

**Taming Sovereignty:
Constituent Power in Nineteenth-Century French Political Thought**

The Version of Record of this manuscript has been published and is available in History of European Ideas,
<http://dx.doi.org/10.1080/01916599.2016.1234969>

Abstract:

Political theorists recently focused their attention on the history of the idea of constituent power. This, they claim, shows that the notion of *pouvoir constituant* expressed the radical and absolute power of the sovereign people. In other words, constituent power pointed at the democratic and irresistible core of popular sovereignty. In this paper, I argue that the analysis of nineteenth-century French political thought offers a different account of constituent power's history. Relying upon archival resources, I show that in the aftermath of the French Revolution politicians and legal scholars used constituent power to tame the very idea of sovereignty and the powers from it derived. First, during the Restoration constituent power was used to pose a limit to the power of the monarch. Second, throughout the July Monarchy scholars resorted to constituent power to claim that, even if the people was sovereign, its power was restricted to authorising the constitution. Third, during the Second Republic, jurists and politicians addressed the people's sovereign power in terms of constituent and constituted power. While the first was meant to disappear after the constitution's approval, the second was a second-order power limited by the hierarchy of norms and the rigidity of the constitution.

Keywords:

Constituent power, sovereignty, Lanjuinais, Laferrière, Berriat-Saint-Prix

Taming Sovereignty: Constituent Power in Nineteenth-Century French Political Thought

Recently, legal and political theorists focused their attention on the idea of constituent power. Scholars from diverse backgrounds approach the notion as an innovative and radical way of framing the relationship between law and politics, as well as a conceptual tool to make sense of revolutionary constitution-making.¹ They claim that the principle at the core of democratic politics - people's political authority - is better understood when the notion of sovereignty is associated to the idea of constituent power. While sovereignty is currently used to point at the supreme authority inside liberal constitutional states, constituent power reminds us of people's unlimited power to reform, revolutionize and overthrow existing political orders, above and beyond the limits set by the constitution.² In other words, constituent power clarifies the radical and revolutionary origins of the idea of sovereignty, and re-establishes the primacy of people's will over state's authority. To theorise the sovereign constituent power, scholars have looked at the origins of the idea. The political thought of the French Revolution is considered one of the first instances of constituent power's revolutionary meaning. The Abbé Sieyès used it not only to reclaim the third estate's right to participate into politics, but also to indicate people's power to create a new political order against and beyond the will of the monarch.³ Second, scholars find inspiration in Carl Schmitt's use of constituent power to describe the sovereign's unbounded and unlimited power to constitute the political order anew. Although Schmitt attributed it to a single man, his understanding of the sovereign constituent power is often adapted to the democratic context.⁴ Third, Arendt's defence of the council system is

¹ The revolutionary potential of the idea of constituent power has been addressed by Loughlin, M., Walker, N., *The paradox of constitutionalism* (Oxford, 2008), Kalyvas, A., *Democracy and the politics of the extraordinary: Max Weber, Carl Schmitt and Hannah Arendt*, (Cambridge, 2009), Wenman, M., *Agonistic democracy: constituent power in the era of globalization* (Cambridge 2013), Del Lucchese, F., 'Machiavelli and Constituent power: the revolutionary foundation of modern political thought', in *European Journal of Political Theory* (2014), 0-21, Vattel, M., 'Political ontology, constituent power, and representation' in *Critical Review of International Social and Political Philosophy* (2015: 6, 18), 678-686, Loughlin, M., 'The concept of constituent power', in *European Journal of Political Theory* (2014: 13,2), 218-237, Geenens, R et al., 'The 'Co-Originality' of Constituent Power and Representation', in *Constellations* (2015), Negri, A., *Insurgencies: constituent power and the modern state* (Minneapolis: 1999).

² See, among others, Kalyvas, A., 'Popular sovereignty, democracy and the constituent power', *Constellations*, 2 (2005), 223-244.

³ Sieyès, E., 'What is the third estate' in Sieyès, E., *Political Writings*, Sonenscher, M. (ed.) (Indianapolis, 2003), 92-162. Much has been written on Sieyès and constituent power by historians and political theorists. The latter tend to interpret his writings as proofs of Sieyès' radical stance in favour of direct democracy and popular sovereignty. See Kalyvas, A., 'Constituent power', last modified 2012, <http://www.politicalconcepts.org/constituentpower/>, Wandan, S., 'Nothing out of the Ordinary: Constitution Making as Representative Politics in *Constellations* (2015: 22, 1), 44-58. By contrast, historians of political thought associate Sieyès' idea of constituent power to national sovereignty, and highlight how it helped establish a constitutional system based upon the hierarchy of norms and the principle of political representation. See Hont, I., 'The permanent crisis of a divided mankind: Nation state and nationalism in historical perspective' in *Political Studies* (2004: 42), 166-231, Fauré, C., 'Sieyès, Rousseau et la théorie du contrat', in Quiviger Y (ed.) *Figures de Sieyès*, (Paris, 2008), 213-226, Pasquino, P., *Sieyès et l'invention de la constitution en France* (Paris: 1998) and Goldoni, M., 'At the origins of constitutional review: Sieyès' constitutional jury and the taming of constituent power' in *Oxford Journal of Legal Studies*, (2012: 32,2), 211-234.

⁴ Schmitt, C., *Constitutional Theory* (Duhnam, 2008). Schmitt's theory of constituent power is extremely influential among contemporary political and legal theorists. Among others, see Kalyvas, A., 'Carl Schmitt and the three moments of

considered a model of democratic politics. In *On Revolution*, she claims that sovereignty must be discarded as it equates politics to a mere process of authoritative decision-making. By contrast, the idea of constituent power allows to think of people's power in an anti-totalitarian, republican and dialogical sense.⁵ All this, it is claimed, shows the radical contribution that constituent power can bring to democratic theory when associated to the notion of sovereignty.

However, in this paper I maintain that there is a different story, one that, offering an alternative genealogy, suggests an opposite role for constituent power. It deals with a tradition largely ignored by contemporary theorists: the political and legal thought of nineteenth-century France. Throughout the post-revolutionary period, historical events proved that whoever held sovereignty could use it in an unlimited, absolute and arbitrary way. In this paper I analyse how scholars close to the liberal tradition perceived this as a threat and I illustrate how they appealed to the notion of constituent power to counter its effects. Specifically, I analyse original archival resources to show that the idea of constituent power did not embody the revolutionary potential of people's sovereignty. By contrast, I claim that it was used by jurists and politicians such as Lanjuinais, Laferrière and Berriat-Saint-Prix to affirm the principle of popular sovereignty while taming the possible excesses the idea sovereignty could entail. Arguing that constituent power indicated the supreme expression of sovereignty, they defined it as the process through which the sovereign people authorises the entry into force of the constitution. In three different occasions, this definition of constituent power played a key role in taming sovereignty. First, during the Restoration it was used to say that the king could not exercise power unlimitedly. Since the people had the supreme constituent power, the monarch only had a delegated sovereignty, whose limits were set in the constitution and could only be changed by the people. Second, during the July Monarchy constituent power was used to oppose the Parliament's claim to be the sovereign power and the only legitimate author of the constitution. Since constituent power belonged to the citizens, only the people could legitimately exercise the sovereign right to authorise the entry into force of the constitution. This could be done either via referendum or through the election of an extraordinary constituent assembly. Moreover, after the *Trois Glorieuses*, constituent power also indicated that people's exercise of revolutionary power could neither be unlimited nor spontaneous. Rather, it had to be circumscribed to electing the constituent assembly and sanctioning its work by voting the constitution. Last, during the Second Republic, the association of constituent power to sovereignty channelled the unlimited power entailed in the idea of popular sovereignty into the safe and limited frame of the liberal constitutional state: the power of the republican sovereign amounted to authorising the creation of the legal system. Beyond that, all powers were second-order powers, submitted to the hierarchy of norms and to the rigidity of the constitution.

democracy' in *Cardozo Law Review* (1999-2000: 21), 1525- 1565, Cristi, R., 'Carl Schmitt on Sovereignty and Constituent Power', in *Canadian Journal of Law and Jurisprudence* (1997), 189-201, Negri, *Insurgencies*.

