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Essay

Of Omnipotent Things

JOEL I. COLÓN-RÍOS

To say that some constituent assemblies have acted as omnipotent law-makers, as not subject to the separation of powers, and as able to exercise the ordinary powers of government, is an understatement. It is, in fact, the way in which many, if not most, constitution-making bodies have operated since the late 18th century. A famous historical example is the French National Convention of 1793, which despite having been called under an already constituted legal order and after having drafted a (later popularly ratified) constitution, declared a state of emergency, abolished the separation of powers, and proceeded to govern the country. In early U.S. constitutional history, some state constitutional conventions also assumed an unlimited law-making jurisdiction, and contemporary concerns about runaway conventions seem to be largely based on that possibility. Much more recently, in the late 20th and early 21st centuries, such type of power has been exercised by constituent assemblies in Latin America. All these entities went, in some way, beyond the adoption of novel constitutions and played legislative, executive, and sometimes even judicial functions. As a result, I will argue in this paper, they should not be understood as having engaged in the exercise of constituent authority, but of sovereignty plain and simple.

The distinction between constituent authority and sovereignty is not merely terminological; it points toward things that an entity tasked to exercise constituent authority cannot do. In addition to drafting a document that counts as a ‘constitution’ in the society at issue, constituent authority, the paper argues, would normally be subject to at least one implicit limit: it must not engage in ordinary governmental activity. An entity called to exercise constituent authority could, moreover, be subject to explicit limits as to the type of constitutional content it must or must not adopt. The traditional definition of sovereignty points precisely in the opposite direction: a sovereign is an individual or entity not subject to the separation of powers, capable of transforming any will into law. Part I of the paper develops the distinction between constituent authority and sovereignty through a critical analysis of Carl Schmitt’s conception of dictatorship. Part II examines the way in which different constitution-making bodies, in Latin America
and the United States, have been conceived by theorists, politicians, and judges. These entities have been frequently understood as sovereign even though they were only commissioned to create a constitution. In Part III, I consider the ways in which the limits on constitution-making bodies that arise from the argument presented in this paper may be put into practice.
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INTRODUCTION

To say that some constituent assemblies have acted as omnipotent lawmakers, as not subject to the separation of powers and as able to exercise the ordinary powers of government, is an understatement. It is, in fact, the way in which many, if not most, constitution-making bodies have operated since the late eighteenth century. A famous historical example is the French National Convention of 1793, which, despite having been called under an already constituted legal order and after having drafted a (later popularly ratified) constitution, declared a state of emergency, abolished the separation of powers, and proceeded to govern the country.¹ In early U.S. constitutional history, some state constitutional conventions also assumed an unlimited law-making jurisdiction, and contemporary concerns about runaway conventions seem to be largely based on that possibility.² Much more recently, in the late twentieth and early twenty-first centuries, such type of power has been exercised by constituent assemblies in Latin America. All these entities went, in some way, beyond the adoption of novel constitutions and played legislative, executive, and sometimes even judicial functions. As a result, I will argue in this Article, they should not be understood as having engaged in the exercise of constituent authority, but of sovereignty plain and simple.

The distinction between constituent authority and sovereignty is not merely terminological; it points toward things that an entity tasked to exercise constituent authority cannot do. In addition to drafting a document that counts as a “constitution” in the society at issue, constituent authority, I will argue below, would normally be subject to at least one implicit limit: it must not engage in ordinary governmental activity. It could, moreover, be subject to explicit limits as to the type of constitutional content it must or must not adopt. The traditional view of sovereignty points precisely in the opposite direction: a sovereign is an individual or entity not subject to


the separation of powers, capable of transforming any will into law.\textsuperscript{3} Part I of the paper develops the distinction between constituent authority and sovereignty through a critical analysis of Carl Schmitt’s conception of dictatorship. Part II examines the way in which different constitution-making bodies, in Latin America and the United States, have been conceived by theorists, politicians, and judges. These entities have been frequently understood as sovereign even though they were only \textit{commissioned} to create a constitution. In Part III, I consider the ways in which the limits on constitution-making bodies that arise from the argument presented in this Article may be put into practice.

\section{I. Between Sovereignty and Constituent Authority}

Richard Kay has distinguished between the concept of constituent power and that of constituent authority.\textsuperscript{4} The former can be described as the unlimitable, unpredictable, and unorganized (and unorganizable) force that creates a constitution.\textsuperscript{5} The latter, in contrast, refers “to the observed quality in a person or persons that enables them to produce an effective positive law constitution.”\textsuperscript{6} More than a brute force to impose a fundamental law on a group of human beings, constituent authority is what allows an individual or entity to “produce a constitution that is regarded as binding for an extended period in the population governed by the legal system that the constitution purports to control.”\textsuperscript{7} Nevertheless, recognizing a constituent authority, writes Kay, “necessarily presupposes something superior to all positive law that cannot logically be provided for \textit{by law}.”\textsuperscript{8} Constituent authority, like constituent power, is in that sense outside of the scope of legal regulation. In what follows, I will argue that an entity whose constituent authority is recognized by society can, at the same time, be subject to different kinds of substantive limits. In the context of a democratic society, it may be that the observation of those limits is what determines, at a given moment, “the rightness of the constituent events”\textsuperscript{9} or the legitimacy of the constitution maker.\textsuperscript{10}

This does not mean that the exercise of constituent authority is bound by established legal forms, but that a condition of having “constituent authority” may be the realization that one is acting on a commission from

