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“Popular Sovereignty that I Deny”: Benjamin Constant on Public Opinion, Political Legitimacy and Constitution Making

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According to a dominant narrative, the concept of popular sovereignty was joined to the notion of public opinion during the French Revolution to form the blueprint of a liberal constitutional state. This article shows how, after the Revolution, Benjamin Constant, who is now recognized as a founding figure of “liberalism,” used public opinion as a substitute for popular sovereignty to theorize political legitimacy and constitution making. I show why and when Constant discussed popular sovereignty, namely to dismiss it as an unhelpful and dangerous fiction in answer to factions invoking the concept to revolutionize the political order, or rulers such as Napoleon using it to claim absolute power. In parallel, I explain how Constant designed his alternative, opinion-based theory of legitimacy in the 1790s, before pragmatically adapting it over the course of his career as political regimes changed in France. Constant’s substitution of public opinion for popular sovereignty, I contend, reveals distinct views on what makes a political regime legitimate and the meaning of constitutional changes. I conclude with a discussion of how Constant’s views, thus interpreted, throw light on debates about sovereignty and public opinion in modern political thought.

Popular sovereignty is a foundational concept in modern political and constitutional thought. Contemporary political theorists see it as the originating principle of constitutional democracy.¹ Genealogies of popular sovereignty have absorbed historians of political thought, while the concept has become an inevitable feature of wider studies on “sovereignty” in its various historical iterations.² Attention to the subject has not dwindled in recent years. In *The Sleeping Sovereign*, Richard Tuck gave a new twist to the debate, by arguing that there existed a fundamental split amongst modern political thinkers between those who, like Rousseau, associated sovereignty with the people and distinguished it from government, and

¹E.g. Bruce Ackerman, *We the People* (Cambridge, MA, 1991); Paulina Ochoa Espejo, *The Time of Popular Sovereignty: Process and the Democratic State* (University Park, 2011).

²E.g. Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York, 1988); Pierre Rosanvallon, *La démocratie inachevée: Histoire de la souveraineté du peuple en France* (Paris, 2000); Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York, 2015); Richard Bourke and Quentin Skinner, eds., *Popular Sovereignty in Historical Perspective* (Cambridge, 2016).

those who, like Joseph-Emmanuel Sieyès, ultimately conflated sovereignty with government.³

This sovereignty-centered narrative is currently coming under criticism. Strands of thinking that used alternative concepts as substitutes or ways of domesticating sovereignty are being unraveled. Paul Sagar, for instance, has recently argued that David Hume and Adam Smith should be read as attempting to design a theory of the state without any foundational concept of sovereignty. On his reading, Hume and Smith assimilated sovereignty with whoever happened to hold decision-making power in a country, such as the King-in-Parliament in England.⁴ For them, “opinion” was the central notion to make sense of why subjects obeyed their government: “lying behind ‘government’ there is no final, philosophically identifiable, and stable foundation of ‘sovereign’ authority, but only the constant and contested changing swirl of opinion.”⁵ More recently still, Lucia Rubinelli has shown that in France, the notion of “constituent power,” which today is often associated with the normative kernel of popular sovereignty—the right to redesign the constitutional foundations of a state—was first used by Sieyès as an alternative to national sovereignty and popular sovereignty, and throughout the nineteenth century a way of taming other varieties of sovereignty.⁶

This article contributes to this ongoing debate by reinterpreting Benjamin Constant’s views on sovereignty as part of what I take to be his wider theory of legitimacy. Constant is now recognized as a founding figure of liberalism in France.⁷ Although interpretations of Constant’s views on sovereignty have come in a variety of ways, scholars tend to think that he endorsed at least some qualified version of popular sovereignty.⁸ This presumption, however, has made it hard to account for Constant’s commendation of constitutional monarchy after defending a republic until Bonaparte’s rule. Moreover, it has left unsettled the question of how Constant squared his supposed commitment to popular sovereignty with his later endorsement of heredity as a valid ground of legitimacy.⁹

³Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge, 2016).

⁴Paul Sagar, *The Opinion of Mankind: Sociability and the Theory of the State from Hobbes to Smith* (Princeton, 2018), 187, 207–8. For a helpful summary of this argument see James A. Harris, “From Hobbes to Smith and Back Again,” *History of European Ideas* 45/5 (2019), 761–6.

⁵Sagar, *Opinion of Mankind*, 10.

⁶Lucia Rubinelli, *Constituent Power: A History* (Cambridge, 2020).

⁷E.g. Lucien Jaume, *L’individu effacé, ou le paradoxe du libéralisme français* (Paris, 1997), 63–118.

⁸Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, 1984), 86; Biancamaria Fontana, *Benjamin Constant and the Post-Revolutionary Mind* (New Haven, 1991), 19–20, 50; Marcel Gauchet, “Benjamin Constant: L’illusion lucide du libéralisme,” in Benjamin Constant, *Écrits politiques*, ed. M. Gauchet (Paris, 1997), 11–115, at 81; Pierre Manent, *Histoire intellectuelle du libéralisme* (Paris, 1997), 184–7; Helena Rosenblatt, *Liberal Values: Benjamin Constant and the Politics of Religion* (Cambridge, 2008), 156; K. Steven Vincent, *Benjamin Constant and the Birth of French Liberalism* (New York, 2011), 108, 178–80; Bryan Garsten, “Representative Government and Popular Sovereignty,” in Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood, and Alexander S. Kirshner, eds., *Political Representation*, (Cambridge, 2009), 90–110, at 98–9; Garsten, “From Popular Sovereignty to Civil Society in Post-Revolutionary France,” in Bourke and Skinner, *Popular Sovereignty in Historical Perspective*, 236–69; Emmanuelle Paulet-Grandguillot, *Libéralisme et démocratie: De Sismondi à Constant, en passant par le Contrat Social* (Geneva, 2010); Aurelian Craiutu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748–1830* (Princeton, 2012), 215–20.

⁹To ease these tensions, some argue that Constant was committed to “popular sovereignty” or “democratic legitimacy” throughout: his defence of hereditary monarchy was a superficial concession to changing

I proceed differently. I contend that Constant, instead of relying on the concept of popular sovereignty, used the notion of *public opinion* to make sense of why a society owed allegiance to a given institutional apparatus, and explain how fundamental lawmaking worked.¹⁰ In other words, public opinion, for Constant, replaced the prevailing notion of popular sovereignty that furnished a political regime's legitimacy and the basis of its constitution. This may come as a surprise. The received narrative around public opinion in France pictures its birth around 1750 as the manifestation of a politics of contestation against absolutism. According to Habermas, the function of public opinion as a critical exchange of arguments was subsequently "joined" with the principle of popular sovereignty—i.e. self-determination—during the French Revolution.¹¹ This story leads to a normative model of liberal democracy, in which the formation of public opinion in the public sphere precedes the formal adoption of laws in the state apparatus. On this reading, public opinion is a key component of a process through which popular sovereignty manifests itself discursively.¹² This article suggests a less teleological story, by charting how, in the wake of to the revolution, public opinion was reconceptualized in a key instance as an *alternative* to popular sovereignty. In doing so, it reveals notions on public opinion that differ from those usually discussed in the literature on the subject, which is typically confined to the pre-Revolutionary period, and tends to associate public opinion either with reason or with public esteem.¹³

In the few instances in which Constant discussed popular sovereignty, I argue, he was reacting to contemporary uses of the concept. Popular sovereignty, on his terms, was an abstract notion that could not account for how allegiance to a political regime took shape over time, in concrete historical circumstances. Further, when recognized as the originating principle of the political order, it either

political circumstances. Holmes, *Benjamin Constant*, 233–40; and Fontana, *Benjamin Constant*, 65–7. Others analyse Constant's intellectual itinerary in a teleological way, as a quest to reconcile "republican," "liberal" and "conservative" principles of legitimacy, namely popular sovereignty, limited authority and heredity. Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge, 2008), 146–75.

¹⁰On the distinction between extraordinary and ordinary lawmaking see Tuck, *Sleeping Sovereign*. Constant, I believe, also used public opinion as a substitute for popular sovereignty in *ordinary* lawmaking—the day-to-day treatment of policy questions by the government outside founding moments. On Constant's views on the role of public opinion in a settled constitutional apparatus see William Selinger, *Parliamentarism: from Burke to Weber* (Cambridge, 2019), 115–43. This article is concerned with Constant's views on extraordinary lawmaking.

¹¹Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA, 1989), 99.

¹²Jürgen Habermas, "Popular Sovereignty as Procedure," in Habermas, *Between Facts and Norms* (Cambridge, MA), 463–90. The two notions are also paired, albeit differently, in Keith Baker's narrative, for whom mid-eighteenth-century uses of public opinion around 1750 made possible the assertion of the people's sovereignty in 1789, while the terms in which public opinion was described—unitary, universal and impersonal—prefigured later characterizations of the general will. See Keith Baker, "Public Opinion as Political Invention," in Baker, *Inventing the French Revolution* (Cambridge, 1990), 167–99, at 198–9.

¹³In addition to Baker and Habermas see, in priority, Mona Ozouf, "'Public Opinion' at the End of the Old Regime," *Journal of Modern History* 60 (suppl.) (1988), 3–21; John Alexander Wilson Gunn, *Queen of the World: Opinion in the Life of France from the Renaissance to the Revolution* (Oxford, 1995); Roger Chartier, *The Cultural Origins of the French Revolution*, trans. L. G. Cochrane (Durham, NC and London, 2004), 20–34.

suggested the people's unconditional power to revolutionize it, or gave a pretext to charismatic leaders such as Napoleon to obtain absolute power through plebiscites. As a result, when forced to do so due to external circumstances, Constant denounced popular sovereignty as a dangerous fiction that should be banned from political theorizing.

In parallel, from the 1790s onwards, Constant developed an alternative theory of political legitimacy. On his terms, extant political institutions always exercised sovereignty *sensu stricto*, in the narrow legal or judicial sense of ultimate decision-making authority.¹⁴ Underneath these institutions, there existed no such thing as a sovereign people, but a society which, at a given time and place, held specific beliefs about the means of selection of rulers (*who* exercises sovereignty?) and the nature of their assignment (*how* is sovereignty exercised?). The state of public opinion determined the form of a political regime—e.g. a republic or a monarchy—and the core features of its constitution. When the correspondence between society's evolving expectations and a political regime started eroding, legitimacy needed to be reinvigorated by putting institutions back in phase with the needs of the social state.

This model of legitimacy, I contend, combined a flexible understanding of changes in opinions and regime forms over time with a normative index to assess these. Because he witnessed the French Revolution and its aftermath, Constant was convinced that France had reached a culminating point in a long historical process of opinion formation. But he was also conscious that opinion could be manipulated into lending support to despotic regimes. He therefore distinguished between an *ephemeral and ignorant* public opinion and an *enduring and enlightened* public opinion—society's "wish." This was a trans-generational opinion that had become aware of more just and rational ways of organizing political institutions—political equality and individual liberty—throughout a perfectibility-driven history, and had acquired normative weight as a result. The content of this "wish" could be rationalized and translated into "principles of politics." Enlightened writers could then use these principles to determine what sort of political regime should be considered legitimate or anachronistic in the present stage of "civilization."

Constant's replacement of popular sovereignty with public opinion, I further claim, also implied a distinct understanding of constitution making and the political actors it involved. Constitutional amendments were not the product of the people's sovereignty, as exercised for instance via a plebiscite, but the end result of an extended process of shifts in opinion, as deciphered by enlightened writers and implemented by extant constituted powers. By reframing extraordinary lawmaking in this way, Constant sought to evacuate founding moments of democratic self-determination, privileging instead gradual constitutional improvements and institutional stability as preconditions for the pursuit of private endeavors.