⁵ Arendt, H., *On Revolution* (London, 1963). Arendt's idea of constituent power is widely cited by Kalyvas, *Democracy and the politics of the extraordinary* but also Arato, A, Cohen, J., 'Banishing the sovereign? Internal and external sovereignty in Arendt', in *Constellations* (2009, 2:16), 307-330.

I. The problem of sovereignty

None of the six constitutions written in France between 1799 and 1847 provides a definition of political authority, nor mentions where it lies, in whose hands it is held or how it is to be exercised.⁶ During the revolutionary years, common practice was to consecrate one of the first articles of the constitution, or of the complementary declaration of rights, to the definition and attribution of the supreme authority. In 1791, the third article of the Declaration of the Rights of Man and the Citizen proclaimed that sovereignty resided in the Nation, in 1793 the twenty-fifth article declared that it belonged to the people and in 1795 the seventeenth article said it pertained to all citizens. By contrast with the revolutionary tradition, no subsequent constitution reproduced the same practice. No agreement could be found on who held the sovereign authority and on how this was defined. As a result, the most diverse and disparate theories of political authority flourished and played important, although often mutually undermining, roles in the organisation of state's affairs. Engendering high levels of uncertainty as to who held the supreme power, this lack of official definitions posed a major challenge to scholars interested in defending the revolution's constitutional heritage. Not only the main achievement of 1789, the principle of people's sovereignty, risked being overthrown, but also the limited character of state's powers, with its guarantee of rights and liberties, was in danger.

In the first half of the nineteenth century, several jurists and intellectuals worried about the inconsistent attribution of sovereignty and its potential consequences. They feared that the confused and inconsistent ways in which sovereignty was defined could threaten the constitutional state, its system of division of power and protection of liberty. Moreover, the spectre of Rousseau's theory of sovereignty and its use during the Revolution daunted post-revolutionary reflections on political authority.⁷ In these regards, the works of Benjamin Constant, Alexis de Tocqueville and other liberal authors are well known.⁸ Yet, the analysis of archival resources – mostly legal and political treatises published in the first half of the nineteenth century – reveals the existence of a peculiar but overlooked approach to the problem of sovereignty. This was fostered by

⁶ In 48 years France changed 6 constitutions: the constitution of the year VIII, the constitution of the year X, the constitution of the year XII, the Charte Constitutionnelle of 1814, the Acte Additionnel aux Constitutions de l'Empire of 1815 and the chart of 1830. For a reconstruction of their history see Godechot, J., *Les Constitutions de la France depuis 1789* (Paris, 1970). Only the constitution of 1814 has a reference to the bearer of the political authority. In the preamble, it says 'For these reasons, We have voluntarily, and by the free exercise of our royal authority, accorded and do accord, grant and concede to our subjects, as well for us as for our successors forever, the constitutional charter' ('A CES CAUSES - NOUS AVONS volontairement, et par le libre exercice de notre autorité royale, ACCORDÉ ET ACCORDONS, FAIT CONCESSION ET OCTROI à nos sujets, tant pour nous que pour nos successeurs, et à toujours, de la Charte constitutionnelle'). In stating that the constitution was *octroyée*, the chart suggested that the bearer of political authority was the monarch. However, not only this principle was strongly contested by liberal deputies and jurists, but it was also contradicted by the fact that it was eventually voted by the parliament, thus suggesting that the final sanction had to come from the representative body.

⁷ For a reflection on Rousseau's legacy on post-revolutionary political thought see Roussel, J., *Jean Jacques Rousseau en France après la Revolution: 1795-1830* (Paris, 1972), especially parts 1, 3 and 5. See also Merriam, C., *History of the theory of sovereignty since Rousseau* (New York, 1900).

⁸ Fontana, B., *Benjamin Constant and the post-revolutionary mind* (New Haven, 1991). Jaume, L., *L'individu effacé* (Paris, 1997), Kelly, A., Grabaud, S., *The Humane Comedy: Constant, Tocqueville, and French Liberalism* (Cambridge, 2007).

scattered individual figures who, in different moments and for different reasons, decided to rely upon the idea of constituent power to face the threats posed by sovereignty's undefined character. Some of these authors were renown politicians, some were respected professors of public law. Yet, it is neither their fame nor the breath of their intellectual writings that makes their contribution to political theory distinct and worth studying. Rather, it is the originality of their choice to use the idea of constituent power that makes their theories relevant to understanding how sovereignty was tamed and limited in nineteenth-century France. Although more renown authors adopted different strategies, the scholars studied in this paper are the only thinkers who decided to rely on constituent power as a means of limiting sovereignty. In doing so, they introduced the idea of constituent power in the political vocabulary of the time and slowly but steadily made it a cornerstone of nineteenth-century constitutional thought.

Relevant figures are Jean-Denis Lanjuinais, a jurist member of the Estates General and of the National Convention, a senator during the Empire and a peer during the Restoration; Felix Berriat-Saint-Prix, a jurist and politicians who was born in Grenoble and, before becoming a supporter of constitutional monarchy, was a fervent defender of Napoleon; François Delarue and M. F. Laferrière, both law professors who took part in the political debate writing pamphlets and intervening on newspapers; and Louis Marie de Cormenin, an eminent politician of noble origins who sat on all post-revolutionary parliaments and served on the Second Republic's Constituent Assembly. The analysis of their writings shows that they all feared unlimited power. They shared this fear with more renown thinkers, such as Benjamin Constant and the doctrinaires.⁹ Yet, notwithstanding these overlaps, it is worthwhile analysing these concerns, as expressed by Lanjuinais, Laferrière and Berriat-Saint-Prix, on their own terms. It is only by engaging directly with their discussions of sovereignty that it is possible to make sense of their choice to resort to constituent power - as opposed to other strategies - to limit the sovereign authority. Specifically, they articulated their fear of sovereignty's unlimited character in four separate concerns: the plurality of definitions of sovereignty, the need to attribute political authority to the people, the limitation of monarchical and parliamentary powers and the containment of popular rule.

Starting with the first concern, there was a widespread fear that sovereignty, whoever it belonged to, could be conceived as an unlimited and absolute power. Since no constitutional attribution of sovereignty was available, any attempt to affirm a limited conception of sovereignty was difficult if not vane. Early nineteenth-century's theories of sovereignty included the Napoleonic understanding of political authority, according to which sovereignty belonged to the people but was completely delegated to the leader via plebiscites.¹⁰ After the end

⁹ As examples, see Constant, B., *Cours de politique constitutionnelle* (Paris, 1818-1820), vol.I, 155-165, Maistre, J., *Essai sur le principe generateur des constitutions politiques* (Paris, 1959), Guizot, F., "De la démocratie dans les sociétés modernes," *Revue française*, November 1837, 224.