\textsuperscript{3} See \textsc{Jean Bodin, On Sovereignty} 3 (Julian H. Franklin ed. & trans., Cambridge Univ. Press 2004) (1576) (describing sovereignty as absolute and undivided).
\textsuperscript{5} Id. at 719.
\textsuperscript{6} Id. at 720.
\textsuperscript{7} Id.
\textsuperscript{8} Id. at 727.
\textsuperscript{9} Id. at 721.
\textsuperscript{10} Id. at 756–57.
the “true sovereign” and therefore bound to observe the limits attached to it. This approach is consistent with Kay’s distinction between constituent power and constituent authority, but not with the idea that constituent authority cannot be subject to legally enforceable limits. Some of these limits may be implicit (e.g., the creation of something that counts as a constitution in the society at issue) and others explicit (e.g., the creation of specific constitutional content). In some cases, these limits should be enforced by judges. In order to develop this argument, I will first distinguish between constituent authority and sovereignty, and I will do so mainly through an examination of Schmitt’s major work, Dictatorship.\textsuperscript{11}
There Schmitt developed the now well-known distinction between the commissarial and the sovereign dictator. During a period of commissarial dictatorship, the constitution remains valid “because [its] suspension only represents a \textit{concrete exception},” that is to say, a situation different to the normal condition that the constitution presupposes and that the dictator is tasked to bring back.\textsuperscript{12} A commissarial dictatorship is thus best exemplified by an executive who, according to a constitutional provision, is authorised to issue decrees—during a period of emergency—which are valid even though contrary to one or more articles of the constitution.\textsuperscript{13}
In the approach presented in Dictatorship, that type of provision would make possible the exercise of extraordinary (dictatorial) powers by the executive, but would not give her the power of constitutional change.\textsuperscript{14} His sovereign dictator, in contrast, is authorised to amend or replace the constitution at will. A sovereign dictator:

\begin{quote}

\begin{center}
do not suspend an existing constitution through a law based on the constitution—a constitutional law; rather it seeks to create conditions in which a constitution—a constitution that it regards as the true one—is made possible. Therefore dictatorship does not appeal to an existing constitution, but to one that is still to come.\textsuperscript{15}
\end{center}
\end{quote}

Sovereign dictatorship could thus be exemplified by a monarch who has been authorised to replace the entire constitutional order, as well as by a democratically elected constituent assembly.\textsuperscript{16} One of the main examples

\begin{footnotes}
\footnote[12]{\textit{Id.} at 118.}
\footnote[14]{\textit{Schmitt, Dictatorship}, supra note 11, at 118–19.}
\footnote[15]{\textit{Id.} at 119.}
\footnote[16]{It was also present in the notion of “the dictatorship of a proletariat identified with the people at large, in transition to an economic situation in which the state is ‘withering away.”’ \textit{Id.} at 179.}
\end{footnotes}
of a sovereign dictator provided by Schmitt was the previously mentioned French National Convention of 1793, which he described as “a sovereign dictatorship of revolution,” and as the “extraordinary organ of a pouvoir constituent.”  In Constitutional Theory, Schmitt noted that the reason why a constitution-making body convened after a revolution is a sovereign dictator is that it “has no jurisdiction, no competence in the actual sense, that is, in the sense of a sphere of office regulated and delimited in advance.”

Put in a different way, a sovereign dictator is not subject to the separation of powers: “it can intervene arbitrarily—through legislation, through the administration of justice, or simply through concrete acts.”  Schmitt nevertheless maintained that, in the end, all forms of dictatorship, even the sovereign ones, are based on a commission.  Regardless of the legality of its mode of convocation, a constitution-making entity “is not . . . the sovereign, but instead acts always in the name of and under commission from the people, which can at any time decommission its agents through a political act.”  From this perspective, being a sovereign dictator and a sovereign is not the same thing: the former acts on a mandate to bring into existence a new constitutional order; the latter “does not depend on the accomplishment of a specific task . . . .”  For example, by going beyond its task (i.e., by remaining assembled after adopting a constitution), the French Constitutional Convention of 1793 ceased to be a sovereign dictator and entered into the terrain of pure sovereignty.

In this sense, a sovereign is an entity that, like an absolute prince or a sovereign people, can arbitrarily exercise constituent and constituted powers in the absence of any commission.  Schmitt nevertheless maintained that, even if acting on a commission from the people, a constitution-making body would in practice enjoy an unlimited jurisdiction given that it would always lack a clear “reference point for [its] dependence.”  That is to say, the will of the people is always “unclear” and has to be “shaped.”  Given the unclear character of the people’s will, “[a]s long as such an assembly has not accomplished its

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17 Id. at 96, 127.
18 CARL SCHMITT, CONSTITUTIONAL THEORY 110 (Jeffrey Seitzer ed. & trans., 2008).
19 SCHMITT, DICTATORSHIP, supra note 11, at 123. This is in fact the “standard definition” of dictatorship: “a suspension of the separation of powers.” Id. at 129. This standard definition, however, failed to properly distinguish dictatorship from other types of arrangements in which the separation of powers is also absent, such as absolute monarchy. Id. at 116.
20 Id. at 119.
21 SCHMITT, CONSTITUTIONAL THEORY, supra note 18, at 110 (emphasis added).
22 SCHMITT, DICTATORSHIP, supra note 11, at 119.
23 Id. at 127–28.
24 Id. at 121.
25 Id. at 124.
work —the constitution—it possesses any imaginable authority.”26 By proceeding in this way, Schmitt did not fully develop the more promising features of his distinction between sovereignty and sovereign dictatorship. That is to say, if a constituent assembly, even if convened in violation of a constitution’s amendment rule, acts on a commission from the true sovereign, then it must draft a constitution and be bound by any other conditions arising from its mandate.27 Those conditions would normally be expressed in the process through which the assembly was convened. Of course, in some cases, they would not have been (or could not have been) explicitly stated, as may be the case of a constituent assembly called after a civil war or a revolution.28 But even in exceptional situations, to describe the assembly as “sovereign” as the sovereign people itself would be inaccurate.29