¹⁴The distinction between popular sovereignty and sovereignty *tout court* is well known in French constitutional history. Olivier Beaud distinguishes between a "souveraineté-puissance publique" (sovereignty in the narrow "legal" sense) and "souveraineté-principe de légitimité" (popular sovereignty). See his *La puissance de l'État* (Paris, 1994), 25–6. Similarly, Rosanvallon distinguishes between sovereignty in the narrow "judicial sense" (last-resort decision) and in the "political" sense (popular sovereignty as a norm of justification of the constitutional apparatus). See Rosanvallon, *La démocratie inachevée*, 50.

The paper unfolds chronologically. I chart the development of Constant's theory of legitimacy, from his early years as a supporter of the French Directorial republic in the 1790s (section I), through his opposition to Bonaparte (sections II, III), to, finally, his shifting allegiances from 1814 to 1830 (sections IV–VI). I show how Constant pragmatically adapted his theory under changing political regimes, depending on whether he wished to disqualify or legitimize them. While doing so, I put Constant's mentions of popular sovereignty back in context, and show when and why he urged that the concept should be disposed of. In the conclusion, I highlight what was distinctive about Constant's theory of legitimacy by contrasting it with other scholarly treatments of sovereignty in modern history of political thought. I also comment on how Constant's views, thus interpreted, question some presuppositions in the literature on the history of public opinion.

I. The Directory

In April 1796, Constant published his first ambitious pamphlet, *On the Strength of the Present Government and the Need to Rally behind It*. His objective, as its title indicates, was to rally the French around the Directorial republic that the Constitution of 1795 had set up. This was not an easy task in the post-Terror context. On the right, moderate royalists such as Jacques Necker championed a constitutional monarchy modeled upon England, while anti-revolutionaries advocated a return to *Ancien Régime* monarchy. On the left, the Babeuvistes and some among the neo-Jacobins aspired to reinstate the more radical Constitution of 1793, while constitutional republicans, although supportive of the Directory, called for an end to the crackdown on freedom of the press and cancellation of electoral results.¹⁵ How could a government whose existence was contested on both sides of the political spectrum be said to have support across the population?

To start with “popular sovereignty” to tackle this question, Constant argued, raised more problems than it solved. Not only was it one of those “abstract principles” which failed to capture French society's expectations in the circumstances of the Directory. The concept also contributed to perpetuating revolutionary anarchy, because competing political factions invoked it to overthrow the republic.¹⁶ Instead, Constant recommended that we shift the focus to the state of public opinion.

Constant's case for the legitimacy of the Directory bears the mark of his engagement with David Hume, whose works he pondered during his student years at the University of Edinburgh (1783–5) and his subsequent stays in Paris with Jean-Baptiste Stuart (1785–7), who eventually became known as “Hume's greatest champion in France.”¹⁷ That all legitimacy derives from opinion was a key tenet of Hume's political theory:

¹⁵On Constant's attitude vis-à-vis competing political groups during the Directory see Henri Grange, *Benjamin Constant amoureux et républicain, 1795–1799* (Paris, 2004).

¹⁶Benjamin Constant, “De la force du gouvernement actuel et de la nécessité de s'y rallier (1796),” in *Oeuvres complètes de Benjamin Constant*, 30 vols. to date (Berlin, 1998–) 1: 340–41. Hereafter FGA. I use OCBC as an abbreviation for Constant's *oeuvres complètes*, edited by De Gruyter in Berlin. All translations are my own.

¹⁷Rosenblatt, *Liberal Values*, 15–16.

Nothing appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.¹⁸

Hume distinguished between two types of opinion: “opinion of interest” and “opinion of right.” Opinion of interest referred to people’s perception of the government’s action, including its ability to provide security (safeguarding peace, maintaining contracts and enforcing property rights) as well as any other government could. Opinion of right, on the other hand, had to do with people’s perception of who should rule, on the basis of what title of legitimacy. Opinion of right Hume further divided into “right to power” and “right to property.” People often obeyed their government out of reverence for their ancient standing, and this was why the English were attached to a hereditary monarchy. On the other hand, people regularly believed that property gave some entitlement to political influence, and recognized the legitimacy of elected property owners as a result. Even though Hume tended to associate opinion of right in monarchies with heredity, and opinion of right in republics with property, he was clear that, abstractly speaking, these observations did not make any specific form of government preferable.¹⁹ Hume’s preference was for *existing* forms of government. “An established government has an infinite advantage, by that very circumstance of its being established.”²⁰ Regular institutions were the product of a long, arduous process of sociability, which made of obedience a matter of habit. Consequently, existing governments should not be carelessly disposed of, because revolutions nullified long-term processes of opinion formation.²¹

Hume used his argument about the advantage of existing governments to defend the British monarchy.²² Constant transferred his line of thought to the French republic: “this Republic has for itself a first advantage that is not sufficiently recognized, that of being what is most established.”²³ As a general rule, opinion gathered around existing institutions, Constant suggested, because masses longed for stability. To attempt to restore monarchy or rehabilitate the Constitution of 1793 would lead to civil war, and unsettle the crystallization of opinion that was taking place around the government.²⁴ In the aftermath of the French Revolution, Constant

¹⁸David Hume, “Of the First Principles of Government,” in Hume, *Political Writings*, ed. Knud Haakonssen (Cambridge, 1994), 16–19, at 16. References to the *Essays* (1772) are to this edition.

¹⁹*Ibid.*, 16–17.

²⁰David Hume, “Idea of a Perfect Commonwealth,” in Hume, *Political Writings*, 221–33, at 221.

²¹I here build on Knud Haakonssen’s “Introduction” to Hume’s *Political Writings*, xxv–xxx.

²²Hume, “Of the First Principles of Government,” 19.

²³FGA, 338.

²⁴*Ibid.*, 353–4.

put to use Hume's skepticism towards revolutions to make the case against *yet another* revolution.²⁵

Constant built his case for the Directory's legitimacy by drawing attention to how it was faring on the two types of opinion Hume had highlighted—"opinion of interest" and "opinion of right." He first sought to distill across parties the idea that the government in place was able to deliver on the basic needs of French society. These needs included respect for property rights and the general sense of being able to pursue one's daily activities without upheavals, which Constant captured in the notion of "rest." On all these aspects a republic would fare just as well as a monarchy.²⁶ Pragmatically, he acknowledged that this emphasis on Hume's "opinion of interest" implied the recognition of the contingent value of regime forms: "I do not write against any form of government but against any kind of new revolution. I do not invite monarchical states to republicanize themselves, but I implore, in the name of all interests ... the French not to revolutionize against the Republic."²⁷

When considered in isolation, the "opinion-of-interest" argument could play into the hands of royalists. Should they succeed in restoring monarchy, the new regime would be legitimate by the sole fact that it was (back) in place. Public opinion would gather anew around what existed, and republicans would have to come to terms with this state of affairs. This is why Constant attempted to justify the "abstract preeminence" of the republic over the monarchy—something that he admitted doing only reluctantly.²⁸ To make his point, Constant contrasted the modes of selection of rulers that prevailed in republics and monarchies. Since rulers had to be designated according to procedures people believed in, Constant sought to demonstrate that equality—understood as the opportunity for all to gain, through individual effort, property, which in turn gave the right to vote—was now superseding heredity in the opinion of the French as the only acceptable way of justifying political allegiance. His target was Jacques Necker.

Necker shared the same Humean premises as Constant. Like him, he believed that the "magic of opinion" explained the obedience a nation owed to its government.²⁹ But to Necker, the mere election of property owners was not sufficient to secure obedience. The strongest component of Hume's "opinion of right," in his view, was long-standing heredity: only a monarchy was able to instil a sense of respect for institutions in a large country such as France. Imbued with the abstract chimera of equality—"this alleged mother idea"—revolutionaries had torn down the subtle hierarchy of opinion that centuries of experience had consecrated in France, with mob rule as a result.³⁰

Recasting Hume's remark that all governments were founded upon opinion, Constant retorted with a perfectibility-driven vision of history:

²⁵Ibid., 338.

²⁶Ibid., 346–8.

²⁷Ibid., 375.

²⁸Ibid., 367.

²⁹See Necker's reworking of Hume's idea that all governments rest on opinion in Jacques Necker, *Du pouvoir exécutif dans les grands Etats*, vol. 1 (Paris, 1792), 21–2.

³⁰Ibid., 369. See also Jacques Necker, "Réflexions philosophiques sur l'égalité," in Necker, *De la révolution française*, vol. 4 (Paris, 1797), 127–356, at 136–9.

Kings, great men and those who defend them seem to be ignorant of the power of ideas. Accustomed to having visible forces dominating invisible opinions, they do not realize that it is to these opinions that this force is due. Habit makes them indifferent to the miracle of authority. They see the movement, but because they ignore the spring, society appears to them only as a rough mechanism. They take power to be a cause, while it is only an effect, and they want to make use of the cause against the effect. However, it is to ideas only that the world's empire has been given. It is ideas that create force, by becoming sentiments ... Never an idea that has been put into circulation has been withdrawn from it. Never a revolution founded upon an idea has failed to establish its empire.³¹

Whereas Hume had shown ample skepticism towards linear conceptions of history, Constant insisted, *contra* Necker, that equality was indeed “a mother idea” unfolding through time, which had successively turned caste systems, slavery, feudalism and heredity into outdated modes of organizing political life.³² This was because equality—as opposed to heredity—was a principle that could be demonstrated to be in the interest of all, instead of a privileged minority, and therefore carried an intrinsically persuasive value. Throughout history, writers had defended equality as an abstract principle while the masses, sensing that equality was consonant with human nature, embraced it instinctively. The result of this concerted effort was an increasingly shared conviction, across society, that the institutional corollary of equality—elections—was the only valid way of selecting rulers.³³

If legitimacy depended on enduring *and* enlightened opinions—“ideas”—rather than timeworn but irrational ones—“prejudices”—Hume’s indifference towards forms of government could be overcome, and an election-based republic defended as the only type of regime form fit for post-revolutionary France. “For the institutions of a people to be stable, they must be at the level of their ideas.”³⁴ Necker’s purportedly historically informed realism neglected the fact that what Hume called “opinion of right” inevitably leant towards property-based elections. Should royalists succeed in restoring even a partially hereditary-based constitutional monarchy, it would soon collapse under the march of ideas.³⁵

As the split between republicans and royalists demonstrated, public opinion as it existed in the late 1790s had apparently not reached Constant’s conclusion about the Directory’s legitimacy. To circumvent this problem, Constant distinguished between “fashion”—a short-sighted opinion ignorant of its true interests—and the nation’s “wish”—a wise opinion aware of its long-term interests.³⁶ “Wish” was a concept Necker had used to designate a nation’s durable aspiration for tranquillity and public happiness, in contrast to the people’s “will”—a capricious desire that did not provide a steady foundation for a (preferably) monarchical

³¹FGA, 372–4.

³²Ibid., 374.

³³Ibid., 372.

³⁴Benjamin Constant, “Des réactions politiques (1797),” in *OCBC*, 1: 457–506, at 457. Hereafter DRP.

³⁵Ibid., 472.