¹⁰ Napoleon organised several plebiscites to legitimise his power. The first was on the constitution of the year VIII, 28 February 1800, the second on his election as consul for life, 2 August 1802, the third for the institution of the Empire in May 1804 and in June 1815 he called the last plebiscite on the additional act on the constitution of the Empire. See Constant's virulent attack of Napoleon's rhetoric use of people's sovereignty, Constant, B., *Cours de politique constitutionnelle* (Paris, 1818-1820), vol. I, 161.

of the Empire, a group of conservative deputies theorised the principle of parliamentary sovereignty, whereby ‘when considered in the reunion of its three branches, our parliament is the sovereign (...) it is the most extreme and superlative expression of power. Its authority is unlimited’.¹¹ In addition, ultra-royalists and counter-revolutionary authors claimed that sovereignty belonged to the monarch who received it through God’s divine investment,¹² through the authority of time as administered by God,¹³ or simply through the sanction coming from the divine order ruling human history.¹⁴ Echoing these ideas, Louis XVIII accepted his investment to the throne in Saint Ouen in 1814 and said that he was ‘by the grace of God, King of France and of Navarre’.¹⁵ Whether attributed to the monarch or to the parliament, sovereignty was conceived as an undeterminable set of powers. Not only it was not constitutionally regulated, but it also derived from abstract and evasive sources, making it undefinable and illimitable. This appeared extremely dangerous to the group of jurists and politicians addressed in this study. In the words of Laferrière: ‘regardless of whether sovereignty belongs to kings, to aristocratic bodies or to the people, whenever it is considered as absolute it negates truth and justice and destroys society. Precisely because it does not have any limits, any barriers, and because it proclaims itself absolute, neither justice nor truth will have any rights against it’.¹⁶

Second, Lanjuinais, Laferrière, Delaure and Berriat-Saint-prix strived to rescue the revolutionary tradition and its animating principle, the idea that political power should belong to the people. They repeatedly intervened in the political debate to affirm the idea of popular sovereignty. This was not only consistent with men’s equal right to participate in the law-making process, but it also ran counter all appropriations of power by the king, the parliament, reason or strong men. Abolishing the revolutionary distinction between national and popular sovereignty, they agreed with more eminent authors in claiming that sovereignty laid with the French population, which they alternatively called *le peuple* or *la nation*.¹⁷ Francois Delaure, for instance, defined

¹¹ Quoted in Lanjuinais, J.D., *Examen du système de M. Flaugergues établissant la dictature du roi et des chambres ou leur pouvoir de changer la constitution sans observer aucunes formes spéciales* (Paris, 1820), 18. Unless otherwise stated, all translations from French into English are mine.

¹² Bonald, L. de, *Mélanges littéraires, politiques et philosophiques* (Paris 1819) et *Démonstration philosophique du principe constitutif de la société* (Paris 1820).

¹³ De Maistre, J., *Essai sur le principe générateur des constitutions politiques* (Paris 1814).

¹⁴ This is a thesis presented by Lamennais, a fervent priest, in his book *De la religion considérée dans ses rapports avec l'ordre politique et civil* (Paris 1826). He will later change his mind, abandon the church and become a supporter of popular sovereignty during the Second Republic.

¹⁵ *Declaration de Saint Ouen* in Godechot, *Les Constitutions de la France depuis 1789*, 9.

¹⁶ Laferrière, H., *Cours théorique et pratique de droit public et administratif* (Paris, 1839), 7-8. A similar tone is used, for instance, by Constant who maintained that “while we recognise the right of that will, that is the sovereignty of the people, it is necessary, indeed imperative, to understand its exact nature and to determine its precise extent. Without a precise and exact definition, the triumph of the theory could become a calamity on its application”. Constant, B., “Principles of representative government”, in *Political Writings*, ed. Fontana B., Cambridge University Press, 1988, 175.

¹⁷ During the Revolution, the ideas of national and popular sovereignty were thoroughly debated and distinguished. The first idea was defended by monarchists and moderate deputies. It attributed the sovereign power to the representatives of the nation gathered in the National Assembly. By contrast, popular sovereignty was defended by Jacobin and radical revolutionaries. It entailed that the political power belonged to the people and had to be exercised directly by the citizens. On this dispute, see Jaume, L., *Les discours Jacobin et la démocratie* (Paris, 1989) and Hont, I., ‘The permanent crisis of a divided mankind: Nation state and nationalism in historical perspective’, *Political Studies* 42 (2004), 166–231. As an example of Constant’s more famous defense of popular sovereignty: “la souveraineté du peuple, c’est-à-dire la suprématie de la volonté générale sur toute volonté particulière [c’est un] principe, en effet, [qui] ne put pas être contesté”. – Constant,

sovereignty as ‘inhabiting the generality of a nation’s individuals living in society’.¹⁸ Similarly, the jurist Henri Ahrens wrote in one of his textbooks that ‘the source and the origin of power is the nation, it is within the nation that the general political power inhabits; it is from the nation that all powers derive their origins’.¹⁹

Third, the principle of popular sovereignty had to be affirmed and defended against the king’s and the parliament’s attempts to appropriate power. The first half of the nineteenth century showed that those who exercised sovereignty, whether the representatives of the people or the king, tended to use it arbitrarily or to appropriate it. Above all, the fact that sovereignty was neither clearly attributed nor defined entailed that both the parliament and the king could claim to exercise sovereignty above and against the popular will.²⁰ Liberal theorists responded arguing for the limitation of parliamentary and monarchical powers.²¹ Berriat-Saint-Prix explained the exemplary value of the 1791 constitution which secured the limitation of delegated sovereignty as follows: ‘the legislative power is delegated to a legislative assembly, which is permanent, indissoluble and renewable without summon every two years’, the executive power ‘is delegated to the king, hereditary representative of the nation, and it is exercised by responsible ministers under his authority’ and the ‘judicial power is delegated to judges temporarily elected by the people’.²²

Last, the idea of popular sovereignty had to be protected from the mob and from its own degeneration into direct democracy. Terror was too close to memory to overlook the dangers coming from unbounded and absolute attributions of sovereignty to the people. Hence, it was necessary to displace the power of the bearer of sovereignty by indicating the people as the source of power but not its executor. An example is Berriat-Saint-Prix’s claim that sovereignty belonged to the people only in a negative sense, as ‘the principle of popular sovereignty does not mean much when considered in the affirmative, ... as attributing a right or a faculty ... It rather has a negative value, insofar as it excludes all contrary principles: for instance, the principle that founds political authority in the grace of God, or in an immemorial possession, or even in the supposed knowledge and wisdom of those who exercise it’.²³ More concretely, Pinheiro Ferreira, a Portuguese-born jurist close to the authors mentioned above, claimed that ‘it would be absurd to imagine the people exercising the power of making

B., *Ecrits politiques*, ed. Gauchet, M., Gallimard, Paris, 1997, 311.

¹⁸ Delaure, F., *Du pouvoir constituant et du principe souverain d’après M. de Cormenin au sujet de la Charte de 1830* (Paris 1831), 4.

¹⁹ Ahrens, H., *Cours de droit naturel ou de philosophie du droit* (Bruxelles 1830), vol II, 369.

²⁰ On this specific point see Merriam, C., *History of the theory of sovereignty since Rousseau*, ch. 5

²¹ As an example, see Constant, B., “Principles of Politics”, *Political Writings*, *op.cit.*, 183 and Jaume, L., *L’individu effacé* (Paris, 1997), ch. 3, 185-192.