Under this approach, a constitution making body exercises, on behalf of the people, a special jurisdiction to issue constitutional norms. When that activity takes place under an already existing constitutional order, the constitution-maker acts on the basis of a commission from the very sovereign from which the established constitution is supposed to have emanated.30 Since the constitution-making body is not the sovereign origin of the separation of powers but its creature, it can separate powers in novel ways but cannot exercise them. It exists because these powers have already been divided and, therefore, it is possible to speak about a special constitution-making jurisdiction separate from the ordinary institutions of the state. If the exercise of constituent power violates the already established separation (by acting in an executive, ordinary legislative, or judicial capacity), it would be acting ultra vires the real sovereign; that is, ultra vires the commission that authorised its exercise in the first place.31

26 Id. at 203.
27 Id. at 125.
28 Id. at 126.
29 See SCHMITT, CONSTITUTIONAL THEORY, supra note 18, at 110 (explaining that the assembly is sovereign, but not the sovereign because it always acts “under commission of the people”).
30 Id.
31 The previous interpretation of Schmitt may appear to contradict his most famous essay on sovereignty, contained in the first chapter of Political Theology. See CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 6–7 (George Schwab trans., Mass. Inst. of Tech. 1985) (1988) (describing a situation in which someone becomes the de facto sovereign during an emergency by protecting the established constitutional order). The French National Convention, as mentioned earlier, was a sovereign dictator that became a sovereign (or simply, a dictator) when it went beyond its commission and decided that the threat of counter-revolution required it to assume all powers of government. SCHMITT, DICTATORSHIP, supra note 11, at 127–28. This is why Schmitt wrote that the sovereign dictator “is sovereign in a completely different sense from that in which the absolute monarch or a sovereign aristocracy can be said to be ‘sovereign.’” Id. at 127. This is in fact consistent with Juan Donoso Cortés’s conception of dictatorship, to which Schmitt frequently referred. See Juan Donoso Cortés, Speech on Dictatorship (Jan. 4, 1849), in SELECTED WORKS OF JUAN DONOSO CORTÉS, 45, 47 (Jeffrey P. Johnson ed. & trans., 2000) (expounding on “theoretical truth” and
Schmitt nevertheless did not reach that conclusion and, as noted earlier, claimed that during the time the assembly has not adopted a constitution, it could exercise any “imaginable authority.”

II. SOVEREIGN ASSEMBLIES

Perhaps the most famous contemporary examples of assemblies which, having been commissioned with the creation of a constitution, engaged in the exercise of what I previously described as sovereignty, are that of Colombia (1991) and Venezuela (1999). Both assemblies dissolved the ordinary legislatures and replaced them with temporary legislative bodies (largely comprised by deputies appointed from the constituent assemblies’ membership). They also intervened, again in different degrees (and more intrusively in Venezuela than in Colombia), with the power of the ordinary courts. The justification for the exercise of that seemingly unlimited jurisdiction was, in both cases, the idea that these assemblies had been authorized to draft a constitution. It was a justification that was reflected both in the rules that governed their convocation, as well as by the judicial decisions that recognised in them an unlimited jurisdiction. Perhaps a more dramatic example is provided by the Venezuelan Constituent Assembly of 2017, which is operating at the moment. This entity was controversially convened by the President of the Republic himself (that is, with no authorising referendum) in a context of political violence and

“historical fact” of dictatorship across differing socio-political structures); SCHMITT, POLITICAL THEOLOGY, supra, at 56–60 (describing Donoso Cortés’s criticism of liberalism); SCHMITT, DICTATORSHIP, supra note 11, at 276 n.11, 278–79 n.22 (citing Donoso Cortés’s concept of dictatorship in support of Schmitt’s theory). But see Brian Fox, SCHMITT’S USE AND ABUSE OF DONOSO CORTEZ ON DICTATORSHIP, 23 INTELL. HIST. REV. 159, 161 (2013) (criticizing Schmitt for “project[ing] backward[ly]” on Donoso Cortés’s own views on dictatorship to construct a link between anti-liberal Catholic thought and fascism).

32 SCHMITT, DICTATORSHIP, supra note 11, at 203.
33 There are, of course, examples of sovereign entities in clear authoritarian contexts. This was the case of the military juntas that governed Spain and Chile during an important part of the 20th century.
35 See, e.g., Judgment no. 17 of the Supreme Court of Justice of Venezuela on the Referendum for Convening a Constituent Assembly (Jan. 19, 1999); “Bases Comiciales para el referéndum consultivo sobre la convocatoria de la Asamblea Nacional Constituyente a celebrarse el 25 de abril de 1999”, Resolution No. 990323-71 (Mar. 23, 1999); Judgment no. 138 (Nov. 9, 1990) in Gaceta Especial Sala Constitucional, Corte Suprema de Justicia, República de Colombia (Santafé de Bogotá, D.C., 1993).
36 This mode of convocation was highly controversial and was eventually challenged in the Supreme Tribunal of Justice, where it was sanctioned. Judgment 2017-0519, Constitutional Chamber, Supreme Tribunal of Justice of Venezuela. There was an interesting discussion about the role of the referendum in the convocation (and the approval of the work) of a future constituent assembly in one of the sessions of the entity that drafted the Constitution of 1999. See Asamblea Nacional Constituyente,
during a declared state of emergency, and has gone beyond the separation of powers established through the Constitution of 1999.\textsuperscript{37}

