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CONSTITUENT POWER AND THE LAW
REPLY TO CRITICS

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ABSTRACT
This article offers a reply to the criticisms and challenges posed by Camila Vergara, Miguel Vatter, Mariana Velasco-Rivera, Yaniv Roznai, Roberto Gargarella and Zoran Oklopcic to *Constituent Power and the Law*. The reply is presented in six sections covering the following themes: (1) Rousseau's primary assemblies and the role of the Legislator; (2) the distinction between sovereignty and constituent power; (3) the types of political practices that can be attributed to the constituent people; (4) the limits of the primary constituent power; (5) the role of constitutional and political history in the book; and (6) the nature of the claim that constituent power should be understood as a juridical concept.

KEYWORDS
Sovereignty; constituent power; referenda; primary assemblies; Rousseau; Schmitt

While working on the manuscript of *Constituent Power and the Law* I had two main concerns, which I imagine are common among authors of academic books. The first one was that no one would read it and, the second one, that people would will read it but find it uninteresting or incomprehensible. One of the great joys of having a book symposium is that the first of those concerns disappears. The problem, however, is that the second one increases, as those who are asked to read your book are your most respected colleagues. After reading the essays that form part of this symposium, I am happy to report that that second concern has disappeared as well. The six responses to the book seriously engage with my arguments and, while expressing important points of disagreement and challenging some of the book's main conclusions, suggest that I was able to make clear my (perhaps wrong) ideas about constituent power. In what follows, I will try to respond to what I understand to be the main challenges found in each of the responses. My reply is presented in six sections organised thematically. Even though each section

is largely devoted to the discussion of one of the essays, there is some overlap (i.e. some sections refer to the critiques of more than one of the commentators).

I. ROUSSEAU'S ASSEMBLIES, ROUSSEAU'S LEGISLATOR

I will start with Camila Vergara's essay, which I read as resting on two key criticisms. The first one has to do with my interpretation of Rousseau. This is not a minor critique. Rousseau plays a key role in the book, to the point that, in a certain way, the main arguments made in the final chapters are already found in his work. Or, at the very least, they are reflected in what Professor Vergara calls my "bold reinterpretation" of Rousseau "as a radical democrat who was in favour of the people exercising constituent power through primary assemblies". Professor Vergara thinks that interpretation cannot be sustained for two reasons. First, that apart from some "scattered references Rousseau makes to the need for periodic assemblies of the people", my interpretation is not "adequately substantiated with textual references". Second, that Rousseau is not really a democrat because "he gives the power to create a new constitution to a single Legislator (even if the text needs to be ratified by the people) and explicitly deprives the people of self-convoking as well as deliberating and proposing laws". Vergara's interpretation of Rousseau is certainly plausible; it is in fact consistent what may be identified as the dominant interpretation of his thought.

Nonetheless, it is an interpretation that actively ignores or (presents as non-central) the most democratic aspects of his thought (as for example, the need for periodic assemblies of the people, which in my view plays a much more important role in the *Social Contract* than that attributed by Vergara) and stresses, often without contextualisation, any passage that evidences his elitism. I find this surprising given the time Rousseau was writing. An author who claimed that the English people lived in slavery because they were subject to laws not subject to popular ratification, or that argued in favour of the imperative mandate so that citizens could control the members of a legislative assembly (in countries so large that required a representative law-making body), arguably has at least equal democratic (or, for that matter, republican) credentials than his 18th century counterparts. Needless to say, as many other 18th century authors, he was full of prejudices and contradictions. In any case, I what wanted to show in the book (particularly in Chapter 2), is that in Rousseau's distinction between sovereignty and government, and in his insistence in seeing sovereignty as a type of power that can only be exercised directly by the people, one can find important elements of the tradition of constitutional thought (a tradition also full of prejudices and contradictions) in which the theory of constituent power was developed.