²² Berriat-Saint-Prix, F., *Commentarie sur la Charte Constitutionnelle* (Paris 1836), 19. Constant argued that

²³ Berriat-Saint-Prix, F., *Commentarie sur la Charte Constitutionnelle*, Videqoc, Paris, 1836, 34-35.

or executing the law'²⁴ because it is 'only very improperly that we say that the people is sovereign. Rather, what we mean and what we should say is that the people is the origin of sovereignty'.²⁵

The political debate of the first half of the nineteenth century revolved around contested claims of sovereignty. Those who defended the heritage of the 1791 constitution repeatedly challenged absolute conceptions of power, affirmed the principle of popular sovereignty and defended it against royal and parliamentary abuses as well as against practices of democracy. To do so, they wrote legal and political treatises and developed rhetorical strategies to confront their political opponents. Among others, the authors presented in this paper resorted to a specific strategy to limit and control the sovereign power. Differently from other liberal authors, they decided, in different moments and for different reasons, to deploy the idea of constituent power. They used it as a strategic device to affirm popular sovereignty and justify the institution of the constitutional state against king's and parliament's arbitrary uses of power, as well as against competing accounts of sovereignty.

II. A solution to the problem of sovereignty: constituent power

First introduced in 1788 by the Abbé Sieyès, the idea of constituent power was used by revolutionaries to indicate the nation's power to create the new legal-political order after the demise of the Ancien Régime. Cited several times during the revolution, mostly by Sieyès and Condorcet, it suddenly disappeared from the political vocabulary around 1795. Until the second decade of the nineteenth century, the expression 'constituent power' rarely appeared in constitutional treatises and political debates.²⁶ Only in the late 1810s it slowly but steadily made its reappearance in the political vocabulary thanks to jurists such as Lanjuinais, Laferrière and Berriat-Saint-Prix. The context and implications of its use varied over time, in relation to the specific historical circumstances in which the idea was deployed. Yet, these can be divided in three phases, corresponding to the Restoration, the July Monarchy and the Second Republic. Each of these phases represents a peculiar usage of

²⁴ Pinheiro-Ferreira, S., *Cours de droit public interne et externe* (Paris 1830), 165-166. He also stated that 'the expression some people use, that the people is sovereignty, is true if it means that the origins of the sovereign power is in the people ... but it is badly expressed, because it seems to suggest that the people is itself the sovereign, that it has the right to directly exercise the legislative and executive powers, which means that it has the right to do what it cannot do', Pinheiro-Ferreira, S., *Cours de droit public interne et externe*, 165-166.

²⁵ Pinheiro-Ferreira, S., *Cours de droit public interne et externe*, 167. Note the similarity of the above presented arguments with Constant's stance on popular sovereignty. When discussing people's 'incontestable' sovereignty, he admitted that 'while we recognise the right of that will, that is the sovereignty of the people, it is necessary, indeed imperative, to understand its exact nature and to determine its precise extent. Without a precise and exact definition, the triumph of the theory could become a calamity on its application' Constant, B., 'Principles of Politics' in Constant, B., *Political Writings* (Cambridge, 1988), 183.

²⁶ It is difficult to explain why the idea of constituent power almost disappeared after 1795. It probably depended on the disappearance of its most sophisticated theorists and promoters: Condorcet, who died during the Revolution, and Sieyès, who progressively withdrew from the political scene. Records testify of a debate between Sieyès and Napoleon on this issue, but no substantial discussion of constituent power ever seemed to occupy the political discourse during that period. See Boulay de la Meurthe, *Théorie constitutionnelle de Sieyès et Constitution de l'an VIII*, Paul Renouard, Paris, 1836. For a similar case, the disappearance of the word 'democracy' in France during the same period, see Rosanvallon, P., 'The history of the word democracy in France', *Journal of democracy*, 6,4, 1995

the idea of constituent power, as it corresponds to a way of countering and taming the threats that, at any given time, were considered entailed in the notion of sovereignty.

First, during the Restoration constituent power developed into an instrument to oppose the king's appropriation of sovereignty and his illicit use of governmental powers. Throughout the first decades of the nineteenth century, the king often took advantage of the ambiguity underpinning the attribution of sovereignty to claim all powers in his hands and to entrusted himself with the authority to arbitrarily change the constitution. Lanjuinais resorted to the idea of constituent power to condemn what he saw as an illegitimate appropriation of power. An emblematic case is the debate that arose in 1819, after Louis XVIII's repeated attempts to modify the *Charte Constitutionnelle* adopted in 1814. Although the constitution did not mention who was the bearer of sovereignty, the king argued that the chart was a *constitution octroyée*, a concession made by the monarch to his people. He then put forward several laws restricting the freedom of the press and reducing the composition of the electoral body, in explicit contrast with the *Charte's* initial provisions. Against this intervened Lanjuinais. His aim was twofold: he wanted to reclaim sovereignty for the people and, in doing so, limit the power of the monarch. In order to achieve both aims, he resorted to the idea of constituent power.

First, he claimed that sovereignty belonged to the people because the political order was created through their exercise of the supreme sovereign function, the constituent power. In Lanjuinais' mind, this expressed itself through the popular authorisation of the constitution and of the legal political order thereby created. Yet, in 1814 no referendum was called on the new constitution, nor the people had any chance to express their approval of the *Charte*. However, Lanjuinais maintained that the political order was legitimate precisely because the people tacitly approved the *Charte's* entry into force. In so doing, they exercised their constituent power and affirmed their sovereignty. Proof was that without people's tacit sanction, the monarchical order would collapse. Consequently, the power of the king was not the source of the constitution. It was a delegated power, entrusted by the people, via the constitution, with the authority to act in its name inside the limits established by the *Charte*. Hence, the king was a constituted power. Not only his existence depended on the constitution, but his working was also submitted to its authority and he was not authorised to change the conditions of his constitutional delegation. Consequently, the king's attempts to modify the constitutional provisions mentioned above were not only abuses of his delegated power, but also a direct attack to the people's constituent power and sovereignty. Explaining how constituent power, being an expression of sovereignty, placed a limit upon the king's exercise of power, Lanjuinais argued that 'it is remarkable to notice how the word *sovereign* literally only means superior, and not superior in an absolute sense, without limits ... The constituted sovereignty [of the monarch] has for its natural, and sometimes even official, superior the entire nation exercising the constituent authority either by itself or through its representatives'.²⁷ Lanjuinais used the idea of *pouvoir constituant* to

²⁷ Lanjuinais, J.D., *Constitutions de la Nation Française avec un essai historique et politique sur la charte et un recueil de pièces corrélatives*, (Paris 1819), vol. I, 13.

claim that sovereignty belonged to the people and not to the king, so as to impose a clear and straightforward limit upon Louis XVIII's illegitimate pretensions over the people's sovereign power.

A few years later, Lanjuinais reused the idea of constituent power twice and in similar ways. In 1824, the Parliament tried to pass a law changing the way in which the legislative chamber was composed. While the constitutional chart provided for its annual and partial renovation, the law proposed to re-elect a new chamber every seven years. In 1828, the king and several *ultras* deputies tried to force an anti-constitutional interpretation of article 14 of the *Charte*.²⁸ This said that the monarch could independently make a law in cases of threats to national security.²⁹ Louis XVIII claimed to legitimately deduce from this article the authorisation to autonomously change the constitution and its provisions. Lanjuinais offered arguments to oppose both these abuses of power relying once more on the idea of people's constituent power. As he repeatedly claimed, every revision of the constitutional chart must respect 'the salutary, natural and essential distinction between the exercise of the constituent power and the exercise of the constituted powers, the distinction between the constitution and secondary legislation'.³⁰ Failing to do so will entail the arbitrary appropriation of sovereignty by delegated authorities and will result in 'oppressive and tyrannical projects'.³¹ Even though the constitution failed to identify the bearer of sovereignty, those who, like Lanjuinais, believed it belonged to the people used constituent power to claim that the king had a delegated – as opposed to sovereign – power and could not modify the constitution.