³⁶FGA, 358; DRP, 484–5.

constitutional order.³⁷ Constant adapted Necker's concept to the new republican regime. Society's "wish" could be determined by looking at political events considered from a broader temporal perspective, instead of sampling present-day opinion: "the people pronounces himself through facts. On July 14, it pronounced himself for liberty, on August 10, for the Republic, on Thermidor 9 and Prairial 4 against anarchy: here is its wish."³⁸ The recent succession of events showed that the French were for rest and equality under the present government. This distinction allowed Constant to argue that, if the Directory had little grounding in current opinion, it was acting in conformity with the nation's wish, and derived its legitimacy therefrom.

In the crisis that followed the establishment of a new constitution, steady institutions needed to uphold this wish against versatile opinions.³⁹ In addition to government officials, political writers who had rallied to the Directory—those who, like him, knew the nation's interests, as opposed to writers attacking the government—had to bridge the gap between existing opinion and the nation's wish. Despite the "apparent dissolution of all national spirit," Constant claimed, the nation's long-term aspirations would prevail thanks to efforts of "friends of liberty and enlightenment."⁴⁰ With the proper amount of persuasion, and as the government would relinquish the repressive measures it had been forced to resort to because of political urgency, royalists and republicans of all tribes would soon surround the Directory.

As the Directory was further sinking into despotism, Constant expressed doubts about the government's capacity to act as the interpreter of the nation's interests. In *On Political Reactions* (1797), his second main pamphlet, he observed that, if popular opinion could not always be taken as a standard of legitimacy, neither could rulers simply be judges in their own causes. Since politics was an area of competing interests, an external, fixed point of reference was needed in the form of a constitution containing a minimal set of "principles."⁴¹ Principles were the systematization of society's core political needs, whose importance and recurrence could be deducted from the observation of past history.⁴² Society's long-term "wish," on Constant's terms, gradually grasped and supported these principles. Key principles included the rejection of "arbitrariness," respect for property, and an election-based representative government.⁴³ Principles were in the interest of all, and acted as a reminder, in post-revolutionary contexts where public opinion was particularly flimsy, of what was required to live under a just political order.⁴⁴ When couched in a constitution, they provided guardrails to the government, and a benchmark to determine when it lapsed into arbitrariness. When it violated constitutional

³⁷Necker, "Réflexions philosophiques," 225.

³⁸FGA, 341.

³⁹Ibid. On Constant's endorsement of restrictions to press freedom during the Directory to reach that goal see Arthur Ghins, "Benjamin Constant and Public Opinion in Post-Revolutionary France," *History of Political Thought* 40/3 (2019), 484–514, at 490–94.

⁴⁰DRP, 479.

⁴¹Ibid., 497. A version of this argument already features in FGA, 377–9.

⁴²Ibid., 489–92.

⁴³Ibid., 502.

⁴⁴Ibid., 497.

rules, the government upset society's wish, and ran the risk of losing its capital of legitimacy.

This was the movement of opinion Constant described in June 1799, when he became a political dissident, blaming the current "degradation of public spirit" on "the dictatorship granted to the Directory."⁴⁵ The government had alienated opinion because it failed to respect its most fundamental desires: tranquility and respect for electoral results. Repeated violations of the Constitution had spread the conviction that it had become an empty shell. Once the Constitution was revised and arbitrary rule banned, public opinion would start surrounding a more credible constitutional order. "Then public spirit will be reborn, because it is the fruit of security, order, regular and progressive amelioration."⁴⁶

II. The Napoleonic Era (I)

After brumaire, Constant became a member of the Tribunat, before his opposition to Napoleon resulted in his exile from France. From 1800 to 1810, Constant penned two political treatises that remained unpublished: the *Fragments on the Possibility of a Republican Constitution in a Large Country* and the first version of the *Principles of Politics*.⁴⁷ In both texts, Constant addressed the question of the legitimacy of the Consulate and the empire. To that end, he resorted once again to the opinion-based account of legitimacy he developed in the 1790s.

Constant's views on legitimacy during this period need to be understood in light of Bonaparte's "eclectic" theory of legitimacy, which pragmatically combined disparate elements without much concern for theoretical consistency.⁴⁸ He first invoked a "popular" legitimacy, arguing that the people had entrusted him with their sovereignty through plebiscites: "sovereignty resides in the French people, in this sense that everything, without exception, must be done for its happiness and glory."⁴⁹ Through two-level voting procedures that ultimately allowed him to appoint representatives, Napoleon further intended to deprive the people of any effective exercise of their sovereignty.⁵⁰ Second, Napoleon reactivated a monarchical legitimacy by reintroducing a hereditary line, which he reinforced through religious references when he became emperor "by the grace of God and the Constitutions of the Empire."⁵¹ Last,

⁴⁵Benjamin Constant, "Des suites de la contre-révolution de 1660 en Angleterre (1799)," in *OCBC*, 1: 654–79, at 675.

⁴⁶*Ibid.*, 677.

⁴⁷Benjamin Constant, *De la possibilité d'une constitution républicaine dans un grand pays: Fragments d'un ouvrage abandonné* (1800–1803), in *OCBC*, 4: 353–680, hereafter *CR*; Constant, *Principes de politique applicables à tous les gouvernements* (1806–1810), in *OCBC*, 5. Hereafter *PdP* 1806.

⁴⁸Charles Durand, "Le pouvoir napoléonien et ses légitimités," *Annales de la faculté de droit et de science politique d'Aix-Marseille* 58 (1972), 7–33; Frédéric Bluche, *Le bonapartisme: Aux origines de la droite autoritaire* (1800–1850) (Paris, 1980), 26–33.

⁴⁹Quoted in Durand, "Le pouvoir napoléonien," 15. The Constitution of year VIII was ratified by plebiscite in February 1800. In May 1802, a second plebiscite endorsed Napoleon's consulate for life. In May 1804, another plebiscite confirmed Bonaparte's nomination as emperor and the principle of hereditary succession. In November 1804 a fourth plebiscite approved the Constitution of Year XII.

⁵⁰Jaume, *L'individu effacé*, 72–3.

⁵¹See the opening paragraph of the Sénatus-consulte organique of 28 floréal year XII (18 May 1804).

Napoleon often invoked a charismatic legitimacy, which made him appear as the only man able to govern France in the current situation.⁵²

In reaction, Constant operated a two-pronged move. He derided popular sovereignty as a dangerous fiction, while recasting his opinion-based theory of legitimacy in a discussion of Rousseau's two "principles" on the "source" and "object" of political authority. The core of Constant's argument is located in Books I and II of the *Principles*.

Rousseau was an apt reference point. Revolutionaries had relentlessly mentioned him when discussing popular sovereignty. But Bonaparte was equally fascinated with Rousseau, and his uses of the concept betray an intimacy with *The Social Contract*.⁵³ Constant could therefore use the name with which popular sovereignty was most readily associated to attack Bonaparte without risking direct confrontation.

For Constant, the sovereign and government that Rousseau distinguished in *theory* were always conflated in *practice*. Popular sovereignty was "an abstract thing" as opposed to "the real thing," "the exercise of sovereignty" by the government.⁵⁴ Because popular sovereignty was, historically, a concept that implied an absolute power, to state that there existed such sovereignty gave rhetorical tools to rulers to exercise absolute power in the name of the people.⁵⁵ To weaken the hand of Napoleon, Constant denounced popular sovereignty as a chimera. In notes written in parallel to the *Principles*, he observed, "this eternal metaphysics of the social contract, always resting on 'an hypothesis'; the gigantic idea of a Sovereignty that does not exist, that should not exist, has done maybe as much harm to the human species than any system of servitude."⁵⁶ Additionally, Constant argued that Rousseau himself, by claiming that popular sovereignty was inalienable, intended to make its exercise impossible. This, he believed, amounted to "annihilating" the concept.⁵⁷

In light of Napoleon's rhetorical tricks, Constant felt compelled to deny that, behind any government, there was such a thing as *popular* sovereignty. Whenever he mentioned "sovereignty" *tout court* in a positive sense, it was in the narrow judicial meaning of the term, to designate a government's ultimate decision-making power. Rousseau's distinction between popular sovereignty and government Constant translated as a distinction between "society" and "social authority." "Society" referred to a concrete, historically situated community with changing opinions about political legitimacy. At its head was a "social authority," which Constant regularly used as a synonym for "sovereignty" in the judicial sense. His coining of the term "social authority" betrays his concerns that the term "sovereignty," even when merely assimilated to government, might suggest absolute power.⁵⁸

⁵²Bluche, *Le bonapartisme*, 27–8.

⁵³Francis Haeley, *Rousseau et Napoléon* (Geneva, 1957), 76–80.

⁵⁴*PdP* 1806, 118.

⁵⁵*Ibid.*, 131–52, 109 n. a, 121–2.

⁵⁶Benjamin Constant, "De l'intervention de l'autorité dans ce qui a rapport à la religion," in Constant, *Deux chapitres inédits de l'Esprit des religions (1803–1804)*, ed. Patrice Thompson (Geneva, 1970), 135.

⁵⁷*PdP* (1806), 129.

⁵⁸*Ibid.*, 106–22.

To determine the “source” and “object” of a given “social authority,” Constant urged that we look at the opinions on legitimacy the society it ruled over had developed over time. The backdrop of his argument was still his perfectibility-driven vision of history, which he expanded upon in the *Principles*, the *Fragments*, and a separate essay on the subject he penned simultaneously.⁵⁹ “Institutions originally are only opinions put into practice,” he explained. As opinions grew more enlightened, they turned into “ideas” or “principles.”⁶⁰ In advanced societies such as France, the idea of equality, Constant recalled, had triumphed over theocracy, slavery, and feudalism, and was coming to grips with heredity.⁶¹ Likewise, opinion in modern societies was becoming increasingly insistent that the object of social authority be limited to satisfy individual independence.⁶² At this point, Constant wavered between two positions. On the one hand, he argued that history was a process of *rediscovery* of timeless principles of legitimacy consonant with human nature.⁶³ On this reading, the *existence* of these principles was independent of whether public opinion, in a given society, recognized them. For these principles to be implemented in a constitution and respected, however, public opinion’s full support would always be required.⁶⁴ On the other hand, Constant sometimes claimed that principles of legitimacy *themselves* were the result of a long-term process of opinion formation. Echoing Necker’s notion of “wish,” Constant explained that principles were nothing more than the systematization of public opinion’s successive embrace, throughout history, of the most effective modes of organization of political life. “Theory,” he wrote in Hume’s fashion, “is no more than practice reduced to rules according to experience.”⁶⁵ On this second reading, principles were no longer ontologically true tenets, but acquired normative purchase because the patterns of human experience they recorded had withstood the test of time.

Irrespective of which argumentative line he adopted, Constant wished to integrate existing human practice into his account of legitimacy—thus escaping the accusation of abstraction leveraged against popular sovereignty—without lapsing into sheer political realism. By historicizing grounds of legitimacy in this way, he could elucidate the legitimizing role an ignorant opinion played in less advanced societies, while condemning the political options it embraced—e.g. theocracy—as an offense to true principles of politics.⁶⁶ He could also explain the weight a debunk opinion could have in an advanced society where propaganda had restored out-of-date grounds of legitimacy (e.g. Napoleonic France), while holding to a normative index to denounce such a regime. (Re)discovered principles provided fixed criteria against which titles of legitimacy could be assessed, and dismissed, if need

⁵⁹Benjamin Constant, “De la perfectibilité de l’espèce humaine (1799–1805),” in *OCBC*, 3: Part I, 439–55.