In the very speech where the convocation of the 2017 assembly was announced, President Nicolás Maduro made clear he was convening a sovereign body. “In the use of my presidential attributions,” he expressed, “I convene the original constituent power . . . to achieve the peace that the Republic needs, to defeat the fascist attempts at a coup, and so that the people with its sovereignty imposes peace, harmony, and true national dialogue.”\textsuperscript{38} “I am convening,” he added, “the totality of the motherland’s power, above the Constituent Assembly there is no possible power!”\textsuperscript{39} During Maduro’s speech, there were mentions of the need of strengthening the Constitution of 1999, of transforming the state and particularly the National Assembly, and of constitutionalising several social policies. The emphasis, however, was on the sovereign character of a constituent assembly and on its independence from and superiority over the established institutions of government.\textsuperscript{40} In a set of rules adopted by the assembly which regulate its relationship with the constituted powers,\textsuperscript{41} the entity also described itself as a “sovereign power” (postestad soberana) that could “issue decrees determining the competences, functioning, and organisation of the organs of Public Power.”\textsuperscript{42} That jurisdiction, the document explained, came from a “mandate of the sovereign people.”\textsuperscript{43}

Despite the various references to a popular mandate or to popular sovereignty during this process, the National Constituent Assembly was conceived by the President of the Republic, and later by itself, as a sovereign entity. That is to say, as an entity that could determine its own competencies and, by implication, the competencies of any other public authority. Indeed, shortly after it came into session, the assembly adopted a series of “Constituent Acts” where it engaged in actions of a legislative,\textsuperscript{44}

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\textsuperscript{37} For a discussion of the process that led to the convocation of the assembly, see Ana Graciela Barrios Benatul et al., \textit{Constituyentes Venezolanas de 1999 y 2017: Contextos y Participación}, 8 REVISTA DIREITO E PRÁXIS 3144, 3147–49 (2017).
\textsuperscript{38} JOEL COLÓN-RÍOS, \textit{CONSTITUENT POWER AND THE LAW} 257 (2020) (alteration in original).
\textsuperscript{39} Id.
\textsuperscript{40} Id. The President also referred to Article 349 of the constitution, which maintains that “[t]he existing constituted powers shall not be permitted to obstruct the Constituent Assembly in any way.” \textit{CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA} art. 349.
\textsuperscript{41} “Normas para garantizar el pleno funcionamiento institucional de la Asamblea Nacional Constituyente en armonía con los Poderes Públicos constituidos.” GACETA OFICIAL no. 6323 (Aug. 8, 2017).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} GACETA OFICIAL no. 41.274 (Nov. 8, 2017) (enacting the Constitutional Law against Hate and For the Peaceful Coexistence and Tolerance).
\end{flushleft}
executive,\textsuperscript{45} and quasi-judicial\textsuperscript{46} nature. At the time of writing, there are no clear indications of when the assembly will produce a draft constitution (if indeed a constitution is to be produced). From a theoretical point of view, there can be no objection to the powers claimed by this entity unless constituent authority and sovereignty are distinguished. In fact, the conflation of these two concepts is what allowed President Maduro to convene an entity with unlimited jurisdiction.

Notwithstanding the many cases of sovereign constitution-making assemblies in Latin America, one can see examples in other regions and epochs.\textsuperscript{47} For instance, during the 19\textsuperscript{th} century, some constitutional conventions in U.S. states assumed a similar power. As noted by Roger Sherman Hoar in his study of constitutional conventions, many of these entities “have claimed the right to exercise powers far beyond the mere framing of a constitutions or constitutional amendments.”\textsuperscript{48}

This, Hoar showed, was not only the case of conventions operating during the Revolutionary War and therefore governed by “the law of extreme necessity,”\textsuperscript{49} but even of those called according to the provisions of a constitution. For example, George M. Dallas maintained that once a constitutional convention assembled in Pennsylvania, “it will possess . . . every attribute of absolute sovereignty [within the state legal order] . . . . It might restore the institution of slavery among us; it might make our penal code as bloody as that of Draco; it might withdraw the charters of the cities . . . .”\textsuperscript{50} Similarly, in the Illinois Convention of 1847, one of the delegates maintained: “We are . . . the sovereignty of the State. We are what the people of the State would be, if they were congregated here in one mass meeting. We are what Louis XIV said he was, ‘We are the State.’”\textsuperscript{51} The practical implications of this approach were clearly exemplified by the Missouri Convention of 1865.\textsuperscript{52} Convened outside of the amendment rule of the Missouri Constitution of 1820 and having been authorised to amend the constitution (among other things, with the purpose of abolishing slavery), this convention issued decrees vacating several judicial and

\textsuperscript{45} GACETA OFICIAL no. 41.265 (Oct. 26, 2017) (convening early municipal elections).
\textsuperscript{46} GACETA OFICIAL no. 41.272 (Nov. 6, 2017) (removing parliamentary immunity and authorising a judicial process against the Vice President of the National Assembly).
\textsuperscript{48} ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 128 (1917).
\textsuperscript{49} Id. at 129.
\textsuperscript{50} Id. at 131–32.
\textsuperscript{51} Id. at 132.
\textsuperscript{52} JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 322 (4th ed. 1887).
executive offices. An earlier convention in that state had also removed executive and judicial officials and repealed a number of ordinary laws.