The second phase in constituent power's nineteenth-century history coincides with the period starting in the July Revolution and ending in the first half of the 1840s. The *Trois Glorieuses* signalled an important moment in the debate on political authority. The role played by the people in overthrowing Charles X's regime and imposing a new monarch gave room to the implicit affirmation of popular sovereignty. In the post-revolutionary regime, the implementation of this principle was neither consistent nor controlled. Yet, differently from the Restoration period, it was progressively recognised as the foundation of the political order. On the one hand, people felt entrusted with the supreme power and pretended to use it unlimitedly. On the other, popular sovereignty was not recognised in the constitution and political practice revealed that the parliament tended to appropriate it far more often and extensively than during the Restoration.³² In this context, the notion of

²⁸ The term 'ultras' was used to indicate a group of members of parliament active during the second restoration, the 'ultra royalists'. They had extreme positions and defended both aristocratic privileges and strong monarchical governments.

²⁹ Article 14 said 'The king is the supreme head of the state, commands the land and sea forces, declares war, makes treaties of peace, alliance and commerce, appoints to all places of public administration, and makes the necessary regulations and ordinances for the execution of the laws and the security of the state'. See Godechot, *Les Constitutions de la France*, 219

³⁰ Lanjuinais, *Constitutions de la Nation Française avec un essai historique et politique sur la charte et un recueil de pièces corrélatives*, 184.

³¹ Lanjuinais, *Constitutions de la Nation Française avec un essai historique et politique sur la charte et un recueil de pièces corrélatives*, 184.

³² On the Restoration and July monarchy, see Waresquiel, E., *Histoire de la Restauration, 1814-1830 : naissance de la France moderne* (Paris, 1996) and Price, M., *The perilous crown: France between revolutions, 1814-1848* (London, 2007).

constituent power provided a progressively more relevant and widespread instrument to limit abuses of sovereignty. Its action was twofold.

To begin with, it provided a consistent argument to claim that sovereignty, even if belonging to the people, did not give them absolute and unlimited powers but had to be implemented through a constitution-making process. This move allowed jurists and political actors to avoid the risk, already experimented during the French revolution, of interpreting the principle of popular sovereignty as the absolute right to constantly and directly exercise political authority. An example of constituent power's limiting function vis à vis the principle of popular sovereignty is offered by Laferrière's intervention in the *Revue Wolowski*.³³ Presenting his newly published course of public law, he argued that popular sovereignty had for unique 'aim the constitution of a social body. It decides on the types of organization to adopt, and has the power to create forms, authorities, institutions and guarantees ... This sovereignty, which is sometimes used among nations, is only relative and temporary, it is the constituent power. This power, which belongs to the entire nation, is exercised very rarely, at great historical conjunctures, to create or modify national constitutions, and disappears after having achieved its task, leaving the constituted powers to deal with social policies'.³⁴ He clearly stated that the people's sovereign power exclusively entailed the authority to write the constitution. Once the sovereign established the constituted powers and framed the boundaries of the constitutional state, he had to disappear.

Another argument to limit people's sovereignty came from Sieyès' association of constituent power with representative politics. In 1789, Sieyès maintained that the people, as holders of constituent power, authorise the constitution but do not create it themselves. Rather, they elect extraordinary representatives to write the constitutional text and, once the latter is ready, they ratify it, authorising its entrance into force. Hence, the exercise of constituent power does not coincide with the writing of the constitution, which is delegated to representatives, but with its authorisation and approval by the nation. As Pasquino shows, this authorisation may occur *ex ante* or *ex post*, but is in not to be confused with the writing process.³⁵ Rather, the core of Sieyès' idea of *pouvoir constituant* rests on the power of the people to authorise, freely choose and accept, the creation of the political order and the laws by which it is to be ruled. Building on this idea, François Delarue explained that the sovereign constituent power 'is not exercised directly, because it is impossible that a multitude of individuals, an entire nation, understands itself when reunited in a general assembly'.³⁶ By contrast, 'it is natural

³³ Laferrière, M.F., 'Faculté de Droit de Rennes, Cours de droit public et administratif, par F. Laferrière, Professeur à la faculté de droit de Rennes' *Revue de Legislation et de jurisprudence* 9 (1838-1839), 360. The *Revue Wolowski*, short name for the *Revue de Legislation et de jurisprudence*, was a famous academic journal printed in Paris and widely distributed among jurists and politicians.

³⁴ Laferrière, 'Faculté de Droit de Rennes, Cours de droit public et administratif, par F. Laferrière, Professeur à la faculté de droit de Rennes' *Revue de Legislation et de jurisprudence*, 361.

³⁵ Pasquino, P., 'Constitution et pouvoir constituant: Le double corps du peuple' in Quiviger Y (ed.) *Figures de Sieyès* (Paris, 2008), 13–24.

³⁶ Delarue, F., *Du pouvoir constituant et du principe souverain, d'après M. de Cormenin au sujet de la Charte du 1830* (Paris 1831), 5

that the general will or the will of the majority - which is the same thing - ends up delegating its decision-making power to the wisest citizens so as to entrust them with the mandate of making a founding contract in its name.³⁷ Hence, not only the exercise of popular sovereignty was circumscribed to the authorisation of the constitution, but also its implementation was delegated to the experts in the fields, to *les plus sages*.

Throughout the 1830s and the first half of the 1840s, the notion of constituent power also had a second function: it was used to contrast the Parliament's abusive disposal of its delegated power. As Rosanvallon highlights, the constitution-writing process of August 1830 was marked by several tensions.³⁸ Not only the constitution was not submitted to referendum, as the July revolutionaries requested, but was also drafted and voted by the pre-revolutionary parliament, against which the people revolted in July. As a consequence, a group of liberal deputies, led by M. de Cormenin, relied on the notion of constituent power to criticise these measures and attack the authority of the parliament. First, Cormenin argued that only the sovereign could exercise (or delegate the exercise of) the constitution-making power. Hence, the new constitution could not be considered legitimate, as it was not written by the bearer of the constituent power, the people, or those acting on its behalf. Rather, it was written and approved by a parliament explicitly disapproved, disempowered and considered illegitimate by the people. As Francois Delarue outlined, expanding Cormenin's arguments, the sovereign peoples cannot be expropriated of their 'original constituent right as, even if they wanted to, they cannot relinquish it, because this right is inalienable and is the real meaning of liberty, without which only the tyranny of privileges and usurpation will survive'.³⁹ Following up on this, he argued that what happened in August 1830 was precisely an expropriation of people's constituent power. This resulted in an improper and abusive use of sovereignty by the parliament. Addressing fellow members of the Assembly, he said: 'the revolution was precisely made against this violation; the people recaptured its sovereignty and as a prize, you want to make it disappear. Acting without people's participation, without its sanction, you appropriate the constituent power, which is inherent to people's sovereignty'.⁴⁰ In addition, opponents of the July Constitution relied on the notion of constituent power to claim that the constitution-making body, directly representing the sovereign authority, could only operate as an extra-ordinary assembly. Hence, it did not coincide with the legislative assembly, which was a normal constituted body. Since the 1830's constitution was written by a legislative chamber and not by a constituent assembly elected ad hoc, it could not be legitimate. Hence, during 1830s liberal jurists used the idea of constituent power to highlight that the parliament was authorised neither to write nor to pass the constitution and demonstrated that in 1830 the representative chambers abused their delegated power and arbitrarily appropriated people's sovereignty. Moreover, they also relied on constituent power to channel people's potentially unlimited sovereignty into a constitution-authorising power.