⁶⁰*Ibid.*, 472. Like Constant’s other works, the *Fragments* hinged on the idea that governments rested on a *masse d’opinions* that constantly evolved due to mankind’s progressive faculty. *Ibid.*, 649. Popular sovereignty was only dismissed once as a pretext to exercise absolute power. *Ibid.*, 550.

⁶¹Constant, “De la perfectibilité,” 467–9; *PdP* (1806), 113.

⁶²Constant, “De la perfectibilité,” 474–5; *PdP* (1806), 144.

⁶³Constant, “De la perfectibilité,” 469–70.

⁶⁴*PdP* (1806), 144.

⁶⁵*Ibid.*, 113.

⁶⁶Constant, “De la perfectibilité,” 473

be, as anachronistic. If public opinion was lured astray, it could be reminded of the true and/or historically enduring principles it had previously embraced. Principles were benchmarks of legitimacy that helped to sort out opinions, and to discriminate between legitimate and illegitimate political regimes. In short, Constant's theory of legitimacy allowed him to distinguish explanation and justification while combining the two, through a junction of public opinion with principles. In the remainder of this section, I show more specifically how this plays out in Constant's treatment of the "source" and "object" criteria of legitimacy.

Constant introduced his discussion of the "source" criterion (his equivalent to Hume's "opinion of right") in the opening chapter of Book I of the *Principles* in the following terms: "Rousseau begins by establishing that any authority which governs a nation must emanate from the general will. This is not a principle I claim to challenge."⁶⁷ This statement has been read as evidence of Constant's support for popular sovereignty, but his definition of the general will had nothing to do with popular sovereignty—a term he did not use in the chapter. It provided another reboot of Hume's belief that all governments rested on opinion:

If you suppose that the power of a small group is sanctioned by the assent of all, that power then becomes the general will. This principle holds for all institutions. Theocracy, royalty, and aristocracy, when they command minds, are the general will. When they do not command minds, they cannot be anything else but force. In sum, the world knows only two kinds of power. There is the illegitimate kind, force; and there is the legitimate kind, the general will.⁶⁸

Constant reinvested Rousseau's general will with a new meaning—the opinion a society held about who was entitled to rule at a given time and place—while *claiming* to be in agreement with Rousseau. Constant's general will was an account of how political obedience was secured under different types of regime.⁶⁹ On his terms, the way in which power was conferred upon rulers had often more to do with a passive, unconscious opinion—what he called "assent"—than any voluntary consent. Assent was a term Necker, again, used to designate the atmosphere of opinion that underpinned any political regime, and in particular the English monarchy, where respect for elected property owners coexisted with admiration for hereditary titles.⁷⁰ Constant similarly suggested that opinion could take different forms, variously combined: diffuse veneration of past traditions (hereditary monarchy), belief in the God-given sanctity of institutions (theocracy), respect for talents or hereditary titles (aristocracy), or more or less explicit endorsement through ballot boxes (republic). Through this redefinition of the general will, Constant could explain Napoleon's successful manipulations to secure his subjects' allegiance, as well as his reliance on heterogeneous grounds of legitimacy. A hereditary line could be made up from bits and pieces of revised history and false titles and yet people could be made to believe in it. Divine right could be similarly rekindled,

⁶⁷ *PdP* (1806), 102.

⁶⁸ *Ibid.*

⁶⁹ Paulet-Grandguillot, *Libéralisme*, 405 n. 193.

⁷⁰ Necker, "Réflexions philosophiques," 299, 316.

as the experience of the Concordat and the instauration of a Napoleonic catechism showed.⁷¹ Personal achievements could be easily magnified, just as failures could be covered up. All types of regime were sustained by acquiescent opinions, which rulers often molded.⁷²

Napoleon's rekindling of antiquated grounds of legitimacy revealed that public opinion needed to be reminded of its previous commitment to equality—Constant's principle of legitimacy for the "source" criterion. His inclusion of theocracy in his definition of the general will notwithstanding, Constant insisted that the religious hypothesis on which theocracy relied was impossible to admit now that governments rested on "human bases."⁷³ Another plausible basis of legitimacy was force: power belonged to who seized it. Constant readily dismissed this possibility, in accordance with his definition of the general will. Perhaps building on Book I, chapters 1 and 2, of *The Social Contract*, he argued that right could never proceed from force: physical and/or intellectual superiorities could not justify arbitrary seizures of power.⁷⁴ Napoleon's charismatic legitimacy had to be condemned as a monopolization of political power in an age of equality.

On heredity, Constant adjusted his earlier categorical stance. Hesitations on the subject are already perceptible in the *Fragments*, written slightly before the *Principles*. The *Fragments'* stated objective to design a constitutional structure on the "principle" of equality exclusively.⁷⁵ As he was witnessing Napoleon's manipulations of elections, Constant nonetheless conceded that hereditary monarchies solved the question of the selection of the head of state more satisfactorily than republics. Monarchies had clear rules of succession based on customary opinion, which prevented ruthless competition.⁷⁶ If he recognized such merits, Constant specified that heredity could play its stabilizing role only if already supported by a timeworn opinion. This effectively disqualified Napoleon's attempts to re-create *ex nihilo* a hereditary line combined with a new brand of imperial nobility in a country where public opinion had embraced equality.⁷⁷ Eventually, the growing contrast between a free England and an increasingly despotic France led Constant to fully recognize an established type of heredity as a valid title of legitimacy, and constitutional monarchies as a regular regime form in the *Principles*.⁷⁸ This was always on the condition, in his mind, that a hereditary chamber and a hereditary king coexist with an elected chamber—the institutional embodiment of the principle of equality he was reasserting in his essay on perfectibility.

Discussing "Rousseau's first principle" about the "source" of political authority was not only a way of dismissing popular sovereignty and redefining the general

⁷¹For Constant's critique of the Concordat see Constant, "De l'intervention de l'autorité," 135.

⁷²Constant conceded about the general will the "difficulty of recognizing and expressing it." *PdP* (1806), 103.

⁷³*PdP* (1806), 102, 161.

⁷⁴Paulet-Grandguillot, *Libéralisme*, 366 n. 1.

⁷⁵In Book I, written at an early stage of production, Constant predicted that the "principle" of elections would soon supplant the "prejudice" of heredity in France.

⁷⁶*CR*, 451–2 and Book IV, "On Hereditary Monarchy," esp. chapter 1.

⁷⁷*Ibid.*, 422–4.

⁷⁸*PdP* (1806), 103.

will, but also an occasion to invoke the moral authority of Rousseau to remind the French that regimes where laws were the brainchild of a single individual and his advisers should be condemned as illegitimate in the present social state.⁷⁹ Rousseau had been the ill-advised theorist of popular sovereignty, but also an advocate of political equality. If the latter was appropriately reinterpreted as equality before the law combined with political rights for land property owners, Rousseau's name, which embodied for many the legacy of the Revolution, could thus be used as a rallying flag for public opinion.⁸⁰

Irrespective of whether a government was undergirded by an opinion endorsing heredity alongside elections, or elections exclusively, Constant stipulated that "the authority that emanates from the general will is not legitimate merely by virtue of this."⁸¹ The first criterion of legitimacy had to be combined with a second one—the "object" of social authority. "Sovereignty," here in the judicial sense, "only exists in a limited and relative manner. The jurisdiction of this sovereignty stops where the independence of individual existence begins."⁸² This sphere of independence included freedom to do anything that does not harm others, freedom of religion, freedom of opinion, the inviolability of property, the right not to be arrested arbitrarily, and the right to a fair trial.⁸³ This was a more rigorous conceptualization of the idea, already extracted earlier from Hume's "opinion of interest," that any government that did not provide rest and security would gradually lose legitimacy. The "object" criterion was now more explicitly defended as a true *principle* in addition to equality, partly in reaction to Napoleon's crackdown on individual freedoms. Just as he had done for "equality," Constant highlighted how a quick look at changing mentalities over time—e.g. society now recoiled at the idea of putting a man to death without trial—demonstrated how public opinion was increasingly supporting the principle that social authority needed to be limited.⁸⁴

Repeatedly in the *Principles*, Constant insisted on the importance of political *theory*.⁸⁵ Clarifying principles helped dispel false opinions about legitimacy, such as popular sovereignty, which served the interests of unscrupulous rulers.⁸⁶ But it also helped to discriminate between enlightened and debased opinions, and the

⁷⁹Ibid., 133.

⁸⁰Ibid., 129.

⁸¹Ibid., 133.

⁸²Ibid.

⁸³Ibid., 146.

⁸⁴Ibid., 144.

⁸⁵E.g. *ibid.*, 112–13.

⁸⁶This explains the single attempt Constant made in the text to *redefine* "the dogma of popular sovereignty" as a "guarantee." *Ibid.*, 108. This was a rhetorical effort to reinvent with a new meaning a notion the French were familiar with. As the uses of "dogma" reveal, Constant believed that this widespread notion remained intrinsically flawed, and was not part of his *own* normative vocabulary. This rhetorical aim is also perceptible in Constant's reproduction, elsewhere in the *Principles*, of sections of articles on popular sovereignty taken from the Constitution of 1795 which stipulated that no faction could ever exercise sovereignty on its own. Compare *PdP* (1806), 133, with Jacques Godechot, ed., *Les constitutions de la France depuis 1789* (Paris, 1995), 102–3. This mash-up of familiar phrases Constant intended as an *illustration* of his argument that "sovereignty" in the judicial sense needed to be limited. It should be noted that the *Principles* only contain five mentions of "popular sovereignty" (108, 377, 575, 644, 645), all of which are pejorative.

regular or irregular regimes they supported: monarchies and republics respecting individual freedoms versus anarchy (i.e. the Terror) and despotism (i.e. the empire).⁸⁷ Given how malleable opinions were, immovable points of reference were needed—hence the title of Constant’s work, *Principles of Politics Applicable to All Governments*.

III. The Napoleonic Era (II)

On Constant’s understanding, because of the perfectibility-driven dynamic of history, public opinion would eventually stop supporting governments that failed to grant citizens sufficient influence upon political affairs and protect individual freedoms. Yet the French nation seemed to have grown disturbingly accustomed to Napoleon’s rule. This is why it needed to be reawakened, and the constitution changed on the basis of a public opinion educated to its task, without, for that matter, precipitating a revolution. It is to Constant’s solution to this problem, and his understanding of fundamental lawmaking, that we must now turn.

Richard Tuck’s idea of a “sleeping sovereign” in its French iterations offers a potent counterpoint to understand Constant’s views on constitution making. In Tuck’s view, building on Rousseau’s idea that sovereignty was inalienable, key revolutionary groups such as the Girondins designed plebiscites as a way of reawakening the people at regular intervals to decide on the constitutional structure of the political association. After exercising their sovereignty, the people went back to sleep, leaving ordinary lawmaking to a regular government.⁸⁸

For Constant, beyond government, there were no sovereign people in waiting, but only constantly evolving societies with fluctuating opinions. There was therefore no question of a “sleeping sovereign,” but of an alternatively somnolent or alert public opinion. The Napoleonic experience revealed that public opinion could be put to sleep through skillful maneuvers. Plebiscites were anesthetics par excellence: ways of manufacturing a “factitious assent” to a new, irregular regime that trampled timeless principles of legitimacy.⁸⁹ These schemes were particularly successful after violent revolutions, which left public opinion disoriented: the mass grew indifferent to politics, while opportunistic writers attempted to lend respectability to the regime.⁹⁰

Beyond the facade of mock assent, Constant argued, as he had done in the 1790s, that a sturdy type of public opinion always remained intact—the nation’s “wish.” This wish was always at bottom opposed to arbitrary measures that harmed individual independence:

To no avail do the weariness of nations, the anxiety of leaders, the servility of instruments form an artificial assent which one calls public opinion, but which it is not. Men never cut themselves off from freedom ... It is never exact to claim that the people’s wish is for arbitrary rule. They can be dropping with

⁸⁷ *PdP* (1806), 103–5.