That tradition of constitutional thought, however, eventually left behind Rousseau's most democratic institutional proposals. The first one, and with this I

begin to respond to Vergara's specific critiques, were the previously mentioned periodic (popular) assemblies, which were connected in important ways to the previously mentioned institution of the imperative mandate. As far as I know, Vergara is correct that Rousseau never used the term 'primary assembly'. Nonetheless, it is abundantly clear that, leaving aside for the moment which specific functions they would have or how would they be convened, Rousseau thought that the entire people of a political community should assemble periodically (for reasons of space, I will not reproduce here the relevant passages, which are cited in Chapter 2 of the book). The question then is whether Rousseau's assemblies should be counted as 'primary assemblies', which is partly a question about what *is* a primary assembly. The question is a tricky one because the notion of a 'primary assembly' has become increasingly associated with -often informal- mechanisms of democratic participation that go beyond the role they have usually played in constitutional practice.

For example, in some 19th century constitutions in Europe and Latin America, primary assemblies were local electoral colleagues called to elect delegates to higher level assemblies and, sometimes, they were authorised to recall certain state officials.[1] As that latter power suggests one key feature of those entities had historically been their ability to issue binding instructions (i.e. the imperative mandate), a practice that was nonetheless generally abolished in the late 18th and early 19th centuries. As Vergara explains (and as I discuss in Chapter 4 of the book), in 18th century France, primary assemblies would have acquired important deliberative and decision-making powers (including the power to initiate future constitution-making processes), had the Girondin draft constitution been approved by the National Convention. Nowadays, the term 'primary assembly' (which is sometimes used interchangeably with the terms 'cabildos', 'popular assemblies', 'local councils'), has come to describe local entities, sometimes self-convened, where citizens deliberate about different aspects of their political future. When (informally) self-convened, primary assemblies naturally lack legally binding powers, but they can nonetheless serve as an important site of democratic participation.

If our political systems were radicalized in the direction of participatory democracy (a radicalization that I would support), one would imagine primary assemblies with the *formal* power of self-convocation, with the right to issue binding instructions to higher level assemblies, with the right to initiate constitutional changes and to deliberate, and then approve or reject, constitutional proposals. If Vergara's point is that Rousseau did not explicitly defend that type of arrangement, she is certainly right, but of course Rousseau did not describe at that level of detail any particular institution. Nonetheless, and I think here is where we disagree, Rousseau's constitutional thought is entirely consistent, and indeed points, in that

[1] See for example, Chapters X and XI of the Constitution of Chile of 1823; Chapter IV of the Constitution of Chile of 1822.

direction. First, as noted earlier, popular assemblies played a major role in his institutional proposals: they were the only legitimate means for the exercise of constituent power.[2] Second, aware that in large societies it would not be possible to convene an assembly of the entire people, Rousseau considered acceptable the convening of multiple popular assemblies so that all citizens have the ability to participate in the exercise of sovereignty.[3] Third, Rousseau explicitly supported the imperative mandate: this was an essential part of his critique or representation.[4]

All this is more than enough to say that Rousseau's thought I consistent, and indeed goes beyond, the type of primary assemblies regulated by some 19th century constitutions. But is it also consistent with the more radical versions of these mechanisms? There seem to be two main obstacles, both identified by Vergara: the mode of convocation of primary assemblies and their powers (e.g. Can they deliberate? Can their merely accept or reject particular proposals?). Vergara writes that in Rousseau's "ideal republic, the sovereign assembly is...silent, non-deliberative, and needs to be convoked by law or by a magistrate; self-convoked assemblies 'should be regarded as unlawful'". It is hardly surprising that, for Rousseau, an *informally* convened popular assembly is unable to produce any legally binding norms. Otherwise, there would not be any kind of guarantees that the assembly (or assemblies) is actually a meeting of ordinary citizens as opposed, for example, to a self-convened group of members of a political elite. The suggestion that an informally convened popular assembly would be "unlawful" appears at first sight much more problematic, as it seems to proscribe informal political deliberation by groups of citizens.

