neutrality involves entering what is already a congested debate concerning the intended purpose of Madison's system of representation, as elaborated and expounded in *The Federalist*. His *Federalist* No.10 has received a greater degree of scrutiny than perhaps any other essay in the American canon; examined not only by historians, but by political scientists and

'On Good Government', in Dagobert D. Runes (ed.), *The Selected Writings of Benjamin Rush* (New York, 1947), pp.3-84

¹⁹³ Brown, 'Echoes of the Terror', pp.529-558.

constitutional scholars, the Tenth *Federalist* is widely considered to be both Madison's most significant contribution to western political theory and the essay which best exemplifies the rationale behind the constitutional system he argued for at the Convention of 1787. The inordinate amount of attention paid to the essay has endured largely thanks to the continuance of a protracted debate among scholars which has come to be defined as much by disciplinary divisions as by ideological ones. One point, however, on which all of the essay's commentators concur, is that Madison understood the expansion of the political territory to be the most effectual remedy for the evil of faction. But what remains less clear is why Madison understood his 'extended republic' to be necessarily less congenial to the evil of majoritarian factionalism than the multitude of smaller republican polities that had gone before it.

Until the 1970s, a consensus existed among the essay's commentators that in *Federalist* No.10, Madison anticipated the emergence of interest group politics and hoped that by extending the size of the republic the multiplicity of interests would check and neutralise one another, thus precluding the dominance of one particular faction.¹⁹⁴ Set against this interpretation emerged what has become known as the republican-revisionist reading of the tenth *Federalist*. Led chiefly by Gordon Wood, Madison's republican commentators have downplayed the extent of Locke's influence on federalist theory and have instead emphasised Madison's republicanism. Robert Morgan, Gary Wills, and Wood have each made the case that Madison's system of representation was geared toward securing the election of an enlightened and impartial class of legislators, capable of pursuing an objective conception of the public good and operating above the fray of factionalism.¹⁹⁵ Ultimately, they hold that Madison sought to establish the

¹⁹⁴ Alan Gibson, 'Impartial Representation and the Extended Republic: Toward a Balanced Reading of the Tenth Federalist Paper' *History of Political Thought*, Vol.12, No.2 (Summer, 1991), pp.263-304 (p.265-266); Sheehan, 'The Politics of Public Opinion', pp.609-611; Robert Dahl, *A Preface to Democratic Theory* (London, 2006), pp.4-33; Judith Shklar, 'Publius and the Science of the Past', *Yale Law Journal*, Vol.86, No.6 Federalism, pp1286-1296 (p.1290); Lance Banning, 'The Hamiltonian Madison: A Reconsideration', *The Virginia Magazine of History and Biography* Vol. 92, No. 1 (Jan., 1984), pp. 3-28 (p.14).

¹⁹⁵ Gibson, 'Balanced Reading', p.267-268; Gordon S. Wood, 'Interests and Disinterestedness in the Making of the Constitution', in *Beyond Confederation: Origins of the Constitution and American National Identity*, Richard Beeman, Stephen Botein, and Edward C. Carter II (ed.) (Williamsburg, Va., 1987), pp.69-109 (p.83).

Federal Government as a ‘disinterested and dispassionate umpire’ between the claims of competing interests.¹⁹⁶

Alan Gibson’s refreshing and comprehensive ‘Balanced Reading’ (1991) of the tenth *Federalist* is one that takes seriously both the ‘multiplicity of interests’ and ‘disinterested umpire’ interpretations. He argues that the system of representation espoused in the tenth *Federalist* was indeed a synthesis of liberal and republican concepts, and that in attempting to establish impartial representation, Madison recognised that the inevitable diversity of interests in a large republic could indeed be beneficial, and even essential. But despite acknowledging the plausibility of the ‘multiplicity of interests’ argument, Gibson has in effect offered what is a more comprehensive adaptation of the ‘impartial representation thesis’ – one that rejects the notion that Madison expected representatives to act as *agents* for the interests of their constituents. Gibson takes issue with the pluralists’ insistence that Madison expected the neutralisation of factions to take place in congress, *post-election*; for Gibson and others, it is at this point that the liberal, or pluralist, interpretation begins to lose plausibility. Madison wrote before the legitimisation of interest group politics, they argue, and the federalists sought to ensure that electoral constituencies would be so large and diverse that federal representatives would be sufficiently detached from one particular interest. Thus in following the line of argument advanced by Morgan, Wood, and Wills, Gibson contends that the principal end of the Madisonian system was the elevation of disinterested and dispassionate representatives capable of acting *impartially* through pursuing an objective conception of the public good.¹⁹⁷

In the present chapter I propose that neither the pluralist nor republican interpretations of *Federalist* No.10 can fully explain the political purpose of Madison’s system of representation. This is not to suggest, however, that the

¹⁹⁶ For a detailed exposition of this argument see: Gordon S. Wood, ‘Interests and Disinterestedness’.

¹⁹⁷ Gibson ultimately accepts the ‘impartiality thesis’ which insists that the Madisonian system was geared toward securing the election of enlightened guardians of the public good, but he importantly claims that this aspect of Madison’s political thought has been over-emphasised. Gibson places equal emphasis on the ‘impartiality’ and ‘multiplicity of interests’ aspects of Madison’s tenth *Federalist* and makes the arguments that: (1) extent of territory would, under Madison’s model, produce a greater variety of interests thus making the formation of homogenous and factional majorities more difficult; and (2) that expanded electoral districts would lead to the election of disinterested representatives who would not seek to advance their own, or their constituents, particular interests; Gibson, ‘Balanced Reading’.

readings offered by Gibson, Wood, Banning, *et al.* are necessarily inaccurate or unreliable, but this chapter maintains that in order to fully appreciate Madison's solution to the problem of faction we must look beyond the confines of his tenth *Federalist* essay and instead explore the specifics of his constitutional design as well as his lesser-known writings on political and constitutional theory. What I aim to show in this chapter is that far from being reliant on Lockean-liberal or classical republican doctrines to solve the problem of faction, Madison in fact adopted a far more pragmatic approach and centred his constitutional theory on finding a form of governance capable of sufficiently replacing the neutrality of the British Crown.¹⁹⁸

By primarily focusing on Madison's *Vices of the Political System*, *Notes for Essays*, his speeches at Philadelphia, and his private exchanges with Jefferson, I demonstrate that he sought to construct political neutrality – as the antidote to faction – from more than one source. In short, I contend that Madison's 'effectual remedy' to the problem of faction was one composed of two parts. The present chapter thus proposes that in order to establish neutral governance in America, Madison arranged the House and Senate in entirely different, but complementary, ways. The federal House, I argue, was designed as a body expected to mirror the interestedness and factionalism of civil society; Madison expected that the various interests in society would be neutralised within the house, preventing the dominance of particular factions. In contrast to his design of the House, I claim, Madison arranged the federal Senate in a way that would facilitate the emergence of enlightened, virtuous and *disinterested* representatives capable of identifying the public good and operating above the fray of factionalism.

3.1 Hume, Montesquieu, and the Small Republic Debate

Madison concluded his *Vices of the Political System of the United States* (1787) with a statement concerning the idea of neutrality and the benefits of an extended republic. Foreshadowing the central arguments of *Federalist* No.10, he explained in *Vices* that by enlarging the size of the political territory, the society would

¹⁹⁸ A central contention of this thesis is that like Constant, Madison's conception of neutrality was based on the characteristics of the institution of monarchy.

become broken down into a ‘greater variety of interests, of pursuits, of passions’ which would ‘check each other’, rendering the formation of factional majorities less likely. This propulsive recognition, that the clashing of particular interests could prove to be beneficial for the health of a republic, was not, however, an entirely new realisation of Madison’s, expounded only on the pages of *Vices*. During the protracted struggle to secure religious freedom in his home-state of Virginia, Madison confessed in a letter to Jefferson that he did not regret the mutual hatred between the Presbyterians and Episcopalians for the reason that ‘a coalition between them could alone endanger all our religious rights’.¹⁹⁹ Though Madison expressed this view at a time of unprecedented sectional struggle in Virginia, his recognition that the clashing of particular interests, or factions, could aid the protection of personal freedom was one that became central to the constitutional strategy he developed during the build-up to the Philadelphia Convention.

Madison’s plan to quell the dangers of faction by exploiting the vastness and heterogeneity of the United States was certainly one of his more radical and innovative constitutional schemes, but the idea that a large republic could be congenial to the preservation of liberty was not without precedent. In the *Idea of a Perfect Commonwealth* (1754), David Hume captured the ancient dilemma of city-state republicanism with unrivalled clarity and accuracy: small democracies, he explained, were necessarily turbulent, and although citizens were often divided into a multiplicity of groups and parties, the realities of dense habitation generally facilitated the emergence of oppressive popular tides of opinion.²⁰⁰ Hume did, however, note that it was ‘more difficult to form a republican government in an extensive territory than in a city’, but he qualified his remarks by arguing somewhat speculatively that once a large republic had been

¹⁹⁹ James Madison, ‘From James Madison to Thomas Jefferson (August 20, 1785)’, in *PJM*, VIII, pp.344-347 (p.345).

²⁰⁰ Hume wrote that: ‘Democracies are turbulent. For however the people may be separated or divided into small parties, either in their votes or elections; their near habitation in a city will always make the force of popular tides and currents very sensible. Aristocracies are better adapted for peace and order, and accordingly were most admired by ancient writers’, David Hume, *Idea of a Perfect Commonwealth*; see also: Douglass Adair, ‘That Politics May be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist’, *Huntington Library Quarterly*, Vol.20, No.4 (Aug., 1957), pp.343-360 (pp.350-351).

established, the government would be better insulated from the evils of ‘tumult and faction’.²⁰¹

It is clear that Hume’s analysis resonated deeply with Madison.²⁰² But it was not just the political conclusions drawn by the Scot that informed Madison’s approach to political theory;²⁰³ the scientific approach to political study, pioneered by Hume and his Scottish contemporaries, was pressed upon the young minds studying at Princeton in the 1770s.²⁰⁴ The idea that the comparative-analytical study of history could be used as a tool to better understand human action and behaviour was one which clearly shaped Madison’s approach to the development of his own political and constitutional theories. The Virginian’s predilection for Scottish empiricism, as a method for developing appropriate and reliable political theory, was evidenced in his writings (particularly those of the early 1790s) concerning the relationship between the extent of political territory and the management of faction.

The notion that there existed a correlation between a republic’s size and its health was an idea with a long history in European political thought and one which had captivated Madison during the 1780s and early 1790s. Though it was Alexander

²⁰¹ David Hume, *Idea of a Perfect Commonwealth*.

²⁰² Mark Spencer, Douglass Adair, and Mark Arkin all note that Madison read, and to some degree borrowed from, Hume’s *Perfect Commonwealth*; Adair, ‘Reduced to a Science’; Mark Spencer, ‘Hume and Madison on Faction’, *William and Mary Quarterly* Vol.59, No.4 (2002), pp.869-896; Marc Arkin, ‘The Intractable Principle: David Hume, James Madison, Religion, and the Tenth Federalist’, *American Journal of Legal History*, Vol.148 (1995), pp.148-176 (p.149). Theodore Draper goes as far as to suggest: ‘[t]hat Hume influence [Madison’s] ideas on faction...is beyond dispute’; Theodore Draper, ‘Hume and Madison: The Secrets of Federalist Paper No.10’, *Encounter* Vol. 58, No.2 (1982), pp.34-47 (p.34).

²⁰³ It is appropriate at his point to note that I concur with Adair’s detractors that Madison’s thoughts on faction were chiefly the product of his practical experiences as a legislator in Virginia during the 1780s. That said, this does not preclude the possibility that Madison’s understanding of the deficiencies of small republics was indeed influenced by Hume’s thesis in *Perfect Commonwealth*. Though they had different views on how to handle the problem of faction, Madison’s assessment of the drawbacks of city-state republicanism mirrored those of Hume. For the differences between Madison’s and Hume’s thoughts on faction see: Edmund Morgan, ‘Safety in Numbers: Madison, Hume, and the Tenth *Federalist*’, *Huntington Library Quarterly*, Vol.49 (1986), pp.95-112.

²⁰⁴ Adair, ‘Reduced to a Science’, pp.345-346; Roy Branson, ‘James Madison and the Scottish Enlightenment’, *Journal of the History of Ideas*, Vol.40, No.2 (Apr.-Jun., 1979), pp.235-250 (p.235-237). Spencer claims that Madison first read Hume long before 1787, and perhaps even prior to his enrolment at Princeton. Spencer convincingly speculates that Madison may have read Hume as a child when he was formally educated by Donald Robertson, an Edinburgh-educated Scot who acquired many of Hume’s works for his school library. It is also certain that Madison encountered Hume’s thought at a deeper level while studying at Princeton; Spencer, ‘Hume and Madison’, p.875.

Hamilton who was given the task of refuting Montesquieu's small-republic thesis in *The Federalist*, Madison used his *Notes for Essays* (1791-1792) to explore, and expound upon, the deficiencies of both small republics and large monarchies.²⁰⁵ Much like the *Memorial*, the *Notes for Essays* have been neglected by many of Madison's commentators, but they nonetheless provide the reader with a significant degree of insight into the intellectual foundations of federalist theory.²⁰⁶ Within the *Notes*, Madison exhibited his mastery of both European history and classical political philosophy; but curiously absent from his numerous analyses of political history were affirmations of the civic humanist idea that states were necessarily subject to cycles of corruption and decline.²⁰⁷ What was particularly intriguing about Madison's research in the *Notes* was the way in which he analysed the Roman Empire alongside that of the British; and the republic of Athens alongside the free cities of Italy. He frequently drew sweeping conclusions concerning the nature of political change, suggesting that he understood comparative historical study to be a tool capable of revealing *timeless* principles as well as *eternal* truths about politics, society, and human nature.

Using the opening chapters of the *Notes* to investigate the nature of European monarchies, he was able to conclude that 'contrary to received opinion', large nations were in fact not suited to the institution of monarchy.²⁰⁸ On this point, Madison's thought was largely in line with that presented by Montesquieu in his *l'Esprit de lois* (1748) – the hugely influential French masterwork which considered in great detail the relationship between territorial extent and the health of a political society. Where Montesquieu insisted that a 'monarchical state ought to be of a moderate extent', Madison cited the example of Great

²⁰⁵ In *The Papers of James Madison*, these fragmentary notes are entitled, 'Notes for the *National Gazette* Essays'. James Madison, "Notes for the *National Gazette* Essays", in *The Papers of James Madison*, Robert Rutland *et al.* (eds.) (Charlottesville, 1983), XIV, pp.157-169.

²⁰⁶ That Madison chose to organise the *Notes* into thirteen chapters spanning a one-hundred page document has prompted speculation as to whether they were intended to form the basis of a philosophical treatise; Sheehan, 'Public Opinion', p.611.

²⁰⁷ Madison cited Aristotle's *Politics* Book V, to contend that the cycles in governments were influenced by 'public opinion' could thus differ dramatically between political societies; Madison, 'Notes', in *PJM*, p.163; see also: Sheehan, 'Public Opinion', p.618. Howe notes that in justifying the constitution, the framers consistently avoided appeals to the traditional, or civic humanist, interpretation of history; Daniel Walker Howe, 'Why the Scottish Enlightenment was Useful to the Framers of the United States Constitution', *Comparative Studies in History and Society*, Vol.31, No.3 (July, 1989), pp.572-587 (p.583).

²⁰⁸ Madison, 'Notes for *National Gazette* Essays', p.157

Britain to posit that a territory of ‘very great extent’ was unfit for monarchical governance. In the *Notes*, he explained that:

Could the people of G. Britain be contracted into one of its Counties it would be scarcely possible for the monarchical branch to support itself agst. the popular branch. Could they be spread over 10 times the present area...the reverse would happen.²⁰⁹

Madison’s point was that while liberty could indeed flourish in a monarchy confined to a territory like that of the British Isles, such a mode of governance would be entirely improper for a much vaster territory such as that which had been established in America after the union of the thirteen states in 1787. Just as Montesquieu cited the demise of Charlemagne’s Empire to support his observation concerning territorial extent and the institution of monarchy, Madison felt that the decline of the Roman Empire verified his contention that a monarchy could not sufficiently function in a considerable territory without descending into despotism.²¹⁰ Though Madison found himself to be in agreement with the French master on this point, he significantly departed from the teachings of Montesquieu through arguing that small states were in fact utterly unfit for popular government. Relying once again upon empirical analysis, Madison explained that the oppression of minority groups by unjust majority combinations was a ‘disease of small states’.²¹¹ From the ‘case of the Debtors & Creditors in Rome and Athens’ to the ‘case of Black Slaves in Modern Times’, he argued, human history was replete with instances which illustrated the plight of minorities under republican government.²¹²

Herein lay the source of the divergence between Madison and the thinker which he and his contemporaries occasionally referred to as ‘the oracle’. Madison and Montesquieu ultimately prized different political ideals; though they both cherished some form of civil liberty, Montesquieu understood the chief end of republican government to be the subordination of private interests to the public good; ‘in an extensive republic’, he warned in *Esprit*, ‘the public good is

²⁰⁹ Madison, ‘Notes for *National Gazette* Essays’, p.158.

²¹⁰ Madison, ‘Notes for *National Gazette* Essays’, p.159.

²¹¹ Madison, ‘Notes for *National Gazette* Essays’, p.159.

²¹² Madison, ‘Notes for *National Gazette* Essays’, pp.159-160.

sacrificed to a thousand private views'.²¹³ For Madison, by contrast, the splintering of society and the pursuit of private interest were wholly natural, and inevitable, developments which could not be avoided under modern conditions. His chief concern was not that the public good would be sacrificed in an expanded republic, but that oppressive combinations could easily form within a limited one. Unlike Montesquieu, Madison prized the ideals of minority freedom and political impartiality above all others.

For Madison, the key to achieving political stability, impartiality, and minority freedom within a republic was to ensure that there existed an equilibrium between the interests and conflicting passions of society.²¹⁴ Just as the discord between the Presbyterians and Episcopalians in Virginia preserved 'all our religious rights', the clashing, balancing, and neutralisation of factions was considered by Madison to be essential in order to preserve stability as well as personal and minority freedoms. Madison's study of ancient and modern European history taught him that factional equilibrium could be achieved not in a city-state democracy, but only in a large representative republic. His task thus became to construct a political system capable of ensuring and preserving equilibrium. The solution he offered was the establishment of political neutrality through careful, and almost scientific, constitutional design.

3.2 *Nemo Iudex in Causa Sua*: Balancing Popular and Impartial Governance

Unlike Hume, Madison was not so much concerned with faction, as he was with factional *majoritarianism*. All societies, he explained in *Vices*, were divided into interests and factions which in and of themselves constituted no substantive threat to minority rights and personal freedom.²¹⁵ He reasoned that factionalism was merely part-and-parcel of republican government; a sign that the polis was both civilized and free. Concerned less than with the presence of factions *per se*, Madison was primarily fearful of majorities united by a factional sentiment: 'Whenever therefore an apparent interest or common passion unites a majority', he wrote in *Vices*, 'what is to restrain them from unjust violations of the rights

²¹³ Montesquieu, *Spirit of the Laws*, Book XII, Chapter XVI.

²¹⁴ Madison, 'Notes for *National Gazette* Essays', pp.158-159.

²¹⁵ Madison, 'Vices of the Political System', p.355.

and interests of the minority or of individuals'.²¹⁶ While the institution of republican government provided an effective check against factional minorities, experience was beginning to demonstrate that popular rule was the system of governance most congenial to the emergence of interested majority groups. This tension within the idea of republican government was not lost on Madison; though instead of dispensing with the principle of popular rule, he turned his attention to meliorating the republican form of government.

For Madison, the melioration of the republic was dependent upon the construction of political neutrality – that most favourable characteristic of monarchical rule.²¹⁷ But as he pointed out in the penultimate paragraph of *Vices*, the neutral prince was often apt to sacrifice the happiness of his subjects to personal ambition.²¹⁸ What Madison needed to construct was a model of neutral governance devoid of this glaring deficiency, and his chief aim thus became to establish a neutral sovereign, but one which did not lose sight of the common interests and happiness of the citizenry. In other words, Madison's ideal republic was one which exercised neutrality in the pursuit of the aggregate interest of the nation; this was his 'great desideratum' and the central element of his vision for the United States Constitution. In *Vices*, he explained that:

The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to control one part of the society from invading the rights of another, and at the same time sufficiently controlled itself, from setting up an interest adverse to that of the whole society.²¹⁹

Put differently, the 'great desideratum' was the transformation of the sovereign authority into an entity which did not act in favour of a particular interest or faction.²²⁰ Madison reiterated this point in a letter addressed to Jefferson in October 1787, but within his private remarks Madison attested that the policy of 'divide et impera' constituted both a means toward the establishment of

²¹⁶ Madison, 'Vices of the Political System', p.355.

²¹⁷ Like Constant, Madison fully accepted the efficacy of constitutional monarchy as an institution capable of providing political neutrality. Madison's attempted to replace monarchy with an alternative neutral *institution* is explored in the final section of this thesis.

²¹⁸ Madison, 'Vices of the Political System'.

²¹⁹ Madison, 'Vices of the Political System', p.357.

²²⁰ Dr. Samuel Johnson defined the term neutral as: 'one who does not act or engage on either side'; it is highly likely that this is what Madison understood by the term; see: Samuel Johnson, *Johnson and Walker's Dictionary of the English Language* (London, 1755), p.490.

neutrality and a solution to the problem of factionalism.²²¹ Despite being a ‘reprobated axiom of tyranny’, Madison understood the idea of divide and rule to be indispensable in a modern republic if the rights of minorities were to be protected against ‘oppressive combinations’ of interested groups and factions.²²² What he meant by this was that for a modern republic to survive, it was vital that political society be structured in such a way that an oppressive or discriminatory sentiment could not effectively suffuse and permeate throughout the polis; in short, it was vital that interested minorities remained as minorities. Within his public writings Madison did not plainly insinuate that his proposed constitutional system was grounded in the idea of *divide et impera*, but in *Federalists* No.9 & No.10 he and Hamilton systematically challenged Montesquieu’s exaltation of the small-republic on the grounds that within smaller societies ‘[a] common interest or passion will, in almost all every case, be felt by a majority of the whole’.²²³ Thus what Madison was attempting to establish was a political system which remained necessarily hostile to instances of factional majoritarianism.

But in the ninth and tenth *Federalists* ‘Publius’ (the collective alias of Madison, Hamilton, and John Jay) was also developing a far more profound and original case which went well beyond seeking to protect the rights of individuals and minorities. For Madison, the ancient aphorism ‘that no man could be the judge in his own cause’ was an axiom which had relevance not only in judicial proceedings but also in the spheres of governance and legislation. ‘With equal, nay with greater reason’, he wrote in *Federalist* No.10, ‘a *body* of men are unfit to be both judges and parties at the same time [emphasis added]’.²²⁴ In Madison’s view, a legitimate political system was one grounded in what he described as the ‘rules of justice’;²²⁵ what he meant by this was that political decisions had to be taken with only the public good in mind, and arrived at only through impartial and unbiased reasoning. But Madison remained painfully aware that within a republican government, ‘the parties are, and must be

²²¹ James Madison, ‘James Madison to Thomas Jefferson (October 24, 1787)’, in *PJM*, X, pp.205-219 (p.214).

²²² Madison, ‘Letter to Jefferson (October 24, 1787)’, p.214.

²²³ Madison, ‘Federalist No.10’, p.126; see also: Hamilton, ‘Federalist No.9’.

²²⁴ Madison, ‘Federalist No.10’, p.124.

²²⁵ Madison, ‘Federalist No.10’, pp.124-125.

themselves the judges'.²²⁶ The implications of this reality were, he reasoned, extensive and damaging. Mindful that society was necessarily divided into interested groups, Madison noted that on most legislative issues political factions, or parties, would tend to forgo the pursuit of the public good and instead endeavour to advance their own particular interests. Focusing in economic matters to elaborate this point, he explained that:

Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and manufacturing classes, and probably by neither with sole regard to justice and public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is perhaps no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice.²²⁷

Madison's assessment of the American political landscape was as straightforward as it was dispiriting: political parties would almost always seek to advance their own interests at the expense of both the public good and the interests of other factions. Such a condition was irreversible, he frequently noted; it was 'sown into the nature of man'.²²⁸ It was on this point that Madison deviated from the philosophy of Hume who insisted that it was vital to prevent factions from forming in the first place.²²⁹ Thus all that Madison could hope to achieve was the construction of a constitutional-political system capable of controlling the *effects* of faction.

After outlining the problems of factionalism in *Federalist* No.10, Madison promptly dismissed the idea that a natural aristocracy could be trusted to manage the repercussions of interested factionalism. 'It is vain to say', he wrote, 'that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good'; exhibiting his blend of pragmatism and pessimism once again, Madison reminded the reader that 'enlightened statesmen will not always be at the helm'.²³⁰ This was not to suggest, however, that his proposed system of representation was not one geared toward securing the

²²⁶ Madison, 'Federalist No.10', p.125.

²²⁷ Madison, 'Federalist No.10', p.125.

²²⁸ Madison, 'Federalist No.10', p.124; Madison, 'Letter to Jefferson (October 24, 1787)', pp.212-213.

²²⁹ Arkin, 'Hume, Madison, and the Tenth Federalist', p151.

²³⁰ Madison, 'Federalist No.10', p.125.

election of disinterested representatives – the elevation of a patrician elite was certainly a core objective in federalist theory, and one which is explored at a later point in this chapter.²³¹ But if we compare Madison’s writings in *The Federalist* with his *Vices* essay written in the same year, it is clear that he considered the elevation of a natural aristocracy to be merely the *auxiliary* desideratum, which he described as ‘such a process of elections as will most certainly extract from the mass of society the purest and noblest characters’.²³² The ‘great desideratum’, or the chief solution to the problem of faction, was modifying the sovereign body in a way that rendered it neutral between competing interests. In his lengthy report to Jefferson written from the Convention, he hinted at a possible solution to the problem of how to encourage neutrality within government. After noting that the institution of property engendered stark distinctions between ‘rich and poor; creditors and debtors; a landed interest, a monied interest’, he went on to explain that in the context of the expanded modern republic:

These classes may again be subdivided according to the different productions of different situations & soils, & according to different branches of commerce, and of manufacturers. In addition to these natural distinctions, artificial ones will be founded, on accidental differences in political, religious, or other opinions, or an attachment to the persons of leading individuals.²³³

This was Madison at his most speculative and optimistic, and the influence of Hume on his reasoning is unmistakable. Though 1780s Virginian politics was in many ways defined by the passage of the Religious Freedom Bill, the bicameral state legislature was the site of an abundance of factional struggles prompted by the tendency of elected delegates to vote in accordance with the interests of their county or region. Virginia’s disposition for factional politics was usually most apparent when economic issues were brought to the floor of the House of Delegates. In the years immediately after independence, the Virginia House was divided between Representatives from the aristocratic Tidewater Region and those from the much poorer and more democratic Piedmont area, as interested economic groups fought over the debt relief issue which gripped Virginian

²³¹ Gordon Wood’s central contention is that Madison’s federalist theory was centred on establishing a ‘patrician-led classical democracy’ in which representatives would be superior to local, or particular, interests; Wood, ‘Interests and Disinterestedness’, p.83.

²³² Madison, ‘Vices of the Political System’.

²³³ Madison, ‘Letter to Jefferson (October 24, 1787)’, pp.212-213.

political life after the Revolution.²³⁴ Though the geographic contours of this divide shifted somewhat with western expansion, the Virginia Assembly continued to find itself divided between *two* distinct groups throughout the 1780s.²³⁵ The factionalism of civil society was thus reflected in the composition of the House; groups that shared an economic interest often secured the election of men sympathetic to their cause. This trend was perpetuated as popular and energetic figures such as Patrick Henry, Richard Henry Lee, and even Madison himself made efforts to marshal the unruly and disorganised House.²³⁶ It thus appears that in his letter to Jefferson, Madison was hypothesising that an expanded republic (containing the thirteen states) would likely be broken into a *plurality* of factions, distinguishing it from smaller republics such as their home state of Virginia where homogeneity and personality often produced *binary* political divisions.

We can infer from this that a central component of federalist theory was the assumption that the sheer diversity of interests within an expanded republic would encourage the emergence of a plurality of political factions. In Madison's view, economic diversity necessitated political diversity. But a pressing question remains as to whether Madison expected the various interests of the extended republic to neutralise one another through the electoral process or instead within congress, *post-election*.²³⁷ Through paying close attention both to the specifics of Madison's language and the nature of electoral politics within the various states prior to the Philadelphia convention, we can see clearly that he expected political

²³⁴ Jackson T. Main, 'Sections and Politics in Virginia, 1781-1878', *The William & Mary Quarterly*, Third Series Vol.12, No.1 (Jan., 1955), pp.96-112 (pp.97-98); Ambler, *Sectionalism*, p.3; Norman K. Risjord and Gordon DenBoer, 'The Evolution of Political Parties in Virginia, 1782-1800', *The Journal of American History*, Vol.60, No.4 (March, 1974), pp.961-984 (pp.963-964).

²³⁵ Westward expansion ensured that the political divide in Virginia was between representatives of Northern Neck region and their counterparts in the Southside; Main, 'Sections and Politics in Virginia', pp.103-104.

²³⁶ Risjord, 'The Evolution of Political Parties', pp.963-964

²³⁷ It is on this point that the discord between Gibson and Madison's pluralist commentators is most apparent. The keystone of the pluralist case is the contention that Madison expected the electoral system of an expanded republic to produce a multiplicity of interested groups or parties within congress, resulting in the neutralisation of faction *post-election*. Following on from this, pluralist scholars hold that Madison envisaged that federal representatives would act as *agents* for the interests of their constituents, resulting in the institutionalisation of *bargaining*. For Gibson and others, this interpretation lacks plausibility; Madison wrote before the legitimisation of interest group politics, they argue, and the federalists sought to ensure that electoral constituencies would be so large and diverse that federal representatives would be sufficiently detached from one particular interest.

factions to be present within the House of Representatives, adding considerable weight to the idea that Madison sought to ensure that factions would be neutralised and nullified within the *legislative process*.

In a momentous and hugely significant speech to the Convention concerning the ‘popular election of the first branch of the legislature’, Madison warned against instituting indirect elections to both houses of congress, arguing that ‘if the first branch of the general legislature should be elected by the State Legislatures...the people would be lost sight of all together; and the necessary sympathy between them and their rulers and officers too little felt’.²³⁸ He reinforced this point in the same speech by asserting that popular election to one branch of the national legislature was ‘essential to every plan of free Government’.²³⁹ Here, Madison made two crucial and related arguments. The first was that a just republican government was one that contained a branch charged with operating in accordance with the express wishes of the people.²⁴⁰ Madison’s second point was equally revealing as he in effect declared that indirect elections placed a considerable degree of distance between the people and the governors, suggesting that the relationship between the Senate and the people was intended to be wholly distinct from that between the House and the citizenry. From this, it is clear that Madison did not expect Representatives (in the House) to be either disinterested or detached members of a patrician elite. Additionally, it is apparent that Madison did not have an *holistic* understanding of the nature of the federal representative; though both chambers of congress were meant to be representative institutions, Madison expected them to discharge this duty in different ways.