Some U.S. state courts also embraced that understanding of the power of a constitutional convention. For example, in a 1907 case, the Supreme Court of Oklahoma refused to invalidate the decision of a convention issuing an ordinance dividing a county, an act that was argued to fall outside of the scope of the authority granted in the entity’s enabling law. For the court, the idea that judges have the power to “enjoin or restrain the convention, its officers or delegates, from exercising the rights, powers, and duties confided to them must . . . be denied. Nor have the courts the power or jurisdiction to enjoin or restrain the submission of the Constitution or any proposition contained therein to a vote of the people.”

The court, the added, “is a legislative body of the highest order, and it cannot be interfered with by injunction in the exercise of its powers.” In his dissent, Justice Irwin noted that the law has never vested “arbitrary power in any body without surrounding and safeguarding it by limitations and checks,” and that according to the decision of the court, the convention was seen as an “unlimited, unqualified, and unquestionable power—a creature greater than its creator, a stream higher than its source, and a power which recognizes no rights and no authority save and except its own sovereign will . . .”

Consistent with Justice Irwin’s dissent and anticipating the type of argument that will be presented in Part III of this paper, Allen Caperton Braxton wrote about the “mistaken and dangerous doctrine of the absolute sovereignty and omnipotence of Constitutional Conventions . . .” “[A] Constitutional Convention,” he maintained, “is not the People, with sovereign and unlimited powers, but a mere Committee of the People, with only such limited powers as the People may expressly bestow upon them, the granting of which powers will be strictly construed against the Convention.” The Supreme Court of Alabama expressly adopted that

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53 Hoar, supra note 48, at 138; Jameson, supra note 52, at 322–23; Mo. Const. of 1820, art. XII.
54 Hoar, supra note 48, at 138–39. Hoar also reports that the South Carolina Convention of 1895 established a new county, the Mississippi Convention of 1890 enacted an electoral law, and the Illinois Convention of 1862 divided the State into congressional districts (a function assigned to state legislatures by the U.S. Constitution). For a discussion, see id. at 140, 147.
55 Frantz v. Autry, 91 P. 193, 228 (Okla. 1907).
56 Id. at 207.
57 Id. at 209.
58 Id. at 232.
60 Id. at 96. Consistent with that view, partisans of what Arthur N. Holcombe called the “coordinate authority of convention and legislature” theory argued that the scope of the powers of a convention are to be found in the terms of the popular vote that authorized it. Arthur N. Holcombe, State Government in the United States 127 (1916).
view in a 1905 case, stating that “in voting for the holding of a convention, [the people] not only limited the powers of the convention to the amendment and revision of the constitution of 1875, but required that its action be submitted back to them.” Ex parte Birmingham, 145 Ala. 514, 529 (1905).

Similarly, when declaring void an ordinance issued by the South Carolina Convention of 1832 (convened under Article 11 of the Constitution of 1790), the state Court of Appeals maintained to have “no authority to judge of, revise or control any act of the people; but when any thing is presented to us as the act of the people, we must of necessity judge and determine whether it be indeed their act.”

The members of the convention, the court maintained, were “not the people for any other purpose than that for which the people elected and delegated them.”

III. CONSTITUENT MANDATES AND THEIR ENFORCEMENT

I have established a distinction between sovereignty and constituent authority and provided some examples of constitution-making bodies which have assumed, or have been attributed with, the former. In practice, this means that they went beyond the creation of new constitutions and acted beyond the established separation of powers. If one accepts the distinction between sovereignty and constituent authority, it follows that those assemblies acted ultra-vires. They acted as sovereign while being on a commission, while being tasked only to draft a constitution. This is true regardless of whether the relevant constitution-making body was legally or illegally convened. There is no reason why the violation of a constitution’s amendment rule should necessarily be taken to mean that the entity drafting a new fundamental law acts in its own right as opposed as in the exercise of a commission. The fact that even illegally convened constituent assemblies are usually authorised by referendum reflects the notion that they exist in virtue of a mandate. A constituent mandate of that kind comes accompanied by two limits: The assembly has to actually draft a constitution (i.e. that is, something that counts as a constitution in the society at issue) and respect the identity of the constituent subject (i.e. it cannot transform itself into a sovereign entity).

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61 Ex parte Birmingham, 145 Ala. 514, 529 (1905).
63 Hunt, 20 S.C.L. at 270.
64 Kay, supra note 4, at 757. Constitutions that provide for the convocation of a constituent assembly (as the Bolivian Constitution of 2009, briefly considered below), could be understood as cases of ex ante constituent authority. However, as Kay has maintained, the attitudes of a society towards a constitution-maker may change over time, and those changes may retroactively deprive them of constituent authority.
As for the first limit, the task of drafting ‘a constitution’ in a contemporary society would normally involve the creation of a document that establishes a democratic form of government, that separates powers, and that recognises rights. But the meaning of “constitution” should not be derived from a philosophical or theoretical analysis to be applied by a court. In an ideal scenario, it would be confirmed by the citizens themselves through their vote in a ratificatory referendum. The second limit is about respecting the identity of the constituent subject; about preventing the assembly from becoming a sovereign. This involves, on the one hand, a prohibition of going beyond any conditions established in the relevant mandate (e.g. the adoption of particular constitutional content) and, on the other, a prohibition against the exercise of the ordinary powers of government. The respect of those limits may, in turn, determine whether the relevant entity is recognized as a legitimate source of constitutional law, as a true constituent authority at a particular moment in time.

As noted earlier, these limits would normally arise from a referendum. The importance attributed to referendums in this paper should not be taken as an implicit dismissal of the academic critiques of that institution. As Kay notes, the association of constituent authority with referendums is highly problematic. In particular, referendum results can be controlled in different ways by its organizers. To see referendums as “the people in action” also rests on the fiction that “the people” has a unified voice.