³⁷ Delarue, *Du pouvoir constituant et du principe souverain, d'après M. de Cormenin au sujet de la Charte du 1830*, 5

³⁸ Rosanvallon, *La monarchie impossible: les chartes de 1814 et 1830*, ch. 3.

³⁹ Delarue, *Du pouvoir constituant et du principe souverain, d'après M. de Cormenin au sujet de la Charte du 1830*, 5

⁴⁰ Delarue, *Du pouvoir constituant et du principe souverain, d'après M. de Cormenin au sujet de la Charte du 1830*, 13.

The last phase in this history of constituent power coincides with the establishment of the Second Republic in 1848 and marks the definitive success of constituent power's limiting function. By 1848, the idea of *pouvoir constituant* no longer embodied a minor conceptual strategy to limit monarchical and parliamentary abuses of sovereignty. It represented the main conceptual tool through which to conceive and implement the very idea of popular sovereignty. For the first time since 1793, France not only attributed sovereignty to the people but also proclaimed itself a republic. As the first article of the first chapter of the new constitution clearly asserted, the 'sovereign power rests in the entirety of French citizens. It is inalienable and eternal. No individual, no fraction of the people has the right to its exercise'.⁴¹ Contrary to previous regimes, political authority was now completely in the hands of the citizens. As the constitution declaimed 'all public powers, whichever they are, issue from the people. They cannot be hereditarily delegated'.⁴² This had two welcomed results. First, it abolished all political distinctions among social orders and eliminated contending claims to the entitlement of sovereignty. Second, the people became the bearer of the sovereign power and its exclusive executor, as no hereditary body was there to act as a counter-power.

However, this renewed and fully fledged attribution of sovereignty to the people required some elaboration to be applied to the republican context, otherwise it risked reproducing the Terror.⁴³ Taking part in a wider debate on the subject, the lawyer at the Conseil d'Etat G. Dufour directly addressed the problem arguing that, even if 'in the 1848 constitution, sovereignty was evident and beyond any doubt, it was its exercise that needed regulation'.⁴⁴ This regulation was needed because 'a sovereignty that is immense, always present and always ready to act, is the danger inherent to all republics'.⁴⁵ Yet, the terms and instruments of this regulation did not come from a long and thought-through process of constitutional engineering. Rather, they naturally followed from the belief that sovereignty, being 'the highest conceivable power ... above which no other power can be placed'⁴⁶ could only be implemented, at practical and factual level, through the expression of the people's constituent power. As Berriat-Saint-Prix maintained 'the most direct application of sovereignty consists in establishing a government. In other words, it consists in exercising the constituent power'.⁴⁷ Differently from what happened in 1789, the 1848 debate on the association of sovereignty to constituent power did not take place during the constitution-making process. On the contrary, it developed on the bases of arguments already present in the public discourse. The language to address their mutual relationship only needed to be developed to its full strength and made accessible to the political class and to the public. This happened before and during

⁴¹ Constitution of 1848, chapter I, art. 1, see Godechot, *Les constitutions de la France*, 264.

⁴² Constitution of 1848, chapter III, art. 18, see Godechot, *Les constitutions de la France*, 266.

⁴³ The Terror was very present in the public discourse of the time. The revolutionaries and the constituents worked to avoid all associations of the republic to the Jacobin experience, as proved by the abolition of the death penalty for political crimes and the effort to limit the meaning of sovereignty. See Godechot, *Les constitutions de la France*, 252-262.

⁴⁴ Dufour, G., 'Du pouvoir executif', in *Revue de Legislation et de jurisprudence*, I (1848), 189.

⁴⁵ Dufour, 'Du pouvoir executif', 189.

⁴⁶ Berriat-Saint-Prix, F., *Théorie du droit constitutionnel français, Esprit des constitutions de 1848 et de 1852 et des sénatus-consultes organiques précédé d'un Essai sur le Pouvoir Constituant et d'un Précis historique des constitutions françaises* (Paris 1851-1853), 186.

⁴⁷ Berriat-Saint-Prix, *Théorie du droit constitutionnel français*, 186.

the revolution, thanks to the widespread work of republican jurists, scholars, politicians and journalists who contributed to transforming the association of sovereignty to constituent power into a self-evident and incontestable fact.

The first and most relevant of these implications extended a reasoning developed during the July Monarchy. It relied on a very simple conceptual mechanism: arguing that popular sovereignty could only be exercised through constituent power, Laferrière and Berriat-Saint-Prix recognised the people with the sovereign power to decide the form of their political existence, but limited its expression to the foundation of the legal-political order. This entailed that once the sovereign constituent power exercised its ‘right to write the constitution’⁴⁸, the latter had been approved and the political order constituted, the absolute sovereignty of the people had to disappear and leave room for the regular exercise of power by the constituted order. Far from entailing a power ‘always present and always ready to act’, sovereignty was transformed into an abstract principle whose only implication was the affirmation of people’s right to authorise the constitution. As Laferrière argued in one of his university lectures, ‘popular sovereignty is, in our modern societies, the fundamental principle at the basis of both constituent and constituted powers; yet, itself it is not power’.⁴⁹ Once associated to constituent power, sovereignty was emptied from any implications that its direct attribution to the people could have entailed.

The articulation of popular sovereignty in terms of constituent power offered also a second limiting strategy. This touched upon the way in which the people exercised their sovereign power when writing the constitution. Although the public discourse, particularly during the 1848 revolution, relied on an undifferentiated reference to the constituent power ‘of the people’, its direct popular expression was evaded by all possible means. Building on an argument introduced by Sieyès, asserted by Constant and used in the aftermath of the July Revolution, the notion of *pouvoir constituant* brought with itself the idea that in a modern society the exercise of power, including the sovereign constituent power, needed to be delegated to representatives. As Berriat-Saint-Prix clearly explained, ‘it is materially and morally impossible for several millions of individuals to deliberate and choose the best option among several complex combinations of possibilities’.⁵⁰ These received their mandate from the people, who maintained the right to seal the constitution’s entrance into force. The framing of popular sovereignty as the people’s constituent power not only had the effect of limiting the exercise of sovereignty to the constitution-making process, but it also delegated its execution to elected representatives, leaving the people with a merely sanctioning role.

A third argument to limit the idea of sovereignty comes from the logical structure underpinning the notion of *pouvoir constituant*. Being necessarily prior and superior to the constituted order, constituent power constrains the latter’s exercise of power inside the boundaries established by the constitution. The argument goes as

⁴⁸ Berriat-Saint-Prix, *Théorie du droit constitutionnel français*, 2.

⁴⁹ Laferrière, *Cours théorique et pratique de Droit Public et Administratif*, 1.