Madison did not just deliver these arguments at the Federal Convention, but reinforced them at great length in *The Federalist Papers*. ‘As it is essential to liberty that the government in general should have common interest with the people’, he wrote in *Federalist* No.52, ‘so it is particularly essential that [the House of Representatives] should have an immediate dependence on, and an

²³⁸ Madison, ‘Popular Election to the First Branch of the Legislature’, p.19.

²³⁹ Madison, ‘Popular Election to the First Branch of the Legislature’, p.19.

²⁴⁰ See: ‘Sympathy’, in *Dictionary of the English Language* (1755).

intimate sympathy with, the people'.²⁴¹ This was hardly a description of a group of men intended to constitute a natural aristocracy. Instead it seems clear that Madison anticipated that *directly elected* representatives would carry with them the interests and claims of their constituents. Writing on the same subject in *Federalist* No.57, he argued that in consequence of frequent elections, members of the House 'will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised'.²⁴² It thus appears entirely evident that Madison expected the various interests of society to be represented within the House, presumably leading to the clashing and eventual neutralisation of factions within the *legislative process* of the popular branch of congress. Accordingly, the interestedness of the people – a condition which Madison firmly accepted as inevitable under modern conditions – would, under his system, be necessarily present in the House. As Lance Banning has astutely observed and affirmed in response to revisionist scholarship, it is not plausible to suppose that Madison would have wished for the election of legislators who *would not* reflect the character and interests of constituents and be consequently unresponsive to the wishes of the majority,²⁴³ such a model of representation would have violated the central tenets of the federalists' understanding of the nature and merits of representative, or republican, government.

Furthermore, something which appears to have been overlooked in scholarship is the fact that the electoral constituencies Madison argued for at Philadelphia (as well as those of the First Congress) were much too small to ensure that Representatives would be sufficiently detached from the claims of local factions in a way that their counterparts in the state legislatures were not. If Madison had been successful in doubling the size of the House at the Convention, Virginia's first federal delegation would have consisted of around twenty members - out of a total of one-hundred-and-thirty U.S. Representatives.²⁴⁴ If we take into

²⁴¹ Madison, 'Federalist No.52', in *The Federalist*, pp.322-326 (pp.323-324).

²⁴² Madison, 'Federalist No.57', in *The Federalist*, pp.343-347 (pp.344-345).

²⁴³ Banning, 'The Hamiltonian Madison', pp.12-14.

²⁴⁴ In a debate at Philadelphia concerning the 'Apportionment of Representatives in the First Branch of the Legislature', Madison 'moved that the number allowed to each State be doubled'. 'A majority of a quorum of 65 members', he explained, 'was too small a number to represent the whole inhabitants of the U. States; James Madison, 'Apportionment of Representatives in the First Branch of the Legislature (July 10, 1787)', in *PJM*, X, p.97.

consideration the fact that the State of Virginia was – on many major legislative issues – divided between a very small number of rival factions, the idea that Madison would have expected the twenty-or-so Virginian delegates to be disinterested and detached from local interests loses its plausibility.

Under Madison's proposed scheme, the Virginia delegation to the House would have been a mere two delegates short of the total membership of the Virginia State Senate – a body which Jefferson had famously criticised for its lack of independence from both the people and the lower house.²⁴⁵ This is hugely significant in that under Madison's framework, the electoral districts of the first Congress would have been far too small to ensure against the possibility of a faction securing the election of an individual or group sympathetic to their interests. As the most astute and effective Virginian politician of his generation, Madison would have been fully aware that some members of Virginia's congressional delegation would have found themselves elected exclusively by either Northern Neck or Southside constituents. Neither Madison's proposal nor the districting formula agreed upon at Philadelphia allowed for the creation of truly heterogeneous districts in which particular interests were not shared by most residents. It would, therefore, have been entirely foreseeable that on economic issues, factions would be formed within the Virginia federal delegation. When this is taken into consideration, the notion that Madison expected federal Representatives to be detached from local interests loses its plausibility.

Instead, a more satisfactory conclusion is that which has served as the basis for the pluralist case, namely that Madison expected the interestedness of Representatives (and the diversity of their interests) to result in the establishment of an equilibrium between the various factions of the extended republic. In *Notes for Essays*, Madison claimed that '[t]he best provision for a stable and free Govt. is not a balance in the powers of Govt. tho' that is not to be neglected, but an equilibrium in the interests and passions of the Society itself'.²⁴⁶ According to federalist theory, the interestedness of a particular state's federal representatives

²⁴⁵ Frances Harrold, 'The Upper House in Jeffersonian Political Theory', *The Virginia Magazine of History and Biography*, Vol.78, No.3 (July, 1970), pp.281-294 (p.284).

²⁴⁶ Madison, 'Notes for the *National Gazette* Essays', p.157

was problematic only if the polity was a small one. Madison understood that within a republic limited in both size and diversity – such as the Commonwealth of Virginia – majority coalitions could be formed with relative ease. But constituting a bold inversion of the small-republic thesis, Madison deduced that within an extended republic (i.e. the United States), it was less likely that interested representatives would share a ‘common motive’ with delegates from other States, thus reducing the likelihood of factional majorities emerging within the legislative process. In *Federalist* No.10, Madison wrote:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States; a religious sect, may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source.²⁴⁷

In other words, a particular faction could enjoy electoral success in, for example, Virginia, but the diversity of the republic as a whole would lessen the likelihood that Virginia’s interested representatives would share a common interest with those of the other states in the Union. If, for example, the states of Virginia and Massachusetts both became dominated by particular factions, the heterogeneity of the extended republic would, Madison hypothesised, ensure that these factions checked and neutralised one another at the federal level. The federal congress was then not expected to be immune from faction, but it was expected to be insulated from the *harmful effects* of faction. Madison noted that extent of territory would ‘secure the national Councils against any *danger* from this source [emphasis added]’; his point was not, then, that the federal legislature would be free of faction, but rather that the federal legislature would be shielded from the perils of faction. Implicit therefore in this theory was the idea that the conflicting interests of Representatives would be neutralised within the congress. A system of representation which ensured against the formation of majorities united by a common motive or factional interest would satisfy the great desideratum as outlined by Madison; due to the sheer diversity of interests being represented in

²⁴⁷ Madison, ‘Federalist No.10’, p.128.

the House, the chamber would, *as a whole*, have been sufficiently neutral between competing interests.²⁴⁸

3.3 The Auxiliary Desideratum: The Invention of a Patrician Elite

In the final paragraph of *Vices*, Madison outlined his auxiliary desideratum for the melioration of the republican form of government. This requirement, he wrote, was ‘such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains’. A central feature of Madison’s constitutional strategy thus became the construction of an electoral system designed to ensure the election of disinterested, enlightened, and virtuous representatives to *one* house of the federal legislature. The chamber thought to be most congenial to the elevation of enlightened statesmen was ‘the great anchor of government’, the federal Senate.²⁴⁹ In determining that the Senate could, if correctly arranged, operate in an enlightened and impartial manner, Madison had learned from the successes of the Constitution of Maryland.²⁵⁰ At the Convention he explicitly invoked Maryland’s Senate to support his argument that the term length of the federal Senate should be as long as seven years:

In every instance of [the Maryland Senate’s] opposition to the measures of the [House of Delegates] they had with them the suffrages of the most enlightened and impartial people of the other states as well as of their own. In the States where the Senates were chosen in the same manner as the other branches, of the

²⁴⁸ Madison’s pluralist commentators have, of course, offered conclusions similar to the one outlined in the preceding paragraph. But where such interpreters err is in supposing that the neutralisation of particular interests within congress would result in the institutionalisation of bargaining. There is, however, almost nothing in the way of textual or contextual evidence to support such a contention. It instead seems clear from a close-reading of the tenth *Federalist* that Madison expected interested Representatives to work together to pursue the aggregate interest. In *Federalist* No.10, Madison wrote that: ‘By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures’.

²⁴⁹ Madison, ‘Letter to Thomas Jefferson (October 24, 1787)’, p.209.

²⁵⁰ The Constitution of Maryland (1776) stipulated that Senators would serve for five years after being elected indirectly; see: Section Two, Article Fourteen of the *Constitution of Maryland* (1776).

Legislature, and held their seats for 4 years, the institution was found to be no check whatever agst. the instabilities of the other branches.²⁵¹

Within the Constitution of Maryland, Madison had found an effective antidote to the problems often found in popularly-elected legislatures. Extended terms for senators, he surmised, would provide the federal congress with a level of stability which would otherwise be found lacking. Though he persistently clamoured for one branch of the federal government to popularly and directly elected, Madison remained aware that lower houses were vulnerable to instances of ‘sudden and violent passions’, often incited by factious leaders harbouring pernicious ambitions.²⁵² For Madison, this reality necessitated the establishment of an indirectly elected body – one that was capable of counteracting the frivolity and unrest of the lower house. Thus central to Madison and Edmund Randolph’s *Virginia Plan* was the inclusion of an upper house composed of members elected by the lower house ‘out of a proper number of persons nominated by the individual legislatures’.²⁵³ Such an arrangement was distinctively Madisonian: the States were to be checked by the House, and the House was to be checked by the States. The result, the Virginians hoped, would be the selection of only the most able and impartial citizens who could remain detached from local interests and factional disputes.

Though Madison and his Virginian allies lost their battle to establish a Senate based on proportional representation, they in fact found themselves to be not entirely dissatisfied with the upper house that emerged from the Convention. That the federal Senate was small, and its members sufficiently detached from the interests of constituents, chimed with Madisonian federalist theory. Madison’s conception of the nature and role of the Senate thus differed significantly from his vision for the federal House. In *Federalist* No.62 he emphasised the ‘dissimilarity in the genius of the two bodies’, declaring that the bicameral arrangement would prove to be double a ‘security to the people’.²⁵⁴ He

²⁵¹ James Madison, ‘Term of the Senate (June 12, 1787)’, in *PJM*, X, pp.50-51 (p.50).

²⁵² James Madison, ‘Federalist No.62’, in *The Federalist*, pp.364-369 (p.366).

²⁵³ Madison *et al.*, ‘The Virginia Plan’, p.16.

²⁵⁴ Madison, ‘Federalist No.62’, p.366. By ‘genius’, Madison presumably meant ‘nature’ or ‘disposition’; see: ‘Genius’, in *Dictionary of the English Language* (1755).

went much further, however, in expounding the differences between the two legislative bodies and in *Federalist* No.62 asserted that:

The necessity of the Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious passions...It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the *comprehensive interests* [emphasis added] of the country, should if left wholly to themselves, escape the variety of important errors in the exercise of their legislative trust.²⁵⁵

Where Madison had appealed for the House to consist of a larger number than that which had been proposed at the Convention, he offered an entirely opposing statement in relation to the Senate; it was the limited size of the body, he argued, which rendered it capable of discerning the true public good. In a speech to the Convention he challenged the assertion offered by John Dickinson (Pennsylvania Delegate) that by expanding the size of the Senate, greater ‘weight’ would be accorded to the body. For Madison, the history of Roman Tribunes refuted Dickinson’s contention and affirmed the idea that there existed an inverse correlation between the size of upper houses and the ability of such institutions to counteract and check popular branches:

‘[The Roman Tribunes] lost their influence and power, in proportion as their number was augmented...The more the representatives of the people therefore were multiplied, the more they partook of the infirmities of their constituents, and the more liable they became to be divided among themselves...When the weight of a set of men depends merely on their personal characters; the greater the number the greater the weight. When it depends on the degree of political authority lodged in them the small the number the greater the weight’.²⁵⁶

Madison went on to argue that it would be salutary for the government to be constituted in such a manner that ‘one of its branches might have an [opportunity] of acquiring a competent knowledge of the public interest’.²⁵⁷ He understood that this would be best achieved by establishing a small institution in which representatives would enjoy long tenures and freedom from the demands of particular interests. It is clear, then, that Madison did not have an holistic

²⁵⁵ Madison, ‘Federalist No.62’, p.366.

²⁵⁶ James Madison, ‘Election of the Senate (7 June, 1787)’, in *PJM*, 10, pp.39-40 (p.39).

²⁵⁷ James Madison, ‘Term of the Senate (June 26, 1787)’, in *PJM*, 10, pp.76-78 (p.76).

understanding of the role of the federal representative; thus in determining the public interest, the Senate would be charged with a role quite different from that of the House.²⁵⁸ The republican interpretation of the Madisonian system has thus erred in obscuring this important distinction between House and Senate. The pessimistic tone adopted by Madison in his discussions concerning the House was entirely absent from his remarks surrounding the nature of the Senate – even after he had made crucial concessions over the design of the body to rivals at the Convention. Madison expected the upper house to be the ‘great anchor’ of government not because of the uniqueness of its legislative responsibilities, but because of the nature of its membership, composition, and design.

In his *Observations on Jefferson’s Draft of a Constitution for Virginia* (1788), Madison was able to speak more freely about the nature of upper houses than he ever could in the very-public and highly-political *Federalist*. He began the essay with a treatment of Jefferson’s Senate design, and noted that ‘[t]he term of two years is too short. Six years are not more than sufficient’, reasoning that the principal role of an upper house was to withstand the ‘occasional impetuosities of the more numerous branch’.²⁵⁹ For Madison, the primary role of a senate was to offset what he termed the ‘spirit of locality’,²⁶⁰ while it was thought that the election of more virtuous and enlightened representatives could certainly contribute to the attainment of this end, Madison understood that the common good could be best realised in the upper house only through a process of careful *institutional* design concerned with the size of the body and the length of tenure. In other words, Madison hoped that the Senate itself would shape the character of its membership as well as the politics of the congress.

In *Observations* he questioned Jefferson’s plan to apportion Senators by district on the grounds that the spirit of locality was ‘inseparable from that mode’.²⁶¹ His critical remarks were followed by a typically Madisonian conclusion: ‘[t]he most effectual remedy for the local biass [*sic*] is to impress on the minds of the

²⁵⁸ Madison, ‘Term of the Senate (June 26, 1787)’, p.76.

²⁵⁹ James Madison, ‘Observations on Jefferson’s Draft of a Constitution for Virginia’, in *The Papers of James Madison*, William T. Hutchinson et al. (eds.) (Charlottesville, 1977), pp.285-293.

²⁶⁰ Madison, ‘Observations’.

²⁶¹ Madison, ‘Observations’.

Senators an attention to the interest of the whole Society by making them the choice of the whole Society'.²⁶² Madison's language here was particularly revealing. He appeared to suggest that institutional design was crucial in shaping the character of representatives; put differently, he was implying that institutions made men, and not *visa versa*. Madison thus fully expected federal Senators to exhibit virtue and enlightened characteristics, but he importantly understood that the ethos of the Senate would be shaped as much by the institutional design of the body as by the 'natural' attributes of its members. Madison thus sought to arrange the upper house in such a manner that its membership would have little option but to govern impartially and in the long-term interests of the nation. By separating representatives from the people through the process of indirect elections, Madison was attempting to guard against the possibility of factionalism emerging in both houses.

3.4 An Effectual Remedy of Two Parts: Neutral Congressional Authority in Federalist Theory

Discussions concerning the extent to which Madison's design for the Senate amounted to a plan to establish an 'aristocratic' branch of government in fact tell us relatively little about the Madisonian variant of federalist theory. While it may be true that John Adams and his Anti-Federalist antagonists both understood Madison's Senate plan to be inherently aristocratic, there is little to suggest that the Virginian deliberated at Philadelphia with England's House of Lords in mind.²⁶³ Adams was not Madison, after all, and nowhere did the latter exalt the idea of mixed-government so often lauded in the writings of the former. For at least some federalists, Madison included, the civic humanist tradition had given way to a more practical, scientific, and in many ways Scottish, way of thinking about politics. Before arriving at Philadelphia in 1787 Madison had already identified political neutrality as the central precondition of successful republican governance. The conception of neutrality Madison sought to resurrect was not one that he borrowed from the teachings of classical republican or civic humanist thinkers, but was instead one which he discovered through his researches into the

²⁶² Madison, 'Observations'.

²⁶³ For more on the idea that Madison sought to elevate a natural aristocracy see: Paul Ellenbogen, 'Another Explanation for the Senate: The Anti-Federalists, John Adams, and the Natural Aristocracy', *Polity*, Vol.29, No.2 (Winter, 1996), pp.247-271.

nature of the institution of monarchy. The pragmatic-Madison identified political neutrality as a favourable characteristic of monarchs and attempted to instil his constitutional system with that same attribute.

Thus his entire constitutional philosophy revolved around determining how to establish neutrality in the modern republic, and his principal solution was to modify the sovereign body in a way that established equilibrium between competing factions, allowing *disinterested* coalitions to form. Madison's commitment to ensuring that disinterested and virtuous representatives would be present in the Senate may appear *prima facie* as a continuation of aspects of the Commonwealth tradition of political thought. But Gordon Wood and others have been too emphatic in highlighting a linkage between Madison and the civic humanists. There was, in the Madisonian system, plenty of space for the interests of constituents to be represented by *interested representatives*; what Madison endeavoured to construct was a constitutional system that prevented one particular interest from dominating. He hoped that disinterested coalitions would form in the House, and that the demands of such coalitions would be judged, amended, and authorised by the much smaller, and ultimately less political, Senate. Perhaps, then, Madison was indeed a more modern thinker than Wood and the republicans care to admit.²⁶⁴ Madison's philosophy was markedly less teleological than that espoused by the civic humanists; he was more interested in forestalling the emergence of a particular type of politics than he was with encouraging particular political ends. But the central flaw in the republican interpretation of the Madisonian system remains the manner in which scholars have failed to sufficiently differentiate between the House and Senate; it has allowed Wood, Morgan, and others to portray Madison's senate design as indicative of his entire political philosophy.

Thus in the context of discussions concerning Madisonian bicameralism, the term 'natural aristocracy' is in many ways a misleading one that overshadows Madison's central constitutional objective: the construction of neutrality. Elevating a group of enlightened, impartial, virtuous, and able men to the

²⁶⁴ After emphasizing the importance of a patrician elite in federalist theory, Wood remarks that 'Madison, in other words, was not at all as modern as we make him out to be'; Wood, 'Interests and Disinterestedness', p.92.

national government was, he remarked, merely the *auxiliary* desideratum of republican government – it was both a way to reinforce the neutrality of the state and a method for ensuring that any perverse sentiments displayed in the House did not make their way on to the statute books. While Madison certainly thought that the method of indirect election offered a higher probability that the ‘purest and noblest’ characters would be extracted from the citizenry, his framework outlined in the *Virginia Plan* suggests that he coveted the construction of a system in which there would be a significant degree of interaction between both houses. It seems clear that he did not envision the federal senate as an entirely autonomous, independent, and privileged branch of government like Britain’s House of Lords.

In Madison’s view, what really differentiated the House from the Senate was that members of the latter body would be naturally more ‘detached’ from local interests and thus better placed than their colleagues in the House to exercise discretion and identify both the common good and the long-term interests of the nation. It was the lengthy nature of Senate membership as well as the state-wide method of indirect election that Madison thought would establish the upper house as the stable anchor of the federal government. His conception of a properly-constituted federal senate was thus less a nod to the patrician elites of classical antiquity (or Britain’s noble few) than it was a pragmatic endeavour to provide his constitutional system with impartiality and political neutrality. An electoral system geared toward the elevation of enlightened statesmen, he reasoned, was the surest way to infuse American politics with the type of stability and impartiality that had been largely absent since Independence.

As single entities, Madison was aware that both of the houses he theorised were lacking in crucial areas; he remained conscious that lower houses were apt to descend into factionalism, and that upper houses could easily lose sight of the demands of constituents. But Madison expected a well-balanced congressional system to stand greater than the sum of its parts. As was characteristic of his broader approach to constitutional design, he was not prepared to rely on one single formula or mechanism to provide his governmental system with sufficient neutrality. If, for some reason, equilibrium failed to emerge in House, or

impartial governance failed to take hold in the Senate, the hope was that the other body would be able to exercise its veto to ensure that federal governance continued to remain neutral between competing interests. For Madison, *inactivity* was the great friend of neutrality.

- 4.1 'A Frequent Source of Error': Interests Common and Particular
- 4.2 Heterogeneity and Political Liberty in the Extensive Republic
- 4.3 A New Theory of Federalism?

The *ultra vires* adoption of the Constitution of the Year VIII (1799) marked the end of an extraordinary, and often calamitous, period of constitutional experimentation in eighteenth century France. Crafted by l'Abbé Sieyès in an effort to de-politicise the French state and rid the political landscape of factionalism, the Constitution of the Consulate stood in sharp contrast to the more republican-oriented Constitution of the Directory which preceded it. Following the events of 18 Brumaire, the doctrines of institutional balance and constitutional separation were emphatically cast aside in favour an alternative approach emphasising the virtues of centralisation and executive dominance. The strand of 'liberal authoritarianism' that informed Sieyès' constitutional philosophy during this period was primarily an intellectual response to what he considered to be the failure of republicanism in the 1790s. Jaded by the frequent upheavals and crises which marked the revolutionary period, the Brumairians began to view the concepts of political autonomy and democracy with increasing suspicion, and in response, endeavoured to forge and establish a new, anti-political, constitutional order capable of providing for strong centralised governance as a way to ensure political stability.

Though Bonaparte certainly made easy work of exploiting the institutional structure of Consulate regime to solidify his position at its summit, Sieyès'

liberalism during this period should be in no way minimized or glossed over.²⁶⁵ Prompted by a deep rooted suspicion of factional politics, the Abbé was sincere in his belief that political stability and individual liberty could be best served in the modern era through the establishment of an anti-political constitutional order geared toward the production of strong ‘rationalist’ central governance. Taking this as his starting point for a post-revolutionary constitutional schema, Sieyès went on to fashion a markedly anti-democratic and hierarchical framework that was both rooted in a set of highly-complex indirect electoral processes and devoid of any mechanisms geared toward the production of constitutional balance. But although the blueprint for the Consulate was certainly the product of his adherence to a particular species of *liberal* political theory, the Constitution of the Year VIII established an environment that could scarcely have been more hostile to the preservation of civil liberties. By 1802, an authoritarian police state existed on the ruins of the comparatively moderate republican institutions that had guided the French nation through the chaos of the middle-1790s; thus, no more than three years after the inception of the Sieyès’ model it was patently clear to most liberal-republican thinkers that the nation’s brave experiment with civil liberty, political autonomy, and republican governance had had come to a decisive end. Bonaparte’s wish had materialised: the revolution had indeed been terminated.

The catastrophic failure of the Constitution of the Consulate to preserve civil liberties did not go unnoticed by Constant, who, by 1802, had had begun to devote his attention to the production of his two major political treatises of the first decade of the nineteenth century – *Principes* and the unfinished *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*. Though both works explored a wide range of political and constitutional problems, each, in its own specific way, grappled with the fundamental question of whether a republican government could effectively subsist and operate within the context of a large and diverse modern nation state. In taking on this fundamental problem in republican political theory, Constant

²⁶⁵ Geoffrey Ellis, *Napoleon* (New York, 1997), pp.46-47; Jainchill, *Reimagining Politics*, pp.198-200.

was arriving at an intellectual juncture at which Madison had found himself just a decade earlier.

But for Constant, the stakes were considerably higher than they had been for the American federalists. Whereas in the case of the burgeoning United States, the primary alternative to Madison's theory of the extensive republic was the continuation of loose-confederacy, it was all too clear to Constant that in the absence of an effective model of republican government, the French people would likely find themselves perpetually under the rule of an authoritarian tyrant. The transition from the structural instability of the Directory years to the Napoleonic authoritarianism of the Consulate was proof enough of this, and *ergo* recent French experience seemed to *prima facie* support the more philosophical proposition advanced by Montesquieu and Jacques Necker that a large nation required monarchical governance – or at the very least a dominant executive branch.²⁶⁶

But for Constant, any deduction that followed the logic of Montesquieu's dictum was erroneous. In his view, the French people were yet to enjoy the benefits of a truly republican order – one grounded in the de-centralisation of political power and the implementation of direct methods of election. Thus, while during the 1790s he watched on in hope as the Thermidorians made laudable, but in many cases hopeless, efforts to chart something of a middle ground between neo-Jacobin radicalism and the reactionary impulses of the ultra-Royalist right, he recognised that the Constitution of the Year III was itself fundamentally flawed, and that tying the weaknesses of the Directory to the concept of republican government produced a false equivalency. As he sat down, then, in 1802 to produce his two-part political treatise, the act of crafting and articulating a defence of an extensive republic became a leading priority. In short, what he resolved to explicate was the idea that individual liberty could be best advanced

²⁶⁶ In 1792, Jacques Necker, published his monumental *Du pouvoir exécutif* within which he appealed for the French constitution to be reformed and modelled in accordance with the British model. Through developing a defence of hereditary along utilitarian lines, Necker declared that only the institution of monarchy (a particularly robust executive authority) could preside over a nation as vast and diverse as modern France; K. Steven Vincent, 'Benjamin Constant, the French Revolution, and the Origins of Romantic Liberalism', *French Historical Studies*, Vol.23, No.4 (Fall, 2000), pp.607-637 (p.619).

under *impartial* governance, and that such impartiality, or neutrality, could be produced by a particular type of representative system.

The purpose of the present chapter is to revive Constant's theory of an extensive republic in an effort to cast light on the ways in which he endeavoured to capitalise on representative institutions in order to produce *neutral* governance. It begins with an examination into his theory of the 'common interest' as expounded in *Principes*, and argues that Constant understood the abrogation of the *particular* from the legislative process to be the key to the production of laws consistent with the rights and interests of individuals and minorities. Here, I show that Constant sought to constrain the jurisdiction of the state through establishing the advancement of the common interest – something distinct from the advancement of particular interests – as the only legitimate justification for legislative action. In this way, my findings suggest that in his efforts to constrain the jurisdiction of the state, Constant eschewed a reliance on the incorporation of *absolute* limitations, and instead sought to place restrictions on the type of rational that could be invoked to *justify* state action.

After surveying the philosophical undercurrents of his theory of modern representation, I move onto an investigation into the system of '*l'élection sectionnaire*' as set forth in the more institutionally-focused *Fragments* manuscript. Here, I present the case that Constant pursued the almost paradoxical line of reasoning – one also advanced by Madison – that the *representation of the particular* was the key to ensuring the discontinuation of factional legislative politics. Otherwise stated, the chapter contends that Constant endeavoured to construct a constitutional system within which the claims of competing interests would be neutralised within the legislative process. In sum, I argue that Constant understood only those laws consistent with an austere conception of the common interest to be legitimate, and that he found in the idea of an extensive republic an institutional solution to the problem of mitigating the production of laws inspired by non-neutral particular interests.

Finally, the chapter explores Constant's position on the advantages of federal government. Without delving too deeply into the Madisonian theory of federalism (something explored in considerable depth in chapter six), I make the

case that even though Constant's position was developed independently of Publius' work in *The Federalist*, he, like Madison, appreciated benefits occasioned by the establishment of a federal system within which both the central authority and the constituent municipalities were each able to act on citizens directly.

4.1 'A Frequent Source of Error': Interests Common and Particular

Although a key feature of the Consulate was the concentration of power in the executive branch, the totality of the French revolutionary experience had taught Constant that in the absence of a monarch, it was the authority of the legislature which had to be considered the greatest threat to modern liberty. Many of the interdictions Constant criticised in *Principes* were not arbitrary decrees but rather legislative acts promulgated by parliamentary majorities through the correct constitutional channels. While he had lent his support to the Directory during the late-1790s, he condemned the regime's leaders in Livre IV of *Principes* for their role in the passage of the laws of 20 Fructidor an III, 7 Vendémiaire an IV, and 19 Fructidor an V.²⁶⁷ It was evident to Constant that while power may have been separated under the Directory, it was certainly not limited.²⁶⁸ Sceptical then of the capacity of traditional, and largely republican, constitutional mechanisms to guarantee modern liberty, he turned his attention to limiting the *sum total* of political power, as well as with providing individuals with an inviolable sphere of existence placed well beyond the purview of the legislature.

This endeavour, to both limit political authority and maximise privacy, ran firmly against the current of eighteenth-century French political theory and practice.

²⁶⁷ The items of legislation to which Constant referred in effect continued the legacy of the Terror; the law of 19 Fructidor V, for instance, targeted '*prêtres réfractaires*', granted the executive with the power to arbitrarily declare a state of siege, and established military commissions in the style of those favoured by the Committee of Public Safety; Brown, 'Echoes of the Terror', p.533; Godechot, *Les Institutions*, p.455; Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, 1998), p.38.

²⁶⁸ His comments here were tied to a broader critique of the doctrine of the separation of powers advanced in *Principes*. While he noted that the division of power was crucial to the health of any regime, he questioned the capacity of such a constitutional arrangement to effectively guarantee individual liberty; in Livre II, he wrote: '[c]e qui m'importe, ce n'est pas que mes droits personnels ne puissent être violés par tel pouvoir, sans l'approbation de tel autre; mais que cette violation soit interdite à tous les pouvoirs. Il ne suffit pas que les agents de l'exécution aient besoin d'invoquer l'autorisation de législateur, il faut que le législateur ne puisse autoriser leur action que dans une sphère déterminée'; Constant, *Principes*, p.54.

Though Paine, Franklin, and Sieyès had each explicitly claimed that the sovereign authority ought to be limited, Constant remained aware that the partisans of limited political power had been decidedly ignored in modern France; the intellectual legacies of Rousseau and Mably, it seemed, still cast a persistent shadow over the French political landscape.²⁶⁹ Constant was thus aware that his plan to limit the sum total of political power was a radical endeavour and he noted that if his pursuit were to be successful it was vital that he be able demonstrate that it was indeed possible to limit power. The central question he asked in the fourth chapter of Livre II was whether power could be restrained by something other than power itself; the theoretical consistency of his thesis hung on his ability to provide a solution to this problem.

The manner in which Constant endeavoured to resolve this problem was indicative of both his educational background and the overriding ‘Whiggishness’ of his understanding of history. He attested that when modern governance was compared with the political systems of earlier epochs, it was patently clear that the extent of political authority had been increasingly restricted over time; ‘*l’autorité sociale*’, he boldly claimed, ‘*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 en pareil droit*’.²⁷⁰ Considering that Constant had endured the horrors and arbitrariness of the 1790s, such a statement was as optimistic as it was profound, but his overarching argument was nevertheless clear and carried considerable weight. As human history had progressed, he explained, more and more restrictions had been placed on the exercise of political authority; as the slavery of Plato’s *Republic* had been replaced by the privilege of feudalism, conditions of domination had been mitigated and lessened throughout human history. In this way, Constant explained, the authority of the state was in fact constrained by something other than power itself; it was constrained by the weight of public opinion.²⁷¹ He elaborated on this point by claiming that:

²⁶⁹ Constant, *Principes*, pp.26-29.

²⁷⁰ Constant, *Principes*, p.56.

²⁷¹ Constant, *Principes*, pp.56-57.