Notwithstanding these problems, in the context of the argument to be presented below, the referendum forms part of a useful fiction, that is, one that serves to combat the (also fictional) idea that the decisions of a constitution-making body are the decisions of the people.

65 This is the idea expressed by the famous Article 16 of the French Declaration of the Rights of Man and the Citizen: “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.” Déclaration des Droits de l’Homme et du Citoyen de 1789, Aug. 26, 1789 (Fr.), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf. As the Peruvian Constitutional Tribunal has noted, not any document can count as a constitution. Not only must the constitution have been “the work of the Constituent Power . . . [but] as expressed in Article 16 of the French Declaration of the Rights of Man and the Citizen, must be minimally recognised and guarantee the essential rights of man, as well as the separation of powers, which are the primary values of a Constitutional State.” Judgment No. 014-2003-Al/TC (Tribunal Constitucional del Perú).

66 For that kind of approach, see Carlos Bernal Pulido, Prescindamos del Poder Constituyente en la Creación Constitucional. Los Limites Conceptuales del Poder para Reemplazar o Reformar una Constitución, 22 ANUARIO IBEROAMERICANO JUSTICIA CONSTITUCIONAL 59, 74 (2018).


68 Kay, supra note 4, at 747.

69 Id.
Before that argument can be fully defended, one must first conclude that a legally regulated voting process can be understood as an expression of sovereign power as opposed to a mere electoral act. In order to do so, a distinction needs to be made between constitutional and constituent referendums. There are many constitutions with amendment rules that require popular ratification before a proposal to alter the constitutional text can become law. Some of those constitutions also require that the modification of fundamental principles takes place through a constituent assembly. Consider, for example, Article 411 of the Constitution of Bolivia. That provision authorises the partial reform of the constitution through a process that may be triggered by popular initiative or by a majority of the members of the legislative assembly, and that ends in popular approval or rejection in a referendum. The total reform of the constitution, defined as “that which affects its fundamental premises, rights, duties, and guarantees, or the supremacy and reform of the Constitution,” according to the same article, must take place through a constituent assembly (called by a referendum and whose proposed changes are also subject to popular ratification).

Under those constitutional provisions, it seems clear that the partial reform process cannot be used to alter the material constitution, that is, the most fundamental norms contained in it. The constitution’s material content can only be revised through the procedure of total reform. The first of these processes would involve the exercise of constituted power; the second would require the exercise of constituent authority. Both, however, involve the participation of the electorate through a referendum and, potentially, through popular initiative. Is it possible to say that in the first case, the electorate acts as a mere state organ and that, in the second, the same electorate acts as the sovereign? In a certain way, the participation of the electorate in constitutional reform can only be understood as an act of constituted power. The reason is simple: in the context of those procedures, the electorate acts within the limits posed by the constitution itself; it does not act as an omnipotent political force, but as a non-sovereign organ of the state. Reaching the same conclusion, Pedro de

70 The Assembly is described by Article 411 as “original plenipotentiary Constituent Assembly.” That is to say, the constitution itself seems to problematically assume that once convened, the Assembly becomes sovereignty. CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb. 7, 2009, art. 411 (Bol.).

71 Such as the norms establishing the basic structure of government and regulating the relations between the state and the citizens, i.e. what Schmitt called the “constitution in the positive sense.” SCHMITT, CONSTITUTIONAL THEORY, supra note 18, at 75.

72 In the case of the Bolivian Constitution of 2009, the Constituent Assembly can be convened by popular initiative. CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb. 7, 2009, art. 411 (Bol.).

73 PEDRO DE VEGA, LA REFORMA CONSTITUCIONAL Y LA PROBLEMÁTICA DEL PODER CONSTITUYENTE 111 (1985).

74 Id.
Vega has argued that the referendum should be understood in its classical sense, that is, as a mechanism of control.\textsuperscript{75} The referendum is “an instrument of ratification of the act of a representative (an assembly) by the represented (the people).”\textsuperscript{76}

To the extent that the referendum is about controlling the amending authority, it cannot be understood as a means “through which the power of constitutional reform -which is always a constituted power- becomes a sovereign constituent power.”\textsuperscript{77} This kind of view was also expressed in a series of judgments of the Colombian Constitutional Court. The Colombian court has stated that, in a “participatory democracy, based on the principle of popular sovereignty,” the people are not limited to act through their representatives.\textsuperscript{78} Rather, they are also able to engage in direct political acts.\textsuperscript{79} A democracy, the court has maintained, cannot be participatory unless the people can sometimes act as the bearer of the power of constitutional reform.\textsuperscript{80} In Colombia, this is facilitated through what the court identified as the “constitutional referendum,” regulated in Articles 377 and 378 of the Constitution of 1991.\textsuperscript{81} Under Article 377, constitutional changes that relate to the rights recognised in Chapter 1, Title II, to the procedures of popular participation or to Congress itself, must be submitted to the electorate if requested by five percent of the citizens who make up the electoral rolls.\textsuperscript{82} But the court made sure to point out that the inclusion of the referendum as part of the mechanism of constitutional reform is not equivalent to the establishment of a “pure direct democracy, not subject to judicial control.”\textsuperscript{83}