⁵⁰ Berriat-Saint-Prix, *Théorie du droit constitutionnel français*, 13.

follows: the sovereign people delegates the authority to create the constitution to the constituent assembly. The constitution, in Berriat-Saint-Prix's terms, is 'the ensemble of rules determining a people's form of government, the law organizing the distribution of public powers'.⁵¹ Once the constitution is accepted, the constituent power disappears and sovereignty is exercised according to the rules established by the constitution. Sovereignty thus passes from being a constituent sovereignty to be a constituted sovereignty. Being constituted, it is necessarily regulated by the constitution and constrained inside the limits the constituent power set to its exercise. Not only it is divided among a plurality of different powers, but its expression is also mediated through its delegated character. No constituted power, whether the executive, the legislative or the judiciary, can claim to embody people's original sovereignty as this does not exist, in its immediate and spontaneous character, in the constituted order. As Laferrière explained, the constituted powers only have 'a delegation of sovereignty', a sort of 'secondary sovereignty', whose exercise is limited to the competences the constitution entrusted it with.⁵² The notion of constituent power logically entails its superiority vis-à-vis the constituted order. Hence, it provides a powerful argument to distinguish the people's original sovereignty from its day to day exercise. It makes clear that 'secondary sovereignty' is only a derivative power, and thus prevents those ordinarily in charge of its running from exercising it unlimitedly.

The idea of constituent power also implied two mechanisms meant to guarantee the limitation of constituted sovereignty. These were first outlined by Sieyès, successively developed by Lanjuinais and became part of the constitutional 'common sense' after 1848. The first of these mechanisms was what we now call the 'rigid' character of the constitution. It derives from the fact that constituent power is the only direct expression of the sovereign will. The latter being voiced in the constitution, cannot be changed by anyone but the constituent power itself. No constituted institution has the authority to change its position in relation to other powers or to the constituent authority, let alone to modify the fundamental rights or the form of the political regime. This was made clear by Dufour who claimed that 'the constituent power establishes immutable laws, it proclaims some rights as absolutely inviolable'.⁵³ To protect their inviolable character 'it places them above and beyond the reach of the powers it creates, and makes them the foundation of our social edifice'.⁵⁴ The best way to avoid attacks to the oeuvre of constituent power was thus to affirm the constitution's rigid character. This was guaranteed insofar as only a constitutional law, written by the constituent power through special procedures, could change any other constitutional law. As Lanjuinais wrote in 1819, 'constitutional or fundamental laws sanction the elementary conditions underpinning the social compact: fortunately, the constituted authorities are unable to legitimately change these conditions, unless the nation authorised them to do so according to specific forms established in the constitution'.⁵⁵ The other important mechanism introduced in 1848 to prevent the

⁵¹ Berriat-Saint-Prix, *Théorie du droit constitutionnel français*, 1.

⁵² Laferrière, *Cours théorique et pratique de Droit Public et Administratif*, 11.

⁵³ Dufour, 'Du pouvoir exécutif', 134.

⁵⁴ Dufour, 'Du pouvoir exécutif', 134.

⁵⁵ Lanjuinais, *Constitution de la nation française*, I, 100.

unlimited exercise of constituted powers is the hierarchical organisation of norms. The legal order comprises both constitutional and secondary laws. The firsts are superior to the seconds, and cannot be changed by them. The logic behind this hierarchical organisation was presented as follows: laws are defined as constitutional ‘if they cannot be made or changed without the general consent’.⁵⁶ By contrast, laws passed by the parliament ‘as a constituted authority are just ordinary or secondary laws: they are modelled and ruled according to natural and constitutional law’.⁵⁷ While ordinary laws can be changed by the legislative assembly as it pleases, constitutional laws can only be modified by the constituent power itself, thus preventing the appropriation of sovereignty by constituted powers. Being a mechanism to implement the rigidity of the constitution, the hierarchy of norms contributed to guaranteeing ‘the legislative power’s limitation by the constituent power’.⁵⁸

The association of sovereignty to constituent power prevented claims to direct, absolute or continuous exercise of power by the people and its representatives. The principle of people’s sovereignty, once coupled with *pouvoir constituant*, was first transformed into a constitution-authorising power and then, once the constitution was created, into a derivative constituted power. Its competences were necessarily limited by its constituted character and submitted to the hierarchy of norms and to the rigid character of the constitution.

III. Constituent power’s success

The transformation of sovereignty into a constitution-making authority developed all along the first half of the nineteenth century and gained momentum in the aftermath of the 1848 revolution. By May 1848, when the first session of the Constituent Assembly took place, it was common sense to consider the notions of popular sovereignty and constituent power complementary and mutually dependent. Taking their association for granted, the entire constitution-making process revolved around the assumption that sovereignty could only be expressed through people’s constituent power. Not only the temporary government decided that popular sovereignty would be voiced through a proper constituent assembly (as opposed to previous constitutional commissions), but it also established that it would be elected by the universality of French male citizens, so as to make it as representative as possible of the sovereign will. In the months that followed, Cormenin, one of the most active theorists of sovereignty as constituent power during the July monarchy, was elected president of the Constituent Assembly. He oversaw the works of the Assembly and witnessed the implications of his theory being incorporated into the constitutional text.⁵⁹ Differently from what happened in 1789 and 1792, the constituents did not linger on debating the forms and means through which to articulate people’s power. Rather, they focussed on discussing the contested ‘droit au travail’, so that the first article of the constitution was

⁵⁶ Lanjuinais, *Constitution de la nation française*, I, 12

⁵⁷ Lanjuinais, *Constitution de la nation française*, I, 12

⁵⁸ Berriat-Saint-Prix, *Commentarie sur la Charte Constitutionnelle*, 118.

⁵⁹ For an interesting reconstruction of the working of the Constituent Assembly see Godechot, *Les constitutions de la France*, 253-262.

approved with almost no debate: they agreed that political authority belonged to the people who, expressing the constitution-making power, sets the forms and conditions of its exercise by the constituted order. The most obvious consequence was the integration of constituent power's superiority over the constituted order in the constitutional text. Reminded of past expropriations of sovereignty by constituted powers, the constituents agreed to draw an unequivocal normative definition of both the hierarchy of norms and the rigidity of the constitution. Also, for the first time since 1795, the constituents decided to include a chapter entitled *De la revision de la constitution*, where they outlined the special procedures needed to change the constitutional text: after three consequent deliberations by the legislative chamber, a special assembly - entrusted with the constituent power - was summoned and its decision was considered indisputable. Representing the sovereign people and implementing the separation between the constituent power and the constituted order, the Constituent Assembly's work demonstrates the extent to which the principle of popular sovereignty was effectively limited by its association to constituent power.

The association of sovereignty to constituent power did not remain the exclusive domain of the 'experts in the field'. From 1848 onwards, it entered the public debate and became the most popular way of addressing the principle of people's power. Jurists and members of parliament relied on the language of *pouvoir constituant* to debate the concrete implications of sovereignty and journalists from the entire political spectrum framed the public discourse in such a way as to suggest their necessary complementarity. In so doing, they made its implications understandable and accessible to the wider public.⁶⁰ An emblematic case is offered by the newspaper directed by Hugues de Lamennais. A former priest elected to the Constituent Assembly, he created a daily newspaper whose aim rested on the divulgence of summaries of the Assembly's proceedings and political reflections. As stated in the first issue, the journal was committed to the affirmation of popular sovereignty and, tellingly, was named after what appeared to be its most appropriate formulation. It was called '*Le peuple constituant*'.⁶¹ Similarly, the most important newspapers and journals of the time, such as *La Tribune* or *National*, extensively used the language of constituent power to indicate the concrete implementation of popular sovereignty.