*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. L'on pourra s'occuper ensuite de la garantir d'une manière plus fixe, par l'organisation particulière des pouvoirs politiques. Mais avoir obtenu et consolidé la première garantie sera toujours en grand bien.*²⁷²

But Constant sought to further limit political power and lessen the frequency with which the legislature could interfere with individual life; in other words, he wished not only to mitigate conditions of domination but also sought to devise principles that could contribute toward limiting unnecessary interference. Despite then having demonstrated that political authority had been subject to restriction and limitation throughout the course of human history, Constant took it upon himself to prove that a modern state could be restricted considerably without sacrificing stability and governability. In Livre II, he sketched a framework for a minimal, or nightwatchman state, declaring that: *'Deux choses sont indispensables pour qu'une société existe et pour qu'elle existe heureuse. L'une qu'elle soit à l'abri des désordres intérieurs, l'autre qu'elle soit à couvert des invasions étrangères'*.²⁷³ By endowing the state with the authority to impose penal laws and resist foreign aggressors (the *necessary* functions of the state), he argued, individual life and national security would be protected: *'La nécessaire serait fait'*.²⁷⁴

This minimal political organisation was not, however, a formal constitutional proposal that he wished, or expected, to see implemented in modern France. A minimal state reduced to the performance of only 'necessary' functions was, after all, a far cry from the comparatively-active American republic that he so much admired. But the minimal state presented in Livre II was far from superfluous to the general argument of the early books of *Principes*. His nightwatchman state was a hypothetical creation which served to prove that government could indeed be accorded a clearly defined jurisdiction and a set of precise roles.²⁷⁵ By formulating a framework for a government reduced to the performance of only necessary functions, Constant demonstrated that political

²⁷² Constant, *Principes*, pp.56-57.

²⁷³ Constant, *Principes*, p.57.

²⁷⁴ Constant, *Principes*, p.58.

²⁷⁵ In the next book (Livre V) Constant explained that the nightwatchman state presented in Livre IV was indeed simply hypothetical. As is clear from later books, he in fact believed that the state could perform a much broader role while remaining free and legitimate.

authority could legitimately stand sovereign and dominant *within* its sphere of jurisdiction while remaining circumscribed by a sphere of private existence where liberty and autonomy would be the norm.

But in *Principes*, Constant advocated not for a minimal state but for a neutral one. He did not equate inactivity with sound governance but instead wished to see the ‘particular’ and ‘factional’ removed from the sphere of the political, and for public decisions to be informed by objective and impartial reasoning. For Constant, one of the leading drawbacks of modern governance was the manner in which utilitarian considerations were so often invoked to *justify* and guide legislative interventions. He considered the principle of utility to be dangerous for the reason that it stimulated feelings of advantage; and since the evaluation of advantage was a subjective pursuit, he went on, any appraisal of the utility of a particular governmental action would be necessarily arbitrary.²⁷⁶ His central concern was that since the principle of utility was merely a matter of individual calculation, when guiding the actions of a political authority utilitarian principles could be invoked to justify a wide range of orders and prohibitions; it was the deployment of utilitarian reasoning in the 1790s which had, in Constant’s view, turned France into ‘*un vaste cachot*’.²⁷⁷

In an effort to abate the employment of utilitarian reasoning in the formation of the laws, Constant searched for an objective standard against which the legitimacy of legislation could be determined. His proposal was that legislation should be formed on the basis of the ‘common interest’ - an entity distinct from particular and factional interests, as well as from the ‘interest of all’.²⁷⁸ He made clear that matters constituting a common interest were few; they were not merely those issues that touched all members of society but were instead those matters which affected everyone in their capacity as *members* of the collective, and not merely as *individuals*.²⁷⁹ Constant explained that while religion was an issue which touched all members of society, it concerned them only as individuals;

²⁷⁶ Constant, *Principes*, p.59.

²⁷⁷ Constant wrote that: ‘*L’on peut trouver des motifs d’utilité pour tous les commandements et pour toutes les prohibitions. Défendre aux citoyens de sortir de leurs maisons préviendrait tous les délits qui se commettent sur les grandes routes*’; Constant, *Principes*, pp.67.

²⁷⁸ Constant, *Principes*, pp.52-53.

²⁷⁹ Constant, *Principes*, p.53.

consequently, he concluded, religion could not be considered a common interest and thus necessarily existed ‘outside’ the jurisdiction of political society.²⁸⁰ Harmful actions, by contrast, were the concern of society as a whole; individual actions ceased to be private or particular when they caused harm to others or threatened the liberty of all.²⁸¹

His understanding of the nature and importance of the common interest was set against the philosophy of Jeremy Bentham. Though Constant admired the intellect of the Briton, he warned that Bentham’s conflation of the ‘common interest’ with the ‘interest of all’ was both flawed and dangerous. Where in the *Introduction to the Principles of Morals and Legislation* (1789) Bentham had explained that the public interest consisted of ‘the sum of the interests of the several members of the community’, Constant understood there to be clear distinction between the sum of particular interests and the common, or public, interest.²⁸² His distinction between the interest of all and the common interest of the nation was central to his constitutional philosophy; if legislation were to be formed on the basis of the aggregate interest, the state would be necessarily responding to the partial claims of *particular* interests.

In developing the idea of the common interest as an objective standard, Constant realised two aims which were of paramount importance to his political project. In the first place, the idea of the common interest had the effect of placing severe limitations on the purview of political society. Any innocuous, or at least *prima facie* non-harmful, interest or action was, in his model, not subject to jurisdiction of the state. Thus in delineating the parameters of the political, Constant was not forced to rely upon absolute, or near absolute, rights to constrain the state; in other words, he was not compelled to fall back on what Madison famously, and

²⁸⁰ Constant, *Principes*, p.53.

²⁸¹ Constant, *Principes*, p.53.

²⁸² Bentham’s full account of the nature of the public interest reads: ‘The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The Community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community is, what? – the sum of the interests of the several members who compose it’; Jeremy Bentham ‘Introduction to the Principles of Morals and Legislation’, in John Stuart Mill and Jeremy Bentham, *Utilitarianism and other Essays* Alan Ryan (ed.) (London, 1987), pp.65-112 (p.66). See also: J.A.W. Gunn, ‘Jeremy Bentham and the Public Interest’, *Canadian Journal of Political Science* Vol.1, No.4 (Dec., 1968), pp.398-413 (p.400); Theodore M. Benditt, ‘The Public Interest’, *Philosophy and Public Affairs* Vo.2, No.4 (Spring, 1973), pp.291-311 (p.291).

derisively, termed ‘parchment barriers’. Instead, Constant constrained the competence of the state from the *inside*. He hoped that if assiduously employed during the legislative process, the idea of the common interest would preclude legislators from engaging in a wide range of particular actions – not, it should be noted, because of the likely consequences of such actions but instead because the *rationale* guiding such actions would be inappropriate and illegitimate. Put simply, the common interest, as an objective standard, placed considerable restrictions on what government *could do* while remaining legitimate. This stood in stark contrast to what we would today recognise as ‘basic liberties’ doctrines of liberalism which focus on what the state *ought not to do*.²⁸³

The idea of the common interest served an additional purpose in that it necessarily prevented legislation from being formed on the basis of the claims of particular or factional interests. In this sense, Constant followed a path taken by Madison a decade earlier; both thinkers sought to ensure that governmental action would be formulated according to the needs of society as a whole and not prompted by the demands of particular interests. This was the founding principle of Constant-Madisonian political neutrality; government would rise above the claims of competing interests and pursue only that which was in the common interest of the nation.

4.2 Heterogeneity and Political Liberty in the Extensive Republic

In *Principes*, then, Constant’s conception of the common interest took the form of what could be termed a ‘restraint principle’ – an abstract political rule which, if adhered to, would preclude government from engaging in any actions expressly designed to privilege or hinder the interests of *particular* groups. As a concept central to his understanding of what constituted legitimate and neutral governance, the idea of the common interest went on to underpin Constant’s more institutionally-focused researches into constitutional theory. In *Fragments*, his other great work of the early nineteenth-century, Constant resolved to

²⁸³ As Raz points out, adherents of ‘basic liberties doctrines of liberalism’ place enormous value on formal liberties and believe that the state ought to be limited by placing certain matters and areas of conduct outside the jurisdiction of the political; Joseph Raz, ‘Liberalism, Autonomy, and the Politics of Neutral Concern’, *Midwest Studies in Philosophy* Vol.7, No.1 (Sept, 1982), pp.89-120 (pp. 89-90).

construct a model of representation and legislative procedure capable of ensuring that legislative interdictions would be formed not on the basis of the claims of particular interests, but instead only through deliberative processes centred on advancing an objective, and not to mention austere, conception of the common good, consistent with the rights and interests of individuals and minorities.

Central to Constant's contention that republican governance could act as an appropriate political model for large territories was his recognition that particular 'interests' served as the primary drivers of modern deliberative democracy. In much the same way as Madison, he recognised that the advent of modern commercialism and economic specialization had rendered the ancient concept of virtue an anachronism which could no longer be relied upon to support and sustain the institutions of a republican political order.²⁸⁴ In place of republican virtue, Constant reasoned, the plethora of private and local interests contained within a large nation had to be carefully channelled in such a way that would mitigate the force of factionalism and produce a legislative system through which an austere and pragmatic conception of the public good would be realised on the basis of deliberation and compromise.

Although Constant's *Fragments* was ostensibly written independently of *The Federalist*, his response to the emergence of modern 'interestedness' was broadly analogous to that advanced by Madison in Publius' Tenth essay.²⁸⁵ In a lengthy discussion concerning methods of election in Livre VI, Constant began to develop an argument regarding the distinction between particular interests and the general interest which illuminated the philosophical basis of his theory of modern representation. The position he advanced in the middle books of *Fragments* was that the true public interest could be discerned only through a process of deliberation whereby each representative would act only on the particular interests of their locale. Constant appealed for representatives to uphold the particular, sectional, and local interests of those by whom they had been elected on the grounds that when taken together, the partiality of each

²⁸⁴ Pasquino, 'Emmanuel Sieyes, Benjamin Constant et le gouvernement des modernes', p.217; 222.

²⁸⁵ Jacob T. Levy, 'Beyond Publius: Montesquieu, Liberal Republicanism, and the Small Republic Debate', *History of Political Thought*, Vol.27, No.1 (Spring, 2006), pp.50-90 (p.75).

would amount to the impartiality of all.²⁸⁶ Presumably relying on the geographical scale and demographic diversity of the French republic, Constant traversed a methodological path pursued by Madison a decade earlier. The crux of his theory was that the deliberations conducted between a broad multiplicity of interested representatives could act as self-neutralising processes, through which the more pernicious ambitions of each faction would be extracted, leaving only those interests consistent with the public good.²⁸⁷

Though Constant sketched out his proposal for a system of representation in considerable detail in *Fragments*, it was in *Principes* that he expounded in most detail the philosophical considerations that shaped the specifics of his constitutional programme. Underpinning the democratic essence of his ‘*constitution républicaine*’ was his markedly modern understanding of the value and purpose of political liberty in the modern era. Constant made clear in *Principes* that far from valuable in and of themselves, electoral rights possessed value only in as much as they allowed citizens to guide and moderate the actions of the state. They were to be employed selfishly, in order to advance particular interests and gain security from the ambitions of a potentially hostile legislature:

*Cette liberté politique, qui sert au pouvoir de barrière, lui sert en même temps d'appui. Elle le guide dans sa route; elle le soutient dans ses efforts, elle le modère dans ses accès de délire et l'encourage dans ses moments d'apathie. Elle réunit autour de lui les intérêts des diverses classes.*²⁸⁸

When read alongside his comments in *Fragments*, Constant’s account of the importance of political liberty imparted a great deal about his considerations on the role played by particular ‘interests’ both in sustaining the republic and moderating legislative excess. Constituting a radical reformulation of the ancient concept of civic participation, Constant viewed citizen-led guidance of the government as something related more to opportunity than to exercise. Betraying

²⁸⁶ Constant wrote: ‘*Je veux que le représentant d’une section de la République 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; parce que si chacun est partial pour ses commettants, la partialité de chacun, réunie, aura tous les avantages de l’impartialité de tous*’; Constant, *Fragments*, p.310.

²⁸⁷ Constant, *Fragments*, p.309. Jacob Levy has also noted the similarities here between Constant’s theory and Madison’s extensive republic thesis, although he maintains that Constant formulated his position independently of any knowledge of Madison’s work in *Federalist* No.10; Levy, ‘Beyond Publius’, pp.76-77.

²⁸⁸ Constant, *Principes*, p.469.

the modern orientation of his political philosophy, Constant's position was that the value of political liberty lay primarily, if not solely, in its ability to ensure that no political authority could be allowed to overstep its jurisdiction and interfere with the range of options enjoyed by individuals and sections of society. The underlying premise supporting his contention was that the various interests of a fragmented and diverse political community would *naturally* seek to avoid becoming victims of legislative encroachments. From this, he was able to posit with considerable confidence that in the context of a large republic – based on the principle of direct and localised election – political rights would be utilised by the citizenry as defensive ramparts, employed primarily to protect particular and local interests from the encroachments of a centralised political authority.

In developing his theory of modern representation, Constant sharply distanced himself from the core civic humanist supposition that political rights were of import chiefly because they provided the community with the ability to exercise control over the shaping of its own existence. Profoundly scarred by the excesses of the revolution – which took the form of interdictions carried out in the name of the 'public will' – Constant endeavoured to fashion a system of modern representation that was not only broadly consistent with the principles of individual liberty, but one which had as its principal end the protection of the negative rights of individuals and groups. His leading theoretical innovation on this subject was his contention that provided the various interests inherent within political society could be appropriately channelled, harmful political ambitions – or more specifically, objectives fundamentally inimical to the rights of individuals and groups – could be effectively neutralised through the institutional processes of a deliberative democratic system. The true public good, Constant argued in *Fragments*, could be realised only if *all* particular interests were protected by the representative system through taking away from each its more harmful elements.²⁸⁹ As he made clear in *Principes*, the only legitimate uses of

²⁸⁹ Constant wrote: *Si on les protège tous [individual and sectional interests], l'on retranchera par cela même de chacun ce qu'il contiendra de nuisible aux autres, et de là seulement peut résulter le véritable intérêt public. Cet intérêt public n'est autre chose que les intérêts individuels, mais réciproquement hors d'état de se nuire. Le principe sur lequel repose le besoin d'unité du corps électoral est donc complètement erroné. Cent députés, nommés par cent sections d'un État, apportent dans le sein de l'assemblée les intérêts particuliers, les préventions locales de leur commettants. Cette base leur est utile. Forcés de délibérer ensemble, ils s'aperçoivent bientôt des sacrifices respectifs qui sont indispensables, ils s'efforcent de diminuer, le plus possible,*

public force took the form of instances when government employed its coercive power to prevent individuals from harming one another.²⁹⁰

Much of Constant's reasoning on this subject was informed by his hostility to the idea of politically-enforced conformity, and in *Principes*, he resolved to expand upon Montesquieu's cautious condemnation of the idea of uniformity as outlined in *l'Esprit*.²⁹¹ In challenging the dogma of uniformity, a concept he considered to be inextricably associated with the concept of the general will, Constant highlighted the limitations inherent in the governmental structures of large nations:

*Mais en reconnaissant ces avantages des grands Etats, l'on ne peut méconnaître leurs inconvénients multipliés et terribles. Leur étendue oblige à donner aux resorts du gouvernement une activité et une force qu'il est difficile de contenir et qui dégénère en despotisme. Les lois partent d'un lieu tellement éloigné de ceux où elles doivent s'appliquer, que des erreurs graves et fréquentes sont l'effet inevitable de cet éloignement. Les injustices partielles ne pénétrant jamais jusqu'au centre du gouvernement.*²⁹²

For Constant, the solution to the problems presented by the existence of an extensive republic was to abandon electoral college methods of representation (championed by Sieyès) in favour of the institution of direct and localised elections. On this point he took issue with the proposal advanced by Cabanis that 'la corps electoral' ought to be placed not at the base but at the summit of the political establishment, and from this critique Constant urged that it was vital to situate the source of political authority as low in the hierarchy as possible.²⁹³

Constant's supposition was that by dispensing with indirect methods of election, members of the governing class – individuals liable to quickly recant on their obligations to the people – would find themselves compelled to respect the natural diversity of the nation and in consequence resist engaging in efforts to ensure conformity throughout the nation.²⁹⁴ This recognition was derived from

l'étendue de ces sacrifices; et c'est l'un des grands avantages de leur mode de nomination; la nécessité finit toujours par les réunir dans une transaction commune, et plus les choix ont été sectionnaires, plus la représentation attient son but général; Constant, Fragments, p.309.

²⁹⁰ Constant, *Principes*, p.24.

²⁹¹ Constant, *Principes*, p.385.

²⁹² Constant, *Principes*, p.387.

²⁹³ Constant, *Principes*, pp.390-392.

²⁹⁴ Constant, *Principes*, 390. Constant quoted directly from Cabanis' *Quelques considerations sur l'organisation sociale en général et particulièrement sur la nouvelle constitution* (1799). In the

his understanding that electoral colleges were especially congenial to the promotion of uniformity on the grounds that too much detachment from the sovereign people invariably produced an *'esprit de corps'* among members of the legislative body. Located in the capital, and able to operate independently of public opinion, detached representatives were, in Constant's view, drawn to the imposition of general ideas, implemented by way of fundamental social change.²⁹⁵ But though Constant challenged the method of indirect election chiefly on the grounds that such a model was congenial to evil of politically-enforced uniformity, there was a deeper philosophical reason behind his support for the establishment of direct popular elections in modern France. Implicit within his argument concerning the relationship between uniformity and the composition of representative assemblies was his contention that the imposition of 'sectional' elections could in fact contribute to the limitation of the sum total of political authority – Constant's overriding and leading constitutional objective.

Noting, without contrition, the inevitability of negotiation as a feature of modern politics, Constant made clear that it was both natural and desirable for representatives to remain partial to the rights and interests of their particular section of the nation. In a passage that would not have been out of place in the private exchanges between Madison and Jefferson, Constant highlighted the absurdity inherent in representative systems within which the governing class endeavoured to act upon a public interest comprised of elements with which they were unfamiliar, and to which they had no personal connection.²⁹⁶ Based on his overarching belief – one wedded to Adam Smith's conception of the 'unseen hand' – that the public interest was merely the sum of all particular interests, Constant considered the formation of a legislature which *reflected* the diversity of society to be essential to the realisation of liberal political ends.

text Cabanis declared that the electoral body ought to be placed *'non point à la base mais un sommet de l'établissement politique'*.

²⁹⁵ In *Principes*, Constant wrote: *'Placés dans la capital, loin de la portion de peuple qui les a nommés, les représentants perdent de vue les usages, les besoins, la manière d'être des représentés. Ils se livrent à des idées générales de nivellement, de symétrie, d'uniformité, à des changements en masse, à des refontes universelles qui portent au loin le bouleversement, le désordre et l'incertitude'*; Constant, *Principes*, p.392.

²⁹⁶ Constant, *Principes*, pp.390-391.

But for Constant, the reflection of particular interests in the legislature was not merely a just political arrangement. He considered local interests to be valuable on the basis that they constituted a source of resistance against an authority naturally attracted to considerations of a general nature. Underpinning his contention was the assumption, based on his appreciation for the realities of modern interest-group pluralism, that the various sections of society could be trusted to jealously guard their particular interests. In his view, under the institution of direct election, the corollary of this socio-political development would be the transformation of interest groups into political entities engaged not in the appropriation of political authority but in constraining the *exercice* of political power. Constant explained:

*Les intérêts et les souvenirs locaux contiennent un principe de résistance... Cent députés nommés par cent sections d'un Etat apportent dans la sein de l'assemblée les intérêt particuliers, les préventions locales de leurs commettants. Cette base leur est utile. Forcés de délibérer ensemble, ils s'aperçoivent bientôt des sacrifices respectifs qui sont indispensables. Ils s'efforcent de diminuer le plus possible l'étendue de ces sacrifices et c'est l'un des grandes avantages de ce mode de nomination.*²⁹⁷

In other words, Constant expected the various sections of the nation to serve as counterweights to the ambitions of political actors intent on expanding the jurisdiction of the legislature and implementing interdictions associated with instilling uniformity; a government firmly rooted in public opinion would, Constant explained, find itself compelled to safeguard the interests of individuals and sections, at the expense of the pursuit of a far broader, and exaggerated, conception of the general interest. Leaning on his appreciation for British, American, and ancient history, Constant was remarkably confident that the institution of popular election would produce the ends he wished to see materialise. Free election, he opined in *Principes*, had never existed in revolutionary France, but its many benefits were evidenced in both the caliber of the members of the House of Commons and '*la paix profonde de l'Amerique*'.²⁹⁸ But it was, of course, not only through empirical historical research that Constant derived his understanding that direct election could serve as a moderating political force. Running throughout his exposition of the theory of representation

²⁹⁷ Constant, *Principes*, pp.389-391.

²⁹⁸ Constant, *Principes*, p.398.

presented in both *Fragments* and *Principes* was his belief that in the context of the modern era, citizens were first and foremost *private* individuals; agents who could be counted on to resist governmental encroachments on their rights and interests.

In this sense, Constant envisioned two roles for the modern legislator. On the one hand, it was the job of the representative to engage in the deliberative processes of the state to forge legislative measures that were in the true public interest.²⁹⁹ Such measures would, of course, be few in number given the nature of the theoretical limitations imposed on the legislature by the markedly austere conception of the common interest as developed by Constant in *Principes*. And on the other hand, the representative was, in Constant's model, to be charged with the additional role of safeguarding local and sectional interests from the ambitions of other self-interested groups in the legislature.³⁰⁰ But though they can be thought of as two distinct functions, the twin roles of the modern legislator were in many ways analogous, or at the very least symbiotic: provided representatives produced only those measures that were in the common interest of society, local and sectional interests would necessarily remain protected; and provided local and sectional interests were safeguarded, items of legislation produced by the state would necessarily be in the common interest.

The end, then, of Constant's theory of representation was the preservation of the negative liberties enjoyed by individuals and groups. A love of liberty, he surmised, would at once steer electors toward constraining the jurisdiction of the legislature, only reinforcing the broad degree of freedom prized by modern private citizens. But in developing what was in essence a *consequentialist* justification for political liberty, Constant sharply distanced himself from the

²⁹⁹ It is on this point that we can most clearly discern the republican foundations of Constant's theory of representation. As was indicative of the republican way of thinking about politics, he demanded that political actors distance themselves from the desires of interest-groups. Clearly, then, a central component of Constant's political thought was an emphasis on the virtues of deliberation – a core republican tenant; Cass R. Sustein, 'Beyond the Republican Revival', *The Yale Law Journal*, Vol.97, No.8, Symposium: The Civic Republican Tradition (July, 1988), pp.1539-1590 (pp.1548-1550).

³⁰⁰ But it is here that we can see the ways in which Constant fused the liberal and republican strands of his political philosophy to ensure neutral governance. He was in effect asking representatives to perform the delicate role of managing the interests of particular groups (in order to preserve such interests from legislative interference) while discarding such interests when formulating legislation consistent with the public good.

architects of republican tradition of political thought; thinkers who, at least in Constant's view, understood there to be *intrinsic value* in political liberty on the grounds that the fate of the individual was inseparably bound to that of the community.³⁰¹ An intriguing corollary of Constant's rejection of the ancient, or neo-Athenian, understanding of the value of political liberty was his recognition that civil liberties could be effectively upheld even under a limited distribution of political rights.

As was discussed in Chapter Two, Constant's considerations on the franchise underwent a significant process of transformation in the early nineteenth-century. Where he had once sided with Montesquieu in declaring that that no man should be bound by laws to which he did not contribute, in *Principes*, he advanced the position that under modern conditions, citizenship ought to be dependent upon property as well as age and nationality.³⁰² While his famous *volte-face* on the subject of the extent of the suffrage may appear symptomatic of his alleged cultivation of a more elitist and bourgeois liberalism, Constant's justification for the establishment of limited suffrage (based on the principle of property) was based on the twin contentions that property rights were entirely distinct from other civil liberties, and that since property was merely a social convention, property rights necessarily demanded a greater degree of protection than did other civil liberties.³⁰³

Of course, Constant's conception of modern man emphasised selfishness and the desire for privacy, and based on this pessimistic appraisal of the nature of man he deduced that a non-proprietary class motivated by materialist interests would inevitably employ its political weight to produce legislative measures inconsistent with the rights and interests of the property-owning minority.³⁰⁴ Given his consequentialist understanding of the value of political liberty, he was committed to ensuring that political rights would be used only to realise *negative* ends, namely the restriction of the sum total of political authority. Thus,

³⁰¹ M.E. Brint, 'Jean-Jacques Rousseau and Benjamin Constant: Dialogue on Freedom and Tyranny', *The Review of Politics*, Vol.47, No.3 (Jul., 1985), pp.323-346 (p.325-326).

³⁰² Constant, *Principes*, pp.174-175.

³⁰³ Constant, *Principes*, p.202. A more in-depth discussion of Constant's position on the suffrage is contained in the second chapter of this thesis.

³⁰⁴ Constant, *Principes*, p.205.

Constant's own philosophical doctrine mandated his insistence on the formation of a limited suffrage based on property ownership; in order to retain its value, political liberty could be accorded only to those who could be entrusted to employ it in the attainment of negative ends.

Constant was, however, cognisant of both the political and philosophical charges that his position was likely to attract. In the first place, he went to great lengths to reassure readers that the *civil liberties* of the disenfranchised would not be open to abuse under an electoral system grounded in the principle of property. A political association, Constant explained, was obligated to provide non-proprietors with '*la garantie civile, la liberté individuelle, la liberté d'opinion, [et] la protection sociale*', and it was necessarily in the *interest* of the propertied class to maintain such preconditions of freedom and justice.³⁰⁵ Thus, given that the love of justice, order, and liberty were shared by *all* inhabitants of a nation,³⁰⁶ non-proprietors could, according to Constant, count on the political activity of citizens to safeguard their private rights.³⁰⁷ He further sought to assuage any concerns through reminding readers that continual circulation of property rendered the proprietorial class a fluid one, subject to frequent renewal.³⁰⁸ And furthermore, he suggested that the broad distribution of property in the modern era dictated that a great number of proprietors would themselves belong to both the '*classes industrielles ou salirées*', and that due to this socio-economic fact, a significant number of the possessors of political rights would share much in common with property-less members of the class, deprived of political power as a consequence of their economic status.³⁰⁹

In meeting another potential line of attack, Constant made clear that he rejected granting electors a greater or lesser number of votes in proportion to the extent of their land holdings.³¹⁰ In this way, he envisioned a political system within which small proprietors would possess the same political influence as even the most opulent in society; this was important, he explained in a later book, in that small

³⁰⁵ For Constant, freedom and justice were preconditions of the material well-being of the properties class; Constant, *Principes*, p.205.

³⁰⁶ Constant, *Principes*, pp.204-205.

³⁰⁷ Constant, *Principes*, p.207.

³⁰⁸ Constant, *Principes*, p.221.

³⁰⁹ Constant, *Principes*, p.221

³¹⁰ Constant, *Principes*, p.220.

land-holders generally shared a set of interests held by the non-proprietors of their particular locale. Here, he returned to the idea of *l'élection sectionnaire*. Representatives, directly elected by proprietors, would find themselves compelled to champion the shared interests of their respective sections, ensuring that those common interests, shared by small proprietors and non-proprietors alike, would be given a voice in the representative assembly.³¹¹ It was something of a philosophical leap of faith, but Constant was confident that the political freedom of *some* would be sufficient to protect the civil liberties of *all*, and he derived his assurance chiefly from his understanding that in the modern era, political liberty possessed only a negative value in that it would be invariably employed in order to constrain the jurisdiction of government.

4.3 A New Theory of Federalism?

Constant's supposition that the institution of direct elections within the context of an extensive republic would encourage the production of neutral laws was intimately tied to his appreciation for the advantages offered by federalism. Intriguingly, although Constant declared in Livre III of *Fragments* that the example of the American republic was of little use to constitution-builders in France, his theory of federalism shared much in common with that expounded by Publius on the pages of *The Federalist*. Jacob Levy, who has explored the links between Constant and Madison in considerable depth, considers it unlikely that the former possessed any knowledge of the latter's theoretical work, and even goes so far as to suggest that Constant may have been unaware that the Articles of Confederation had been replaced with the Philadelphia Constitution in 1787/8.³¹²

Though it is certainly the case that Constant nowhere cited the writings of Publius in any of his political treatises, it is evident that he indeed possessed a working knowledge of the federal Constitution; Constant was, for instance, aware that the U.S. system of government incorporated a unitary executive, and in Livre VIII of *Fragments* explained to his readers that the authority of the

³¹¹ Constant, *Principes*, pp.395-396.

³¹² Levy, 'Beyond Publius', p.75-77.

federal Congress had been formally strengthened on more than one occasion.³¹³ That said, though Constant may have been aware of the specifics of the internal structure of the *federal* government, it is nonetheless clear that he was largely unaware of the profound changes made to the relationship between the State and federal governments instituted by the Philadelphia Constitution. But these limitations to the extent that Constant was cognisant of Madison's work on the concept of federal government renders his espousal and defence of what was a typically 'Madisonian' theory of federalism all the more intriguing, and not to mention worthy of careful study.³¹⁴

In the first place, Constant's theory of federalism was underpinned by his distinction between common, sectional, and individual interests. In both *Fragments* and *Principes (II)*, he made clear that only those '*intérêts généraux, commun à chacun des individus*' ought to fall under the jurisdiction of the '*peuplade entière ou ses représentants*'.³¹⁵ In the same passage, he asserted that any interference on the part of the national government into matters not constituting a common interest would be unjust and illegitimate in precisely the same way as would an act of interference on the part of a particular section into a matter affecting the entire population. In this sense, Constant's theory of federalism was non-hierarchical. Neither the national authority, the district, nor the commune could, he insisted, be considered formally superior in the context of their mutual relations to one another. Instead, each subdivision had to remain within its own sphere, and consequently supreme only within its own unique jurisdiction.³¹⁶

Thus, seemingly at ease with the idea of *imperium in imperio*, Constant was advocating for a model of government grounded in the concept of shared, or divided, sovereignty. This sovereignty extended from the national authority down to the individual, and it was predicated on his contention that interests

³¹³ Constant, *Fragments*, p.407.

³¹⁴ Madison's theory of federalism is explored and expounded extensively in the final chapter of this thesis. It is sufficient at this point to note that the two core principles of his theory were: (1) that the federal government ought to be empowered to act directly on individuals as well as on the several states, and (2) that the federal government ought to be empowered to intervene against the states directly in order to protect the liberties of individuals.

³¹⁵ Benjamin Constant, *Principes des politique applicables a tous les gouvernements représentatifs* (Paris, 1815), p.194 (Hereafter cited as *Principes (II)*).

³¹⁶ Constant, *Principes (II)*, pp.195-196.

could be divided into a number of distinct classes. But crucially, in Constant's model the idea of the common interest did not only serve to restrict the authority of the national government and divide the nation into a number of distinct jurisdictions – it was instead a binding and unifying concept. Deeply sceptical of federal systems that held their constituent parts together only through external links, Constant envisioned what he termed a '*différent fédéralisme*' within which the central authority would be empowered to act on each municipality according to the demands of the common interest. In this way, Constant theorised a federal system similar to that drafted by Madison in 1787; the liberties of individuals would enjoy the protection of a centralised authority compelled to intervene when matters of a common interest arose.³¹⁷

In other words, Constant considered the establishment of a centralised authority guided by the common interest, and empowered to intervene in the municipalities independently, as a vital bulwark against local despotisms. On an institutional level, Constant was searching for a middle ground between the (decentralised) Constitution of 1791 and the (highly-centralised) Constitution of the Year III. He appealed for the creation of a 'dual-sovereign' system within which those responsible for executing the national laws of the state *in the various municipalities* would be distinct from those entrusted with managing the interests of *each municipality*.³¹⁸ If the two sets of agents were in any way conflated, he argued, '*les lois générales seront mal exécutées, et les intérêts partiels mal ménagés*'.³¹⁹

Constant's efforts to assert the legitimacy of strong municipal governance as a bulwark against the authority of the centralised state is indicative of the context within which he was operating. Where Madison was beginning from a point of strong state governance, Constant was conscious of the fact that localism had not

³¹⁷ It is important to keep in mind that in *Principes* Constant explained that points of common interest arose when '*les intérêts de chacun sur ce point sont de nature à se reconstruire et à se froisser les uns les autres*'; Constant, *Principes*, p.53.