However, to conclude that that passage means that any informal (and political) meeting of citizens should be treated as an illegal act (i.e. illegal in the sense of deserving some kind of punishment) would be a way too uncharitable reading of Rousseau (and in any case I don't think that is Vergara's view). It is much more likely that what Rousseau meant is that no informally convened group of citizens can claim to be a *sovereign* entity or to participate in the legal exercise of sovereignty, a prohibition common to most constitutional regimes in the world. Moreover, that does not mean that the *law* (or the constitution), cannot regulate the process through which primary assemblies can be convened, which could involve self-convocation (as, in fact, the Girondin constitutional draft did). As for the powers of popular assemblies, it is true that Rousseau's sees their role as that of accepting or rejecting proposed laws (i.e. constitutional changes, as explained in Chapter 2 of the book). There is nothing in his work, however, condemning the possibility of the law vesting

[2] Jean- Jacques Rousseau, *The Social Contract and The Discourses* (Everyman's Library, 1973) 259.

[3] Ibid 260. See also Rousseau's essay on the 'Constitutional Project for Corsica' (1765).

[4] Jean Jacques Rousseau, 'Considerations on the Government of Poland and on its Proposed Reformation', April 1772 (ISN ETH Zurich) 16; Rousseau, *The Social Contract* (n 2) 263.

primary assemblies with the power to deliberate about future constitutional changes. Here Vergara's objection would be forthcoming: the Legislator. If the Legislator has the exclusive authority to draft new constitutional content, then primary assemblies can only have the power to accept or reject the Legislator's proposals.

The question of course is, *what is the Legislator*, a question that is also raised by Miguel Vatter's essay, discussed below. Rousseau is not the first writer to refer to a 'Legislator' like figure. Niccolò Machiavelli, who usually sided with the many over the few, maintained that, since "the many are not capable of instituting anything", as a general rule, a republic should be "organized by one man alone".[5] But as I show in Chapter 2 of the book, in the history of political thought, "the Legislator" could also refer to an entire people or to an assembly of the people, as opposed to a single individual. For example, Rousseau wrote that in a state where the people is sovereign, the Legislator speaks through a popular assembly.[6] However, even if the Legislator takes the form of an assembly that drafts a constitution to be later rejected or ratified by primary assemblies, Rousseau's system would still fall short of the most democratic conceptions of the latter entities. It would nonetheless be at the very least equivalent to the type of constitution-making process that is today described as 'democratic'. I agree with Vergara that that kind of process is not enough, and I am sympathetic to her own proposals in her *Systemic Corruption*.[7] So, in the end it is true that Rousseau does not go far enough, but it would be truly remarkable for an 18th century theorist to delineate an ideal democratic constituent process for the 21st century. I don't think, however, that that is enough reason to classify his thought as elitist or conservative.

Vergara's second critique has to do with my treatment of the material constitution. She writes that I define the material constitution in "non-material terms", "omitting the centrality of material conditions and power relations, and...focusing rather on the constitution's 'basic structure' and 'fundamental content'". I don't have much to say in response to this important critique (even though I will come back to the question of the material constitution in my response to Mariana Velasco-Rivera), because I think that Vergara is right. The role that the notion of the material constitution plays in the book can be described as a strictly 'doctrinal' or 'juridical' one. That is to say, it does not seek to uncover, for example, the power relations that emerge from the material conditions of society. Rather, my references to the notion of the material constitution follow a juridical tradition according to which not all provisions contained in a constitution are equally important, and the most important ones can only be altered through an exercise of constituent power. 'Material', from the perspective of this tradition, usually means

[5] Niccolò Machiavelli, *Discourses on Livy* (Oxford University Press, 2008) 45.

[6] See Joel Colón-Ríos, *Constituent Power and the Law* (OUP, 2020) 47-48.