⁸⁸ Tuck, *Sleeping Sovereign*, 143–60.

⁸⁹ *CR*, 655–6.

⁹⁰ *PdP* (1806), 702–3.

fatigue and want to rest awhile, just as the exhausted traveler can fall asleep in a wood although it is infested with brigands. This temporary stupor, however, cannot be taken for a stable condition.⁹¹

In similar terms, Constant insisted that beyond the veneer of indifference to politics that the people displayed, deep down they kept a desire for equality and the opportunity to participate in lawmaking:

There is always a public spirit ... Men can never be indifferent to their own fate nor lose interest in their destinies. But when governments act against the people's wish, the people grow weary of expressing it, and since a nation cannot, even through terror, be forced to lie to its conscience, they say that the public spirit is asleep, holding themselves the while ready to choke it, if ever it should allow the suspicion that it is awake.⁹²

In the 1790s, the custodians of the nation's "wish" were writers at the service of the Directory. Like Constant, they were now in the opposition. Principles of legitimacy being timeless, they could be rekindled even if the people gave the impression of giving up on them.⁹³ Enlightened writers were "missionaries of truth" supported by the march of history: they turned a lethargic opinion into "public spirit"—a type of public opinion supportive of principles, which would condemn arbitrary measures and trump factional attempts to seize power.⁹⁴

This implied that public opinion, on Constant's terms, was not simply formed by the learned elite to the exclusion of the people, as had been the case for most eighteenth-century political thinkers.⁹⁵ Public opinion was the sum result of ideas—formulated by writers—embraced by society at large, which gave to the conclusions of an educated elite the weight they needed to have a political impact. Within society, property owners were the privileged targets of this enterprise of persuasion, because they had voting rights and, therefore, the ability to elect representatives that would defend, in elected assemblies, the political options embraced by public opinion.⁹⁶ *Uneducated* women therefore had a subsidiary role in the process of opinion formation Constant described, since they did not have, on his terms, voting rights—they could only lend their support to ideas, as non-proprietary men could. *Enlightened* women, however, could be "opinion makers" (to use an anachronism) just as well as men.⁹⁷ Having worked closely with Germaine de

⁹¹Ibid., 705, n. a.

⁹²Ibid., 688.

⁹³Ibid., 706.

⁹⁴Ibid., 143, 220.

⁹⁵See Baker, "Public Opinion"; and Chartier, *Cultural Origins*.

⁹⁶For Constant's views on property as a token to political rights see *PdP* (1806), Book X.

⁹⁷Constant—like Germaine de Staël—used the French term *homme* to designate human beings in general. See his remarks about the "devoir des hommes éclairés" to form public opinion in *PdP* (1806), 684–709. On women and the public sphere see, in priority, Keith Baker, "Defining the Public Sphere in Eighteenth Century France: Variations on a Theme by Habermas," in C. Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA, 1996), 181–211, at 198–208; and Mary P. Ryan, "Gender and Public Access: Women's Politics in Nineteenth-Century America," in *ibid.*, 259–88.

Staël until at least the beginning of the drafting of the *Principles*, Constant may in fact have articulated with her—or borrowed from her—the view that enlightened writers, including herself, needed to show public opinion the way to true principles of politics.⁹⁸ If writers were rallied to an illegitimate government, public opinion at large ran the risk of being further corrupted by their propaganda. If they were “friends of enlightenment,” like Constant or Staël, it had chances to grow more educated. This presupposed a strong faith in the power of ideas and of rational demonstration, which Constant partly inherited from William Godwin.⁹⁹

The end result of this effort of reawakening would be a series of constitutional amendments. Here, it should be noted that Constant’s use of the nation’s “wish” instead of “popular sovereignty” implied a reorientation of the meaning of constitution making. In lieu of the democratic right to self-determination that Rousseau and the Girondins associated with popular sovereignty, Constant advocated a historicist understanding of constitution making: “Constitutions are not the product of men’s wills. Time makes them. They are brought in gradually and imperceptibly.”¹⁰⁰ For a people exercising its sovereignty in founding moments of democratic redefinition, Constant substituted a society from which emanated a diffuse assent to constitutional changes.

For French revolutionaries, “constituent power” had designated the normative core of popular sovereignty: the prerogative to overthrow and revolutionize the political order above the limits set by the constitution.¹⁰¹ For Constant, “society” could never reclaim the exercise of such right, and he never used “constituent power” in this sense.¹⁰² No doubt, constitutional changes were sometimes needed. But on his terms, these were the result of historical changes in opinion, as interpreted by enlightened writers and enacted by the same government that passed ordinary laws.¹⁰³ This had two main consequences. First, the main actors behind constitutional changes were not a sovereign people voting in a plebiscite, but the government working together with “opinion makers,” who were in charge of persuading, in priority, society’s key political actors (property owners with voting rights) to back up specific constitutional amendments. Second, constitutional changes were not traceable to an act of popular *will* at a given moment of time, but emerged from an increasingly more enlightened public opinion about the type of general *interests* that needed to feature in a constitutional text.¹⁰⁴

⁹⁸ Germaine de Staël, “Des circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République en France,” in de Staël, *Oeuvres complètes, série III: Oeuvres historiques I*, ed. L. Omacini (Paris, 2009), 287–552, at 436–7, 447–9. Constant edited—perhaps co-authored—this manuscript, and made a personal copy of some of its key passages. See “[Copie partielle de *Des circonstances actuelles* de Madame de Staël (1799–1806)],” in *OCBC*, 4: 797–901.

⁹⁹ *PdP* (1806), 111–12, 144. See Arthur Ghins, “Benjamin Constant and the Politics of Reason,” *History of European Ideas* 44/2 (2018), 224–43.

¹⁰⁰ Constant restated this argument unambiguously in the foreword of his *Principles of Politics* of 1815.

¹⁰¹ Rubinelli, *Constituent Power*, 33–74. On the French revolutionaries’ conception of popular sovereignty as the people’s right to change the constitution see Rosanvallon, *La démocratie inachevée*, 19–20.

¹⁰² *PdP* (1806), 118.

¹⁰³ *CR*, 654.

¹⁰⁴ On Constant’s critique of political voluntarism see Ghins, “Benjamin Constant and the Politics of Reason.”

This meant that constitution making was never an act of autonomous self-legislation that could, *ex hypothesi*, recast the whole political order. The government's margin for constitutional amendment was conditioned by past practices that had been translated into constitutional dispositions because public opinion, as distilled over time, had grown attached to them.¹⁰⁵ It was also amputated by true principles of legitimacy, which, once translated in the constitution thanks to the advocacy of an enlightened public opinion, could never be amended even if there was a temporary majority to do so. As he had done in *On Political Reactions*, Constant indeed distinguished, in a constitutional text, between intangible core principles—individual liberty and a minimal standard of political equality—and secondary dispositions that could be amended without extraordinary procedure as soon as opinion changed on the matters they covered.¹⁰⁶

Constant privileged institutional stability over democratic self-determination. Since the goal of politics was to ensure that individuals could develop their faculties in restful conditions, nations were advised to stick with the constitution they had, unless it was so vicious that “inaction” would prove worse than the “tremor of change.”¹⁰⁷ The action Constant expected in instances of despotism would come from enlightened writers attempting to persuade rulers to change their course of conduct, and amend the constitution to put it back in phase with true principles of legitimacy. Like Hume, Constant denied that the people had a right to revolution.¹⁰⁸ At the same time, his belief that just principles of political organization were unfolding throughout history implied that, if governments failed to translate them into a constitutional text in a country where public opinion had recognized them, they would be met with growing opposition, and inevitably be deposed. To avoid this deleterious situation, governments should make sure that the nation's constitution was always “in proportion with its ideas.”¹⁰⁹

Constant hoped the *Fragments*, then the *Principles*, would help propagate such ideas. Although these manuscripts remained unpublished, he soon had the opportunity to build upon them to discuss, in published texts, the legitimacy of the political regimes that succeeded each other in France from 1814 onwards.

IV. Napoleon's downfall

In October 1813, Napoleon was defeated at Leipzig. Once the collapse of the imperial system became inevitable, three unequally credible scenarios emerged: keep the imperial dynasty and enthrone Napoleon II, after his father's abdication (6 April), under the supervision of a regent; restore the house of Bourbon in the person of Louis XVIII, either as the legitimate successor of Louis XVII or as the prince most likely to support liberal institutions; inaugurate a new throne with

¹⁰⁵See Constant's laudatory comments about the gradual changes made to the “English Constitution” since 1688 in *CR*, 652–3.

¹⁰⁶*CR*, 651–2; *PdP* (1806), 224–5.

¹⁰⁷Benjamin Constant, “Additions Constitution républicaine,” in *OCBC*, 4: 683–765, at 702.

¹⁰⁸*PdP* (1806), 681. For Constant's opinion-based views on revolution, partly inspired by Hume, see *PdP* (1806), 678–83. On this see Iain McDaniel, “Representative Democracy and the ‘Spirit of Resistance’ from Constant to Tocqueville,” *History of European Ideas* 44/4 (2018), 433–48, at 438–42.

¹⁰⁹*CR*, 654.

Bernadotte, Prince of Sweden since 1811 and formerly Maréchal d'Empire.¹¹⁰ Constant placed his bets on Bernadotte. After joining his *cour* in Hanover in November, he put himself to work. The first edition of *The Spirit of Conquest* was published in January 1814, the second in March of that same year. Two further editions (April and June 1814) followed Louis XVIII's return to France, though omitting Book Two of chapter 5, in which Constant had implicitly defended the candidacy of Bernadotte.

To treat the question of the legitimacy of the future head of state, Constant expanded upon the opinion-based solution he articulated earlier. As its full title indicated, *The Spirit of Conquest and Usurpation in Its Relations with European Civilization* was an attempt to capture “the general spirit” of modern France and the type of regime consonant with such state of opinion. The work's “presentation” stated that “the duration of any power depends upon the proportion that exists between its spirit and its epoch.” When a regime faithfully embodied the needs of the age, habits took shape and opinion surrounded it. When it acted against them, assent started eroding before rulers were deposed, and institutions dissolved.¹¹¹ Worth noting in *Spirit of Conquest* was Constant's central use of the term “civilization,” which he now routinely employed to designate a historical stage in which true principles of legitimacy had been revealed.

Popular sovereignty was absent from the text. In 1813–14, Constant did not feel obliged to prove the inanity of the concept, since Napoleon was on the downslope. *Spirit of Conquest* intended to demonstrate that Napoleon had been an illegitimate ruler, despite the simulacra of assent he had managed to secure for himself. Constant focused not on two phenomena, as its title indicates, but three: conquest, usurpation and despotism. All three were anachronisms. In the long run an authentic opinion, in lockstep with the expectations of the age—commerce and peace, regularity and a minimal standard of political equality, respect for individual independence—would prevail over the out-of-phase opinion that Napoleon created. Throughout the work, Constant wavered between a eulogy for a sturdy if silenced public opinion and a confessed “impatience” vis-à-vis a nation that seemed to have resigned itself quite too easily to Napoleon's yoke.¹¹² Constant suggested that, if Napoleon had lured the masses, his maneuvers had, however, not succeeded in corrupting enlightened writers, who had kept the nation's “wish” intact.¹¹³

Spirit of Conquest refined the typology of regime that the *Principles* (1806) introduced. The real distinction was not between republics and monarchies, but between regular and irregular governments.¹¹⁴ Regular regimes were republics and monarchies attuned to the general spirit of the age, which respected tranquillity and

¹¹⁰Stéphane Rials, “La question constitutionnelle en 1814–1815: Dispersion des légitimités et convergence des techniques,” *Annales d'histoire des facultés de droit et de la science juridique* 3 (1968), 167–97, at 167–70.