³¹⁸ Constant, *Principes (II)*, pp.195-196.

³¹⁹ His position here was that if those responsible for enforcing general laws were at the same time those responsible for administering the municipalities, the paradoxical situation would emerge wherein the execution of the general laws would be hindered by the advancement of local interests, and local interests would be simultaneously neglected for the reason that local administrators would be keen to please the superior authority, namely the central executive; Constant, *Principes (II)*, pp.195-196; Constant, *Fragments*, p.410.

emerged as a robust feature of French governance in the wake of the revolution. In this sense, while it may appear that Constant saw decentralised governance as a means toward the preservation of liberty (in a way that Madison did not), a closer inspection of his theory of federalism suggests that he shared with Madison a broad vision of the ideal relationship between central and local government. Both were searching for a particular *balance* between central and local government, and considering the historical dissimilarities between French and American governance, achieving such an equilibrium involved the employment of dissimilar strategies. There was in this sense an understanding of the purpose and advantages of federalism that unified the constitutional philosophies of Madison and Constant. Both allowed for a significant degree of local governance but remained mindful that the presence of an active central authority was a vital precondition of liberty under localism. It was, in the view of both thinkers, the existence of a diverse and *reactive* central authority – one within which factional claims were neutralised – that would allow for the reconciliation of personal freedom and decentralised governance.

Part Three

Guaranteeing the Neutral State

- 5.1 Constant: Neutrality via Restraint Principles
- 5.2 Constant: The Illegitimacy of Social Improvement
- 5.3 Madison: Judicial Review and the Madisonian model of Coordinate Construction
- 5.4 Madison: Blending Popular Control and Judicial Oversight: The Council of Revision

Notwithstanding their perceptible confidence in the capacity of the electoral systems of an extensive republic to encourage and facilitate neutral governance, neither Constant nor Madison was content to rely solely on the heterogeneity of the republic as a mechanism for ensuring the protection of private rights and interests against illegitimate political interference. For both, the realisation of the ideal of political neutrality was as much dependent upon the *formal* limitation of political power as it was upon ensuring the maintenance of an equilibrium between a multiplicity of interest-groups (something they expected would result in the *de facto* limitation of power). Following this rationale, they each turned their attention squarely to questions concerning the legitimacy and constitutionality of legislation, and duly resolved to formulate additional legal-constitutional mechanisms centred on reducing the authority of government to the promulgation of neutral legislative measures.

The purpose of the present chapter is to examine and elucidate the respective strategies developed by Constant and Madison as part of their efforts to ensure the production of neutral and legitimate laws within their broader political systems. The principal argument advanced here is that though both thinkers pursued divergent theoretical and constitutional paths in realising their common objective of securing neutral governance, within their respective approaches we can see the ways in which the *liberal* end of impartial and limited government

was found to be dependent upon the reformulation and imposition of *republican* political concepts. It is hoped that the conclusions drawn here contribute to, and reinforce, the underlying contention advanced in this thesis that the pursuit of political neutrality as an end of government was very much a *liberal-republican* project – liberal in the nature of the objective; and republican in the methods and procedures employed in order to attain the desired outcome.

Beginning with Constant, and what I classify as his ‘restraint principle liberalism’, the chapter holds that the horrors of the revolutionary experience taught him that the key to ensuring neutral governance was to de-legitimise particular *motives* that had been, and could continue to be, used to justify instances of oppressive legislative action. This investigation pushes beyond Constant’s formulation of the ‘common interest’ and engages with his additional principles and meta-legal rules designed to restrict the competence of the state in the absence of absolute restraints on political authority. What we find is that he was concerned less with the substantive content of law than he was with the type of *rationale* used to justify the passage and implementation of particular items of legislation. As we will see, Constant’s primary objective became to overturn the ‘exclusionary politics’ which marked the 1790s, and replace such a model with one that allowed for only the production of *general* laws, justified on the basis of an austere, and widely-agreeable, conception of the common interest.

In the case of Madison, by contrast, I show that the broader neutrality of the state was thought to be dependent upon the primacy of public opinion and the establishment of an equilibrium between the departments of government. The chapter claims that through charting this rather different, and more institutionally-focused, course, there was comparatively far more linkage in Madison’s approach between his theory of representation and the ‘auxiliary arrangements’ which he devised as part of his effort to ensure the production of legitimate laws. Looking to the intricacies of the practice of constitutional construction, I argue, Madison concerned himself with formulating a method of constitutional interpretation capable of achieving the twin (and from some perspectives antithetical) ends of maintaining popular sovereignty and preserving individual privacy from the political sphere. In short, I hold that Madison

formulated a method of ‘interpretative plurality’, under which each branch of government would play a unique role in maintaining the limitations and stipulations put into place by the popular constitution.

As previously mentioned, however, what I hope to demonstrate more broadly is that the respective strategies developed by Constant and Madison as part of their efforts to ensure neutral governance remain crucial parts of the broader story of the development of ‘liberal-republican’ political theory. The constitutionally-focused liberalisms developed and articulated by both thinkers, I maintain, were built upon republican foundations; but this was not, as has been widely suggested, indicative of an organic process whereby classical republicanism was gradually transformed into liberalism under the weight of modern pressures.³²⁰ The liberal-constitutionalisms of Constant and Madison bore republican traits chiefly because both thinkers understood that the ideal of neutral governance could be realised only through the imposition of typically republican concepts and institutions. More specifically, both sought to constrain the jurisdiction of government through facilitating the primacy of popular will, and this constitutional strategy was predicated upon the distinctly modern assumption that individuals – and by extension, the interest groups they formed – were ultimately private entities which could be counted on to safeguard their rights and interests in the face of political ambitions and legislative encroachments.

5.1 Constant: Neutrality via Restraint Principles

During his short-lived tenure as a member of the Tribune – the Consulate’s deliberative legislative body – Constant made his name as a consistent and prominent spokesman for the principles of individual liberty and due process, transforming him into a leading opposition figure and a thorn in the side of Bonaparte’s increasingly militaristic regime.³²¹ Taking a deep interest in the legality of executive action and the boundaries of legitimate political authority, he strenuously warned against what he saw as the re-emergence of the type of

³²⁰ Kalyvas and Katznelson, ‘The Republic of the Moderns’, p.453; Kalyvas and Katznelson, ‘We are Modern Men’, p.533; Viroli, *Republicanism*, p.58; Wood, *Creation*, xii. See also: Jainchill, *Reimagining Politics*.

³²¹ Dennis Wood, ‘Constant: Life and Work’, in *The Cambridge Companion to Constant* Helena Rosenblatt (ed.) (Cambridge, 2009), pp.3-22 (p.8).

arbitrariness that had characterised French political life during the revolutionary period.³²² One of his more controversial interventions as a Tribune was his speech against ‘*le projet de loi concernant l’établissement de Tribunaux criminels spéciaux*’ in which he insisted on the supremacy of formal constitutional procedures and appealed for the continuation of the jury system on the grounds that it provided an indispensable legal safeguard.³²³ Within his public denunciation of the bill, Constant focused on the necessity of constitutional procedures, or *les formes*, and urged that the solidity and stability of government could be guaranteed not through recourse to extra-legal measures but instead through an unwavering commitment to principles of constitutional governance.³²⁴ This intervention, along with many others delivered on the floor of the Tribunate, foreshadowed the legal theory which would both imbue the pages of his *Principes de politique* and come to characterise his mature political thought.

As it pertained to his intellectual development as a political philosopher, Constant was fortuitously expelled from the Tribunate in 1802. Though he had jostled for a legislative position for much of his adult life, and viewed the possession of an active political role as central to his destiny, he did manage to find some solace in his dismissal; upon his departure from the French state in 1802 he had new-found intellectual freedom and had done nothing, he believed, to tarnish his formidable reputation as a defender of constitutional governance and personal freedom.³²⁵ In seeking to capitalise on the changes in his circumstances, he sat down to complete a literary project that he had begun to draft during the long and stormy years of the 1790s. This work was his *Principes*

³²² Constant had good reason to be fearful: the Constitution of the Year VIII explicitly referred to ‘*les émigrés*’ in Article 93 and allowed for arbitrary searching of homes in Article 76. The regime also frequently subverted the constitution through imposing draconian restrictions on press freedom in order to crush factions. See: Louis Bergeron, *France under Napoleon*, R.R. Palmer (trans.) (Princeton, NJ., 1990), pp.8-9; Lefebvre, *Napoleon*, pp.89-90.

³²³ Benjamin Constant, *Opinion de Benjamin Constant sur le projet de loi concernant l’établissement de Tribunaux criminels spéciaux* (Paris, 1801), p.3, pp.32-33.

³²⁴ During his speech Constant warned that: ‘*Mais précisément parce que nous voulons que le brigandage soit réprimé, nous ne pouvons pas vouloir que les innocents soient confondus avec les coupables; parce que notre existence dépend du respect des propriétés nationales, nous ne pouvons pas consentir à ce qu’on leur donne une garantie illusoire, par cela même que elle serait arbitraire; parce que nous sommes attachés au gouvernement, nous devons veiller au maintien de la constitution, dans laquelle seule il trouve des moyens légaux, et une solidité au-dessus de toute atteinte*’.

³²⁵ Constant, *Principes*, pp.516-517.

de politique – Constant’s masterwork and the purest, most systematic, expression of his liberal political philosophy.

Though the text grappled with concepts and ideas at a high level of abstraction, it was always deeply attentive to the political history of France and sympathetic to the fatigue of the French people. As for most who had resided in France during the 1790s, the decline and fall of each of the nation’s regimes of the eighteenth century had left a profound mark upon Constant’s mind; ‘*nous avons*’, he wrote at the beginning of *Principes*, ‘*en peu d’années, essayé de cinq or six constitutions et nous nous en sommes assez mal trouvés*’.³²⁶ After the numerous mistakes and catastrophes of the 1790s, Constant’s political thought took on a more conservative character; the production of political stability became one of his chief aims, second only to his desire to see personal freedom maximised. Reasoning that it would be salutary to abandon seemingly fruitless discussions concerning the virtues of particular forms of government, Constant dedicated much of the first decade of the nineteenth century to the exploration of more abstract political principles, freestanding of any particular constitutional structures. *Principes* was the product of this endeavour and throughout the text Constant tried, as best he could, to eschew discussions of a constitutional nature and instead endeavoured to focus on the timeless principles of freedom and legitimate political association.

Constituting a clear shift away from orthodox classical liberalism (a doctrine necessarily freestanding of a commitment to any particular governmental forms), Constant endeavoured to define the parameters of the legitimate jurisdiction of the state not through a reliance on the imposition of particular liberties, but instead through the development of a set of ‘restraint principles’ which denied the propriety and legitimacy of particular *reasons* for governmental intervention. The innovative nature of Constant’s strategy can be best comprehended when brought into juxtaposition with that advanced by Locke in the *Second Treatise*. Where the English master posited the existence of inalienable rights which, at least theoretically, restrained the competence of the state *externally*, Constant took as his starting point the *motivations* behind legislation and accordingly

³²⁶ Constant, *Principes*, p.19.

resolved to develop principles capable of limiting the jurisdiction of the state *internally*.

Chief among these ‘restraint principles’ was, of course, the idea of the ‘common interest’ – Constant’s objective standard centred on removing the particular and the factional from the legislative process. As was alluded to in the preceding chapter, the common interest was less a negative construction than a principle designed to determine what the state *could legitimately do* in a positive way. An intriguing corollary of Constant’s development of the common interest as a guiding principle of good government was that while he may have vigorously argued for limited governance in *Principes*, he was never of the view that private rights had to take absolute precedence over the basic functions of the state. In other words, Constant understood that government was obliged to pursue the common interest, even if the resulting governmental action took the form of interference. Importantly, however, this did not mean that individual rights were in any way superfluous to Constant’s broader theory of governance. Though he did not seek to use rights to place absolute limits on political power, he nonetheless understood particular liberties to be valuable in that they could be employed to guard against the imposition of coercive measures justified not on the basis of the common interest, but instead on the claims of private or factional interests. In this way, the idea of the common interest and the private rights of individuals enjoyed a symbiotic relationship: according to Constant’s theory, particular interests were necessarily not subject to political jurisdiction, and private rights reflected, and protected, the independence of particular interests.

For Constant, then, once the parameters of the political authority had been determined via the common interest, his leading restraint principle, the sphere of individual liberty could be detected and comprehended. ‘*Les droits individuels*’, he wrote with startling brevity, ‘*se composent de tout ce qui reste indépendant de l’autorité sociale*’.³²⁷ Thus if the state were an expansive and omnipotent one, private rights would be few; but if state action remained consistent with restraint principles, private rights would be plentiful, and a *de facto* sphere of private

³²⁷ Constant, *Principes*, p.58.

individual existence would be established.³²⁸ Thus what differentiated Constant's approach from that of 'basic liberties' doctrines of liberalism was the method by which he derived private rights. Constituting a significant departure from the Lockean orthodoxy, he made the case that the extent and character of private rights could be determined not by a law of nature, but only by taking into consideration the extent and nature of an objective conception of a 'necessary' state.³²⁹

The chief corollary of this was that particular civil liberties could be granted and admitted only *after* the extent and nature of the legitimate political authority had been determined. The state then engendered individual liberties, and such private rights in turn provided citizens with security against illegitimate coercive governmental interference. In other words, private rights contributed to the *continued* limitation of the state, but they did not *determine* the parameters of legitimate governmental jurisdiction.³³⁰ Though he shared with Locke a number of common objectives, Constant's theory did not incorporate the idea that the establishment of civil society involved a dissolution of a natural law into a series of inalienable individual rights.³³¹

Though deeply distressed by the human cost of the Terror, Constant's reflections on the Jacobin's regime indicated that he was principally concerned with the rationale that was so often invoked to justify the destructive actions of the Committee for Public Safety. He reasoned that the prime, and ultimately most

³²⁸ Kalyvas and Katznelson claim that in *Principes*, Constant 'placed rights, understood as a set of pre-political, pre-social individual rights that no human collective authority can eliminate or threaten without losing its legitimacy, at the centre of his discussion'; Kalyvas and Katznelson, 'We are Modern Men', p.522. Their position is partly accurate but, at the same time, fundamentally misguided. Constant could not have understood rights as pre-political and pre-social entities, for the reason that his theory was based on the idea that the state engendered and defined private rights. As will be demonstrated throughout the remainder of this chapter, private rights were subject to redefinition if they conflicted with a common interest.

³²⁹ There were, of course, similarities between Constant's and Locke's understandings of the legitimate end of government; for instance Locke wrote that the state could never 'extend farther than the common good'. But their approaches ultimately diverged in that Constant did not attempt to restrain the state *externally* through positing abstract absolute rights.

³³⁰ It is on this point that Kalyvas and Katznelson are most misguided in their analysis of Constant's theory as presented in *Principes*. They argue in 'We are Modern Men' that Constant used 'immutable' and 'eternal' private rights in the 'institutional delineation and normative circumscription of an omnipotent interior'; Kalyvas and Katznelson, 'We are Modern Men', p.523.

³³¹ For the role of natural law in Locke's theory see: Corwin, 'Natural Law Concepts', p.262; Michael, 'The Role of Natural Law in Early American Constitutionalism', pp.435-436.

perilous, feature of the Jacobin's system of 'revolutionary justice' was its continued reliance on a set of arbitrary measures, heralded for their supposed capacity to prevent crimes before they took place - or in other words, exalted for their alleged *utility*.³³² Constant astutely noted, however, that Robespierre and his associates were not alone in their exhalation of utility as an end of governmental action. Rousseau, Mably, and to some extent Montesquieu, had all, Constant argued, posited that law ought to be useful, and it was clear, he continued, that once the principle of utility was accepted as an end of government, all hope of placing limitations on power was necessarily lost: '[establish political authority] *sans bornes, et vous retombez dans l'abîme incommensurable de l'arbitraire*'.³³³

For Constant, the application of the principle of crime prevention during the revolutionary period was a prime example of how the idea of utility could facilitate arbitrariness; the abrogation of due process, the use of indefinite detentions, and the arbitrary exiling of individuals were all, he claimed, justified on the basis of their supposed capacity to prevent crime.³³⁴ Constant did not, however, stand wholly opposed to efforts geared toward the prevention of crime, and in Livre V he remarked that in many cases the prerogative of crime prevention was not merely a right, but a duty of government.³³⁵ What differentiated arbitrary measures from legitimate crime prevention, he explained, was the manner in which the former explicitly targeted groups united by a particular *interest*. Invoking the memory of the Terror to support his contention, Constant explained that:

On se souviendra longtemps des inventions diverses qui ont signalé ce que nous nommons le règne de la Terreur, et de la loi contre les suspects, et de l'éloignement des nobles, et de la proscription des prêtres. L'intérêt de ces classes, affirmait-on, étant contraire à l'ordre public, on avait à redouter qu'elles ne le troublassent et l'on aimait mieux prévenir leurs délits que les punir. Preuve de ce que nous avons observé ci-dessus, qu'une république dominée par une faction, réunit aux désordres de l'anarchie toutes les vexations

³³² Constant, *Principes*, pp.94-95

³³³ Constant, *Principes*, pp.66-67

³³⁴ Constant, *Principes*, pp.94-95.

³³⁵ In Livre V, Constant wrote that: '*Si l'on entend par le droit de prévenir les délits celui de répartir de la maréchaussée sur les routes ou de dissiper des rassemblements, avant qu'ils aient causé du désordre, l'autorité possède ce droit ou, pour mieux dire, c'est un de ses devoirs*'; Constant, *Principes*, p.94.

*de despotisme.*³³⁶

Thus, central to his opposition to the employment of utilitarian reasoning in the formation of coercive interdictions was his contention that preventative measures often discriminated against particular groups or individuals based on their particular interests. His most penetrating critique of the Jacobin's system of revolutionary justice was not that the substantive content of their coercive interdictions were illegitimate and destructive; rather, what Constant really took issue with was inappropriateness of the *reasons* invoked by the *Comité* in order to justify their various '*mesures extraordinaires*'. He did, of course, find the substantive content of the Jacobin's measures to be highly objectionable, but Constant ultimately treated the specifics of the revolutionary laws as mere symptoms of a more fundamental and persistent problem. In short, what Constant stood opposed to were instances of governmental intervention where the interests of specific groups had been taken into consideration. The principle of utility was not then the *cause* of illegitimate legislation but was instead a concept that assisted the governors, or a fraction of the governors, in justifying and promulgating discriminatory legislation.

But Constant's unrelenting criticism of Jacobin's regime did not mean that he was appealing for a passive state which responded only to violations of the 'harm principle'. In fact, in Livre V he declared that the state possessed the right to direct its powers against *harmless* actions if they seemed likely to produce injurious results:

*Si par exemple un pays était infesté par des rassemblements en armes, l'on pourrait sans injustice mettre momentanément à toute réunion des entraves qui gêneraient les innocents ainsi que les coupables...Si les meurtres devenaient nombreux, comme en Italie, le port d'armes pourrait être interdit à tout individu sans distinction.*³³⁷

In such scenarios, Constant urged, coercive governmental intervention would be legitimate in that it would be directed against actions rather than interests; the safeguard against arbitrariness, he went on, lay within this distinction.³³⁸ Though

³³⁶ Constant, *Principes*, pp.94-95.

³³⁷ Constant, *Principes*, p.97.

³³⁸ Constant, *Principes*, p.97.

he attested that the prohibition of non-harmful actions always debased the liberty of the governed, he remained of the position that government could not be denied the right to intervene against potentially harmful actions – provided that such interventions were necessary and directed specifically against *actions*. Constant warned that if the coercive measures outlined in his hypothetical scenarios – the prohibition of arms and all public meetings – were ‘*dirigées d’une manière exclusive contre certains individus ou certaines classes*’, they would be patently unjust.³³⁹

It is within Constant’s distinction between the prohibition of particular actions and the targeting of particular interests that his conception of political neutrality can be most clearly detected and comprehended. His entire political and legal doctrine revolved around ensuring that interests were not taken into consideration during the legislative process, and his admission that the state could prohibit potentially harmful actions provided him with a way to ensure the maintenance of stability and order without inviting arbitrariness. For Constant, legitimate legislation could have non-neutral consequences; for instance, the prohibition of arms would affect the various groups in society to differing degrees. What really mattered to Constant then was the nature of the reasoning employed to justify coercive governmental intervention. From his examples offered in Livre V, we can see that he condoned legislative action that tracked only the common interests of the nation; in other words, he considered a legitimate government to be one which remained blind to the various competing interests in society. The chief corollary of this was that the *outcome* of legislation could be, and was in fact likely to be, non-neutral; but at the same time, such legislative interdictions would be legitimate provided that they were justified only on the basis of their ability to advance a common interest shared by all individuals in their capacity as citizens.

Constant thus allowed for a significant degree of coercive force on the part of the state and this was due to his extension of what we would today recognise as a liberal harm principle. Where Mill would later offer a harm principle based on perceptible damage to the self or one’s property, Constant developed a more

³³⁹ Constant, *Principes*, p.97

expansive variant of the concept which permitted the state to intervene against *potentially* harmful actions. Though this was perhaps a conceptual innovation likely to constrain the negative liberty of individuals, it was nonetheless consistent with his broader theory concerning the relationship between rights and the state.

5.2 Constant: The Illegitimacy of Social Improvement

Though Constant had convincingly sketched a framework for a state reduced to the performance of only necessary functions, he recognised that political authorities seldom remained confined to their legitimate sphere of activity and almost always sought to arrogate fresh powers and expand the jurisdiction of political society over individual actions. For Constant, this seemingly inevitable and destructive trend had been encouraged and vindicated by the weight of European political philosophy.³⁴⁰ While he usually spared the brunt of his philosophic criticism for Rousseau and Mably, on this point Constant took issue with a number of writers he ordinarily admired; Fénelon, Necker, and even Montesquieu were responsible, he explained, for advancing the highly dangerous idea that man was a product of law.³⁴¹ Constant's appraisal of their shared error was remarkably straightforward: the most illustrious writers of the French enlightenment had mistakenly revived and clung onto the classical, and anachronistic, idea that government was responsible for enlightening the *polis* and ensuring that the individual act in virtuous manner and resist the temptations of corruption and passion.³⁴²

Constant's considerations on the role of the state with respect to the spread of enlightenment and morality could scarcely have contrasted more with the position of the neo-classicists. He consistently argued in *Principes*, as well as in the *Commentaire*, that government was necessarily incapable of identifying objective truth and was thus responsible for the advancement of enlightenment

³⁴⁰ At the beginning of Livre III, Constant noted that: '*Chez aucun peuple, les individus n'ont joui des droits individuels dans toute leur plénitude. Aucun gouvernement n'a restreint l'exercice de l'autorité sociale dans le limites du stricte nécessaire. Tous l'ont étendue fort au-delà ; et les philosophes de tous les siècles, les écrivains de tous les partis ont sanctionné cette extension de tout le poids de leurs suffrages*'; *Principes*, p.65.

³⁴¹ Constant, *Principes*, p.65.

³⁴² Constant, *Principes*, pp.65-66.

only in as much as it had an obligation to step back from philosophic debate and teaching. Constant explained that when in its infancy, the revolution in France was laudable in that it appeared to be focused on removing the support of government from established errors;³⁴³ such action was passive, negative, and neutral between competing beliefs. But in Constant's view, the revolution veered away from its initial objective when the force of the state began to be employed in the destruction of errors.³⁴⁴ While he made clear that no one wished to see the advance of enlightened thinking more than him, he believed that the truth could flourish only if the state adopted a passive role and allowed ideas to clash within the public sphere. In the *Commentaire* he encapsulated this position with remarkable simplicity: '*Ce qui est bon n'a jamais besoin de privilèges, et les privilèges dénaturant toujours ce qui est bon*'.³⁴⁵

Constant's opposition to the idea that the state ought to support the growth of enlightenment was grounded in his understanding of the intellectual fallibility of the governing class. He explained that while the method of election usually ensured the elevation of educated men to positions of political power, there was nothing to suggest that the governors would be intellectually superior to remainder of their class; '*Leurs opinions*', he wrote, '*seront au niveau des idées les plus universellement répandues*'.³⁴⁶ With a stroke of a pen, Constant had taken all legitimacy away from governmental attempts to promote particular ideas, morals, and theories; his point was that the government was just as prone to error as the individuals over which it ruled.³⁴⁷ That the governors would naturally possess a level of knowledge in accordance with the most prevalent ideas of the age, led Constant to insist that while suitable for conservation and protection, the government was not equipped for intellectual and moral leadership. He thus appealed for the state to remain passive, and neutral between conflicting ideas:

³⁴³ Constant, *Principes*, p.365.

³⁴⁴ Constant, *Principes*, p.365.

³⁴⁵ Constant, *Commentaire*, p.150.

³⁴⁶ Constant, *Principes*, pp.71-72.

³⁴⁷ Constant, *Principes*, pp.72-73.

*Mais si l'autorité reste neutre et laisse parler, les opinions se combattent et de leur choc naît le lumière. Le jugement national se forme et la vérité réunit bientôt un tel assentiment, qu'il n'est plus possible de le méconnaître.*³⁴⁸

In Constant's view then, government had no legitimate right to compel individuals to adopt a particular life-plan, belief, or idea; the active promotion of ideas pertaining to social improvement, he argued, was the reserve of enlightened and impartial individuals, detached from the exercising of political authority.³⁴⁹ It was crucial that those capable of advancing the truth and ameliorating society remained as the *governed*; it was only by resisting the allure of political power that they could preserve their independence and objectivity. Though his terminology differed, Constant's position on the relationship between government and the truth foreshadowed the concept of the 'marketplace of ideas' – a leading doctrine in contemporary liberal theory which has its juridical origins in Madison's First Amendment to the Constitution.³⁵⁰ Constant set out his vision for a marketplace of ideas most clearly in his remarks concerning the status of the monasteries. Livre XV, he explained that:

*Il y a deux manières de supprimer les couvents: l'une d'en ouvrir les portes, l'autre d'en chasser les habitants. Le premier fait du bien, sans faire du mal. Il brise des chaînes et ne viole point d'asile. Le second...porte atteinte à un droit incontestable des individus, celui de choisir leur genre de vie.*³⁵¹

This passage, which was briefly examined in the first chapter of this thesis, was one of Constant's most explicit appeals for state neutrality. In it, he was making clear that each individual had the right to adopt a particular life-plan and that any attempt on the part of the government to restrict an individual's range of viable options was fundamentally illegitimate and without justification. This was, however, an appeal for neutrality, not passivity: the state, in Constant's view, had an important role to play in ensuring that each individual had access to a range of

³⁴⁸ Constant, *Principes*, p.411.

³⁴⁹ In Livre XIV, Constant remarked that while the governing class formed part of the enlightened class, the governors, as a mere fraction of the enlightened, were necessarily less 'désintéressée' and less 'éclairée' than the rest of the educated class; *Principes*, p.356.

³⁵⁰ According to Kymlicka, the marketplace of ideas results in less valuable life-plans being driven out by more appealing and valuable ways of life. A marketplace of ideas thus produces non-neutral consequences; Will Kymlicka, 'Liberal Individualism and Liberal Neutrality', *Ethics*, Vol.99, No.4 (Jul., 1989), pp.883-905 (p.884). For more on the origins of the marketplace of ideas theory see: Stanley Ingber, 'Marketplace of Ideas: A Legitimizing Myth', *Duke Law Journal*.1 (1984), pp.1-91.

³⁵¹ Constant, *Principes*, p.355.

potential 'ways of life'. For instance, in the case of monasticism, the state had a duty to *allow* individuals to escape the domination of an ecclesiastical institution, but had no legitimate right to compel an individual to discard a particular life-plan. For Constant, government had an obligation to remain neutral; it could remove obstacles and smooth roads, but it was ultimately obliged to leave individuals to pursue a path of their own choosing.

Constant did, however, acknowledge that the state had an important role to play in the provision of education and the dissemination of knowledge. In his view, education differed from enlightenment in much the same way as punishment differed from crime prevention. The provision of education required the state to perform a supervisory role, overseeing the transmission of knowledge from previous generations to the present; government action on enlightenment, by contrast, involved the intervention of the state over the private matter of opinion. Constant urged that in managing education, government ought to adopt a passive role by which it would merely ensure that citizens had access to educational resources, thus allowing the individual to pursue his own interests. Constant's most important dictate was that teachers ought to remain entirely independent of government and be subject only to public opinion; teachers were to be paid by the state, he urged, but were not to be dismissed by the state without the approval of men independent of government.³⁵²

What Constant was driving at was the establishment of a neutral framework for the provision of education. Government, in his model, would merely establish the conditions under which the individual could shape his own education and utilise the guidance of independent and autonomous teachers. This all contributed toward Constant's vision for a marketplace of ideas, a condition which he considered to be essential to the discovery of the truth and the development of society. Employing the same rationale central to his considerations on governmental involvement in social improvement and 'ways of life', Constant turned his attention in Livre XII to the legitimate role of the state in economic matters.

³⁵² Constant, *Principes*, pp.373-376.

Constant classified political intervention pertaining to economic matters into two distinct branches: prohibitions and privileges. With respect to both, he insisted that society did not possess the prerogative to interfere with an individual's economic activity in order to favour that of another.³⁵³ He considered the granting of an economic privilege to a particular group, individual, or industry to be a manifestly unjust principle on the grounds that it ought to be the aim of society to grant everyone equal advantages in economic activity through the general passivity of state action.³⁵⁴ Constant developed his argument in support of *laissez-faire* economic practices through employing the same reasoning which he had invoked earlier in his discussion concerning the relationship between governmental activity and the promotion of the truth and conceptions of the good. Constant urged that:

*La nature de l'industrie est de lutte contre l'industrie rivale, par une concurrence parfaitement libre et par des efforts pour atteindre une supériorité intrinsèque.*³⁵⁵

As with the importance of debate to the discovery of the truth, Constant considered competition to be the principal driving force behind social development and economic fairness. Where he asserted in Livre XIV that individuals benefited from not just the *possession* of truth but from the *search* for truth, he claimed with respect to economic activity that the destitution of a few individuals in a free market was preferable to '*la masse incalculable de malheurs et de corruption publique que les privilèges introduisent*'.³⁵⁶

Following the empirical work of the Baron de Baert-Duholant in *Tableau de la Grande-Bretagne, de l'Irlande et des possessions anglaises dans les quatre parties du monde* (1802), Constant cited the examples of Birmingham and Manchester as towns which had benefited enormously from free-market economic practices.³⁵⁷ Constant thus challenged the efficacy of economic

³⁵³ Constant, *Principes*, p.241.