[7] Camila Vergara, *Systemic Corruption: Constitutional Ideals for an Anti-Oligarchic Republic* (Princeton University Press, 2020).

something like 'substantive from a constitutional point of view' or 'legally fundamental', as opposed to pointing toward real power and economic relations.[8] Vergara's challenge to move beyond that tradition, as part of a move against what she calls "the oligarchization of democracy", is indeed a welcome one.[9]

II. SOVEREIGNTY OR CONSTITUENT POWER

This brings me to Vatter's equally powerful criticisms. Vatter puts to the test the basis of the distinction between sovereignty and constituent power which, as he explains, is one of the main, if not the main, argument of the book. In an incredibly rich summary of the way I develop that distinction (a summary that is in many ways superior to the original!), Vatter notes that, according to the book, "Rousseau has a juridically immanent idea of constituent power because he distinguishes sovereignty from constituent power...[and] gives us the key to understand constituent power as *truly* democratic". However, Vatter maintains that the book eventually betrays that conception, because I ultimately claim that "constituent power can play a democratic role only if it is identified with a species of dictatorship". "This surprising claim", he writes, "derives from Schmitt, whom Colón-Ríos rehabilitates by arguing that his account of both sovereignty and constituent power is misunderstood if placed on the side of transcendence, and politically on the side of a 'conservative revolution' that favours the coup d'État". Although largely agreeing with my reading of Rousseau, Vatter objects to what he describes as my "attempt to give a 'republican' or Rousseauian employment of Schmitt".

According to Vatter, the problem has to do with the fact that, in my development of the relationship between the people and the constitution, I appear to commit to the view of the people as holding a "plenitude of powers" and as preceding the creation of a constitution. This view, he explains, drives me toward Schmitt's conception of a constitution as a decision of the constituent subject, of a unified entity whose purely political will becomes law. However, Vatter maintains there is a way of avoiding that road. Instead of understanding the sovereign people as a unified entity that delegates an element of its sovereignty (i.e. its constituent power) to an assembly that drafts a constitution on its behalf, one could instead argue that "the power of the people is just its constituent power, and such constituent power is not only active in drafting constitutions, but also in judging, along and in dispute with the organs of the state, of what counts as law". The latter alternative, Vatter explains, is consistent with a republican reading of Rousseau but inconsistent with Schmitt's constitutional thought. I confess I am attracted to Vatter's solution, but partly

[8] There are, of course, some exceptions, as that of Costantino Mortati and Hermann Heller, examined in Chapter 8 of book.

[9] Vergara (n 6).

because, even if it relies on different theoretical foundations, I think it is not necessarily in conflict with the practical implications of my own approach.

First, Vatter is right that when discussing Schmitt, I embrace the kind of view of the relationship between the people and the constitution that he finds problematic: the people as a sovereign entity that, unable to create a constitution on its own, delegates parts of its power to a constitution-making assembly. However, the role that that view plays in the argument is a legal one, that is, it is what serves to justify the judicial imposition of legal limits on the power of constitutional change of any entity (e.g. the ordinary amending authority) that is not the people or that is not acting on a direct popular mandate. In providing that justification *during the life* of a constitutional order, my understanding of popular sovereignty is consistent with the continuing relevance of constituent power beyond the initial act of constitutional creation. Moreover, that relevance is not only negative (i.e. it is not only about the limitation of political power) but, as suggested by Velasco-Rivera in her essay (discussed below), can also be positive, can also assume a creative form. For example, *because* the people is sovereign, it should have the right to issue imperative mandates (as I argue in Chapter 10 of the book) on the entity tasked with the drafting of a new constitution. Moreover, in an ideal democratic setting, it should also be able to initiate processes of constitutional change independently, and even against the will, of the ordinary institutions of government.