¹¹¹Benjamin Constant, *De l'esprit de conquête et de l'usurpation dans leurs rapports avec la civilisation européenne*, 1st edn (Hanover, 1814), in OCBC, 8: 551–683, at 555. Hereafter ECU (1st).

¹¹²See the preface to the third edition in Benjamin Constant, *De l'esprit de conquête et de l'usurpation dans leurs rapports avec la civilisation européenne*, 4th edn (Aug. 1814), in OCBC, 8: 689–822, at 691–2. Hereafter ECU (4th).

¹¹³ECU (1st), 673.

¹¹⁴Ibid., 601.

individual independence—the “object” criterion—and a minimal standard of political equality—the “source” criterion. Regime forms—republics or monarchies—depended upon the state of opinion in a given national context. Irregular governments on the object criterion were despotic regimes trampling individual liberties, as well as governments, Constant now specified, that embarked on foreign invasions which indirectly unsettled the stability and tranquillity of the invading country.¹¹⁵ On the source criterion, Constant introduced a now clearer subdivision between irregular governments in which society’s assent had been extorted—a phenomenon he described as “usurpation”—and regular governments where it had been spontaneously, albeit sometimes implicitly, given. As an illustration, Constant opposed Napoleon’s rise to power to time-honored monarchies. Recycling a point he had previously conceded about heredity in his republican *Fragments*, he now argued positively that in hereditary monarchies the king was sustained by an implicit assent to age-old rules of succession, which prevented upheavals and contests for power.¹¹⁶ By contrast, the usurper attempted to cope without this temporal capital. When he seized power, he had to work to create for himself a simulacrum of assent, with deleterious results in terms of stability and freedom.¹¹⁷

More than the *nature* of the grounds of legitimacy, it was the *established* character of the process through which legitimacy was conferred that mattered, Constant suggested. Beyond the sole case of the head of the executive, a long-lasting regime, irrespective of its form, gradually increased its capital of legitimacy. Without dwelling on the difficulties tied to the election of the head of state in a republic—a problem he had attempted to solve in the *Fragments*—Constant insisted that republics could acquire “a heritage of traditions, uses and habits,” with similar results to monarchies in terms of permanency.¹¹⁸ When such an assent prevailed, the government’s stability usually benefited individual independence. The “source” and the “object” criteria were thereby intimately linked.¹¹⁹

These criteria throw light on Constant’s arguments about who was the most legitimate candidate to the throne of France. Given his father’s faked legitimacy, Napoleon II stood no chance. Louis XVIII, with his long hereditary line, might seem a more plausible candidate. The problem with his candidacy was twofold. First, the Revolution had interrupted the transmission of power within the house of Bourbon. As a result, the implicit assent from which it had benefited for centuries was fading away. Should power come back into the hands that had lost it, a violent counterreaction was likely to occur.¹²⁰ Second, at the time the first edition of

¹¹⁵*Ibid.*, 602–3. Constant’s belief in “civilization” as the benchmark of legitimacy allowed him to condemn Napoleon’s *Reconquista* of civilized France in 1814 as anachronistic, while justifying the conquest of less advanced countries by civilized countries. See Constant’s later article on Algeria, in which he invited the French to “applaud the ruin of a nest of pirates, if we have the courage to carry it off, rather than respecting the character of sovereignty in a barbarian.” Benjamin Constant, “Alger et les élections,” in Constant, *Recueil d’articles: 1829–1830*, ed. E. Harpaz (Paris, 1992), 191. On Constant’s views on empire see Jennifer Pitts, *A Turn to Empire: The Rise of Imperialism in Britain and France* (Princeton, 2005), 173–84.

¹¹⁶*ECU* (1st), 605.

¹¹⁷*Ibid.*, 606.

¹¹⁸*Ibid.*, 612.

¹¹⁹*Ibid.*, 809.

¹²⁰*Ibid.*, 623.

his work came out in January 1814, Constant was suspicious that the legitimate heir of the Bourbon line would wish to turn back the clocks to a monarchy based on divine right. The difference between Louis XVIII and Bernadotte was that the latter was a *modern* king, in line with the current aspiration for tranquillity, individual liberty and political equality.¹²¹ On the “source” criterion, Constant knew well that Bernadotte’s claims to the throne of France were thin. Drawing on the fact that Bernadotte had been called from France and elected by the Swedes before being adopted by the Swedish king in 1810, Constant tried to make up for his lack of obvious legitimacy by suggesting that a similar scenario could occur in 1814. In such hypothesis, Bernadotte would avail himself of a legitimacy derived from *both* (indirect) heredity and election.¹²²

After the Declaration of Saint Ouen (May 1814), Constant rushed to publish the *Reflections on Constitutions* in the hope of influencing the commission in charge of writing the constitutional text that would become the Charter of 4 June 1814.¹²³ In the introduction, Constant attempted to square his theory of legitimacy with the restoration of the Bourbon king. There was some degree of opportunism in Constant’s shifting allegiances, but his theoretical stance remained consistent. In the meantime, the people’s enthusiasm for the king’s return had provided evidence that the French were still supportive of the Bourbons.¹²⁴ Bernadotte no longer being a plausible candidate, Constant, both in his *Reflections* and in subsequent editions of *Spirit of Conquest*, withheld his earlier negative comments about a broken hereditary line. He now commented on how the population’s “assent,” in the present case, had been secured through “the power of memories.”¹²⁵ On the other hand, in the Declaration of Saint-Ouen, Louis XVIII had made known his intention of giving a “liberal constitution” to France—a constitution that would keep intact the existence of two chambers, including an elected one, and would secure “public and individual liberty.”¹²⁶ This was additional indication for Constant that the new regime would act in a way that reflected the nation’s needs.

In an addition to the fourth edition of *Spirit of Conquest*, published in July 1814, one month after the promulgation of the Charter, Constant summarized his views on legitimacy as follows: “I admit two types of legitimacy: one positive, which derives from free election, the other tacit, which rests upon heredity; and I shall add that heredity is legitimate, because the habits it generates, and the advantages it grants, render it the national wish.”¹²⁷ The legitimacy derived from election was “the most appealing in theory,” Constant argued in a way reminiscent of the argument he had developed in the *Fragments*, but it had the inconvenience that it could be counterfeited, as Bonaparte’s example had shown.¹²⁸ Building on Necker’s idea

¹²¹Ibid., 624.

¹²²Ibid., 608.

¹²³Benjamin Constant, *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties, dans une monarchie constitutionnelle*, 1st edn (May 1814), in *OCBC*, 8: 951–1064. Hereafter *R&C* (1814).

¹²⁴Rials, “La question constitutionnelle,” 169.

¹²⁵*R&C* (1814), 959.

¹²⁶Stéphane Rials, “Essai sur le concept de monarchie limitée (autour de la charte de 1814),” *Revue de la recherche juridique* 2 (1982), 331–57.

¹²⁷*ECU* (4th), 816.

¹²⁸Ibid., 817.

that people were often more driven by “imagination” than by reasoned arguments, Constant explained that a quick look at the English enthusiasm for the Stuarts after the fall of Cromwell showed that people had a tendency to “prefer hereditary legitimacy.”¹²⁹ The most legitimate head of state, however, would derive its legitimacy from both heredity, which captivated “imagination through the power of memories,” and from elections, which satisfied “reason through national suffrage.”¹³⁰ This implied a toning down of Constant’s earlier conviction that the idea of equality had irremediably triumphed over prejudices such as heredity. The key to legitimacy was the conformity between the state of opinion—both in its irrational and rational dimensions—and the institutions in place.

There was, however, a fresh risk with the Restoration: the resurrection of the divine right of kings. The Preamble of the Charter stipulated that Providence had called back the king to the throne. The Charter further suggested that sovereignty ultimately resided in the person of the king, albeit he conceded to share his authority with the two chambers.¹³¹ In reaction, Constant argued that divine right was now out of phase with the state of opinion because it implied unchecked power in the hands of one individual. Taking the example of Bonaparte’s ultimately unsuccessful indoctrination campaign to resurrect the “dogma of divine right,” but in fact targeting the partisans of absolute monarchy, Constant warned that “it is somewhat imprudent to reproduce systems that the progress of enlightenment has rendered null.”¹³²

V. Napoleon’s return

When Napoleon landed in Golfe-Juan in March 1815, Constant sided with Louis XVIII because this was the government in place and, in that respect, the one most likely to provide stability against Bonaparte’s by now well-known anachronistic politics. Napoleon came back to power nonetheless and after a brief flight, Constant returned to Paris in late March, and soon made contact with supporters of Napoleon. Personal ambition did play a role in this episode, but Constant only supported Bonaparte once it had become clear to him not only that Bonaparte had chances of staying in place, but also that he *might* rule in accordance with the principles of legitimacy Constant held dear.

In an article published on 4 April 1815, Constant reacted to the purported intention, expressed at the ongoing Congress of Vienna, of restoring Louis XVIII. Constant argued that since the king was no longer on the throne, this would amount to making “a revolution against an already stable and tranquil state.”¹³³ Of course, it could not easily be argued that the once-usurper now benefited from the kind of legitimacy Constant desired for the head of state: the flight of the eagle could hardly be compared to a nation spontaneously calling back a ruler whose titles of legitimacy Constant himself had been deriding for years. He

¹²⁹Ibid., 818.

¹³⁰Ibid., 817.

¹³¹Rials, “La question constitutionnelle,” 171.

¹³²*ECU* (4th), 816.

¹³³Benjamin Constant, “Observations sur une déclaration du congrès de Vienne. 31 mars–4 avril 1815,” in *OCBC*, 9: 549–52, at 549.

therefore shifted the focus onto the expectations the French had in terms of individual independence and stability. The “national sentiment,” he explained, abandoned the Bourbons because they failed to provide the French with constitutional “guarantees” that protected individual freedoms.¹³⁴ As a matter of fact, soon after the Charter was adopted, the government generated widespread discontent by pushing for restrictions upon constitutional freedoms, making Napoleon look upon his return as the guardian of the achievements of the French Revolution.¹³⁵ From his conversations with the emperor’s advisers, Constant, moreover, convinced himself that Napoleon now wanted a liberal constitution and peace with France’s neighbours.¹³⁶ On Constant’s optimistic analysis, Bonaparte had at last decided to do justice to society’s desire for peace and rest, both inside and outside the country.¹³⁷ As conqueror, despot and usurper, he had been an anachronism. If he now ruled in accordance with the state of civilization, Napoleon could play the role of constitutional monarch that Louis XVIII had failed to fill.