³⁵⁴ Constant, *Principes*, pp.243-244.

³⁵⁵ Constant, *Principes*, p.240.

³⁵⁶ Constant, *Principes*, p.243.

³⁵⁷ Baert-Duholant argued that in the absence of corporations in Manchester created the optimal conditions for production: '*et à ce que n'étant que simple market-town, n'ayant ni corporation, ni corps de métier, chacun peut y venir exercer celui qui lui convient et se livrer à toutes ses*

privileges in a pragmatic tone; relying on both Adam Smith and Baert-Duholant, he urged that the history of English commerce demonstrated that the granting of exclusive privileges to large companies had the dual effect of firstly ruining independent merchants, and secondly, of destroying the company itself through the complacency generated by excessive profits.³⁵⁸ He added that privileges were not only detrimental to economic development, but that they also undermined the principles of justice; he understood the granting of economic privileges to be unjust for the reason that while they could be advantageous for a small number of individuals, privileges necessarily excluded '*la grande majorité de la nation*' from any economic benefits.³⁵⁹

In this argument we can see glimpses of the rationale he employed earlier in his discussion concerning governmental involvement in proscribing the 'truth', suggesting that there was a marked consistency in his understanding of the value of state neutrality; unnecessary political intervention in both private and economic matters was considered by Constant to be not only unjust, but also counterproductive. Again, Constant placed considerable emphasis on the importance of neutrality in the justification of government action. Where in Livre XV he had argued that the legitimate end of the neutral state was the creation of conditions whereby each individual was free to choose a particular way of life, he explained in reference to overseas trade that under some circumstances government had an obligation to assist certain commercial companies.

Following Smith, Constant explained that when a group of individuals engaged in trade with '*peuples lointains et barbares*', the state would be justified in granting the company a temporary monopoly as compensation for the dangers faced by the merchants.³⁶⁰ He made clear, however, that such intervention would

spéculations'; Baron de Baert-Duholant, *Tableau de la Grande-Bretagne, de l'Irlande et des possessions anglaises dans les quatre parties du monde* (Paris, 1802).

³⁵⁸ Constant, *Principes*, p.243.

³⁵⁹ Constant, *Principes*, p.242.

³⁶⁰ Constant, *Principes*, p.244. The passage of *The Wealth of Nations* to which Constant referred reads: 'When a company of merchants undertake, at their own risk and expense, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint-stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years. It is the easiest and most natural way in which the state can recompense them for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit.'; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Pennsylvania, 2005), p.617.

be legitimate provided that it was not permanent. While the temporary granting of a monopoly can rightly be considered a privilege, Constant's argument was in fact entirely consistent with his understanding of state neutrality. Just as he expressed his commitment to providing individuals with a range of viable life-plans, his acceptance of the efficacy of *temporary* state-support for - what Smith termed - a 'dangerous and expensive experiment', would eventually provide all individuals with the opportunity to engage such commercial activity once the term of the monopoly had expired. In both the spheres of economic activity and private ways of life, Constant was committed to providing individuals with a range of options; in achieving this he argued that government could have an important role to play provided that it did not, at least in the long-run, favour or promote one particular end over others.

5.3 Madison: Judicial Review and the Madisonian model of Coordinate Construction

Where Constant emphasised the capacity of extra-constitutional, and ostensibly liberal,³⁶¹ principles to ensure the impartial production of legitimate laws, Madison maintained a more consistent belief in the notion that popular sovereignty could indeed be self-limiting and self-neutralising. Turning to the intricacies of formal institutional design in the months before the Convention, he resolved to forge and articulate a model of constitutional construction that would, he hoped, preserve constitutional equilibrium, and by extension, conserve and protect the rights and interests of individuals and minorities. In confronting the question of how a constitution would be enforced and constructed, Madison was pressed into grappling with a relatively recent institutional development in the form of the institution of judicial review. His constitutional strategy demanded a reformulation of the role of the judiciary in performing the distinct tasks of safeguarding personal freedom from oppressive law, and maintaining the consistency and integrity of the formal constitutional framework.

By the time delegates met in Philadelphia in the summer of 1787, the institution of judicial review already had a complicated history in the various States, and it

³⁶¹ I say liberal primarily due to the fact that Constant's restraint principles were freestanding of particular governmental forms.

was a history with which Madison was at least moderately familiar.³⁶² On a practical level, the idea that courts possessed the authority to control the operation of an act of the legislature had been largely solidified in post-colonial America following the Supreme Court of New Jersey's landmark *Holmes vs. Walton* ruling of 1779.³⁶³ But though during the 1780s it was widely understood that the Supreme Courts of the individual States were indeed endowed with the authority to review acts of legislation, there was little in the way of any firm consensus regarding the philosophical and justificatory basis for the institution of judicial review.

During the seventeenth century, the justificatory basis for the institution had been in many ways analogous to the logic that underpinned Sir Edward Coke's classic dicta in *Dr. Bonham's Case*.³⁶⁴ Sparking the emergence of the 'noninterpretivist' model of judicial review, Coke's opinion gave rise to the idea that parliamentary authorities were necessarily without the right to produce items of legislation inconsistent with the principles of the common law and natural right.³⁶⁵ Firmly grounded in the idea that judges uniquely possessed a distinct set of attributes that allowed them to nullify and void legislation, the noninterpretivist tradition laid the foundations for judicial supremacy by placing abstruse limitations on the sovereign authority. As nothing short of a clear repudiation of the very idea of sovereignty, Coke's model provoked sustained opposition in seventeenth-century England, before eventually petering out under the weight of Blackstone's theory of parliamentary supremacy as outlined in the *Commentaries*.³⁶⁶

But though Coke's model of judicial review experienced a sharp decline in the country of its origination, on the American mainland it managed, for a time, to

³⁶² Saikrishna B. Prakash and John C. Yoo, 'The Origins of Judicial Review', 70 *University of Chicago Law Review* 887 (2003), pp.887-982 (p.939).

³⁶³ E.S. Corwin, 'The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention', *The American Historical Review*, Vol.30, No.3 (Apr., 1925), pp.511-536 (p.521); Prakash and Yoo, 'The Origins of Judicial Review', p.936.

³⁶⁴ Allen Dillard Boyer, 'Understanding, Authority, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review', *Boston College Law Review*, Vol.39, No.1 (1998), pp.43-93 (p.89); Leslie Goldstein, 'Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law', *The Journal of Politics*, Vol.48, No.1 (1986), pp.51-71 (p.57).

³⁶⁵ Wood, *Creation*, pp.292-293. Bailyn, *Ideological Origins*, p.176 .

³⁶⁶ Boyer, 'Coke and the Elizabethan Origins of Judicial Review', p.89.

withstand the emergence of Blackstone's theory, remaining an integral part of the American legal system up until the end of the eighteenth century.³⁶⁷ Notwithstanding, however, Coke's sustaining influence in the colonies, the philosophical basis for judicial review in North America was complicated and obscured by the introduction of formal constitutions and charters in the aftermath of the break from the British Crown in 1776.³⁶⁸ Following the first-wave of constitution-making that followed the Declaration of Independence, it was increasingly understood by prominent political actors from across the thirteen States that the presence of formal constitutional documents implied interpretivist judicial review.³⁶⁹

Thus, the institution of judicial review in the individual States was by the middle 1770s grounded in two competing conceptions of the nature and basis of the 'higher law'. In the first place, exponents of the 'noninterpretivist' doctrine of judicial review relied on both the idea of natural rights and the English common law tradition when evaluating and determining the appropriateness, or even the 'constitutionality', of laws passed by the legislatures of the colonies, and later, those of the States.³⁷⁰ Through inspecting formal legislative acts against the idea of 'common right and reason', prominent justices and legal thinkers were in effect fusing the natural rights philosophy of Locke with the activist jurisprudence of Coke.³⁷¹ The result of this was that notable justices in the individual States found themselves compelled to consult a plethora of sources in determining the constitutionality of man-made acts of legislation.³⁷²

But following the enshrinement of popular sovereignty, and the dissemination of Blackstone's *Commentaries*, and materialisation of fixed constitutional

³⁶⁷ Boyer, 'Coke and the Elizabethan Origins of Judicial Review', pp.89-90; Corwin, 'Progress of Constitutional Theory', p.523.

³⁶⁸ Irving R. Kaufman, 'The Essence of Judicial Review', *Columbia Law Review*, Vol.80, No.4 (May, 1980), pp.671-701 (p.684).

³⁶⁹ Corwin, 'The Progress of Constitutional Theory', p.522; Wood, *Creation*, p.292; Goldstein, 'Popular Sovereignty, the Origins of Judicial Review', p.61.

³⁷⁰ Corwin, 'Natural Law Concepts', pp.263-265; Sherry, 'The Founders' Unwritten Constitution', p.1135; Corwin, 'The Progress of Constitutional Theory', p.523.

³⁷¹ Though the concept of judicial review – particularly the noninterpretivist variant – had no place in Locke's philosophy, it nonetheless seems clear that his assertion that the legislature was indeed restricted by a supreme natural law was one which contributed to the gradual construction of the institution of judicial review in the American legal tradition. See: Wood, *Creation*, p.292.

³⁷² Sherry, 'Unwritten Constitution', p.1135; Kaufman, 'Essence of Judicial Review', pp.684-685.

documents in the late-1770s, a competing, and more ‘positivist’, basis for judicial review began to take hold in the American legal tradition. Although there was no room for formal judicial activism in Blackstone’s holistic theory of parliamentary supremacy, a careful manipulation of the philosophy presented in the *Commentaries* engendered a fresh basis for judicial review in the individual States.³⁷³ Through transferring the supreme political authority away from the legislature and to the people at large, younger justices like James Iredell of North Carolina were able to posit and exalt the *primacy* of constitutional documents enacted by the collective will of the people.³⁷⁴

Notwithstanding Blackstone’s crucial, albeit indirect, influence in the development of this tradition, the type of ‘positivist’ and ‘interpretative’ doctrine of judicial review, exemplified by Iredell’s opinion in *Bayard vs. Singleton*, owed much to the philosophy of Hobbes.³⁷⁵ It presupposed the supremacy of constitutional documents on the grounds that they were the product of an expression the sovereign will of the people, and it was this ostensible ‘fact’ that necessitated their status as bodies of law superior to individual items of legislation enacted by mere agents of the people.³⁷⁶

The presence then of two philosophically discordant justificatory bases for the institution of judicial review prompted the emergence of both ‘interpretivist’ and ‘noninterpretivist’ models for judicial pre-eminence in the early republic. In one sense, this was a source of considerable confusion, and from even a cursory inspection of the practice of judicial review in the several States it is clear that there was appreciable dissonance among American legal and political thinkers regarding precisely *why* judicial bodies were empowered to nullify items of man-made law. That said, as it pertained to the task confronting the delegates at the

³⁷³ For thinkers like Jefferson, the type of sovereignty that Blackstone spoke of resided solely in the people themselves. Thus, in emphasising the importance of consent, Whig thinkers remodelled the Blackstonian conception of sovereignty into one that necessitated the theoretical and constitutional supremacy of the people over parliament. There remained then a sovereign power, however its location had been shifted; Mayer, ‘Radical Whig Origins’, pp.203-204.

³⁷⁴ Michael, ‘The Role of Natural Law’, pp.451-452; Corwin, ‘Progress of Constitutional Theory’, p.526; Goldstein, ‘Revival of Unwritten Law’, p.65.

³⁷⁵ Corwin, ‘Progress of Constitutional Theory’, p.522.

³⁷⁶ It ought to be said that the first six of the thirteen State constitutions were ratified by the States legislatures rather than by specially organised ratifications Conventions. The practice of popular ratification did not become widespread until the 1780s; Goldstein, ‘Revival of Unwritten Law’, p.58.

Constitutional Convention, the chief corollaries of this complex and multifaceted legal arrangement was that, irrespective of the philosophical underpinnings of the institution of judicial review, it was nonetheless the case that the judiciary's authority to actively restrain the legislature (through the enforcement of bodies of higher law) had become a relatively well-established legal doctrine central to the burgeoning American political system.³⁷⁷

Not all Americans, however, were comfortable with the paramount status seemingly enjoyed by judicial bodies in the several States. Dissatisfied with the idea of judicial pre-eminence over the legislature, Whig publicists and disciples of the Country Ideology had, during the eighteenth-century, formulated extra-judicial methods thought to be capable of safeguarding individual rights in the face of legislative expansion. Derived largely from the radical Whig philosophy articulated by Trenchard and Gordon in *Cato's Letters*, a generation of influential 'Real Whig' thinkers – most notably Richard Price, Joseph Priestley, and Jefferson himself – argued that popular control over the legislature was the foremost safeguard of personal freedom.³⁷⁸ This Whig philosophy was grounded in the enduring claim that the people were both sovereign and obliged to defend their sovereignty against the actions of legislatures liable to descend into a state of corruption.

This emphasis on the capacity of active political participation to serve as a bulwark against oppressive state action established the Real Whig philosophy as a political doctrine within which there was little space for the institution of judicial review as it had been practiced in the individual colonies and States.³⁷⁹ For Price, Priestley, Sidney and others, judicial pre-eminence – whether implied or formal – was fundamentally incompatible with the idea of 'civil liberty', and in this way promised to imperil what was considered the paramount precondition of freedom. Underpinned by unwavering attachment to the concept of popular sovereignty, the crux of their highly influential argument was that freedom under government consisted in residing under the rule of a legislative power established

³⁷⁷ Prakash and Yoo, 'The Origins of Judicial Review', pp.934-935.

³⁷⁸ Mayer, 'Radical Whig Origins', pp.192-193, 203-205.

³⁷⁹ Michael, 'Natural Law', p.440.

in accordance with the consent of the people of the commonwealth.³⁸⁰ Thus imbued by an ostensibly republican hostility to arbitrary governance, the upshot of the Whig position – which, incidentally, shared much in common with Locke’s doctrine as set-out in the *Second Treatise* – was the idea that *popular control* stood as the only mechanism capable both of restraining the authority of the governors and guaranteeing personal freedom.³⁸¹ Otherwise stated, according to the Real Whig doctrine, ‘civil liberty’ and legislative supremacy served as essential preconditions of individual liberty.

It was this commitment to *popular* control over the legislature that rendered Whig philosophy and the institution of judicial review fundamentally irreconcilable. Even the relatively modern concept of interpretative review was necessarily inconsistent with the republican principles underpinning the Whig stance on the basis that a judicial body could offer an interpretation of a statute that conflicted with the will of the elected legislature – a legislature which was, in theory, a *reflection* of the will of the people.³⁸² Thus, by the beginning of the Convention in 1787 there was in place a strong philosophical argument to be made against the idea of judicial pre-eminence. Importantly, it was an argument that relied not on a Blackstonian belief in the validity of parliamentary supremacy, but instead on the distinctly neo-Roman claim that a popularly elected legislatures – jealously controlled by citizens – served both as mainstays of the people’s rights and as barriers to the ambitions of the governors.³⁸³

Though Madison’s broader constitutional philosophy was grounded in both an unwavering hostility to the ‘legislative vortex’ and an accompanying commitment to the maintenance of private rights, it seems clear that the Real Whig philosophy of Price, Priestley, and Jefferson left an indelible mark on his otherwise broadly liberal constitutional doctrine. As is evident from *Federalist* No.10, during which he expounded the extensive republic thesis, Madison was firmly of the view that popular political control – when channelled through the electoral processes of a large republic – would serve as the paramount restraint

³⁸⁰ Mayer, ‘Radical Whig Origins’, p.192.

³⁸¹ Mayer, ‘Radical Whig Origins’, p.192.

³⁸² Michael, ‘Natural Law’, p.440.

³⁸³ Michael, ‘Natural Law’, p.439; Jack N. Rakove, ‘Origins of Judicial Review: A Plea for New Contexts’, *Stanford Law Review*, Vol.49, No.5 (May, 1997), pp.1031-1064 (p.1052).

on the competence of the legislature. But this reliance on popular vigilance and oversight was, of course, only one strand of his broader theory of republican governance. As he consistently reminded his readers in *The Federalist* and elsewhere, a reliance on placing the governors into a state of dependency on the people had to be reinforced by ‘auxiliary precautions’.³⁸⁴

The challenge for Madison was then to fashion a political system in which private rights could be guaranteed against legislative excess, but in a way that did not undermine the principles of popular sovereignty and popular political control. While his solution to this problem would take an institutional form, Madison’s efforts to reconcile the existence of a ‘higher law’ with the principles of republican government central to Federalist theory reflected the deep rooted tension between the ‘liberal’ and ‘Real Whig’ strands of his broader political philosophy. On the one hand, Madison and others like him were convinced of the need to impose real restraints on the legislative power in order to safeguard negative liberty, but this belief was always tempered by a patently republican understanding that such restraints could not be in any way arbitrary or indeed inconsistent with the principles of popular governance.³⁸⁵

As is clear from the appreciable dissonance between the Cokean and Blackstonian legal theories which dominated mid-eighteenth-century American political discourse, Madison’s task of formally reconciling a ‘higher law’ with the principle of popular supremacy was a particularly ambitious one. His project was, however, simplified somewhat as a consequence of his recognition that the question of constitutional interpretation had to be divided into two separate

³⁸⁴ Madison, ‘Federalist No.51’.

³⁸⁵ The existence of such a profound tension in Madison’s political thought has rendered his pre-Convention position on judicial review a difficult one to accurately gauge and analyse. Ralph Ketcham, for one, has argued that Madison adopted a bewildering number of positions on the subject of judicial review even during the years prior to the Convention; and Patterson has incorrectly inferred from Madison’s discussion regarding *ex post facto* laws that inherent in his constitutional theory was a broad commitment to the legitimacy and necessity of judicial review within modern republican governmental systems. The problem running throughout the respective studies of Ketcham and Patterson is that during the years leading up the Convention Madison consciously avoided developing, and tying himself to, an holistic position on the status of judicial review. Instead, he was far more pragmatic, viewing the judiciary’s oversight of legislative activity as just one element of a broader and multifaceted system of constitutional construction; Ralph Ketcham, ‘James Madison and Judicial Review’, *Syracuse Law Review* 158 (1956-1957), pp.158-165 (p.158-160); C. Perry Patterson, ‘James Madison and Judicial Review’, *California Law Review*, Vol.28, No.1 (Nov., 1939), pp.22-33.

issues: (1) the protection of the individual against the state; and (2) the maintenance of the internal structure of government. On the first issue, Madison envisioned an expansive role for the judiciary and firmly expected the Supreme Court to practice interpretivist review over legislation. When marshalling the set of Amendments that would become the Bill of Rights through Congress in 1789, Madison appeared fully aware that future items of legislation produced by the federal government would find themselves examined against the codified rights outlined in the Constitution.

On this point, Madison considered the judicial defence of codified rights to be not only constitutionally-proper, but also philosophically desirable. ‘If [these provisions] are incorporated into the constitution’, Madison explained to the House, ‘independent tribunals of justice will consider themselves...the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or the executive’.³⁸⁶ Exhibiting the liberal character of his political doctrine, Madison was prepared to allow for judicial review in the enforcement of rights on the grounds that such a model would constitute a mechanism capable of restraining the active branches of government.

Importantly, he suggested in the same speech that uncodified rights could not possess the same status as rights formally outlined in the Constitution. Though he appeared sympathetic to the idea that under a government of ‘enumerated’ powers the rights of the people in a sense constituted the ‘residuum’, Madison ultimately adhered to a more positivist understanding of the basis of constitutional law.³⁸⁷ Central to his case for the inclusion of codified rights became the supposition that government could be restrained more effectively by the presence of formal rights secured through judicial protection.

But though Madison accepted the validity of judicial *review* in some cases, foundationally – and in a manner indicative of his Real Whig leanings – he was always deeply suspicious of the idea of judicial *supremacy*. The distinction between these two models was both subtle and of enormous constitutional

³⁸⁶ Joseph Gales, *The Debates and Proceedings of the Congress of the United States Vol. 1* (Washington, 1834), p.457.

³⁸⁷ Gales, *Debates and Proceedings*, p.455.

significance.³⁸⁸ Madison – along with many contemporary champions of coordinate construction – held that it was entirely natural and appropriate for the Court to enforce particular elements of a constitution when deciding upon cases brought before the judicial system – even if this meant refusing to enforce an act authorised by a branch of government. But at the same time, he maintained that it was improper to transform this ‘case-by-case’ model of judicial review into a doctrine of judicial supremacy under which the Court would determine the limits and dynamics of the internal structure of government *in futuro*, in effect giving one institution a monopoly over questions of constitutional meaning.

It was at the Convention that Madison first articulated his aversion to models of judicial oversight that involved granting the Court *de jure* or *de facto* pre-eminence over matters of constitutional interpretation. Arguing in response to William Samuel Johnson, he claimed with considerable cogency that it would be inadmissible to extend the competence of the Court to cases ‘arising under the Constitution’, and that it would be instead wise to restrict the jurisdiction of the supreme tribunal to ‘cases of a Judiciary nature’.³⁸⁹ Reinforcing this contention in particularly plain terms, Madison concluded his intervention with the assertion that ‘[t]he right of expounding the Constitution in cases not of [a judicial] nature ought not to be given to that Department’.³⁹⁰

Though at the Convention Madison was silent on precisely why the jurisdiction of the Supreme Court ought to be so decidedly limited, in a speech delivered to Congress in 1789, he elucidated the rationale behind his position through explaining that there was simply no principle capable of justifying the supremacy of any one coordinate branch of government over the others.³⁹¹ His remarks at once betrayed the extent of his republican leanings as well as his hostility to the Cokean doctrine which presumed the existence of a set of principles capable of

³⁸⁸ The distinction between judicial review and judicial supremacy is a particularly important one. Unlike the concept of judicial supremacy, judicial review does not insist that the Court is the authoritative institution on matters of constitutional meaning; Keith E. Whittington, ‘Extrajudicial Constitution Interpretation: Three Objections and Responses’, *North Carolina Law Review* 80 (2001-2002), pp.773-852 (p.784); Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton, 2007), p.7

³⁸⁹ James Madison, ‘Jurisdiction of the Supreme Court (August 27, 1787)’, *PJM*, 10, pp.157-158.

³⁹⁰ Madison, ‘Jurisdiction of the Supreme Court’, pp.157-158.

³⁹¹ Gales, *Debates and Proceedings*, p.520; James Madison, ‘Presidential Removal Power’, in Ralph Ketcham, *Selected Writings of James Madison* (Indianapolis, 2006), pp.177-188 (p.187).

justifying judicial supremacy over the ‘political’ branches of government. But implicit in his remarks was a critique of not only the Cokean tradition of judicial review; in suggesting that there was indeed no principle capable of exalting one department over the others, Madison was in effect suggesting that the Court possessed no special relationship to the Constitution itself. The corollary of this was that, for Madison, the Constitution’s *meaning* lay in the will of the people, and not in any learned interpretations advanced by legal experts – and the influence of Montesquieu and the Real Whigs on his thinking was unmistakable.

5.4 Madison: Blending Popular Control and Judicial Oversight: The Council of Revision

In absence then of a principle capable of lifting a particular institution into a position of superiority in matters of constitutional interpretation and construction, Madison developed the concept of coordinate constitutional construction as a method for producing legitimate constitutional interpretation. In taking this course, he would emphasise the *political* nature of the constitution and in turn look to the employment of a number of institutional mechanisms and innovations to create a pluralistic system of constitutional interpretation – as opposed to one that relied upon the dictates and proscriptions of a specialist and preeminent legal institution.³⁹² During his intervention in the ‘Presidential Removal Power’ debate, Madison resolved that:

The Constitution is the charter of the people to the government...If the constitutional boundary of either [department] be brought into question, I do not see that anyone of these independent departments has more right than another to declare their sentiments on that point...In all systems there are points which must be adjusted by departments themselves, to which no one of them is competent’.³⁹³

Embedded within his remarks was a classic exposition of the theory of coordinate constitutional construction, or ‘departmentalism’.³⁹⁴ What Madison

³⁹² It is important at this juncture to note that George Thomas has also explicitly attached Madison’s constitutional theory to the contemporary concept of coordinate construction. The present study differs, however, from that offered by Thomas in that it seeks to understand Madison’s theory of construction in light of his constitutional proposals that were defeated at Philadelphia; George Thomas, ‘Recovering the Political Constitution: The Madisonian Vision’, *The Review of Politics*, Vol.66, No.2 (Spring, 2004), pp.233-256.

³⁹³ Gales, *Debates and Proceedings*, p.520.

³⁹⁴ Thomas, ‘The Madisonian Vision’, pp.242-243.

envisioned was a system within which each constitutionally-recognised institution would take part in the construction of the Constitution depending on the nature of the issue at hand. Throughout the entirety of his speech to the House on the subject of the Presidential Removal Power, Madison emphasised the rigour of the system of checks and balances that underpinned the structure of the federal government, and he frequently presumed that it was in the interest of every branch of government – not only the judiciary – that the Constitution be preserved in its entirety.³⁹⁵

[T]he breach of the Constitution in one point [Madison pronounced] will facilitate the breach in another. A breach in this point may destroy the equilibrium by which the House retains its consequence... Besides, the bill, before it can have effect, must be submitted to both those branches who are particularly interested in it; the Senate may negative, or the President may object, if he thinks it unconstitutional.³⁹⁶

It was then the ‘thick’ nature of the Constitution, that Madison seemed content to rely upon in ensuring against breaches of the Constitution.³⁹⁷ Through the maintenance of the system of interpretative plurality – grounded in the idea that each institution would defend its own particular jurisdiction – the integrity of the Constitution as-a-whole would be preserved.

However, as a thinker always concerned with constructing what he termed ‘auxiliary precautions’, Madison looked to the Jeffersonian/Whig tradition in order to develop a mechanism for ensuring against constitutional breaches that might arise in spite of his ‘thick’ and pluralist system of constitutional construction. In the same speech on the subject of the Presidential Removal Power, Madison remarked that if the meaning of the Constitution could not be determined through the ordinary channels of intra-departmental deliberation and compromise ‘there is no recourse left but the will of the community’.³⁹⁸ Importantly, he had previously considered the possibility of convening popular conventions for the purposes of interpreting the Constitution in *Federalist* No.49 during his survey of Jefferson’s Draft Constitution for Virginia (1783). Although in that essay he stopped short of endorsing popular conventions as a formal

³⁹⁵ Gales, *Debates and Proceedings*, pp.518-520.

³⁹⁶ Gales, *Debates and Proceedings*, p.520.

³⁹⁷ Thomas, ‘The Madisonian Vision’, pp.240.

³⁹⁸ Gales, *Debates and Proceedings*, p.520.

method of constitutional interpretation, Madison urged that as the people were the ‘only legitimate foundation of power’, a ‘constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions’.³⁹⁹

Freed in 1789 from the politically-necessitated confines of *The Federalist*, Madison appeared far more congenial to the idea of popular participation than he previously had been during the ratification struggle. As something of a diluted variant of the concept of the ‘right of revolution’ central to the Whig political theories of Trenchard, Gordon, and Sidney, Madison’s ostensible congeniality to such a mechanism was highly significant. In a sense, it betrayed his commitment to placing the sovereign people into a position of *de facto* supremacy over elected law-makers in such a way that they would serve as a fundamental restraint on political power. In other words, it was a ‘final’ method of last-resort, geared toward restraining the actions of the coordinate branches of government, that did not involve the arbitrariness of judicial supremacy.

Moreover, in his *Observations of Jefferson’s Draft of a Constitution for Virginia* (1788), Madison plainly expressed support for a model of coordinate constitutional construction conducted under the guise of popular supremacy:

In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.⁴⁰⁰

Thus, two things seemed to be underpinning Madison’s sophisticated and dyadic stance on the question of judicial involvement in the interpretation of the Constitution. In the first place, his indubitably liberal concern for the provision of private rights attracted him to a range of mechanisms geared toward constraining the capacity of Congress to legislate in ways contrary to the principles of individual liberty. Thus, in this sense, his acquiescence to a model of judicial review focused on the examination of *individual* items of legislation was really no more significant than his endorsement of other institutional

³⁹⁹ Madison, ‘Federalist No.49’.

⁴⁰⁰ Madison, ‘Observations’, p.293.

mechanisms, centred on restricting legislative power, such as the institution of bicameralism, the executive veto, and extended terms for the Senate. Judicial review was, in other words, just one mechanism in a complex and pluralistic system of constitutional interpretation.

Secondly, in Madison's view, the institution of judicial review had to be limited in its competence in order to remain consistent with his broader constitutional philosophy that possessed both a liberal *and* republican character. The republican, or Real Whig, foundations of his political thought in effect precluded him from endorsing any institutional mechanisms that supplanted the sovereignty and primacy of the will of the people, and it is on this point that we can most clearly see the republican, or neo-Roman, roots of his constitutional doctrine. To make a single institution the primary custodian of the Constitution was, in Madison's view, to entirely dispense with what he considered to be the essential precondition of freedom under government: political liberty.

In an effort to institutionalise the concept of coordinate construction, Madison placed the idea of a Council of Revision at the centre of the Virginia Plan (1787). In its original form, the Council was to consist of the executive and a 'Convenient number of the National Judiciary', and it was to be charged with examining 'every act of the National Legislature' before giving either its assent or its final 'Negative'.⁴⁰¹ Considering the complexity of his position on judicial involvement in matters of constitutional interpretation, his proposal for a Council of Revision was a something of an institutional formulation of the concept of coordinate construction.

In one of the few extensive inquiries into the plan for a Council of Revision, James Barry has argued that Madison and other advocates for the proposal "overlooked the danger that a policy making role for judiciary...could seriously impinge upon the more fundamental policy of popular sovereignty".⁴⁰² On closer inspection, however, this was simply not the case. In the first place, Madison always assumed that the federal courts would be empowered to nullify items of legislation they deemed inconsistent with the higher law of the constitution; in

⁴⁰¹ Madison *et al.*, 'The Virginia Plan', p.13.

⁴⁰² Barry, 'Council of Revision', p.251.

this way, his plan for a revisionary council was framed so as to reduce the likelihood of items of legislation being voided by the courts *alone*.

Here, Madison sought to inject the judicial review process with additional democratic legitimacy through including the executive branch in the oversight process. Further reinforcing the popular underpinnings of Madison's proposal was the fact that the justices included in the Council were to be appointed directly by Congress, according them a level of democratic legitimacy comparable to that enjoyed by members of the Senate, who, under the Virginia Plan, were to be appointed by members of the House.⁴⁰³ In this sense, it is important to think of the judicial members of the Council not as justices in the conventional sense of the term, but instead as *ex officio* members of the legislature.⁴⁰⁴

Most significantly, however, Madison was always clear that an act of nullification on the part of the revisionary body ought to be subject to Congressional reversal, provided super-majorities in favour of the particular item of legislation could be recorded in both chambers. As he made clear at the Convention, the Council of Revision was necessary in order to safeguard the rights of the minority from majoritarian oppression, and in seeking to establish a mechanism by which an overwhelming majority could reverse a negative, Madison had uncovered a way to shield individuals and minorities that didn't in any way undermine the principle of the people's sovereignty.⁴⁰⁵ In short, under his proposal for a Council of Revision, the people would have been empowered with the final say over the passage of a bill; if sufficiently united, Congress would have always remained in a position of constitutional pre-eminence. Considering both of these factors, Madison's plan for a revisionary body was, at

⁴⁰³ That federal justices were to share in the legislative process was consistent with Madison's understanding of the foundational principle of republican government. In *Federalist* No.39, Madison defined a republic as a government which 'derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their office during pleasure, for a limited period, or during good behaviour'; James Madison, 'Federalist No.39', in *The Federalist*, pp.254-259 (p.255).