I also agree that, as suggested by Vatter, the people should be able to participate in determinations of what count as law, and that would include, as I have argued elsewhere, the power to override judicial determinations declaring the validity or invalidity of a law on constitutional grounds.[10] However, if I understand him correctly, Vatter's point seems to be a deeper one: that the people is not a sovereign law maker, that there is no unified instance of popular power whose ultimate role is to produce legally binding norms. Rather, the people is a constituent subject that continuously judges whether political power is being legitimately exercised.[11] For Vatter, it is only if understood in this way that the idea of popular sovereignty can be accepted. Vatter's conception of the separation of sovereignty and constituent power is thus more radical than mine: for him, the sovereign (i.e. the state) lacks constituent power, and the constituent subject (the people) lacks sovereignty. In other words, sovereignty and constituent power are in a permanent relationship of opposition, where the latter serves to keep citizens free from the potential arbitrary will of the state. For me, the state is neither the sovereign (that is, there can be positive laws that it is *legally* unable to adopt) nor the constituent power: both lie with the people.

[10] Joel I. Colón-Ríos, "The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules", 25 *Canadian Journal of Law and Jurisprudence* 53 (2012).

[11] See Miguel Vatter, "The People Shall be Judge: Reflective Judgment and Constituent Power in Kant's Philosophy of Law", 29 *Political Theory* 749 (2011).

Nonetheless, sovereignty and constituent power are separated because the people cannot exercise its sovereignty, but rather delegate parts of it: in a constitution-making context, it delegates the power to draft a constitution to an assembly. Even if Vatter is right that, from a theoretical perspective, this approach could be seen as being in tension with the republican tradition, it does not necessarily negate the practical or institutional relevance of the people's constituent power once a constitution is in place or its potential to facilitate freedom. The idea that according to the theory of constituent power defended in the book, a constitution-making body can be described (as in Schmitt) as a sovereign dictatorship, may of course give one pause. But all I mean by that is that in virtue of being called to exercise constituent power, a constituent assembly is not, unlike, for example, an absolute monarch, a real 'sovereign': it always acts *on a mandate from the people*, a mandate that should be understood as legally enforceable and that can potentially involve substantive limits as to the kind of constitutional content that can be validly created. Vatter notes that I write that constituent assemblies have often assumed "a jurisdiction formally akin to that exercised by military dictators and military juntas"[12], but that passage was precisely describing examples where the notion of a mandate was *not* accepted.[13]

III. THE PEOPLE UNDER A CONSTITUTION

I doubt I was able to make justice to Vatter's challenging essay, but I hope it is clear that despite the divergence in our accounts of the relationship between sovereignty and constituent power, we are not too far away in terms of the institutional implications that follow from our own views. Velasco-Rivera's insightful essay pushes the argument in the book in a similar direction and with equal force. She writes that the book does not make "clear whether constituent power could be exercised through legal means other than constitution-making instances" and that

[12] Colón-Ríos, *Constituent Power and the Law* (n 5) 228.

[13] That is, that passage was not pointing to the way in which I think these entities should be understood. The relevant passage, found in the introduction to Chapter 9, reads as follows: "In contrast, when the distinction between sovereignty and constituent power is blurred, the scope of the jurisdiction of the latter tends to be exaggerated, sometimes in dangerous ways. In Part IV [of Chapter 9], I will consider examples of different individuals and entities that, in the 20th and 21st centuries, have assumed what I describe above as sovereignty and presented themselves as unbound by the separation of powers. The emphasis will be on the Colombian Constituent Assembly of 1991, which can be understood as the paradigmatic case of this phenomenon in a formally democratic context, and in the Venezuelan Constituent Assembly of 2017. These were elected (in the latter case, controversially) entities which, on the basis that they held constituent power, assumed a jurisdiction formally akin to that exercised by dictators and military juntas. While the exercise of that kind of power by a democratically elected assembly can in some cases result in the improvement of the constitutional order, the confusion between sovereignty and constituent power can also serve to justify important departures from democratic principles". Colón-Ríos, *Constituent Power and the Law* (n 5) 228.

"the limits of referendums as effective means to determine the will of the people are not sufficiently examined". I think Velasco-Rivera is right on both counts. The first point, as she puts it, is about whether the exercise of constituent power is present in the context of constitutional changes that take place through ordinary legal means (i.e. outside of a formal process of constitutional change). She calls this the "mediated" exercise of constituent power. The main example provided by Velasco-Rivera has to do with the exercise of the right to vote, such as a situation where citizens elect a new government that engages in fundamental transformations of the political and economic system, even if those transformations do not involve changes in the existing constitutional text.