In addition, the theorisation of constituent power as a form of sovereignty entered the university. Until the mid 30s only few legal treatises addressed the question of sovereignty in terms of people's constituent power. By the mid 1840s, the situation had relevantly changed. Starting from 1848, important journals such as the *Revue Wolowski* or the *Revue de deux mondes* regularly published reviews of books addressing the notion of constituent power. Most of them focused on the working of constituent power and attempted to systematise the terms of its relationships with the principle of sovereignty. Others addressed more specific issues, such as the

⁶⁰ Proof is the frequency with which electoral manifestos refer to people's power in terms of constituent power. See *Recueil de documents relatifs à la campagne électorale pour les élections à l'Assemblée Constituante*, available at <http://gallica.bnf.fr/ark:/12148/bpt6k1019609.r=assemblée+constituante+1848.langFR>.

⁶¹ *Le peuple constituant*, 27 février-11 juillet 1848. On Lamennais see Derré, J.R., *Lamennais et ses amis* (Paris, 1962).

way in which the constituent assembly had to be elected in order to legitimately represent the people's sovereign will. A further proof of the pervasiveness of the language of constituent power is the fact that almost all critiques of the political regime were framed in terms of the people's sovereign power to reactivate the constituent authority. In 1851, the jurist and politician Edouard Laboulaye voiced his concerns for the stability of the republic in the following terms. Contesting the initial choice of instituting a single chamber, he criticised its excessively powerful legislative authority. He proposed to counterbalance its power creating a stronger presidential figure entrusted with the right to veto the decisions taken by the legislative. To put forward his proposed constitutional revision, Laboulaye directly invoked the people's sovereign constituent power. In his words 'I demand that the nation, re-entrusted with its inalienable sovereignty, that is recognized by all republican constitutions and that none can chain, expresses itself over the constitution currently hindering and ruining it'. This, more concretely, meant: 'I demand that the legislative assembly, without losing its powers, shortening the duration of its mandate or suspending the nation's life, summons, for the year 1851, an extraordinary assembly to revise the constitution'.⁶² The legislative chamber paid no attention to Laboulaye's claims and, a few months later, Louis Napoleon took advantage of the instability he was trying to solve and secured his personal ascent to power. The Second Empire temporarily silenced most debates on popular sovereignty and constituent power. Re-proposing the same rhetorical strategies used by his uncle, Louis Napoleon justified his political authority through the 1852 plebiscite. Moreover, neither the people nor its representatives participated to the constitution-making process, as the 1852 constitution was written overnight by a single man, signed by Napoleon and straightforwardly published as France's new constitution. However, the absence of political debates did not entail the end of intellectual and academic interest in the theme of constituent power.

Ironically, during the Second Empire most of the above mentioned jurists decided to organise their reflections on sovereignty and constituent power into fully structured legal textbooks. This is not only the case of Berriat-Saint-Prix's *Théorie du droit constitutionnel Français*, published in 1856, but also of Laferrière's complete transcription of his university courses, collected under the title of *Cours de droit public et administratif*.⁶³ Moreover, under Louis Napoleon's rule constitutional law was recognised as an autonomous field of intellectual enquiry. This transformation was marked by the publication of one of the most influential legal treatises of the time: Pellegrino Rossi's *Cours de droit constitutionnel*.⁶⁴ Definitively dropping the expression 'public and administrative law' from its title, this posthumous oeuvre was a systematisation of the juridical implications derived from sovereignty's association to constituent power. Not only it dealt with the difference between constituent power and constituted order in great detail, but it also established the canonical way of approaching

⁶² Laboulaye, E., *La révision de la constitution: lettre à un ami*, (Paris 1851), 4-5.

⁶³ Laferrière, *Cours de droit public et administratif*. Although this book was first published in 1839, a second and more complete edition was published in Paris in 1860.

⁶⁴ The first professorship of constitutional law was established in the early 1830s by Guizot and assigned to Pellegrino Rossi. However, the book by Rossi is the first constitutional treatise called as such.

the question of sovereignty. Furthermore, the association of sovereignty with constituent power solidified its presence and became an object of study in its own right, as demonstrated by the flourishing of academic seminars and brochures directly addressing the people's sovereign constituent power.⁶⁵ Laboulaye himself presented a series of reflections on the historical development of the idea and its concrete implications throughout France's recent history.⁶⁶ This proves that the idea of constituent power, far from being a minor mechanism to limit sovereignty, became one of the fundamental pillars of the French constitutional state.

IV. Conclusion

The idea of constituent power is studied by scholars interested in contemporary political theory. They rely on it to make sense of the principle of people's power in contemporary constitutional states, as it is meant to indicate the democratic core of popular sovereignty. In order to grasp the specificities of constituent power's relationship to sovereignty, scholars have occasionally analysed its history. However, the resulting genealogies systematically overlook a key moment in the idea's intellectual development, the nineteenth century. Compared to other moments in French history, the post-revolutionary period received little attention. With some notable exceptions, the legal and political thought of the Empire, the Restoration and the July Monarchy has traditionally been left aside, or has been studied through the work of eminent figures such as Constant and Tocqueville, who barely mentioned the idea of constituent power.⁶⁷ In this paper, I attempted to start filling this gap and I showed how contemporary accounts of constituent power misunderstand at least part of its history. By looking at archival material, I found that a discourse on constituent power did exist in the first decades of the nineteenth century, and steadily developed in the following years. This was not institutionalised in political or juridical treatises, but developed in the light of changing political circumstances, thanks to scattered groups of individual thinkers. These were jurists and politicians who acted on the political scene, but rarely systematised their thoughts or gathered into a school of thinking, thus revealing the peculiarly political and contextual role played by the idea in nineteenth-century France. First, constituent power was used to defend the principle of people's sovereignty against competing attempts to attribute it to the king, the parliament or God. Second, the idea was deployed to limit the concrete exercise of power by the king and the parliament first, and the people later on. Last, the association of constituent power to sovereignty helped establishing the grounds for the constitutional state, as it gave meaning to the distinction between people's sovereign will, expressed in the constitution, and the constituted order, ruled by the hierarchy of norms and the rigidity of the constitution. In conclusion, and in

⁶⁵ Examples are Bonhomme, J., *Ni Monarchie, ni république. Honnêteté. Dissolution. Pouvoir constituant. Suffrage universel* (Paris, 1873), Block, M., *Dictionnaire générale de la politique* (Paris 1873) and the course given by Chavegrin between 1899-1900 titled '*Le pouvoir constituant*' (Paris 1900).

⁶⁶ Laboulaye, E., 'Pouvoir Constituant', in *La Revue des Deux Mondes* (1871), 792-1014.

⁶⁷ Among others see Rosanvallon, P., *La monarchie impossible: les chartes de 1814 et de 1830* (Paris, 1994), Rosanvallon, P., *Le moment Guizot*, (Paris, 1985), Fontana, B., *Benjamin Constant and the post-revolutionary mind* (New Haven, 1991). Jaume, L., *L'individu effacé* (Paris, 1997), Benichou, P., *Le temps des prophètes* (Paris, 1977), Kelly, A., Grabaud, S., *The Humane Comedy: Constant, Tocqueville, and French Liberalism* (Cambridge, 2007), Pranchère, J.Y., '*Autorité contre les Lumières : la philosophie de Joseph de Maistre* (Geneva 2004).

contrast with what stated by contemporary theorists, constituent power's use in the nineteenth century reveals a highly complex relationship to the idea of sovereignty. Far from representing sovereignty's directly democratic and spontaneous core, constituent power was used by jurists and politicians to affirm the principle of popular sovereignty in theory and tame its exercise in practice.