⁴⁰⁴ Robert L. Jones writes: 'The judicial members of the Council would presumably not be perceived as wearing their robes, figuratively or literally, while sitting on the Council. They would operate in essence, as *ex officio* members of a legislative body.'; Robert L. Jones, 'Lessons From a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance', *Journal of Law and Politics*, Vol.27, No.3 (2012), pp.459-555 (p.493).

⁴⁰⁵ James Madison, 'Revisionary Power of the Executive and the Judiciary (June 4, 1787)', p.25.

least in theory, not one that undermined the popular foundations of the political system. Between the president and the appointed justices, the Council would have possessed a level of democratic legitimacy sufficient to justify acts of qualified nullification.

But as it pertains to Madison's theory of constitutional construction, the plan for the Council points to his hostility to judicial supremacy as well as to his advocacy for a process of concurrent review. Through involving the executive and the judiciary directly in the legislative process, Madison was fashioning an institutional method of interpretation through which constitutional meaning would be derived through a process of intra-departmental deliberation and compromise. Given his insistence that the jurisdiction of the Court ought to be confined to cases of a 'judiciary nature', it seems unlikely that he would have expected the establishment of a Council of Revision to produce a situation whereby the judicial branch would possess a *double check* on the jurisdiction of the legislature. Ultimately, the institution of the Council would have accorded the executive and judiciary departments the opportunity to defend *their* respective jurisdictions *ex ante* (through maintaining the division of power); and according to Madison's theory, conventional, or *ex poste*, judicial review merely gave the Court the opportunity to defend the private rights of individuals and constitutional rights of the federal government.

- 6.1 Constant: Political Liberty and the Supreme Power
- 6.2 Constant: Inviolability and the Royal Power
- 6.3 Madison: Sovereignty and the States
- 6.4 Madison: Forging the Great Desideratum in Republican Government
- 6.5 The Primacy of Public Opinion and the Neutral Power

In ensuring the broader limitation of political authority, both Constant and Madison formed complex constitutional models, replete with institutional mechanisms geared toward constraining the competences of the governors. Though their proposals were dissimilar in many areas – and tailored to particular sets of circumstances – both thinkers placed the preservation of (negative) individual liberty at the centre of their respective schemas and accordingly made considerable efforts to place restrictions on the jurisdictions of the executive *and* legislative authorities. But while their principal objective was to place sufficient restrictions on the sum total of power, both thinkers were concerned less with the *content* of legislation than with the *motivation* behind particular legislative measures. It was in this sense that their respective political philosophies revolved around the ideas of impartiality and neutrality; for Constant and Madison, the most effectual way to maintain individual liberty in the modern republic was to establish political procedures through which particular interests and factional objectives would not be allowed to undermine legislative efforts consistent with individual and minority rights.

However, both Constant and Madison were confronted with a similar problem. Unconvinced by the capacity of codified rights and the division of powers to *guarantee* political neutrality in this way, both thinkers recognised that their respective constitutional frameworks had to be reinforced by extraordinary, and

to some degree unprecedented, constitutional arrangements. The institutional products of their respective efforts to guarantee the neutrality of the state were what might be termed constitutional ‘controlling’ powers, intended to maintain political harmony and guard against the promulgation of ‘interested’ and oppressive items of legislation. Though in isolation they stand as significant and original contributions to *constitutional* theory, these institutional arrangements and schemas devised by Constant and Madison serve as revealing windows into the relationship between the liberal and republican strands of political theory in the late eighteenth and early nineteenth-centuries. Confronted with the uniquely republican problem of legislative excess – one which undermined the liberal aspiration of neutral and limited governance – both thinkers advanced institutional solutions which relied on the putative capacity of public opinion to remove pernicious particular interests from the legislative process.

It is in this sense that as a coherent philosophical objective, procedural liberal neutrality was predicated on the distinctly republican assumption that personal freedom could be guaranteed only through the active participation of the public in the political process. By holding to this limited, and strictly political, understanding of the value of republicanism (one distinct from the doctrine of civic humanism),⁴⁰⁶ both thinkers understood that the neutrality of the state – just like the liberty of the individual – could be guaranteed only through public engagement in the political process. In this way, their respective efforts to guarantee the neutrality of the state can be thought of as constitutional extensions of the republican conception of liberty as non-domination. Thus, while both thinkers pursued the quintessentially liberal end of a neutral governance, they did so only through a heavy reliance on a set of principles and assumptions central to the republican tradition of political thought.

Notwithstanding, however, this Real Whig commitment to popular governance and the ideal of active political participation, both Constant and Madison were

⁴⁰⁶ I hold that the republicanism of Constant and Madison was distinct from the civic humanist doctrine for the reason that they saw political participation as something capable of shielding individuals from political interference. In this sense, both thinkers understood that political rights had a largely negative role to play – instead of cultivating civic virtue, they saw participation as a defensive mechanism, which would protect individuals and minorities from the legislative ambitions of particular factions.

pressed into discovering and forging *institutional* models capable of facilitating the primacy of public opinion over the political procedures of the state. As historically attentive theorists, both looked to the English model of constitutional monarchy as a source of guidance regarding how neutral governance could be guaranteed in the modern republic. Sharing this appreciation for the unique capacity of the disinterested and detached king to intervene in an impartial manner, their respective understandings of the idea of ‘constitutional neutrality’ were in part derived from, and conditioned by, their analyses of the nature and purpose of the British crown.

But in the case of Madison, the restoration of the crown in the thirteen states was neither appropriate nor possible, even despite the conspicuousness of empty constitutional space left behind in 1776. Without recourse to some inactive and external institution, the challenge for Madison was to establish a new form of constitutional arbiter, but one which took the form of an *arrangement* between pre-existing elective political institutions. Having offered a model for a ‘revisionary body’ which was to operate only within the federal government itself, the next step in his plan was to devise an arrangement capable of acting on the state governments directly – the organs of government widely considered to pose the most substantial threat to individuals and minorities. Anticipating that the political neutrality of the federal government would be provided largely by the diversity of the respective states (as institutionalised in both chambers of legislature, albeit in different ways), he was compelled to design a system in which the neutrality of the federal Senate could be reflected back onto the state governments themselves. Thus, in absence of an external institution capable of exercising neutrality, Madison was forced to employ *active* political powers in ensuring the limitation and neutrality of each and every institution within the broader constitutional framework – both at the state and federal levels.

Motivated by a similar set of concerns, Constant too sought to replicate the neutrality of the British crown within his two major constitutional frameworks. Though initially reluctant to transplant English-style constitutional monarchy to the political landscape of modern France, core features of his republican constitution sketch (1802-03) were modeled on the structure of British

framework. Borrowing from the British crown its attributes of inactivity and externality, Constant sought to construct a specialist body capable of performing the role of a neutral constitutional arbiter, charged with guaranteeing the integrity of what was an otherwise orthodox republican constitutional model. But while Constant's efforts were continually beset by the realities of regime change – resulting in his theorising of two formally distinct models for a neutral power – he remained consistent in his commitment to the employment of a number of mechanisms and arrangements he understood to be vital to the success of a neutral constitutional power.

In its entirety, the present chapter demonstrates that the liberal constitutionalism of Constant and Madison was predicated on a neo-Roman republican assumption. Both thinkers were committed to the proposition that if channelled correctly, public opinion – as manifested through political participation – could serve as a moderating force capable of ensuring against the ascendancy of particular interests, shared by only a fraction of the citizenry. Their reliance on refashioning the institution of monarchy to realise this end has possibly obscured this aspect of their shared liberal-republican constitutionalism. However, if we are to appreciate their understanding of the value of constitutional monarchy as a cog in an otherwise liberal-republican structure, we must view the institution of monarchy as they themselves did. Thus, the present chapter argues that both Constant and Madison understood the presence of a disinterested and detached institution as the only way to ensure the primacy of public opinion over the political procedures of the state.

6.1 Constant: Political Liberty and the Supreme Power

In the aftermath of the fall of Robespierre's regime in 1794, Constant lent his unequivocal support to the Constitution of the Year III. Determined to see France enter into a period of political stability in the wake of the Thermidorian reaction, he authored his *De la force du Gouvernement* which stood as an appeal to the French citizenry to rally in support of what he saw as a government moderate in nature, and legitimate in form. In the Directory regime, Constant saw a type of 'moderate' political organisation markedly preferable to either of the two leading

alternatives at the time: revolutionary Jacobinism and a return to royalist *ancien regime* governance.⁴⁰⁷ Thus the defining feature of Constant's political doctrine of 1790s became a principled and dogmatic opposition to heredity, tempered by an equally vehement opposition to the politics of the extreme left.

This moderate liberal-republicanism would remain the keystone of Constant's political philosophy during the first years of the nineteenth century. With the advancement of individual liberty as his principal objective, he continually exalted elective institutions chiefly on the grounds that private rights could – at least at this point in French history – be best maintained under republican conditions.⁴⁰⁸ This recognition was in large part prompted by what he saw as the emergence of an executive-led despotism in the early nineteenth-century, headed by Bonaparte. Though he never downplayed the dangers presented by legislative excess, particularly the evil of juridification, Constant was at this point primarily concerned with the risks occasioned by unified and powerful executives. Moreover, in keeping with his twin commitments to the active political life and the supremacy of '*le volonté nationale*', Constant understood that in a republican constitution, the legislature ought to stand as the principal political power of the state.⁴⁰⁹

After finding himself dismissed from the Tribunate in 1802, Constant began authoring two major political treatises. In addition to the abstract *Principes de politique* (1806) – intended to offer an original and foundational political science – Constant completed his first major constitutional work, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays* (1802). At the outset of his political researches of the early nineteenth-century, he envisioned that his two studies would form a single *magnum opus*; a grand treatise – similar to *l'Esprit de lois* – focused on questions of both a philosophical and constitutional nature.⁴¹⁰ From his notes in *Fragments*, it seems clear that the *Principes* manuscript was intended to form the

⁴⁰⁷ Dennis Wood, 'Benjamin Constant: Life and Work', in *Cambridge Companion to Constant* Helena Rosenblatt (ed.) (Cambridge, 2009), p.7; Vincent, 'Origins of Romantic Liberalism', pp.615-616.

⁴⁰⁸ Jainchill, *Reimagining Politics*, p.277.

⁴⁰⁹ Constant, *Fragments*, pp.151-153.

⁴¹⁰ Levy, 'Beyond Publius', p.74; Constant, *Principes*, pp.511-512; Jainchill, *Reimagining Politics*, p.284.

first half of the treatise, indicating that the republican constitutional philosophy expounded in *Fragments* was intended to be read in light of Constant's more abstract and liberal political theory.⁴¹¹ In this way, *Fragments* can be thought of and treated as a concerted effort to present a framework capable of facilitating the institutionalisation of liberal principles within a republican constitutional setting.⁴¹²

But where *Principes* is generally celebrated for its breadth, *Fragments* has become known primarily for one institutional proposition outlined in the work: the concept of the '*pouvoir préservateur*', an institution intended to guarantee the smooth functioning of his wider republican governmental framework. The constitutional principles presented by Constant in *Fragments* were developed partly in reaction to what he saw as the fundamental deficiencies inherent in the constitutions of 1795 and 1799.⁴¹³ Where the weakness of the multi-headed – and veto-less – executive of the Directory regime had occasioned significant instability, at the time Constant authored the work, Bonaparte – as 'Consul for Life' and later Emperor – was stepping ever closer to political domination.⁴¹⁴ Thus in dividing political power in his own constitutional model a careful balance had to be struck. Eager to see the demise of the type of executive dominance that was characterising the Consulate regime, Constant was appreciative of the need to restrain the authority of the executive but without inviting the type of instability that had characterised the Directory years and ultimately resulted in the emergence of Bonaparte as a dictatorial figure.⁴¹⁵

⁴¹¹ That the two works were written as complementary pieces has been missed by some of Constant's commentators. Most notably, Kalyvas and Katznelson mistakenly read *Principes* as an attempt to correct mistakes made in *Fragments*. In suggesting that Constant was clearly 'dissatisfied with the republican tilt of his prior institutional solution', Kalyvas and Katznelson fail to appreciate both the purpose of *Principes* as well as its relation to *Fragments*; Kalyvas and Katznelson, 'We are Modern Men', p.521-522.

⁴¹² Jainchill, *Reimagining Politics*, pp.275-276.

⁴¹³ Rolland importantly notes that the idea of neutrality preceded his conceptions of neutral institutions, suggesting that it was less that Constant saw neutrality in the British crown than that he understood that it was essential to have in place a neutral power to compensate for the disadvantages engendered by the separation of powers; Patrice Rolland, 'Comment préserver les institutions politiques? La théorie du pouvoir neutre chez B. Constant', *Revue Française d'Histoire des Idées Politiques*, Vol.1, No.27 (2001), pp.43-73, p.45.

⁴¹⁴ Lyons, *Napoleon Bonaparte*, p.111.

⁴¹⁵ Jainchill, *Reimagining Politics*, p.282.

It was in Livre VIII of *Fragments*, as Constant began to build his case for the establishment of a preservative power, that he surveyed in considerable detail the drawbacks inherent in separation of powers models. Despite being concerned primarily with executive dominance during this period, Constant remained deeply suspicious of ‘unity’ emerging in either of the active branches of government. He noted that a constitution grounded in the principle of elective representation would be apt to produce a damaging form of legislative unity that could unsettle even the most carefully constructed constitutional balance established between executive and legislature.⁴¹⁶ Juxtaposing his republican constitutional sketch with the English parliamentary model, Constant advanced the idea that the way in which the two chambers of the British parliament were sufficiently differentiated (through their respective means of appointment) guarded against the emergence of legislative dominance.⁴¹⁷ But in a republican bicameral constitutional system, he noted, the absence of two distinct interests in the legislature increased the likelihood of unity taking hold between the two elected houses. ‘*La division du corps législatif*’, Constant warned, ‘*ne s’oppose point à leur coalition. Ces deux chambres étant électives toutes deux, n’ont pas un intérêt distinct l’une de l’autre*’.⁴¹⁸

His appraisal of the nature of republican legislative power constituted a deeply significant recognition. In identifying a structural weakness potentially unique to ‘republican’ forms of government, Constant was pressed into taking extra care in ensuring that the legislative power was not permitted to overstep its authority and encroach on the executive’s jurisdiction.⁴¹⁹ Though the political landscape of the time prompted him to treat executive power with particular suspicion, Constant was always attentive – in both *Principes* and *Fragments* – to the problems engendered by legislative dominance, particularly the phenomenon of the proliferation of the law.

In Constant’s view, the legislative power was ‘*évidemment le premier de tous en rang et en dignité*’ and in consequence had to be treated particularly carefully as

⁴¹⁶ Constant, *Fragments*, p.363.

⁴¹⁷ Constant, *Fragments*, p.364.

⁴¹⁸ Constant, *Fragments*, p.363.

⁴¹⁹ Constant, *Fragments*, p.363.

well as decidedly limited.⁴²⁰ Drawing on the early years of the revolution, he expressed his revulsion at the way in which absolute and unlimited sovereignty had been accorded to the people and exercised by a handful of individuals who dominated the National Convention.⁴²¹ Following this, Constant noted that while the establishment of the Constitution of the Year III had terminated a frightful period of sustained despotism, the constitutional framework in fact did little to reduce the sum total of legislative power. He lamented the fact that the 1795 Constitution failed to provide the executive with both the power of veto and the authority to dissolve the legislature; and of equal concern to Constant was the glaring omission of particular rights capable of guarding against legislative encroachments against the individual – an arrangement which he saw as an enormously positive product of the American constitutional experience a decade earlier.⁴²²

In attempting to avoid the errors committed by the framers of the 1795 constitution, Constant endeavoured to establish a strong, albeit multi-headed, executive, endowed with the powers of veto and dissolution.⁴²³ But while he saw the establishment of an executive with considerable negative authority over the legislature as a vital constitutional mechanism, Constant understood that even in light of its ‘complex’ form, his executive body would nonetheless possess an ‘*arme offensive*’ that could be wielded in such a way that would disturb the constitutional balance. By blocking laws necessary for public safety, he supposed, disorder could develop, only bolstering the authority of the

⁴²⁰ Constant, *Fragments*, p.151.

⁴²¹ Importantly, Constant informed the reader that the consequences of the employment of unlimited sovereignty would be explored in the first ‘*Livre de cet ouvrage*’ (by which he meant the *Principes de politique*), suggesting that he did indeed envision that the two works would form a single treatise; Constant, *Fragments*, p.295; p.480.

⁴²² Constant, *Fragments*, p.295. While the Constitution of the Year III was prefaced by a declaration of rights, Jainchill notes that the declaration ‘privileged the role of the legislator...the legislative body assumed a position akin to the great legislator of the classical-republican tradition, licensed to instruct the people in the name of their true, if unknown, interest’. Additionally, the declaration did not outline natural rights; Andrew Jainchill, ‘The Constitution of the Year III and the Persistence of Classical Republicanism’, *French Historical Studies*, Vol.46, No.3 (Summer, 2003), pp.339-435 (pp.426-427).

⁴²³ It ought to be noted, however, that Constant’s aim was never to solidify the executive’s power at the expense of that possessed by the legislature; his position, even in light of the Directory years, was that in order to ensure that the national will was sufficiently expressed, the legislature would have to retain a level of independence. Thus in this sense, constitutional balance was the aim; Jainchill, *Reimagining Politics*, p.282.

executive.⁴²⁴ Thus in Constant's view – one perhaps informed by his experiences as a member of the Consulate regime – the executive's defensive weapon could easily be moulded into an offensive tool, capable of facilitating despotism, particularly if firm unity was to emerge within the institution itself.

Thus through his enquiries into the nature of authority under a regime grounded in the division of political power, Constant had identified a number of frailties inherent in constitutional framework he outlined in *Fragments*. Reasoning that division or collusion between the legislative and executive powers could be equally disastrous, Constant had exposed the inherent fragility of a republican constitutional structure grounded in the principles of elective representation and the separation of political power. However, after surveying the potential problems inherent in his proposed constitutional model, Constant announced that the inconveniences he had identified could be put down to a single, rectifiable, cause: the absence of a neutral intermediary power. Thus, it is here, in his commentary on the division of power, that we can most clearly discern the rationale guiding his inclusion of a '*pouvoir préservateur*'.⁴²⁵

But Constant was, of course, not the first thinker to appreciate the potential advantages supplied by the establishment of an intermediary constitutional power. Most famously, Sieyès had launched his proposal for a 'constitutional jury' in 1795, a body which was to serve more as a legal than a political institution, charged primarily with thwarting unconstitutional acts.⁴²⁶ After a process of substantial reformulation, Sieyès' proposal made its way into the Constitution of the Year VIII, taking the form of the *Sénat Conservateur*, an active branch of the legislature tasked with guarding the constitution. Germaine de Staël had advanced a similar scheme in her *Des circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République*

⁴²⁴ Constant wrote: '*Il y a telle conjoncture où les refus de sanctionner des lois nécessaires à la sûreté publique occasionnerait des désordres dont le pouvoir exécutif tirerait parti pour accroître sa puissance...le pouvoir exécutif peut donc abuser du veto*'; Constant, *Fragments*, p.364.

⁴²⁵ Constant, *Fragments*, p.373.

⁴²⁶ Though there are some similarities between Constant's model and that offered by Sieyès, the Constitutional Jury proposed by Sieyès was likely not a major source of inspiration for Constant. The Constitutional Jury was a strictly legal body which did not possess the authority to dissolve the legislature or dismiss the executive; Marco Goldoni, 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power', *Oxford Journal of Legal Studies*, Vol.32, No.2 (2012), pp.211-234 (pp.217-218).

en France. In it, she proposed that the Council of Ancients be transformed into a ‘*Corps conservateur*’, elected for life and responsible for the maintenance of stability.⁴²⁷ De Staël’s explicitly aristocratic solution was also not without precedent. Montesquieu had suggested in his canonical commentary on the constitution of England that the establishment of a ‘*puissance réglante*’ was a prudent way to moderate the executive and legislative branches.⁴²⁸ And for Montesquieu, as for Staël, an aristocratic institution was best placed to perform the role of a moderating power.⁴²⁹

Having grounded his entire constitutional model in the principle of elective representation, Constant was forced to look elsewhere for a body capable of acting as a moderating and neutral power. But even aside from this opposition to heredity, he was adamant that the neutral power could not be an institution that simultaneously played an active role in government, irrespective of the particular form it took.⁴³⁰ This emphasis on inactivity and externality was the defining feature of Constant’s *pouvoir préservateur* and one which differentiated it from similar schemes. Unconvinced that an active body could exercise neutrality in the performance of its functions, he thus eschewed the approaches of Sieyès and de Staël, opting instead for the creation of a specialist body, elected by the people for life.

In this way, the neutral institution Constant devised shared more in common with the British crown than with the *Sénat Conservateur*. In clarifying his position on the desired nature of the preservative power, Constant wrote that it was essential to establish a body with an interest distinct from those of the legislative and executive powers; it had to be organised in such a way that it would not seek to

⁴²⁷ Germaine de Staël, *Des circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République en France*, Lucia Omacini (ed.) (Genève, 1979), pp.161-162; Jainchill, *Reimagining Politics*, p.134-135; Rolland, ‘Le pouvoir neutre’, p.51.

⁴²⁸ Montesquieu, *l’Esprit*, p.114; Rolland, ‘Le pouvoir neutre’, p.51.

⁴²⁹ Montesquieu, *l’Esprit*, p.114.

⁴³⁰ Constant, *Fragments*, pp.383-384. ‘*L’intérêt de pouvoir législatif, lorsqu’il n’est ni dominé ne séduit, est que sa volonté fasse toujours la loi, et que le pouvoir exécutif ne soit qu’une machine obéissante...Le intérêt de pouvoir exécutif est du gouverner le plus possible, sans que la volonté du pouvoir législatif intervienne.*’; Constant, *Fragments*, p.375.

undermine the active branches, but would instead endeavour to establish equilibrium and harmony between them.⁴³¹

However, as Jainchill and Gauchet have both noted, at this point in his constitutional researches, Constant was studying the nature of political power from a negative perspective, concentrating on the potential abuses of power that could emanate from either of the active branches of government.⁴³² Thus, maintaining equilibrium between the respective political powers was not an end in and of itself. Though the smooth functioning of government was indeed desirable, Constant considered institutional balance and equilibrium to be vital in guaranteeing the limitation of the sum total of power – a precondition for the maintenance of individual liberty.

Noting in *Principes* that the principal guarantee of the limitation of power was ‘*l’opinion publique*’, he claimed in the same work that such limitation had to be further guaranteed via the specific arrangement of the political powers. This was a task outside the confines of *Principes* but one which he took up in *Fragments*. Within the climatic exposition of the neutral power contained in Livre VIII, we can most clearly see Constant’s attempt to limit the sum total of power through institutional arrangement. Having carefully divided authority between the active branches – along with ensuring that each possessed a defensive mechanism *vis-à-vis* the other – what was needed was the establishment of a supreme constitutional power capable of ensuring the continuance of such division, balance, and moderation. If such a role was sufficiently performed, Constant maintained, the broader limitation of power would be ensured.

Thus within this configuration, grounded in the division of political power, Constant had developed a theoretical model in which the *limitation* of power partially consisted in *equilibrium* between the constituted powers. In this way, the *pouvoir neutre* had to perform the delicate role of ensuring against the concentration of political power, while guarding against political deadlock. Provided that it could execute this function, clear restraints would be placed on both powers. The rationale guiding Constant’s proposition on this subject was his

⁴³¹ Constant, *Fragments*, p.375.

⁴³² Jainchill, *Reimagining Politics*, p.283.

understanding that the division of power would likely produce competition between the respective powers.⁴³³ Such competition was considered beneficial in as much as it would guard against the concentration of power, but the arrangement had to be managed in order to avoid the emergence of a form of instability that could facilitate a disturbance in the balance of power.

But as Constant consistently maintained, institutional configurations were merely ways to *further* guarantee the limitation of power.⁴³⁴ A separation of powers model, even when guaranteed by the presence of a neutral power, was not in his view enough to ensure the limitation of the *sum total* of power. According to Constant, the division of power simply placed restrictions on the respective jurisdictions of the active powers; what was really required was a mechanism for ensuring the fixed and external limitation of state more broadly. Thus while useful in and of themselves, formal constitutional arrangements would, he suggested, prove futile in the absence of a more comprehensive form of limitation that could be provided only by *political liberty*, as the manifestation of the sovereign will of the people.

Constant's faith in the capacity of political liberty to limit the sum total of power must be read in light of his considerations on the benefits of the representative system as expounded in *Principes*. Holding that political liberty was valuable primarily in a negative sense – in that it could guide and moderate government – Constant was in effect proposing that those who enjoyed the franchise would naturally use their political voice guard their civil and property rights, and in doing so would ensure the *de facto* limitation of the state. Though in some respects theoretical, Constant understood that the accuracy of his hypothesis could be demonstrated empirically. Arguing in *Principes* that throughout human history the will of the people had consistently diminished the sum total of power, Constant reinforced this contention in *Fragments* by pointing to the British and

⁴³³ Constant remarked in Livre VIII that the natural competition between the two branches would emerge from the distinctness of their respective interests. The executive, he suggested, had an interest to govern as much as possible without the interference of the legislature; and the legislative body, he continued, possessed an interest to render the executive subservient to its will; Constant, *Fragments*, p.375. However, as Rolland has noted, Constant understood that the division of powers could not guarantee against the formation of coalitions among the constituted powers; Rolland, 'Le pouvoir neutre', p.47.

⁴³⁴ Constant, *Principes*.

American experiences of electoral politics. The recent histories of both nations, Constant argued, demonstrated that the possessors of political rights could generally be trusted to elect champions of individual liberty.⁴³⁵

Thus in light of his understanding that public opinion could serve as the primary guarantee of limited government and personal freedom, Constant institutionalised into the design of the *pouvoir neutre* a mechanism for ensuring that '*l'opinion publique*' would play a leading role in curtailing political authority. Through instituting the power of dissolution, he provided a way for both the executive and the citizenry to be protected from the harmful effects of the proliferation of the law. Additionally, through the right of dismissal, he provided a way for the citizenry to indirectly restrain the executive branch. Thus in both cases, interventions on the part of the neutral power simply allowed for the people to reshape the government and curtail its authority externally.

It was, then, political liberty that served as the ultimate guarantee of the limitation of government and the maintenance of individual liberty. In this way, the *pouvoir neutre* of *Fragments* was charged with ensuring the limitation of government by facilitating the primacy of public opinion over the governors. Within this arrangement we can see Constant's subtle and but crucial distinction between legislative authority and the will of the people; where the former was apt to descend into excess, the latter was considered a moderating force, particularly in that it was conditioned through the establishment of a limited franchise, based on the principle of private property.

Firmly exposing the extent of his shift toward a more strikingly liberal way of thinking about government, Constant established his neutral power in *Fragments* as much more than a strictly constitutional umpire, charged with mediating between the active branches of government. Though it was to have no *direct* relationship with the individual (other than through its election), his *pouvoir neutre* was charged with playing a key role in upholding individual liberty through ensuring the limitation of political power. Tying together various stands of his broader political philosophy, Constant placed the idea of '*liberté politique*'

⁴³⁵ Constant cited the elections of George Washington, John Adams, and Thomas Jefferson to illustrate his point that popular elections can result in the election of individuals sympathetic to personal freedom; Constant, *Fragments*, p.281, p.479.

at the centre of his sketch of a preservative, or neutral, power capable of upholding personal freedom. In this way, democracy could indeed be self-limiting, provided that the parameters of the electoral franchise were clearly delineated, and that its expression was carefully conditioned by an independent neutral power.

6.2 Constant: Inviolability and the Royal Power

Though Constant had formulated a theoretically consistent model for a republican neutral power in *Fragments*, his conception of constitutional neutrality was to undergo substantial revision a decade later.⁴³⁶ Following the fall of Bonaparte and the Empire in April 1814, the French political landscape lacked a coherent and unified republican movement. The experience of the First Republic continued to cast a bleak shadow over the very concept of republicanism, hampering efforts to assemble a sustained opposition to monarchical government; widely associated with disorder, Terror, and economic hardship, the French republican tradition was at this point fragmented and without committed leadership.⁴³⁷ In light of the Allies' demands following Bonaparte's defeat, the restoration of the Bourbon dynasty under the Charter of 1814 stood as a *modus vivendi* option; one likely to attract broad, albeit unenthusiastic, support from the French populace.⁴³⁸ The Charter itself was to a large degree liberal in nature. In addition to guaranteeing some of the gains of 1789, it promised to ensure equality under the law as well as a plethora of liberal aspirations including the freedoms of the press and opinion, the inviolability of property, and the restoration of free elections to the Chamber of Deputies.⁴³⁹

With there being little in the way of a sustained 'republican' opposition to the restoration of the Bourbon crown, the course of events moulded Constant's

⁴³⁶ Kalyvas and Katznelson have mistakenly suggested that the second *Principes* was the result of Constant's dissatisfaction with his strategy of 'transcendence' outlined in *Principes* (1806). *Principes* (1815) is, like *Fragments*, a work concerned with constitutional theory and is thus entirely compatible with the more theoretical (and intentionally non-constitution) *Principes* (1806).

⁴³⁷ Pamela Pilbeam, 'Republicanism in Early Nineteenth-Century France, 1814-1835', *French History*, Vol.5, No.1, pp.30-47 (pp.32-33); Pamela M. Pilbeam, *The Constitutional Monarchy in France, 1814-1848*, (New York, 2000).

⁴³⁸ J.P.T. Bury, *France, 1814-1835* (London, 2003), pp.2-3.

⁴³⁹ Bury, *France*, p.3.

acquiescence to the establishment of a constitutional monarchy. In his view, the overthrowing of yet another regime would have been a retrograde and dangerous step. Since the turn of the nineteenth century, a core tenet of Constant's political philosophy had been a respect for pre-existing political institutions coupled with a deep suspicion of revolutionary change. The Charter, moreover, seemed to institutionalise many of his most sacred political principles, and he had argued strenuously in *Principes* that individual and political liberty could indeed be compatible with moderate monarchy.

But despite the liberal nature of the Charter, Constant's rallying to the monarchy in 1814 was not prompted solely by philosophical and ideological considerations. An acute desire to remain politically relevant and active became something of an obsession for Constant during the nineteenth century; and in keeping with his broader political aspirations, he set himself the lofty task of making his mark on French politics by the age of fifty. With the restoration of the crown quickly secured in the April, 1814, the ambitious, forty-seven year old, Constant was left with little option but to reconsider his previously dogmatic stance on the value of republican institutions.