Consider, for instance, the case of a progressive political movement that promises that, if prevailing in an election, would intervene in important ways in the regulation of the economy, dramatically alter the state's environmental policies, improve the provision of social services through significant changes to the taxation system, , and adopt other major redistributive strategies. There will probably come a point where some of those changes would be subject to constitutional challenges and therefore require a formal constitutional amendment. It is nonetheless certainly possible for many -or perhaps most- of those type of changes to occur without a single alteration of a typical liberal written constitution. If the majority of the population elects that government, they would have indirectly contributed to a change that would probably be much more fundamental than, for example, a formal constitutional amendment that replaces a bicameral legislature with a unicameral legislative body, or even than an amendment that abandons federalism in favour of unitarianism. Under the understanding of constituent power advanced in the book (and this is something that brings me back to Vergara's second critique), only the latter kind of changes would count as "a change to the material constitution" and therefore as involving an exercise of constituent power.

I wonder whether understanding those type of changes as involving an alteration in the material constitution (and therefore involving the exercise of constituent power) may be counterproductive: it would place much needed social and economic transformations outside of the scope of the ordinary institutions of government. The fact that my approach fails to properly recognise the fundamental nature of those kinds changes is nonetheless problematic. Moreover, I agree with Velasco-Rivera that the exercise of constituent power may take place outside the context of formal constitutional change.[14] I am not sure, however, about the extent to which constitutional theory is currently able to address those problems or to accommodate those views. That is to say, it is nowadays widely accepted that a constitutional order may change even in the absence of a formal constitutional amendment, not only through judicial decisions but also through changes in

[14] In fact, we are co-authors of a work-in-progress that develops that point: Mariana Velasco-Rivera & Joel I. Colón-Ríos, "On the Implications of a Permanent Constituent Power" (on file with authors).

unwritten constitutional rules (i.e. constitutional conventions). It is also clear that a change in the material constitution may occur outside of the constitutional amendment rule and therefore leave the constitutional text intact. What is still largely missing, from the perspective of contemporary constitutional theory, is a conception of the constitution that treat things such as the taxation system, the governmental approach to the regulation of the economy, or the state's relationship with nature, as *materially constitutional* by definition.

It is true that in countries with unwritten constitutions some of those things are treated as 'constitutional': in New Zealand, for example, many would include, as part of the unwritten constitution, statutes as the *Resource Management Act*. Nonetheless, in most contexts (that is, in jurisdictions with written constitutions), for a change that takes place outside the constitution's amendment rule to be described as 'constitutional', it must be in some way connected to the constitutional text. For example, a change in the conventions regulating the protection of the right to freedom of expression may be considered an alteration of the material constitution, *because* it modifies the way in which a (material) part of the constitutional text (i.e. the bill of rights) operates. Similarly, a major economic transformation, say a transition to a system in which there is no private ownership of the means of production, would normally also count as a change in the material constitution, but not because it literally changes the material relations of power existing in society, but because it alters -or conflicts with- the protection of property rights. However, changes related to redistributive policies (as those mentioned above) that do not modify the interpretation or application of the constitutional text would normally fall outside the traditional conception of the material constitution under which the book operates.