“The power of constitutional reform, even when it includes a referendum,” the court stated, “is not the deed of neither the originary constituent power nor of the sovereign people, but an expression of a juridical competency organised by the Constitution itself.”\textsuperscript{84} For that reason, the court maintained, such a power is always limited by the impossibility of replacing the constitution. Otherwise the power of constitutional reform would become the originary constituent power.\textsuperscript{85} The type of electoral acts examined in

\begin{footnotes}
\footnotetext{75}{Id.}
\footnotetext{76}{Id. at 113.}
\footnotetext{77}{Id. at 114.}
\footnotetext{78}{Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, Gaceta de la Corte Constitucional [G.C.C.] (vol. 2, p. 42) (Colom.).}
\footnotetext{79}{Id.}
\footnotetext{80}{Id.}
\footnotetext{81}{Id.}
\footnotetext{82}{CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 377.}
\footnotetext{83}{Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, Gaceta de la Corte Constitucional [G.C.C.] (vol. 2, p. 44) (Colom.).}
\footnotetext{84}{Id. at 40.}
\footnotetext{85}{Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, Magistrado Ponente: Eduardo Montealegre Lynett (¶ 40) (Colom.). See also Corte Constitucional...}
\end{footnotes}
those judgments can be identified, as suggested by the court itself, as constitutional referendums. That is, referendums through which a proposed constitutional change is approved as part of a procedure established by the constitutional amendment rule. But not all referendums are like that. Indeed, the Colombian Constitutional Court has distinguished between situations “where the citizenry acts as a constituted organ, and accordingly, as a limited one,” and situations where the people, acting “outside of any normative channel, decide[] to alter the constitution or give itself a new one.”\[^{86}\] The latter was the case when the Colombian Constitution of 1991 was adopted by an assembly convened through a referendum in violation of the amendment rule of the Constitution of 1886.\[^{87}\] In that type of scenario, the court maintained, the people acts as the originary constituent power.\[^{88}\]

Both an authorising and ratificatory referendum, as long as they involve the alteration of the material constitution, should be understood as constituent referendums. That is, as instances in which the sovereign exercises its constituent power directly, that is, in the absence of a commission.\[^{89}\] This is true regardless of the referendum’s legal status. That an authorising referendum takes place according to law cannot be enough to deprive it from its constituent nature and cannot lead us to ignore the fact that it may result in the replacement of an entire constitution.\[^{90}\] During the 1999 constitution-making process in Venezuela, the Supreme Court of Justice (as that of Colombia in 1991) reached a similar conclusion about the nature of a referendum that took place in violation of the amendment rule of the Constitution of 1961. In the end, however, the Venezuelan courts only recognized the binding character of the mandate contained in it in a partial way, attributing the assembly with the power to determine the

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\[^{86}\] Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, Magistrado Sustanciador: Humberto Antonio Sierra Porto (¶ 1.3) (Colom.)

\[^{87}\] Corte Constitucional [C.C.] [Constitutional Court], julio 18, 2016, Sentencia C-379/16, Magistrado Ponente: Luis Ernesto Vargas Silva (¶ 4.4) (Colom.)

\[^{88}\] As Massimo Luciani has noted, “[i]t has never been claimed that the holder of sovereignty can only act in a sovereign capacity.” Massimo Luciani, El Referéndum: Cuestiones Teóricas y de la Experiencia Italiana, 37 REVISTA CATALANA DE DRET PÚBLIC 1, 11 (2008).

\[^{90}\] As Ernst-Wolfgang Böckenförde has stated, “[A]nytime the people takes an active role as an organized entity the unorganised people of the pouvoir constituant is also involved and present in some way.” ERNST-WOLFGANG BÖCKENFÖRDE, CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 179 (Mirjam Künkler & Tine Stein eds., 2017).
scope of its own jurisdiction. But it does not have to be like this, not even in the context of constituent assemblies convened outside of a constitution’s rules of change.

There is a long tradition of thought that holds that although a representative acts on a free mandate and therefore is not bound by citizen instructions, she acts under an imperative mandate with respect to the constitution itself. That is to say, that there are things representatives can or cannot do because they had been authorised or deauthorised to do them by the sovereign who brought the constitution into existence. In a similar manner, the conditions expressed or implied in a constituent referendum can also be understood as establishing a binding mandate on the resulting constitution-making body. In such cases, the electorates act as if it was the people. Whenever there is a constituent mandate, a ratificatory referendum would not only serve the purpose of approving or rejecting the proposed constitution, but of confirming that the relevant conditions have been respected. Those conditions may include the creation of determinate constitutional content or the production of a new constitutional text within a certain period. They may also require the submission of the draft constitution to popular ratification.

A question that inevitably arises here is whether the conditions that arise from a constituent mandate should be judicially enforced. For example, could a court intervene where a lawfully or unlawfully convened constitution-making body attempts to go beyond the conditions that arise from a constituent referendum? At least in a system where courts are already attributed with the power of enforcing constitutional law, that is, of enforcing what is ultimately understood as the ‘will of the people,’ I think the answer is yes. In so doing, the court could be understood not as interfering with the ultimate constitution-making power of the people but as protecting it; making sure its mandate has been respected by the entity exercising constituent authority. Accordingly, the court would not be

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91 See, e.g., Judgment No. 1110 (n. 101) 39–41 and the rest of the cases collected in BASES JURISPRUDENCIALES DE LA SUPRACONSTITUCIONALIDAD (Caracas: Supreme Tribunal of Justice, 2002).

92 See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (“It is not otherwise to be supposed, that the Constitution could intend the representatives of the people to substitute their WILL to that of their constituents.”); FELIX BERRIAT-SAINT-PRIX, THEORIE DU DROIT CONSTITUTIONNEL FRANCAIS: ESPRIT DE LA CONSTITUTION DE 1848 ¶ 45 (1851).

93 This is, of course, not a novel idea—it was even present in Article 117 of the French Constitution of 1793, which maintained that a National Convention could be limited in terms of the topics it was allowed to deliberate on. Déclaration des Droits de l’Homme et du Citoyen, June 24, 1793 (Fr.), https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-24-juin-1793.