Prompted then by a range of intellectual considerations he had harvested for some time, Constant's conversion to constitutional monarchy in 1814 was in many ways an understandable, or even predictable, one. However in direct contrast, his shift in allegiance to a resurgent Bonaparte in 1815 was a highly unexpected, and less easily-explainable, move that profoundly troubled many of his contemporaries. His opposition to Bonaparte's return had been such that he had planned to travel to America in April, 1815, but when presented with the opportunity to draft a new constitution for France, Constant agreed and assumed his new role as a Councilor of State under the direction of his former-adversary. His surprise acceptance of Bonaparte's proposition – described by Laquièze as '*un retournement sans équivalent dans l'histoire politique française*' – was met with outrage as his decision provoked considerable criticism not only from Constant's enemies but also from generally supportive figures like de Staël.⁴⁴⁰

⁴⁴⁰ Rosenblatt, *Liberal Values*, p.155.

Labelled an inconsistent opportunist by many, Constant's reputation took a considerable hit, but he had nonetheless found himself endowed with the opportunity to make a lasting mark on the French political landscape. In an effort to counter accusations of opportunism and inconsistency, he authored his *Mémoires sur les Cent-Jours* (1816) in which he made a concerted, and convincing, effort to justify his *volte-face*. Constant presented the case that his position had always been that liberty was indeed possible under all forms of government, and that provided individual liberties could remain sacrosanct safeguards, monarchical and republican forms of government could be equally advantageous.⁴⁴¹ Thus on Constant's account, his rationale for supporting Bonaparte was analogous to that which had encouraged his *ralliement* to the Bourbon monarchy in 1814: liberty could be preserved under multiple forms of government, provided that both the sum total of power remained limited, and that the institutions in place were in keeping with the prevailing spirit of the age.⁴⁴²

Constant's work in the drafting of the *Acte additionnel aux constitutions de l'Empire* (1815) resulted in his authoring of the *Principes de politique* of 1815, his third major constitutional treatise. In the work, as in the *Réflexions* authored just a year earlier, the king was to assume the role of the neutral power. Thus despite the significance of his *political* shift in supporting Bonaparte, his move toward establishing the royal power as the neutral authority was a hugely significant *philosophical* conversion. He had previously argued in *Fragments* that the most significant drawback of monarchy was its aptness to place the neutral and executive powers into the same hands, yet in *Principes (II)* he appeared confident that the executive functions of the state could be sufficiently divorced from the royal, or neutral, power.

⁴⁴¹ Benjamin Constant, *Mémoires sur les Cent-Jours* (ed.) O. Pozzo di Borgo (Paris, 1961), p.54.

⁴⁴² In this sense, the validity of Constant's own justification for his willingness to work with Bonaparte on the drafting of a new constitution is certainly plausible when read in light of the *Principes de politique* of 1806. He had argued eight years earlier that the flourishing of individual liberty and the limitation of government were both possible under constitutionally-moderated forms of monarchy. From Constant's musings in *Mémoires*, it seems clear that he possessed a genuine belief that Bonaparte could be held to a liberal framework of constitutional monarchy – one grounded in principles of individual liberty and the primacy of the national will. As Rosenblatt and others have explained, Constant's shift of 1815 was inspired more by idealism and naivety than by cynical opportunism; Rosenblatt, *Liberal Values*, p.156. Kalyvas and Katznelson gone further in explaining that Constant's shift was neither 'opportunistic nor tactical' but instead entirely 'principled'; Kalyvas and Katznelson, 'We are Modern Men', p.529.

Unlike in *Fragments*, Constant now identified five constitutional powers. In his monarchical system as sketched in *Principes (II)*, the legislature consisted of two distinct powers – the representative power and the hereditary chamber – and these were to operate in harmony with an executive as well as a judicial power, which for the first time he considered *active*.⁴⁴³ Sitting above the four active powers was the royal power – an institution which was to play no role in government other than to ensure the maintenance of equilibrium and harmony between the active powers. Thus in much the same way as the *pouvoir préserveur* of *Fragments*, the royal power of *Principes (II)* was to stand adjacent to the active powers, concerned with tempering the excesses of the executive and legislature. However, despite the fact that the two institutions were charged with performing the same role, Constant sharply distanced himself from his prior institutional solution through identifying a glaring deficiency in the concept of a supreme republican power.

Juxtaposing a hypothetical supreme republican power with the English monarchy in *Principes (II)*, Constant demonstrated that the former would necessarily lack the type of inviolability possessed by the latter.⁴⁴⁴ Through being periodically elected by the people, Constant argued, a republican institution would be devoid of the veneration usually accorded to an hereditary monarch.⁴⁴⁵ Drawing on the unique nature of a king's historical lineage and position within the state, Constant argued that a monarch could be positioned within a constitution in such a way that rendered him answerable to non-one and thus *inviolable*.⁴⁴⁶ Later noting that such inviolability was merely '*une fiction légale*', he nonetheless understood that the pretence of the king's inviolability was an indispensable feature of not only a constitutional monarch, but also of a neutral constitutional power more generally.⁴⁴⁷

⁴⁴³ Constant, *Principes (II)*, p.19.

⁴⁴⁴ Constant, *Principes (II)*, pp.24-26.

⁴⁴⁵ Constant wrote: '*Un pouvoir républicain se renouvelant périodiquement, n'est point un être à part, ne frappe en rien l'imagination, n'a point droit à l'indulgence pour ses erreurs*'; Constant, *Principes (II)*, p.24.

⁴⁴⁶ Constant, *Principes (II)*, p.24.

⁴⁴⁷ In reference to the idea of the inviolability of the monarchy, Constant wrote that: '*Il est évident que cette hypothèse est une fiction légale, qui n'affranchit pas réellement des affections et des faiblesses de l'humanité, l'individu placé sur le trône*'; Constant, *Principes (II)*, p.80.

From his characterisation of the king as a superior and inviolable being, Constant was able to point to a fundamental weakness inherent in the idea of a supreme republican power. Though he had made considerable efforts in *Fragments* to differentiate between the supreme power and the executive, his position in 1815 was that by being periodically elected by the people, such an institution would ultimately struggle to shroud itself in the type of inviolability that was naturally accorded to a monarch. In this way, he continued, a republican neutral power would find itself unfavourably compared to the active executive branch – a body composed of men no different to those who occupied the supreme position within the state. In Constant’s view, the chief corollary of this was that if public opinion desired that the ministry be transformed into the supreme power, nothing in the formal composition of the latter would prevent such a remodelling of the former.⁴⁴⁸ Couched within this argument then was the idea that a *supreme* constitutional power was so only in relation to the other constituted powers; the ultimate source of political authority remained the sovereign people.

Furthermore, in a system under which the executive was responsible and the supreme authority irresponsible, the legitimacy, as well as the purpose, of the neutral power would be brought into question. In expounding these twin points, Constant drew on the example of the Directory:

*Entre un pouvoir républicain non-responsable, et un ministère responsable, le second serait tout, et le premier ne tarderait pas à être reconnu pour inutile... Supposez, dans le constitution de 1795, un Directoire inviolable, et un ministère actif et énergétique. Aurait-on souffert longtemps cinq hommes qui ne faisaient rien, derrière six hommes qui auraient out fait?*⁴⁴⁹

His conclusion was that in absence of the trait of inviolability, a supreme republican power would have to be rendered *responsible*, but the problem with such an arrangement was that this responsibility would be rendered illusory for the reason that a prerogative which would debilitate the internal machinery of government would scarcely be invoked by the legislature.⁴⁵⁰ Thus, the range of problems he had identified in a republican neutral power were necessarily absent

⁴⁴⁸ Constant, *Principes*, pp.24-25.

⁴⁴⁹ Constant, *Principes (II)*, p.25.

⁴⁵⁰ ‘Une responsabilité qui ne peut s’exercer que sur des hommes dont la chute interromprait les relations extérieures et frapperait d’immobilité les rouages intérieurs de l’État ne s’exercer jamais’; Constant, *Principes (II)*, p.25.

in a royal neutral power. He was confident that the inviolability ascribed to the king would firstly prevent any comparisons between the monarch and his ministers, and secondly, would allow the king to operate *irresponsibly*. For Constant, it was only when power was considered sacred in this way that it could be sufficiently separated from responsibility.

His confidence in the ability of an inviolable monarch to exercise political neutrality was then largely informed by his discovery of the concept of ministerial responsibility. It ought to be said, however, that Constant's conception of ministerial responsibility was rather different to the convention which had emerged under English common law. He stopped short of establishing a ministry dependent upon the support of a parliamentary majority, and instead created a system under which a minister would find himself prosecuted by the legislature only if he engaged in an action that constituted an abuse of power or an illegal interdiction prejudicial to the public interest.⁴⁵¹ As a trial between the executive authority and the power of the people, Constant moved that ministers be tried in the House of Peers – a body which was, in his view, capable of standing as a disinterested and neutral arbiter, concerned only with the greater interest of the state.⁴⁵²

Thus, it was the inclusion of ministerial responsibility into his constitutional model that allowed for the monarch to assume an inactive, irresponsible, and inviolable position within the state; by establishing a responsible ministry, Constant's hope was that the executive branch would form a power base entirely separate from the royal power. The corollary of this, he supposed, would be the establishment of a truly disinterested supreme power capable of acting as a disinterested *judge* of the ministry. He noted that such an arrangement was possible only under constitutional monarchy; where the executive branch would be a natural '*alliée*' of an absolute monarch, and an '*ennemie*' of a republican supreme power, under moderate monarchy the king would be well positioned to

⁴⁵¹ Mary S. Hartman, 'Benjamin Constant and the Question of Ministerial Responsibility in France, 1814-1815', *Journal of European Studies*, Vol.6, No.4 (1976), pp.248-261 (p.252).

⁴⁵² Constant, *Principes*, pp.77-78.

act only as a judge of the executive, in precisely the same way that he could act as a judge of the legislature.⁴⁵³

The key to his new schema was that under constitutional monarchy, the king was to be devoid of *active* political power and thus irresponsible for the actions of the executive. Coupled with this was Constant's faith in the capacity of the unique characteristics of a monarch to ensure against comparisons being made between the royal power and the executive. If such an arrangement proved successful, Constant noted, the king would remain permanently elevated above political dissensions in a way that a republican power could not. Reinforcing his contention, Constant made clear that a monarch could merely maintain the status quo and consequently could not propose the promulgation of any new laws without the consent of the active and responsible ministry.

After considering the form of his new neutral power, Constant explored in its functions in greater depth. In keeping with his considerations in *Fragments*, he was clear that one of the primary functions of the *pouvoir neutre* was to facilitate the dominance of public opinion in such a way that would allow political liberty to guide and moderate the state. In Chapitre III, he reiterated – sometimes verbatim – many of the points he offered in the first *Principes* regarding the importance of curtailing legislative excess and maintaining the broader neutrality of the state in its dealings with individuals and minorities. Concerned with the ways in which legislatures often took it upon themselves to intervene with every facet of human existence, Constant argued that the right to dissolve the representative chamber was a precondition of the limitation of the competence of the state.⁴⁵⁴

His description of the drawbacks involved in the multiplicity of the law suggested that his understanding of the limits to legitimate legislative authority had not changed since his drafting of the original *Principes* manuscript.⁴⁵⁵ The core role he ascribed to the neutral power of *Principes (II)* was to intervene only when a particular organ of government overstepped its legitimate jurisdiction, and in this sense the primary purpose of the royal power was to curb legislative

⁴⁵³ Constant, *Principes (II)*, p.22.

⁴⁵⁴ Constant, *Principes (II)*, p.26.

⁴⁵⁵ Constant, *Principes (II)*, pp.30-32.

excess and guard against the employment of arbitrary authority on the part of the executive. On this point, it seems that his constitutional model of 1815 – like that of 1802 – was grounded in the idea that political liberty was the primary mechanism for curtailing the actions of the legislature. Though endowed with the ability to veto items of legislation, the ultimate prerogative possessed by the royal power was the right of dissolution – a move that would simply herald the convening of the electoral colleges for fresh elections. As he strenuously argued in *Principes*, voting rights ultimately served a negative purpose; shields rather than weapons, political liberties were, in Constant's view, essential instruments for restricting the competence of the state with respect to individual existence. It was thus in this way that Constant reconciled his neutral power with his overriding theory that public opinion was the primary mechanism for ensuring limited and neutral government.⁴⁵⁶

Constant's understanding of the nature of constitutional neutrality was thus in large part derived from his understanding of the advantages offered by monarchical government in Britain. Surveying many of the options employed by various regimes throughout European history, Constant continually pointed to the importance of inactivity and externality. As active branches of government, the *Sénat Conservateur*, and the rather more obscure example of Florence's fifteenth-century Ballia, were not models from which Constant was able to seriously draw.⁴⁵⁷ Instead, he consistently emphasised the importance of inactivity and externality, and in this sense looked primarily to the example of English constitutional monarchy – even when expounding his formulation in the republican *Fragments*.

It is important to note that within *Fragments*, Constant's critique of the British constitutional model was for the most part grounded in his more principled opposition hereditary. In this sense, it seems clear that he regarded the British

⁴⁵⁶ Fontana makes a similar point. Drawing on Constant's description of the representative chamber as 'pouvoir représentatif de l'opinion', she argues that Constant understood public opinion to be something capable of protecting freedom and ensuring the maintenance of political stability: 'opinion', she writes, 'would prove the best possible support for maintenance of free political institutions'; Fontana, *Post-Revolutionary Mind*, pp.91-92.

⁴⁵⁷ In *Principes (II)* Constant noted that what was needed was something like Florence's extraordinary council but he made clear that the Ballia was fundamentally flawed in that it possessed the authority to criminally prosecute members of the governing class; Constant, *Principes*, pp.22-23.

crown as the prime example of an effective neutral power, but one that couldn't be replicated in France due to circumstantial differences between the two nations. Moreover, any fears he expressed in *Fragments* concerning the propensity for models of constitutional monarchy to place the executive and neutral powers into the same hands were substantially revised in 1815 as a product of his discovery of the mechanism of parliamentary ministerial responsibility.

Thus while his two proposals of the neutral power remained formally distinct from one another, they both shared a set of core traits. In the first place, his two neutral powers were set up as external and inactive forces, sitting above the political apparatus of the state. In this way, both models stood as discretionary *political* powers unlike both of Sieyès' formulations, of which one took the form of a *legal* power, and the other as an *active* branch of government. Secondly, and most significantly, both of Constant's neutral power formulations were geared toward allowing political liberty to fulfill its natural objective of limiting the competence of the state. Both institutions were granted mechanisms which ultimately empowered the citizenry: in the event of a dissolution of the legislature, it was the people who were given the opportunity to reshape government; and under both formulations the dismissal of a member of the executive involved the full participation of the people's representatives in the legislature.

6.3 Madison: Sovereignty and the States

By the time delegates gathered in Philadelphia in the summer of 1787, Madison and others had come to view the individual states the leading sources of oppression, deficient governance, and political instability within the American continent. The federalists, broadly united in their suspicion of the various states, resolved that whatever emerged from the Constitutional Convention had to have as one of its central ends the establishment of strong checks on the political actions of the various state houses. This was a supremely ambitious objective in light of both the *realpolitik* of the 1780s and the prevailing philosophical assumptions that dominated eighteenth-century American political theory. While

the act of placing limitations on the State legislatures was at once made difficult due to the presence of reactionary states-rights factions at the Convention, the attainment of the federalists' aims was to a greater degree complicated by the prevalence and popularity of Sir William Blackstone's theory of sovereignty as presented in his *Commentaries on the Laws of England*.

From the passage of the Stamp Act (1765) onwards, determining the precise location of sovereignty within the thirteenth colonies emerged as the central task in American political theory. The highly influential contention offered by Blackstone that there could be only one supreme sovereign authority within a state was broadly treated as an incontestable assumption well into the decade of the revolution.⁴⁵⁸ Every proposed plan which had as its goal the reconciliation of the authority of colonies with the power of the British parliament had to confront Blackstone's maxim.⁴⁵⁹ For many, the parameters of the debate concerning the location of sovereignty within the colonies was clear-cut: either the Westminster Parliament stood supreme in *all* matters pertaining to the colonies, or it could have no authority whatsoever over those territories.⁴⁶⁰ This unitary view of the nature of sovereignty was embraced by thinkers like Jefferson who invoked Blackstone's logic in justifying the drive toward securing the independence of the colonies from the crown; and even those who endeavoured to sketch a line of demarcation between the authority of parliament and that of the colonies often arrived at the unmistakably Blackstonian conclusion that such a line did not, nor could not, exist either in theory or practice.⁴⁶¹

The presence of two legislatures within the same territory was considered by many to be the practical embodiment of the political absurdity of *imperium in imperio*, and thinkers like Jefferson and Witherspoon drew on this specific concept when developing their leading argument that the British parliament did not in fact possess any authority over the individual colonies.⁴⁶² The

⁴⁵⁸ John Jeziarski, 'Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty', *The Journal of the History of Ideas*, Vol.32, No.1 (Jan-Mar, 1972), pp.95-106 (p.96); Wood, *Creation*, p.345; Akhil Amar, 'Of Sovereignty and Federalism', *The Yale Law Journal*, Vol.96, No.7 (Jun., 1987), pp.1425-1520 (p.1430-1432).

⁴⁵⁹ Wood, *Creation*, p.345.

⁴⁶⁰ Wood, *Creation*, p.349-350.

⁴⁶¹ Wood, *Creation*, p.350.

⁴⁶² Nevis, *The American States*, p.622.

Pennsylvanian lawyer James Wilson – Madison’s friend and arguably the most articulate spokesman for this rationale – concluded from his researches into the extent of parliamentary sovereignty over British America that in absence of formal representation within the Westminster parliament, the colonies were necessarily not subject to the supreme authority of Britain’s tripartite legislature.⁴⁶³ Leaning heavily on the Lockean concept of consent, Wilson – an Edinburgh-educated Scot and signatory to the Declaration of Independence – produced the conclusion that American sovereignty was invested solely within the people themselves, and not in a detached and supreme parliament within which the people enjoyed no formal representation.⁴⁶⁴

Thus in light of the philosophic climate of the 1770s, upon the declaration of the independence of the thirteen colonies there was little appetite among the leading political actors for sovereignty to be transferred to yet another external body, the Continental Congress. Initially in 1774, the establishment of some form of political unity between the various colonies was viewed by many as the most expedient way to draw concessions from the British parliament. However, as relations between the colonists and the Westminster government became strained to breaking point, the individual colonies transformed their strategy and endeavoured to exploit their now-considerable unity in order to achieve the ultimate concession in the form of formal independence.⁴⁶⁵ But while unity between the colonies was generally thought of as central to the campaign for independence, the movement itself had as its aim the establishment of independence and sovereignty for the individual states, rather than for the collective.

Although the Continental Congress did, during its infancy, wield significant *de facto* authority as a consequence of the realities of war, the individual states were overwhelmingly considered sovereign territories, and even independent nations, during the late 1770s and early 1780s. From this, the idea that each state stood as a sovereign and independent entity, or in the words of Witherspoon ‘a distinct person’, was reflected and institutionalised in section two of *The Articles of*

⁴⁶³ Jezierski, ‘Parliament or People’, p.104.

⁴⁶⁴ Jezierski, ‘Parliament or People’, p.106.

⁴⁶⁵ Claude H. Van Tyne, ‘Sovereignty in the American Revolution: An Historical Study’, *The American Historical Review*, Vol. 12, No.3 (Apr., 1907), pp.529-545 (pp.534-535).

Confederation and Perpetual Union (1777).⁴⁶⁶ Moreover, after hostilities with the British ceased in 1783, the authority of Congress was considerably diminished to the point that it struggled to execute even its most basic functions. An absence of an independent source of revenue and Congress' reliance on the often incontinent states to enforce its dictates produced an impotent confederate authority that was rendered subservient to the individual states.⁴⁶⁷ In this sense, while the nature of Congress' authority during the 1780s may have been largely in line with the sentiments of the majority of the inhabitants of the thirteen states, it was, in the view of the federalists, drastically out of step with the political needs of the United States.

As early as 1781, and just twelve days after taking his seat in the Congress of the Confederation, Madison proposed that the *Articles* be amended in such a way that would provide the central government with a more sufficient level of authority *vis-à-vis* the states. The centrepiece of his proposal was the provision of coercive powers to the central authority that would compel the states to 'fulfill their federal engagements'. In Congress, he was explicit about how such federal authority ought to be enforced, declaring that the coercive power of the United States could to be applied 'by sea as well as by land'. Writing to Jefferson a month later, he elucidated the rationale guiding his highly-nationalistic contention; it was the 'shameful deficiency' of some of the states that had in his view necessitated the establishment of coercive federal powers capable of guaranteeing the compliance of the states. But though he enjoyed the backing of Hamilton and others in Congress, Madison's scheme proved to be hopelessly ambitious.⁴⁶⁸

But despite incurring a level of opposition that would compel him to abandon the plan he fashioned as a junior congressman, Madison's understanding of the core vices of the political system of the United States remained unchanged and was, if

⁴⁶⁶ Article II of the *Articles of Confederation* declared: 'Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled'; *The Articles of Confederation and Perpetual Union*; Barbara Silberdick Feinberg, *The Articles of Confederation: The First Constitution of the United States* (Brookfield, CT., 2002), p.29.

⁴⁶⁷ Feinberg, *Articles*, pp.36-37; Wood, *Creation*, pp.359-361.

⁴⁶⁸ Charles F. Hobson, 'The Negative on State Laws: James Madison, The Constitution, and the Crisis of Republican Government', *The William & Mary Quarterly*, Third Series, Vol.36, No.2 (Apr., 1979), pp.215-235 (pp.220-221); Ketcham, *James Madison*, p.113.

anything, further solidified by the time he arrived in Philadelphia in 1787. In light of the prevalence of the anti-nationalist and states-rights forces within the Continental Congress, he spent much of his tenure in the body attempting to devise piecemeal reforms geared toward subtly realigning the balance of power between the states and the central authority.⁴⁶⁹ But while the Madison of the 1780s has often been portrayed as an ideological nationalist, his quest for more substantial powers for Congress was underpinned by the practical and historically-derived hypothesis that the type of political instability plaguing the thirteen states could ultimately result in the emergence of a new tyranny.⁴⁷⁰

Though not alone in recognising the potential for a new tyranny to emerge throughout the continent, Madison was more systematic than most in his researches on the subject of political instability – particularly within the context of a confederacy. After granting Jefferson, who was stationed in Paris, an unlimited commission to purchase books pertaining to confederate governments past and present, Madison devoted a considerable portion of his time during 1786 to the preparation of a pocket book, entitled *Notes on Ancient and Modern Confederacies* which was to serve as resource for his speeches at the short-lived Annapolis Convention (1786).⁴⁷¹ In the work, Madison surveyed the political systems of a wide variety of federated unions, and within each identified its particular weaknesses, expounding them under the heading ‘Vices of the System’ – a title he would later recycle for his seminal diatribe against the actions of the governments of the thirteen states.

Within *Ancient and Modern Confederacies* Madison offered one particularly important observation that would inform his understanding of how a new United States government ought to be constructed. The broader conclusion he reached from his historical studies was that confederacies were by their very nature unstable entities, prone to internal insurrection, external vulnerability, and

⁴⁶⁹ Ketcham, *James Madison*, pp.114-116.

⁴⁷⁰ In a letter to Jefferson he warned that without significant changes to the constitutional arrangement, circumstances could produce ‘an opposite extreme of our present situation’; James Madison, ‘From James Madison to Thomas Jefferson (March 19, 1787), *PJM*, 9, pp.317-322 (p.318); Ketcham, *James Madison*, p.119.

⁴⁷¹ Madison, ‘Notes on Ancient and Modern Confederacies’, p.3

ultimately fatal dissolution.⁴⁷² But aside from this broader observation, Madison offered a number of more focused considerations, specific to particular confederated arrangements that had existed throughout history. In his assessment of the constitutional structure of the Dutch Republic, he emphasised the importance of establishing and maintaining a unifying figure or body capable of mediating in disputes between the various members of the Union as an arbiter of ‘last resort’.⁴⁷³ Highlighting the existence of the natural ‘jealousy of each province of its sovereignty’, Madison was emphatic in his conclusion pertaining to the necessity of the Union’s Stadtholder; toward the end of his appraisal of the confederacy’s constitutional structure, he declared that ‘it is certain that so many independent Corps & interests could not be kept together without such a centre of union as the Stadtholdership’.⁴⁷⁴

But notwithstanding the role accorded to the Stadtholdership, Madison lamented the ‘confusion’ over the nature of sovereignty within the confederacy.⁴⁷⁵ The principle of unanimity, he declared, exposed the union to ‘the most fatal inconveniences’, and while he recognised the importance of the Stadtholder to the continuance of the Union, Madison, drawing on Abbé Mably’s *Etude d’Histoire*, expressed his revulsion at the way in which immense prerogatives had been handed to what was essentially a ‘prince’. However, despite the nature of the formal composition of the Union’s ‘arbiter of last resort’, Madison continually placed emphasis on the benefits occasioned by the presence of an umpire within a confederated governmental structure. This was something he also pointed to in his appraisal of the Helvetic Confederacy, in which he spoke favourably of the union’s law of arbitration through which ‘neutral cantons’ were often called upon to mediate between particular provinces involved in disputes.⁴⁷⁶

⁴⁷² Hobson, ‘Negative on States Laws’, p.220; Madison, Notes on Ancient and Modern Confederacies’.

⁴⁷³ Madison, ‘Notes on Ancient and Modern Confederacies’, pp.12-13.

⁴⁷⁴ Madison, ‘Notes on Ancient and Modern Confederacies’, p.17.

⁴⁷⁵ Madison, ‘Notes on Ancient and Modern Confederacies’, p.16.

⁴⁷⁶ Madison, ‘Notes on Ancient and Modern Confederacies’, p.10; According to Joseph Planta, the neutral cantons were required by law to act in an impartial manner; they could not offer opinions and their decisions were final. There were a number of cases throughout the history of the confederacy in which the actions of neutral cantons brought about amicable resolutions;

But while Madison found within a number of confederate constitutions mechanisms capable of contributing toward more effective federal government, he was insistent that in most cases such arrangements failed to produce in practice the type of governance promised in theory.⁴⁷⁷ In *The Federalist*, he drew on the Amphyctionic Council – an arrangement that in many respects formally resembled the system established by the *Articles of Confederation* – to elucidate his theory that weak unions were necessarily pre-disposed to internal conflict and eventual dissolution.⁴⁷⁸ In this way, Madison’s assessment of the nature of confederate government produced two significant conclusions. The first was one that he had derived not only from his historical researches but also from his personal experiences as a legislator both in Virginia and Philadelphia. Overturning a widely-held, ‘Anti-Federalist’, assumption about the nature of political union, Madison’s overriding conclusion was the threat of centralised tyranny under deep-union paled in comparison to the threat posed by internal anarchy under loose-union; in other words, his position was that comprehensive political union was ultimately in the interest of the various *constituent* governments.⁴⁷⁹

Though less politically-controversial, his second conclusion was in many ways more important to the development of his philosophy of federalism. Within *Ancient and Modern Confederacies*, as well as in his private letters, Madison frequently spoke of the benefits occasioned by the presence of an impartial arbiter, capable of resolving disputes between constituent governments. Though his conclusion on this subject was in part derived from his historical studies into the nature of confederate government, Madison also borrowed from the example of the British crown to fortify his argument.⁴⁸⁰ When taken together, Madison’s

Joseph Planta, *The History of the Helvetic Confederacy: Volume Two* (New York, 1800), p.167, p.295.

⁴⁷⁷ Madison, ‘Notes on Ancient and Modern Confederacies’, p.17.

⁴⁷⁸ Madison, ‘Federalist No.18’, pp.159-161; Hamilton presented a similar case in *Federalist* No.17; Hamilton, ‘Federalist No.17’, in *The Federalist*, pp.156-159.

⁴⁷⁹ Madison, ‘Federalist No.18’, p.164; The Anti-Federal position was always that a central government had to remain largely subordinate to the constituent governments so that sufficient barriers would be in place to block the authority of a centralized authority that could descend into tyranny; Cecilia M. Kenyon, ‘Men of Little Faith: The Anti-Federalists on the Nature of Representative Government’, *The William and Mary Quarterly*, Third Series, Vol.12, No.1 (Jan., 1955), pp.3-43 (pp.15-16).

⁴⁸⁰ James Madison, ‘From James Madison to Thomas Jefferson (24 October, 1787)’, *PJM*, X, pp.205-220 (p.210).

two leading contentions on the subject of confederate government coalesced to form an holistic philosophy of federalism: in the absence of an *external* power like Stadtholder and the royal prerogative, what was needed was the formation of an extensive union, but one which *itself* served as an arbiter of last resort – it was only in this way, Madison argued, that the union could be safeguarded from both internal anarchy and potentially destructive disputes between the constituent governments.

In attempting to devise an institutional panacea – with a role similar to the Stadtholder and the ‘neutral cantons’ – for the problems plaguing the American political landscape, Madison strove to construct a political system composed of distinct legislatures, but one which would avoid the ‘evil’ of *imperium in imperio*. In a letter addressed to George Washington, composed just a month before the beginning of proceedings in Philadelphia, Madison appeared largely convinced by the Blackstonian account of sovereignty, and within the letter expounded his ‘middle ground’ answer to what had been the most controversial question in American political discourse.⁴⁸¹ Declaring the independence of the States to be utterly irreconcilable with their ‘aggregate sovereignty’, he outlined his vision for a system ‘which may at once support a due supremacy of the national authority’ while allowing the ‘local authorities’ to play a role whenever they could be ‘subordinately useful’.⁴⁸² Certainly less of a ‘middle-ground’ position than Madison may have contended,⁴⁸³ his ostensibly nationalistic, and at this point embryonic, proposal demanded the transfer of sovereignty from the individual states to the federal government under the guise of the concept of popular sovereignty.⁴⁸⁴

⁴⁸¹ James Madison, ‘From James Madison to George Washington (16 April, 1787)’, *PJM*, IX, pp.382-387 (p.383).

⁴⁸² Madison, ‘Letter to Washington (16 April, 1787)’, p.383.

⁴⁸³ In terms of the *realpolitik* of the 1780s, Madison’s description of his position as a ‘middle-ground’ option was in many ways a stretch. However, in light of both the Blackstone-doctrine and the history of confederated unions in Europe, it seems clear that in Madison’s view the establishment of a system in which the various States were clearly ‘subordinate’ co-possessors of sovereignty was a *modus vivendi* arrangement.

⁴⁸⁴ In a letter addressed to Jefferson written in March of 1787, he explained that it ‘would be expedient in the first place to lay the foundation of the new system in such a ratification by the people themselves of the several states as will render it clearly it clearly paramount to their legislative authorities’; ‘Letter to Thomas Jefferson (March 19, 1787)’, p.318. He made the same

6.4 Madison: Forging the Great Desideratum in Republican Government

After the close of the Convention, however, Madison did concede considerable ground on the issue of sovereignty. The results of a number of key votes taken in Philadelphia ultimately pressed him into reconsidering and ultimately abandoning his previously robust commitment to the Blackstonian account of the conceptual limitations of sovereignty. In his landmark letter to Jefferson, dated October, 24, 1787, just over a month after close of the Convention, he explained that one of the central objects of the Convention had been the establishment of a line of demarcation between the General Government and the States, and noted that such an exercise had been the most difficult and challenging task conducted by the delegates present in the old capital.⁴⁸⁵ Though he never championed the total abolition of the states, Madison's position was always closer to consolidation than divided sovereignty. In both *The Federalist* and his writings composed during the build-up to the Convention, he had consistently maintained the rather unpopular position that it was in fact the central authority that would be vulnerable to political encroachments on the part of the States; recent history, he explained in his 'Reply to the New Jersey Plan', proved the reverse to be unlikely.⁴⁸⁶

Along with consolidationists like Hamilton, Madison appealed for political supremacy to be invested within the central authority, as a defensive mechanism, if nothing else. The debate was a fraught one, and after the introduction of the New Jersey plan Madison's position was rendered largely untenable. In hindsight, the compromise on the subject that went on to characterise the new constitution (which Madison vigorously defended as 'Publius') was in many ways an inevitability; shared supremacy was the only way to reconcile the Virginia with the New Jersey Plan. But for Madison, as for a great many federalists, this was deficient outcome. Finding himself on the losing side of this crucial debate, he emerged from the Convention with the view that the decision

point in his letter Washington, claiming that 'a ratification must be obtained by the people'; Madison, 'Letter to Washington (April 16, 1787)', p.385.