With these thoughts in mind, Constant wrote, at the emperor’s request, a constitutional draft that placed heavy emphasis on individual freedoms. After a complex process of rewriting to integrate Napoleon’s own wishes, the final text became the Additional Act to the Constitutions of the Empire, only parts of which can be attributed to Constant.¹³⁸ To defend his course of conduct, Constant published his *Principles of Politics* of 1815. That Constant intended this work as a commentary on the Additional Act is crucial for understanding its first chapter, “On Popular Sovereignty.” In several speeches upon his return, Napoleon revived his eclectic conception of legitimacy—popular, proto-traditional and charismatic.¹³⁹ Weary of breaking with the Bourbons, Napoleon put even more emphasis on popular sovereignty than he had before. In the wake of several imperial declarations, both the Preamble and Article 67 of the Additional Act reestablished, without expressly naming it, popular sovereignty.¹⁴⁰ Through the orchestration of a fourth plebiscite to enact the constitutional text, Napoleon made clear that he intended to use the appeal to the people, once again, to deprive them of sovereignty and exercise it in their name.¹⁴¹

In reaction, Constant recycled some of the observations developed in the *Principles* of 1806 to attack, now in a published work, popular sovereignty as a concept. Since Napoleon put it so clearly back on the political agenda, Constant decided to fight him upon his own terms. He opened the second version of the *Principles* with the statement that “our present constitution formally recognizes

¹³⁴Ibid., 552.

¹³⁵Benoit Yvert and Emmanuel de Waresquiel, *Histoire de la restauration (1814–1830)* (Paris, 2002), 67–101.

¹³⁶Alain Laquière, “Benjamin Constant et l’Acte additionnel aux Constitutions de l’Empire du 22 avril 1815,” *Historia Constitucional* 197 (2003), 197–234, at 202–4.

¹³⁷Constant, “Observations,” 552–3.

¹³⁸Kurt Kloocke, “Introduction” to Benjamin Constant, “Acte additionnel aux constitutions de l’Empire 14–22 avril 1815,” in *OCBC*, 9: 561–624.

¹³⁹Rials, “La question constitutionnelle,” 182–6; Laquière, “Constant et l’Acte additionnel,” 199–200.

¹⁴⁰“Acte additionnel,” in Godechot, *Les constitutions de la France*, 232, 238–9.

¹⁴¹Bluche, *Le bonapartisme*, 119–21.

the principle of the sovereignty of the people,” to which he immediately added, “that is the supremacy of the general will over any particular will.” He then restated his idiosyncratic definition of the general will as “the power of a small number sanctioned by the assent of all,” which applied to monarchies and theocracies alike.¹⁴² In 1806, Constant had divorced his definition of the general will from the concept of popular sovereignty. He now equated it with popular sovereignty in order to better denounce Napoleon’s use of the concept as a masquerade meant to lure the people into lending support to the new regime.¹⁴³ Other updates further reveal the reactive character of the opening chapter of the *Principles* of 1815. In 1806, Constant had replaced Rousseau’s distinction between popular sovereignty and government by his own distinction between society and social authority—his synonymous for a limited sovereignty in the narrow judicial sense. He now replaced his own concept of society with “popular sovereignty.”¹⁴⁴ Likewise, in places where Constant had spoken about limited sovereignty *tout court*, or, preferably, social authority in 1806, he now wrote about “popular sovereignty.”¹⁴⁵ In some of the passages extracted without modifications from the 1806 edition, Constant nonetheless still suggested that behind existing institutions there was no such thing as popular sovereignty. He intimated again that Rousseau, by stating that popular sovereignty was inalienable, wished to make it impossible to exercise, which amounted to “annihilating” the concept.¹⁴⁶ At the end of the chapter, Constant reintroduced his opinion-based model of legitimacy, distinguishing between an “assent” manufactured by rulers to justify absolute powers, and a public opinion that had embraced the idea that “sovereignty” in the judicial sense needed to be limited.¹⁴⁷ These forced insertions of “popular sovereignty” created terminological confusions that were absent from the first version of the *Principles*. But these were of secondary importance to Constant, since the object of this chapter was not to expose his own theory of legitimacy in any rigorous way—something he already had done a few months earlier in *The Spirit of Conquest*—but to attack Napoleon’s use of popular sovereignty via any possible rhetorical means.

In the remainder of the *Principles*, Constant implicitly reinstated his own theory of legitimacy. He described the constitutional apparatus of the Additional Act as composed of different powers benefiting from various titles of legitimacy. Besides the hereditary king, there were, in Constant’s ideal constitutional system, ministers responsible before the chambers, a hereditary assembly, an elected chamber and an independent judicial power.¹⁴⁸ His opinion-based model of legitimacy allowed for

¹⁴²Benjamin Constant, *Principes de politiques applicables à tous les gouvernements représentatifs et particulièrement à la Constitution actuelle de la France*, in OCBC, 9: 653–858, at 679, hereafter *PdP* (1815).

¹⁴³*Ibid.*, 680.

¹⁴⁴E.g. compare *PdP* (1806), 121, added emphasis, “l’erreur de Rousseau et des écrivains les plus amis de la liberté, lorsqu’ils accordent à la société un pouvoir sans bornes, vient de la manière dont se sont formées leurs idées en politique,” with *PdP* (1815), 681, added emphasis, “l’erreur de ceux qui, de bonne foi dans leur amour de la liberté, ont accordé à la souveraineté du peuple un pouvoir sans bornes, vient de la manière dont se sont formées leurs idées en politique.”

¹⁴⁵E.g. compare *PdP* (1806), 133, and *PdP* (1815), 687.

¹⁴⁶*PdP* (1815), 683.

¹⁴⁷*Ibid.*, 688.

¹⁴⁸*Ibid.*, 691.

the coexistence of variegated grounds of legitimacy, and Constant put this to good use to articulate his mature conception of the balance of powers. The fact that the *elected* chamber coexisted with a *hereditary* chamber and, crucially, a *hereditary* king—the “neutral power”—made it indeed possible to achieve a proper equilibrium between constitutional branches.¹⁴⁹ The discrepancy between the body of work, from which “popular sovereignty” was absent, and the introductory polemical chapter only reinforced the impression that the latter was a circumstantial effort to dismiss Napoleon’s use of this concept. Constant clarified this point retrospectively, in his re-edition of his *Reflections on Constitution* (1818):

In 1814, I had no reason to deal with what has been named the sovereignty of the people, because it was not to be feared that this would be the pretext that one would want to use to encroach upon our freedoms. In 1815, things were entirely different. Bonaparte, who had always recognized popular sovereignty in principle, had often claimed it to justify the excess of the power he had seized, and that he represented as having been delegated to him by the people themselves. This thus was the theory that needed to be attacked, in order to break this dangerous weapon into the hands of a man who had all but too much exploited it. The sense of this necessity made me start my *Principles of politics* with the following chapter, that I here reproduce with a few new developments.¹⁵⁰

In the recast of the first chapter of the *Principles* of 1815, Constant reintroduced his notion of “social authority,” and expressed the hope that, once the notion of an unlimited “sovereignty” in the judicial sense had been properly dispelled, no ruler would be able to claim absolute power without alienating a public opinion aware of its real needs.¹⁵¹

VI. After 1815

When Louis XVIII returned to the throne of France, Constant did not comment on his now further damaged hereditary legitimacy. It is likely that the quick succession of events made him weary of taking a position on the subject. Already in 1814, he wrote that he did not like to dwell on the question of the “origin of sovereignty” in the judicial sense, because such debates usually played into the hands of unscrupulous rulers.¹⁵² After 1815, Constant no longer referred to popular sovereignty, except in some rare instances in which he warned of the danger of mentioning a concept suggesting unlimited power.¹⁵³ With the ultimate downfall of Napoleon, the need for a sustained refutation had passed, and popular sovereignty therefore

¹⁴⁹On the king’s role in preventing governmental usurpation see Garsten, “Representative Government”; and Selinger, *Parliamentarism*, 120–33

¹⁵⁰Benjamin Constant, *Réflexions sur les constitutions et les garanties; publiées le 24 mai 1814, avec une esquisse de constitution*, 2nd edn (Paris, 1817–18), OCBC, 8: 951–1161, at 1160, hereafter RsC (1818).

¹⁵¹*Ibid.*, 1170.

¹⁵²*Ibid.*, 956.

¹⁵³E.g. “Sur la même loi d’exception (10 mars 1820),” in Benjamin Constant, *Discours de M. Benjamin Constant à la Chambre des députés*, vol. 1 (Paris, 1828), 211.

disappeared from Constant's main works. On the other hand, Constant believed that the regime the Charter instituted satisfied modern principles of legitimacy: an elected chamber alongside a hereditary chamber and a hereditary executive, combined with respect for individual rights. As time elapsed, a growing consensus was taking shape around the restored constitutional monarchy, to the benefit of rest and stability.¹⁵⁴ When rulers harmed individual liberties, especially in the early 1820s, Constant warned that such measures ran the risk of alienating the nation's wish from the monarchy.¹⁵⁵

Constant provided a summary of his mature views on legitimacy in the fourth lecture he gave on the English Constitution at the Athénée royal in 1819. He explained he would treat in turn the question of the "origin of social authority ... according to the received opinion amongst the English" before talking about the limits of social authority.¹⁵⁶ In other words, he was once again making a case for a theory of political right rooted in established practices. When one looked at history, Constant explained, "sovereignty" in the judicial sense had resided in different hands depending on the titles of legitimacy that opinion accepted in different countries, in different periods of time.¹⁵⁷ In England, since the Glorious Revolution, the government was truly underpinned by a general "assent," because it had been recognized that the nation should have genuine influence in politics via an elected chamber.¹⁵⁸ Since that day, sovereignty in the judicial sense resided with the king, the peers and the Commons taken all together.¹⁵⁹ Building on his earlier redefinition of "the general will" (without any reference to Rousseau or popular sovereignty this time), Constant argued that England also demonstrated that long-standing heredity could become a valid title of legitimacy, in which case it reflected "the general will passed on from generations to generations."¹⁶⁰ Constant never gave the lecture on the limits of social authority, but handwritten notes reveal that he did not believe the principle of individual rights was sufficiently recognized by public opinion in England, unlike the principle of equality.¹⁶¹

Constant's last thoughts on legitimacy can be found in a series of articles he penned for the liberal newspaper *Le Temps* between February and March 1830.¹⁶² This was a time when radical republicans were calling upon popular sovereignty to establish a republic, while the ultra ministry of Polignac, with the support of Charles X, was reaffirming the king's absolute sovereignty to tame the liberal

¹⁵⁴See Constant's attempt to rally public opinion around his interpretation of the Charter after the downfall of the ultras in 1816 in the several editions of "De la doctrine politique qui peut réunir les partis en France," in *OCBC*, 10.

¹⁵⁵See Robert Alexander, "Benjamin Constant as a Restoration Politician," in H. Rosenblatt, ed., *The Cambridge Companion to Constant* (Cambridge, 2009), 147–72.

¹⁵⁶Benjamin Constant, "Lectures à l'Athénée royal sur la Constitution anglaise (Dec. 1818—June 1819)," in *OCBC*, 11: 227–361, at 327.

¹⁵⁷*Ibid.*

¹⁵⁸*Ibid.*, 332.

¹⁵⁹*Ibid.*, 333.

¹⁶⁰*Ibid.*, 330.

¹⁶¹*Ibid.*, 331–2.