94 Even in situations where the established constitution seeks to limit the powers of a constituent assembly, the court should remember that those limits arise from the very entity (the constituent people) that is now commissioning the constitution-making body. That is to say, those kinds of limits
negating a constitution-making body’s jurisdiction to alter the constitution in fundamental ways but, for example, ensuring that it abides by any substantive limits contained in the referendum question. In the end, this kind of review is about an institution that, given its role during ordinary times, becomes the only organ able to legitimately challenge abuses of power during a constitution-making episode. Precisely for that reason, this review power should only be exercised in rare situations, and with attention to the entire nature of the constitution-making process at issue.

For example, there could be instances where the attempt to exercise the ordinary powers of government may be part of an effort to comply with the mandate of creating a new constitution, as when a legislature actively interferes with the activities of a constituent assembly. In that type of case, it could be argued that the constituent assembly’s commission comes accompanied by an implicit authorisation to engage in any juridical acts that “are necessary and proper for the execution of powers expressly granted,” as John Alexander Jameson maintained in his 1887 book.

There may also be cases were the court disagrees with the assembly’s interpretation of the content of an explicit limitation arising from the constituent referendum. For instance, does a mandate to create a constitution that establishes a bicameral legislature require that both chambers have equal powers? In this kind of case, the exercise of judicial authority should arguably be highly deferential as long as the disagreement is a reasonable one. Moreover, in constitution-making processes where the draft constitution is to be subject to final popular ratification, courts should be especially careful: questions about whether the specific conditions set by a constituent referendum have been respected may sometimes be better left to the electorate.

**FINAL THOUGHTS**

In “Constituent Authority,” Kay examined two decisions of the Supreme Court of Pennsylvania that revolved around the nature and powers of the Constitutional Convention of 1873, convened outside the amendment rule of the Constitution of 1838. These decisions exemplify what is at stake in any attempt to legally limit a constituent entity. “In a paradoxical argument,” Kay writes, “the court acknowledged that the convention procedure was a way of expressing the original will of the

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95 John Alexander Jameson, *A Treatise on Constitutional Conventions* 302 (4th ed. 1887). Jameson described situations where conventions failed to respect the separation of powers, as “usurpations of authority” carried out by revolutionary force, though, adding that while illegal, they could in some cases be morally or politically justified. *Id.* at 325.

sovereign people—something outside the positive law rules of the constitution—but that procedure was cognizable as such only because it was authorized by the positive law of the enabling legislation.⁹⁷ Despite this undeniable ambiguity, these decisions have the merit of avoiding the confusion between the entity tasked to adopt a constitution and the sovereign people. In one of those judgments, the court was at pains to distance itself from the comments of Judge Edwin H. Stowe at the trial court, who pointed toward the “absolute power” of the convention in respect to any limitations imposed by the authorising legislation.⁹⁸ In the context of the case, such absolute power would have even included the ability of the convention to determine, contrary to the legislative act under which it was called, that its draft constitution would not be submitted to a popular vote.

The Supreme Court maintained that:

[i]f, by a mere determination of the people to call a convention whether it be by a vote or otherwise, the entire sovereignty of the people passes ipso facto into a body of deputies or attorneys, so that these deputies can without ratification, . . . impose at will a new government upon the people[,] . . . no true liberty remains.⁹⁹

Such a view would “declare the impotency of the people, and the absolute potency of their agents.”¹⁰⁰ To say that a constitutional convention is legally bound by law, the court argued, is not to say that the legislature is able to restrain the people. On the contrary, it is to recognise that the people, through the actions of their representatives in the legislature, can limit the power of their representatives in a constitutional convention.¹⁰¹ “The idea which lies at the root of the fallacy, that a convention cannot be controlled by law[,]” maintained the court, “[i] that the convention and the people are identical.”¹⁰² In the other case, which examined the legality of a decision of the constitutional convention to pass an ordinance seeking to regulate the election through which the constitution would be approved or rejected, the court added that the members of a constitutional convention “possess no inherent power.”¹⁰³ If they have “greater powers than are contained in [the law authorising their election],” the court rhetorically

⁹⁷ Id. at 730.
⁹⁹ Woods’s Appeal, 75 Pa. at 70.
¹⁰⁰ Id. at 71.
¹⁰¹ Id.
¹⁰² Id. at 72.
asked, “when, where and how did they obtain them?” The argument presented in this paper is largely consistent with that reasoning, but with one important qualification.

That is to say, the limits imposed by “law” must arise not from a mere legislative act but be contained in a mandate arising from a constituent referendum. They must be limits that can be reasonably understood as arising from the sovereign people and not from the constituted authorities. In that respect, Judge Stowe’s judgment at the trial court was not as scandalous as may otherwise appear. For him, a constitutional convention had “absolute power . . . unless prohibited or restricted in the manner specified by the people . . . .” “In saying this,” he clarified, “we are not to be understood as saying that the convention is in any respect the supreme power of the state. We take it to be simply the attorney for the people, with plenary power to do what is required of it, but nothing beyond.” The idea, it seems, is that an entity tasked to create a new constitution can be subject to limits, but to limits imposed by the people directly, not by the positive law emanating from the legislature. This is in no way a novel notion, and it rests on a number of fictions that accompany modern constitutionalism, in particular, that there is a ‘sovereign people’ that can somehow act through a referendum. It is nonetheless a fiction that negates an at least equally problematic notion: that being tasked to draft a constitution necessarily involves an authorisation to act in a sovereign capacity.

104 Id. at 53.
105 Woods’s Appeal, 75 Pa. at 67.
106 Id.