⁴⁸⁵ Madison, 'Letter to Jefferson (24 October, 1787)', p.209.

⁴⁸⁶ James Madison, 'Reply to the New Jersey Plan', in *PJM*, X, pp.55-63 (pp.57-58); James Madison, 'Relationship between Federal and State Governments', *PJM*, X, pp.67-69 (p.67).

agreed upon by a majority of delegates to establish a central authority with ‘limited power’ had the potential to invite into the new constitutional system the condition of ‘*imperia in imperio*’; and for Madison, the ambiguous division in political power between the federal government and the States was obscured even further by the delegates’ decision to establish the Senate on the basis of equal representation.⁴⁸⁷

Though dissatisfied with the consensus arrangement – and unconvinced that such a division of power could prove to be workable in the long term – Madison reluctantly acquiesced to the crucial decisions taken by what he called a ‘bare majority’ of delegates.⁴⁸⁸ However, while he was prepared to concede ground on the issues of ‘supremacy’ and sovereignty, his faith in the accuracy of his historical researches ultimately precluded him from abandoning his belief in the necessity of a ‘controlling’ power. Writing to Jefferson after the close of proceedings in Philadelphia, Madison summarised his position in arguing that: ‘if a compleat [*sic*] supremacy some where is not necessary in every society, a controuling [*sic*] power is at least so’.⁴⁸⁹ In this sense, the keystone to his vision for the new constitutional system was the idea of an authority capable of acting as a *direct check* on the actions of the States; thus while remarkably undogmatic in his commitment to the establishment of a single supreme authority, Madison was not prepared, even after its defeat at the Convention, to abandon his proposal for a controlling authority.

The controlling power he spoke of was his concept of the ‘federal negative’ – a veto to be accorded to the federal government that could be employed in ‘*all cases whatsoever*’. It was a proposal he had fashioned in the years and months leading up to the Philadelphia Convention, and it served as the central pillar of his blueprint for new constitution which he had briefly outlined to both Jefferson and Washington six months prior to the beginning of proceedings in the capital. Madison’s plan for the federal negative was in large part derived from his understanding of the role played by the British crown throughout the Empire, and, in his exchanges with Jefferson, Madison drew on this example to posit that

⁴⁸⁷ Hobson, ‘Negative on State Laws’, p.226.

⁴⁸⁸ Madison, ‘Letter to Jefferson (24 October, 1787)’, p.209.

⁴⁸⁹ Madison, ‘Letter to Jefferson (24 October, 1787)’, p.209.

‘if the supremacy of the British Parliament is not necessary as has been contended, for the harmony of that Empire; it is evident I think that without the royal negative or some equivalent controul, the unity of the system would be destroyed’.⁴⁹⁰

It was in this sense that Madison conceived of the negative as a mechanism capable of ensuring uniformity and unity throughout the ‘empire of laws’ of the American continent. Pressed into abandoning his previously Blackstonian understanding of the conceptual limitations of sovereignty, Madison clearly envisioned the formation of a controlling power as a necessary substitute for the type of formal supremacy and sovereignty he wished to see established in the ‘General legislature’. In this way, the negative was in part conceived of as an indispensable arrangement capable of steering the republic away from the evil and absurdity of *imperium in imperio*, while avoiding what Madison understood to be an ‘inexpedient’, and unworkable, consolidation of power that would involve extensive encroachments on the state jurisdictions.⁴⁹¹

This desire, however, to guarantee the unity of the compound republic accounts for only part of Madison’s commitment to the federal negative. Borrowing once again from the example of the British crown, he made clear in his exchanges with Jefferson and Washington that the negative constituted an expedient mechanism perfectly suited to guarding against unjust abuses of legislative power within the various states; and on this subject, it seems evident that Madison had been profoundly influenced by the history of the royal prerogative and its application in the thirteen colonies prior to independence. In perhaps the most famous articulation of the colonials’ understanding of the efficacy of the royal negative, Jefferson, in his *Summary View of the Rights of British America* (1774), had argued that such an arrangement was indispensable for the reason that under its scrutiny and supremacy, individuals could ‘obtain through its intervention some redress of their injured rights’. Going further, Madison’s mentor explained in his memorandum that the king was ‘entrusted with the direction and management of the great machine of government...He had the

⁴⁹⁰ Madison, ‘Letter to Jefferson (24 October, 1787)’, p.210.

⁴⁹¹ Madison, ‘Letter to Washington (16 April, 1787)’, p.383.

negative on the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws'.⁴⁹²

Ostensibly following Jefferson's rationale, Madison on occasion equated the federal negative with what he called the 'kingly prerogative' – an 'absolutely necessary' legal mechanism in a compound constitutional structure.⁴⁹³ But despite the concept's status as something of a 'republican' variation of the royal prerogative more suited to the unique circumstances of the United States, Madison was firmly of the view that his model in fact constituted a superior mechanism. Where a 'prince may be tolerably neutral towards different classes of his subjects', Madison wrote, the General government of the United States would possess this same attribute of neutrality 'and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests'.⁴⁹⁴ In this way, it was the *republican* nature of his replacement for the kingly prerogative that would, in Madison's view, establish it as an institution positioned and arranged so as to facilitate the realisation of the distinctly liberal end of neutral governance.

Just as in the context of the colonial period, neutral governance was considered by Madison to be indispensable primarily due to the extent of the political authority he anticipated would be reserved to the individual states. Notwithstanding his nationalist credentials, prior to the beginning of the Convention he had been clear about the limited nature of the responsibilities that ought to be transferred to the national government.⁴⁹⁵ Though he may have found himself in agreement with consolidationists like Hamilton and Charles Pinckney on a number of issues, Madison was never of the view that the total consolidation of political power in the new federal government was either viable or desirable. Speaking to the Convention, he remarked that the maintenance of considerable

⁴⁹² Jefferson's hostility toward the actions of the Crown in the middle 1770s was not the product of an opposition to the idea of the royal negative itself. Instead, he rallied against the King partially on the grounds that while George III had frequently made use of the veto with respect to colonial legislation, he had contrariwise resisted its employment in his dealings with the Parliament in Westminster. Inequity, then, seemed to be the primary issue; Stephen Howard Browne, 'Jefferson's First Declaration of Independence: A Summary View of the Rights of British America Revisited', *Quarterly Journal of Speech* 89:3 (2003), pp.235-252 (p.249).

⁴⁹³ 'Madison, 'Letter to Washington (16 April, 1787)', p.383.

⁴⁹⁴ Madison, 'Letter to Jefferson (24 October, 1787)', p.214.

⁴⁹⁵ Madison, 'Letter to Washington (16 April, 1787)', p.383.

state authority, while not necessary for the protection of state interests, was a most expedient solution, describing the idea of the federal authority extending its reach to *local* interests as an ‘impracticable’ and ‘imperfect’ use of political power.⁴⁹⁶ Thus while adamant that the federal authority had to be given positive powers in ‘all cases requiring uniformity’, Madison nonetheless remained aware that even under his own comparably expansive formula for the division of power, a considerable number of matters would remain confined to the jurisdictions of the several states.

In placing considerable faith in his ‘extensive republic thesis’, Madison had been confident that – particularly with the added restraint of a revisionary council – the federal legislature would be prevented from descending into the type of interested-factionalism that often resulted in the promulgation of unjust law. However given the limited size and general homogeneity of the various states, it was assumed that a balanced equilibrium between local interests would likely never become a sustaining feature of the political cultures of the States. This, he made clear to Jefferson: ‘in too small a sphere oppressive combinations may be too easily formed agst. the weaker party...In small republics the sovereign will is...not sufficiently neutral towards the parts composing it’.⁴⁹⁷ From this historically derived conclusion, Madison and his federalist allies were pressed into exploring other constitutional means capable of safeguarding individual and minority rights from the actions of factional state houses.

Thus, although the negative was conceived as a method for ensuring both harmony and the protection of the General Authority from State encroachments, Madison’s scheme was with equal measure intended to serve as a ‘controul on the internal vicissitudes of state policy; and the aggression of interested majorities on the rights of minorities and individuals’.⁴⁹⁸ In each of his major discussions concerning the nature and purpose of the federal negative, he placed the plight of individuals and minorities at the centre of his case, finding within the recent histories of State legislatures a plethora of examples to support the

⁴⁹⁶ Madison, ‘Relationship between State and Federal Governments’, p.68.

⁴⁹⁷ Madison, ‘Letter to Jefferson (24 October, 1787)’, p.214.

⁴⁹⁸ Madison, ‘Letter to Washington (16 April, 1787)’, p.384.

federalist position.⁴⁹⁹ In *Vices*, Madison's exposition of what he termed the 'Great Desideratum in Government' – described as 'such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions' – followed an extensive examination of the nature of individual liberty within the thirteen states, and from this conclusion on the subject of how to guarantee the application of justice in the various states, he appealed for the creation of an institution capable of remaining *neutral* between the various factions and interests of the 'extensive republic'.⁵⁰⁰

In this way, Madison's concept of the negative was indubitably predicated on the 'extensive republic thesis' he would later expound in *Federalist* No.10. In his lengthy statement to Washington three months before the beginning of the Convention he expounded on the nature of the federal negative through drawing on his understanding of the type of political neutrality he hoped would become a feature of politics at the federal level. Drawing clear links between Britain's royal prerogative and his theory of the federal veto, Madison wrote that:

In monarchies the sovereign is more neutral to the interests and views of different parties...might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would be sufficiently restrained from the pursuit of interests adverse to those of the whole society?⁵⁰¹

His faith in the capacity of the national government to remain neutral in its dealings with the individual states was derived from his understanding that the composition of the federal government could be made to sufficiently reflect the heterogeneity of the nation as a whole: this was the 'great desideratum in Government' he spoke of in *Vices*. Where a small republican government could not remain sufficiently neutral between the parts from which it was composed, the 'extended republic of the United States', Madison claimed, 'would hold a pretty even balance between the parties of particular states'.⁵⁰² Importantly,

⁴⁹⁹ Madison, 'Vices of the Political System', p.355.

⁵⁰⁰ Madison, 'Vices of the Political System', p.355.

⁵⁰¹ Madison, 'Letter to Washington (16 April, 1787)', p.384.

⁵⁰² Madison, 'Letter to Jefferson (24 October, 1787)', p.214.

Madison moved early on that the federal negative be accorded only to the Senate, the institution he frequently described as the ‘great anchor of the government’.⁵⁰³

Thus, it is here that we can begin to discern the pivotal link between Madison’s ‘extensive republic thesis’ – as expounded in *Federalist* No.10 – and the plan for the federal veto. In precisely the same way as the federal Senate was to serve as a check on the heterogeneous, but nonetheless factional, House of Representatives, it was in much the same way intended to restrain the more homogenous and similarly factional state legislatures. Typically Madisonian, the plan revolved around the idea that the heterogeneity of the states *as a collective group* would be reflected in the composition of the federal legislature, and that such heterogeneity would be reflected back on the states in their *capacity as individual entities*.

In this way, the classic description of the ‘great desideratum in government’ toward the end of *Vices* was not, then, a description of the United States Constitution as ratified by a majority of states in 1788.⁵⁰⁴ *Federalist* No.10 thus stands as an incomplete window into Madison’s philosophy of federalism. While the existence of sufficient heterogeneity at the federal level could well render the Congress neutral between the claims of competing interests, such an arrangement would have no effect on the nature of politics at the state level in the absence of a negative. Considering the nature of the legislative powers reserved to the states, Madison was of the view that the Convention’s failure to equip the federal government with a negative as a ‘material defect’ that could possibly undermine the integrity of the Constitution itself.⁵⁰⁵

In sum then, Madison was of the view that a General Government grounded in the principle of ‘factional equilibrium’ could serve as much more than a unifying force responsible for resolving disputes between member states. His relatively frequent references to Britain’s royal prerogative suggests that he conceived of a federal Senate equipped with the negative as a disinterested neutral arbiter – sufficiently detached from the local politics – capable of correcting invasions against the rights of individuals and minorities.

⁵⁰³ Madison, ‘Letter to Washington (16 April, 1787)’, p.385.

⁵⁰⁴ Charles Hobson has been alone in pointing this out.

⁵⁰⁵ Madison, ‘Letter to Jefferson (24 October, 1787)’, p.212.

6.5 The Primacy of Public Opinion and the Neutral Power

In the construction of their respective ‘controlling’, or ‘neutral’, powers, Constant and Madison exhibited a commitment to ensuring against the prevalence of particular, or factional, interests in the legislative process. Both models relied heavily on the distinctly liberal-republican hypothesis that the citizenry – as *electors* – could be trusted to safeguard their own interests and rights against the potentially nefarious objectives of self-interested factions, apt to take hold in representative legislatures. In this sense, both Constant and Madison saw political liberty and public opinion as defensive mechanisms, capable of restraining the competence of the positive power of the legislature.

In the case of Constant, political liberty served as the ultimate guarantee of individual liberty, but its primacy over the organs of the state was intended to be facilitated and ensured by the neutral constitutional power. Thus, in both of his constitutional frameworks the neutral power was constructed in such a way that any constitutional interventions would merely result in the elevation of public opinion to the supreme position within the political framework. His understanding of the nature and value of public opinion – as manifested through political liberty – was such that he remained confident that an electorate, conditioned by the institution of property, would generally seek to constrain the actions and jurisdiction of the governors, whether they be in the executive or legislative branches.

Though Madison didn’t entirely see political liberty from this negative perspective, he understood that through successive processes of electoral filtration, a sufficiently refined embodiment of the public opinion could effectively suppress the political ambitions of localised factions throughout the republic. Leaning heavily on his ‘extensive republic thesis’, as outlined in *Federalist* No.10, Madison understood that the totality of public opinion could be employed in order to guarantee against the promulgation of legislative measures motivated by a sets of particular interests unique to a particular locale. By constructing the Senate as a national body – and on the basis of indirect election – his hope was that the heterogeneity of the republic as-a-whole could

serve as an obstacle to the advancement of particular interests within the legislative processes of the wider republic.

Thus, within the respective constitutional philosophies of Constant and Madison we can see the ways in which the unmistakably liberal end of procedural neutrality emerged from the distinctly neo-Roman understanding of the value of political liberty and public participation in the political sphere. Constant, more so than Madison, had faith in capacity of political liberty to serve as a restraining factor, but even in the case of the latter, the chief presumption was that a nationalised representation of public opinion could be reflected back on the various States, in turn reducing the likelihood of the production of legislation inconsistent with the rights of individuals and minorities.

Despite, however, their shared debt to the republican concept of non-domination, both thinkers consistently looked to the British model of constitutional monarchy in their efforts to *institutionalise* political neutrality. For Constant, the aim was always to establish an external controlling power, adjacent to the active organs of government and devoid of any attachment to ‘particular interests’ and factional ambitions. Madison’s model, on the other hand, was not entirely external. Instead, the ‘federal negative’ was intended to be exercised by an active, albeit ‘disinterested’, institution, capable of examining the motivation behind legislative measures authorised in the various states. In this sense, the Senate – as the possessor of the federal negative – was thought to be capable of checking self-interested factionalism due primarily to its disinterested nature. While still a *representative* body, Madison considered the Senate to be capable of acting impartially as a consequence of its electoral method – one grounded in the distillation, and subsequent reflection, of public opinion.

Though the ideal of liberal neutrality has come to be inextricably associated with the contemporary analytical political philosophy of Rawls and others, the constitutional doctrines of Madison and Constant serve to remind us that pursuit of neutral governance stands as a political objective that dates back to the very inception of modern liberalism in late eighteenth-century America and France. Though Mill and Rawls are commonly thought of as the leading expositors of liberalisms that focus less on legislative *outcomes* than on the appropriateness of certain *reasons* as grounds for political action, it has, I hope, been demonstrated in this study that Madison and Constant each sought to secure the production of *neutrally-justifiable* laws as part of a broader effort to limit the legislative competence of the state and maximise individual liberty.

Following broadly analogous assumptions regarding the nature of man, power, and liberty, Madison and Constant both recognised that the central challenge facing the modern constitutional designer was to determine how the practice of popular governance might be reconciled with the maintenance of private rights and the protection of minority interests. Based on a shared understanding that the legislative pursuit of particular sectional and economic objectives stood as the driving force behind the proliferation of the law, they each resolved that individual and minority rights could be most effectively safeguarded through treating the problem of legislative excess at its source. In this way, the constitutional programmes of Madison and Constant revolved around determining how to secure the *neutralisation* of the aims and objectives of particular factional groups, and their respective efforts in this area were motivated by a common belief that efforts to restrain the legislative competence of the state hung on the capacity of constitutional systems to preclude the formation of *interested* legislative majorities.

Thus, in much the same way as their liberal descendants, Madison and Constant considered legitimate laws to be those which did not seek to advance or hinder

particular interests. They understood just usages of the apparatus of the state to be only those which were *motivated* by a concern for the realisation of an objective, or impartially conceived, conception of the public good. From this position, both thinkers denied not the legitimacy of particular legislative outcomes but rather the legitimacy of certain reasons that could be invoked to justify instances of legislative action – and the presence of this line of reasoning in early nineteenth-century Western political thought points to the existence of a striking level of continuity in liberal political theory.⁵⁰⁶

It ought to be noted, however, that while Madison and Constant may have arrived at a set of conclusions regarding the legitimate role of the state that would be familiar to contemporary liberal theorists, the rationale behind their shared insistence on the appropriateness of state neutrality was in some ways an inversion of that which underpins the Rawlsian justification for neutrality. Whereas contemporary liberal theorists tend to justify neutrality by reference to the fact of value pluralism – on the basis that the multiplicity of pre-existing conceptions of the good cannot be placed into a ‘discernible hierarchy’⁵⁰⁷ – Madison and Constant were motivated less by an appreciation for existence of diversity than by a ‘libertarian’ hostility to majoritarianism. In recognising the inherent incompatibility between factional-majoritarianism and individual liberty (on the grounds that factional majorities tended to expand the competence of the state), both thinkers sought to *exploit* pluralism in order to neutralise political will.

More specifically, Madison’s and Constant’s predilection for neutrality was not motivated by a moral concern for the sanctity of various ‘conceptions of the

⁵⁰⁶ Kalyvas and Katznelson arrive at a similar conclusion when they write: “If we revisit this contemporary project [Rawls’ and Larmore’s efforts to turn liberalism into a force above politics] through Constant’s eyes we can see that this transcendental quest for neutrality is equivalent to past efforts to instantiate a de-politicized monarch”; Kalyvas and Katznelson, ‘We are Modern Men’, p.534.

⁵⁰⁷ Glen Newey, ‘Metaphysics Postponed: Liberalism, Pluralism, and Neutrality’, *Political Studies*, Vol. 45, No.2 (June, 1997), pp.296-311 (pp.297-298); Percy B. Lehning, ‘Liberalism and Capabilities: Theories of Justice and the Neutral State’, *Social Justice Research*, Vol.4, No.3 (Sept., 1990), pp.187-213 (p.192); Charles Larmore, *Patterns of Moral Complexity* (Cambridge, 1987), p.23; Newey, ‘Metaphysics Postponed’, pp.301-302; John Rawls, ‘The Idea of an Overlapping Consensus’, *Oxford Journal of Legal Studies*, Vol.7, No.1 (Spring, 1987), pp.1-25 (p.4).

good'. Instead, both thinkers were convinced that the neutralisation of political will was the most effective way to limit the legislative competence of the state which was, in effect, little more than a precondition for the maintenance of negative individual liberty. In this sense, the theories of political neutrality they developed were in essence 'liberal' responses to a distinctly 'Real Whig' problem. Much like Sidney, Trenchard, Gordon, and others, Madison and Constant conceded the legitimacy of popular sovereignty without hesitation while remaining aware that man's tendency to pursue his own political interests could, under conditions of popular governance, translate into a 'conspiracy of the Many against the Minority'.⁵⁰⁸ In a manner not unlike the giants of Real Whig tradition, Madison and Constant emphasised the importance of popular vigilance over the governors, but they did so with their eye on a more ambitious objective. In short, their shared hope was that by securing the political empowerment of a multiplicity of distinct interest-groups, the claims of particular factions would be moderated, neutralised, and eventually nullified within the legislature.

To clarify then, where much contemporary liberal theory treats neutrality as a means towards the preservation of pluralism, the Madison-Constant doctrine treats the existence and politicisation of pluralism as way to both uphold state neutrality and guarantee against unnecessary and unjust instances of legislative interference. Thus, while their solution to the problem of factional majoritarianism was to all intents and purposes *liberal*, it was born from the assumption that widespread political participation was a vital means toward guarding against the emergence of majoritarianism within the context of an 'extensive republic'. In other words, it was individual liberty, and not pluralism, that made neutrality *desirable*; and it was pluralism that made neutrality *possible*.

It might, in this sense, be tempting to conclude that Madison and Constant formed a justification for state neutrality that in effect mirrors the argument advanced by Mill and Immanuel Kant that neutrality is necessary on the grounds that individuals ought to be provided with a level of autonomy sufficient to pursue a particular way of life.⁵⁰⁹ While, however, there might be some

⁵⁰⁸ Mayer, 'Radical Whig Origins', p.193.

⁵⁰⁹ Charles Larmore, 'Political Liberalism', p.343.

similarities between the liberalisms of Kant, Mill, Madison, and Constant, such a characterisation would fail to capture the true essence of the Madison-Constant doctrine of state neutrality. Although both thinkers understood that individual rights would be reinforced under conditions of state neutrality, their principal objective was not to provide individuals with a wide range of opportunities (though this was considered a natural consequence of state neutrality). Their aim was instead to guard against the emergence of a new species of arbitrariness in the form of majoritarian despotism, and it is on this point that we can once again discern the Real Whig foundations of their respective political philosophies. Otherwise stated, Madison's and Constant's shared insistence on state neutrality was motivated more by a philosophy of government than by a philosophy of man.

It is on this point that we can begin to see that the doctrines of liberal neutrality developed by Madison and Constant have, philosophically speaking, more in common with the thought of Hobbes than with the liberalism of Rawls. What I mean by this is that they conceived of politics through the prism of self-interest and consequently resolved that complex constitutional models were needed to channel and neutralise particular interests in such a way that would result in the realisation of a modest and somewhat austere conception of the public good. Neither thinker, in other words, attempted to theorise anything like Rawls' conception of an 'overlapping consensus', and they instead developed what can most accurately be described as *modus vivendi* liberalisms. Thus, although Rawls has himself quite rightly pointed out that Madison did not view self-interest as the *only* available political motivation, I believe that this study has shown that much like Constant, he considered self-interest to be the *primary* political motivation capable of supporting a liberal-republican regime under modern conditions.

It is in this sense that the political philosophies of Madison and Constant offer a distinctive, and ultimately liberal-republican, way of thinking about the relationship between the preservation of personal freedom and the exercising of political authority. For both, neutrality was not a highly-abstracted 'view from nowhere', but rather the political corollary of factional equilibrium. In other

words, Madison and Constant endeavoured to construct political systems within which sectional and factional conflict would allow for the construction of legislative majorities formed on the basis of objective accounts of the public good. In attempting to realise this ambitious aim, both sought to exploit the heterogeneity of the extensive republic in order to *institutionalise* political diversity. Thus, their shared strategy was one rooted in the assumption that the politicisation of a multiplicity of diverse and conflicting interests would result in the neutralisation of faction, and, by extension, the emergence of impartial decision-making.

But while the rationale underpinning their quest for political neutrality is certainly of considerable importance, it was the methods employed by Madison and Constant in the realisation of this shared objective that ought to be most significant to students of eighteenth-century political theory. Without wishing to restate observations already outlined in this conclusion, it is important to emphasise the point that neither Constant nor Madison sought to limit the competence of the state through the employment of external, and apolitical, mechanisms. For instance, ‘declared rights’ were largely superfluous to their constitutional doctrines, and the respective attempts made by both thinkers to thwart factional majoritarianism stemmed from a belief that popular sovereignty could indeed be self-limiting within the context of an extensive republic.

A case in point is Constant’s *pouvoir neutre* as outlined in *Principes (II)*: even though his final constitutional formulation incorporated the institution of monarchy, his monarchical *pouvoir neutre* was one which facilitated popular vigilance and oversight. Within this model, the king was stripped of active political authority and the institution’s primary power was ‘dissolution’ – a move that would only enhance the influence of public opinion through the convening of new elections. A further example of the way in which popular sovereignty was manipulated so as to restrain the competence of the state is the case of Madison’s formulation of a ‘controlling power’. This scheme can be best thought of as a republican alternative to the royal prerogative; the theory behind it, underpinned by the idea that political liberty ultimately served a negative purpose, was that the institution of a federal negative would allow the ‘neutralised’ sovereignty of

the whole to thwart instances of majoritarian aggression instituted by only a section of the whole.

Thus, while the conclusions offered in this study are consistent with the idea that the late eighteenth-century witnessed a significant level of interplay between liberal and republican concepts, my reasoning for labelling Madison and Constant as *liberal-republicans* differs somewhat from the conventional interpretation. Ultimately, this study has contended that although they were consistent in attempting to advance the liberal ends of limited governance and negative liberty, both adhered, rather pragmatically, to the republican, or more precisely Real Whig, assumption that the political will of the legislature could be restrained most effectively through encouraging the sovereign people to practice political surveillance. It was in this sense that Madison and Constant found value in political liberty. Neither subscribed to the neo-Athenian idea that the exercising of political power was valuable in and of itself, but they instead held that the political rights were important in as much as they contributed toward the protection of negative liberty and the preservation of minority interests.

But although the conclusions offered in this study principally contribute to our understanding of the development of modern liberalism, a number of claims which have been advanced in this thesis also carry significant implications for contemporary constitutional theory. Beginning with Madison, an important and largely neglected aspect of his political philosophy was his opposition to judicial supremacy and preference for what is today termed ‘coordinate constitutional construction’, or ‘departmentalism’. When Madison’s considerations on the topic of constitutional interpretation are taken into consideration, it is clear that contemporary American constitutional practice has deviated significantly from his original vision. Contra Madison’s understanding of how the Constitution itself would be interpreted, the U.S. Supreme Court currently enjoys a near-monopoly over constitutional meaning by refusing the share its interpretative responsibilities with the active, or political, branches of government.

The argument could be made that the omission in the Constitution of Madison’s Council of Revision and federal Negative schemes necessitated the emergence of

judicial supremacy. Although the constitutional structure is replete with checks and balances, a Madisonian reading of the Constitution would suggest that within the American political system there is presently a distinct and worrying lack of opportunities for the people and their representatives to ‘construct’ the constitution. From a Madisonian perspective this is particularly alarming, since federal justices are in effect being asked to adjudicate on constitutional disputes with a level of neutrality that can, at least according to federalist theory, only emerge from the condition of factional equilibrium.

However, although the concept of factional equilibrium is central to understanding Madison’s vision for the method by which the Constitution would be interpreted, when taken in isolation it stands as a markedly under-developed theory. Strategic, or procedural, theories of neutrality are commonly criticised on the basis that they are inherently unstable in that they demand the maintenance of a power-balance between conflicting conceptions of the good.⁵¹⁰ This is, of course, a fair criticism. For procedural neutrality to work effectively, dramatic shifts in the balance of power between conflicting groups must be guarded against, and under democratic conditions the maintenance of an equilibrium between factions simply cannot be guaranteed. Factional equilibrium could, however, be enforced through the construction of a constitutional model which rewarded *equal* parliamentary representation to each and every group, or party, that achieves a certain baseline level of popular support. Such a system would, of course, be inherently undemocratic, but it would provide minority groups with (an internal) constitutional protection and guarantee an equilibrium between factions, thus increasingly the likelihood of neutral governance.

As it pertains to the broader implications of Constant’s constitutional philosophy, two observations are of particular importance. Firstly, it seems evident that it was Constant, and not Mill, who first developed what could be termed a ‘restraint principle liberalism’. His development of a ‘harm principle’ predates the publication of *On Liberty* by almost half a century, and this principle, though important, was not the only ‘restraint principle’ outlined in *Principes*. At the

⁵¹⁰ Larmore, ‘Political Liberalism’, p346.

heart of Constant's liberalism lay a paradox: his constitutional philosophy revolved around limiting the sum total of power but he was ultimately reluctant to map out a fixed and definite circumscription of the limits of political authority. His way out of this paradox was to rely on restraint principles which were largely agnostic to political outcomes but attentive to the *reasoning* used to justify instances of legislative action. In this sense, it might be more accurate to argue that Constant was not so much concerned with limiting political power *in toto* than he was with guarding against unnecessary expansions of authority into the lives of particular groups and individuals. Achieving such a balance was a delicate exercise, but it was crucial to his broader philosophy of government. Constant was not prepared to uphold a minimal nightwatchman state at the expense of the 'necessary functions of government', and it was his employment of restraint principles (rather than fixed limits to power) that allowed him to design a state that was capable of authorising *general* interventions centred on securing internal and external security which would be non-discriminatory.

Constant's approach in this area is highly significant when we consider his theoretical account of the nature of legitimate (and thus neutral) legislative action alongside his structural framework for achieving factional equilibrium (or, in other words the constitutional framework for the neutralisation of faction). Given that he constructed a legislative system that was geared toward institutionalising deep pluralism, it necessarily follows, at least theoretically, that legislative outputs would be subject to reasonable agreement. It is in this sense that Constant's understanding of political neutrality was not one that took neutral interventions to be 'views from nowhere'. Instead, he conceived of neutral governance to be the product of deliberations conducted between a multiplicity of interested, and neutralised, groups. In this way, his expectation was that the installation of procedural neutrality would necessarily result in the production of legislative actions devised not on the basis of particular interests but instead on the basis of interests common to all political groups.

A further implication of Constant's constitutional philosophy is the way in which it demonstrates desirability of non-democratic external neutral institutions in unitary states. Far from a politically-motivated retreat from his republicanism of

the 1790s, Constant's exaltation of constitutional monarchy *Principes (II)* can be most accurately thought of as a distinctly 'Whiggish' argument centred on guaranteeing popular oversight, and, by extension, the maintenance of factional equilibrium. From his liberal-republican belief that the power of *l'opinion publique* served as the principal restraint on political power, Constant turned to the idea of 'passive' constitutional monarchy as a way to guarantee the sovereignty of the people against the authority of the legislature. If, then, there is a lesson we can take from the philosophy of Constant it is that the ultimate authority of the people ought to have an outlet in an independent, non-political, and extra-constitutional institution endowed only with the powers of executive dismissal and legislative dissolution.

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