¹⁶²Constant, *Recueil d'articles: 1829–1830*, 99–103, 109–31, 121–8.

opposition in the elected chamber.¹⁶³ Constant answered both parties at once: “Two systems have always dominated the world: popular sovereignty that I deny; the divine right of kings that I abhor.”¹⁶⁴ Popular sovereignty echoed a right to revolutionize the existing political order and, when delegated, unconditional power for those who exercised it. Divine right implied absolute power in the hands of one individual, and absurdly made political legitimacy derive from God. Both had to be denounced once more as dangerous fictions. Instead, Constant argued once again that political right depended upon principles, as deduced from historical experience, backed up by public opinion. “What is theory, but practice reduced into rules?”¹⁶⁵ Today, after centuries of tyrannies of diverse types, “opinion” started to embrace the idea that “sovereignty” in the judicial sense had to be limited.¹⁶⁶ When government trespassed its rightful limits, it became “usurpative,” Constant added in a final update: “usurpation” now designated a violation of the “object” criterion of legitimacy rather than the “source” criterion, as it had in *Spirit of Conquest*.¹⁶⁷ In his last article of the series, he insisted that France stick with a monarchy. Republics may be legitimate in some time and place, but a change in regime form in the present circumstances was likely to bring more harm than good.¹⁶⁸

In an ironical twist of fate, Constant found himself defending a monarchy with almost the same arguments with which he had defended the early Directorial republic as a young man. In the meantime, he had readjusted the “source” criterion of his theory of legitimacy, while continuously stressing the need to provide rest and tranquility under the extant regime, except when it did not offer any chance for individual liberty, as had been the case under the second Directory, the Consulate and the empire.¹⁶⁹

VII. Conclusion

Constant only discussed—and dismissed—popular sovereignty when forced to do so. In his view, extant institutions always exercised final decision-making

¹⁶³On the republicans’ uses of popular sovereignty see George Weill, “Les républicains français en 1830,” *Revue d’histoire moderne et contemporaine* 1/4 (1899), 321–51. On the ultras’ attempt to rekindle the absolute sovereignty of the king see Guillaume Bertier de Sauvigny, *Au soir de la monarchie: La restauration* (Paris, 1955), 424–31.

¹⁶⁴Benjamin Constant, “De la souveraineté. *Le Temps*. 12 février 1830,” in Constant, *Recueil d’articles: 1829–1830*, 99–100.

¹⁶⁵*Ibid.*, 99, 101–2.

¹⁶⁶*Ibid.*, 102–3.

¹⁶⁷*Ibid.*, 102; Benjamin Constant, “De la compétence du gouvernement. *Le Temps*. 12 février 1830,” in Constant, *Recueil d’articles: 1829–1830*, 109–31, at 109. On Constant’s later uses of “usurpation” see Gianna Englert, “Usurpation and ‘the Social’ in Benjamin Constant’s *Commentaire*,” *Modern Intellectual History* 17/1 (2020), 55–84.

¹⁶⁸Benjamin Constant, “De la monarchie et de la république. *Le Temps*. 26 mars 1830,” in Constant, *Recueil d’articles: 1829–1830*, 121–8.

¹⁶⁹See Benjamin Constant, *Mémoires sur les Cent-Jours*, in OCBC, 14: 57–314, at 116–18, where Constant explains his course of conduct, from the Directory to the restoration, as a continuous attempt to rally the “sentiment national” to tolerable regimes, always starting from the premise that “en fait de gouvernement, il faut partir du point où l’on est.”

authority—“sovereignty” *sensu stricto*. In modern countries, these were underpinned by a general wish aware of correct ideas about legitimacy.

Constant’s theory of legitimacy combined attentiveness to existing political arrangements with a normative index to evaluate these. This distinguishes him from Sagar’s reading of Hume. According to Sagar, instead of justifying a priori who was owed allegiance via a social contract, Hume derived political right from standing human practices exclusively. This meant that, for Hume, there was no external criterion by which to assess existing governments. In other words, people could not be mistaken in their opinions about legitimacy.¹⁷⁰ “Insofar as the opinion of mankind judges that some power possesses authority and is owed obedience, it therefore does and is.”¹⁷¹ As we have seen, Constant’s opinion-based theory of legitimacy partly originated in an early engagement with Hume. Constant shared Hume’s preference for stabilized regimes, expressed a similar degree of indifference towards forms of government, and tended to believe that theory was always rooted in historical experience. Unlike Hume, Constant was writing after the French Revolution, and this had significant implications for his political theory. In his analysis, the Terror and Napoleon had showed that a bare appeal to *existing* opinion did not always provide a satisfactory basis of legitimacy.¹⁷² One had to take a broader view, and consider the nation’s wish as the historical product of an ever-increasing recognition of equality and individual independence, of which the revolution properly interpreted was the culminating point. The standard of legitimacy was not simply Hume’s “established practice of the age,” but the stage of “civilization.”¹⁷³ Constant’s belief in perfectibility implied that, even if opinions were manipulated, the principles characteristic of a modern social state could be rekindled with the proper amount of persuasion. Political regimes could thus be condemned for not living up to these principles rather than being merely accounted for because they were temporarily in phase with the opinions of their subjects. Constant was thus able to *explain* public opinion’s changing moods, while retaining a normative benchmark to *condemn* regimes where charismatic leaders ensnared public opinion.

Constant’s use of public opinion as a substitute for popular sovereignty to theorize fundamental lawmaking was intended to privilege institutional stability at the expense of democratic self-rule. The contrast with Sieyès is revealing here. As Rubinelli has shown, Sieyès’s notion of “constituent power” allowed him to argue that the people themselves authored the constitution, which in turn provided boundaries to the exercise of sovereignty *sensu stricto* by constituted powers.¹⁷⁴ The idea of constituent power, she notes, was strikingly absent from Constant’s works.¹⁷⁵ This is due to the fact that Constant rejected the notion of constituent

¹⁷⁰Harris, “From Hobbes to Smith,” 761.

¹⁷¹Sagar, *Opinion of Mankind*, 130, 138.

¹⁷²On the limits of an exclusively “realist” approach to legitimacy see Clifton Mark’s review of Sagar’s book for *Political Theory* 47/3 (2019), 409–13.

¹⁷³“The established practice of the age” is an expression Hume used in *The History of England*. Quoted in Sagar, *Opinion of Mankind*, 134 n. 122.

¹⁷⁴Rubinelli, *Constituent Power*, 33–74.

¹⁷⁵Lucia Rubinelli, “Taming Sovereignty: Constituent Power in Nineteenth-Century French Political Thought,” *History of European Ideas* 44/1 (2018), 60–74, at 74.

power just as well as popular sovereignty, using the nation's wish instead to make sense of fundamental lawmaking. Constant agreed with Sieyès that "sovereignty" in the narrow sense needed to be limited.¹⁷⁶ The source of such limitation, however, was not the people's initial exercise of their constituent power, but enlightened writers constantly reminding present-day society and the extant government of a historically conditioned wish, which in principle should be embodied in the constitution. For Constant, radical acts of democratic self-determination unsettled the institutional stability required to pursue private endeavors. Constitutions therefore had to be progressively updated by the government to keep track of gradually changing beliefs, as deciphered by writers, about the fundamental conditions of the political order. In that respect, Constant's promotion of public opinion instead of popular sovereignty reveals a tension between political stability and the predictability it offers to individuals to organize their lives, and the people's right to author the constitutional text that structures the political regime under which they live.

Further, Constant's theory of legitimacy provides a counterpoint to Tuck's dichotomy between thinkers who located sovereignty with the people as opposed to the government, and those who conflated sovereignty with government. Constant denied that the people were sovereign. But he can only be associated superficially with Tuck's second category. Since constitutional reforms were the product of a public sentiment distilled over long periods of time, extant institutions never exercised "sovereignty" in any meaningful way. This is also why Constant used "social authority" as a synonym for "sovereignty" *tout court*: this was the authority that, when questions of fundamental lawmaking arose, did nothing else than register the nation's wish on specific constitutional amendments. This long-term wish inevitably instantiated through current public opinion, which manifested itself via elections and newspapers. But on Constant's terms, present-day public opinion only became substantive enough to force constitutional reforms when it constituted the end point of a long-term process of reflection under the guard of enlightened writers. In addition to political thinkers who associated sovereignty either with the people or with government, Constant's case thus suggests the existence of an additional category that assimilates sovereignty with government only in a purely formal sense, while seeing in a lasting and educated public opinion the real source of fundamental legislation.

Last, Constant's case tends to qualify prevailing assumptions in the literature on the concept of public opinion. It suggests that the pairing of public opinion with popular sovereignty, which scholars describe as occurring during the French Revolution, did not go unchallenged. On a first level, one may argue that if public opinion did emerge as a polemical response to the king's absolute sovereignty, as the mainstream narrative around public opinion has it, then uses of public opinion after 1789 were in significant cases an equally belligerent answer to popular sovereignty. Yet on a second level, further research on public opinion along the lines of this essay—public opinion as a way of accounting for the legitimacy of political regimes—would significantly nuance the literature that sees mid-eighteenth-

¹⁷⁶Constant described Sieyès as the first to defend "the limitation of sovereignty" *tout court*. Benjamin Constant, "Souvenirs historiques" (1830), in *Benjamin Constant publiciste, 1825–1830*, ed. E. Harpaz (Geneva, 1987), 169–209, at 175.

century uses of public opinion as indicative of a “public sphere” (Habermas) or a “politics of contestation” (Baker). Necker already used public opinion *before* the Revolution to describe a general belief in the monarchy’s legitimacy, which ministers needed to nurture by proceeding to ad hoc reforms.¹⁷⁷ He continued to do so after the Terror, in an updated form—the nation’s “wish”—in an explicit answer to revolutionary uses of popular sovereignty.¹⁷⁸ His uses of public opinion—like Constant’s later uses—were not intended as a challenge to the king’s authority, but as ways of describing a historically situated state of beliefs about what constituted political right.

Baker and Mona Ozouf have tended to enroll past uses of public opinion—including most prominently Necker’s—to illustrate what they see as a transfer of authority from the king to “the public.” In a teleological way, they expect this move to generate a new political space where competing claims about politics can be voiced. Because eighteenth-century conceptions of public opinion do not match what they describe as a “modern,” pluralistic, individualistic and egalitarian conception of public opinion, they dismiss them as “archaic”—i.e. obsessed with unity and an elite shaping the opinion of the masses.¹⁷⁹ Yet what they see as a fascination with “unanimity” was, at least in Necker’s case, a Humean reflection about the necessity, for any sustainable political regime, to be sustained by a broad consensus across social groups, especially when substantial constitutional reforms were required. Likewise, the distinction between an opinion-making elite and the mass was not simply an anti-egalitarian pathology. Public opinion was certainly, for Necker, a way of avoiding the arithmetic conception of political participation he associated with popular sovereignty. But it was also a way of theorizing the role that “opinion makers”—ministers or writers—had in persuading society at large to support constitutional and public policy reforms. These notions about public opinion endured after the Revolution, as Constant’s case suggests.

Uses of contemporary assumptions about public opinion as the sum result of conflicting interests through debate, or a concept somehow intertwined with popular sovereignty, have tended to obscure how past French thinkers used the notion and to what purpose. Refraining from these should allow us to further unravel the distinct theoretical resources past conceptions of public opinion hold.

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¹⁷⁷Necker, *De l’administration des finances de la France*, vol. 1 (n.p., 1784), vii–xiii.

¹⁷⁸Necker, “Réflexions philosophiques sur l’égalité,” 221–7.

¹⁷⁹Baker, “Public Opinion,” 196, 198–9; Ozouf, “Public Opinion,” 19–21. On the “narrative of rational modernity” that underpins Baker and Ozouf’s treatment of public opinion see Harold Mah, “Phantasies of the Public Sphere: Rethinking the Habermas of Historians,” *Journal of Modern History* 72 (2000), 153–82, esp. 169–79.

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