Granted, there are some authors who go beyond that traditional conception (notably Mortati and Heller), as well as important attempts to continue moving in that direction.[15] But as I noted above, the conception of the material constitution developed in the book is strictly 'doctrinal' or 'juridical' in nature. The reason is connected to the book's overall aim. I wanted to show how the relationship between constituent power and the law should be understood in light of concepts that inform contemporary constitutional theory. For example, my argument about constituent assemblies acting on a legally enforceable mandate is not presented as a reformulation or a novel development of the theory of constituent power. Neither is the distinction between constituent power and sovereignty nor my views about the relationship between the notion of the material constitution and the doctrine of unconstitutional constitutional amendments. These arguments are rather presented as the natural implications of ideas and doctrines (constituent power, sovereignty, material constitution) established through constitutional history. There have been,

[15] Marco Goldoni & Michael Wilkinson, "The Material Constitution", 81(4) *The Modern Law Review* 567 (2018).

as shown in the book, moments of rupture and changes in that history. But my goal was not to provide alternative or new conceptions of those ideas and doctrines; rather, I wanted to show that they are consistent with, and sometimes point toward, institutional arrangements very different to our current ones.

Accordingly, important questions such as 'to what extent constituent power can be exercised outside moments of constitution-making (or re-making)', or in what ways 'do material constitutional changes' that take place outside a constitution's amendment rule involve the exercise of constituent authority, largely fall out of the scope of the project. That, however, cannot be the response to Velasco-Rivera's other main point: that the argument in the book relies in a central way in referendums as a means for the expression of the will of popular majorities. As Velasco-Rivera notes, referendums "are not free from the political context in which they are deployed" and are thus "inevitably prone to create conditions for politicians to stir public opinion in favour of their interests and agendas". The question then becomes one about whether we should take referendums as "reliable proxies of popular sovereignty". I share Velasco-Rivera's concerns with referendums. In fact, I think those concerns not only apply to referendums, but also to any electoral event where individuals are asked to choose between different alternatives or candidates. That is to say, to a significant extent, the problem with the potential manipulation of referendums (through, for example, the social media) is ultimately a general problem of electoral democracy in contemporary societies.

There is nonetheless something particularly problematic about referendums. Unlike general elections, where citizens select among different candidates who are called to assemble and deliberate about new laws and policies, referendums ask citizens to choose among two (or sometimes more) alternatives, with no formal place for deliberation. However, one should note the following. First, all laws and policies adopted by a representative assembly are ultimately approved in a 'yes' or 'no' referendum: a referendum among the members of the assembly. And while it is true that those laws and policies will only be subject to the assembly's final vote after a period of deliberation, were their content and form is finalised, the same is true of the options eventually submitted to the electorate in a referendum. The key difference is that while an assembly is able to formally deliberate on whether a proposal should be accepted or rejected, the entire electorate (at least in the typical 'constitutional democracy') is not. But this should not be exaggerated: on the one hand, informal deliberation among citizens prior to a referendum does take place in democratic societies (even if subject to the potential manipulation noted above) and, on the other, formal deliberation in an assembly may not be genuine (e.g. it may be controlled by interests groups).

Second, note that in the book, the role of referenda is limited to two main instances: the issuing of constituent mandates and the ratification of a constitutional text. The latter use of referendums, I think, is not controversial. Most people, even

those who think referendums are a terrible form of decision-making, would agree that the popular ratification of a constitution is, at least sometimes, necessary for its legitimacy. The use of the referendum as a means to issue constituent mandates should not, in my view, raise any major issues either. The main reason is that the role of such referendums is largely a negative one: it is about placing limits on an entity (a constituent assembly) that would otherwise have sovereign power. This does not make a referendum more or less reliable as a proxy for popular sovereignty, but it does reduce the stakes of a 'wrong' referendum result. Moreover, ideally, a constituent mandate would be initiated from below, for example, presented to the electorate by primary assemblies as the ones supported by Vergara and, as shown in the book, associated with the exercise of constituent power at different moments in constitutional history. Needless to say, that would require a major transformation in our constitutional arrangements, but one that would find strong support in historical and contemporary discussions about the appropriate means for the exercise of constituent power.

IV. INTERNATIONAL LAW AND THE LIMITS OF THE PRIMARY CONSTITUENT POWER

The relationship between referendums and constituent power is also discussed at some length in Yaniv Roznai's excellent essay. He rightly points to the fact that, in some jurisdictions, courts have treated referendums (in the context of formal constitutional change) as equivalent to the exercise of constituent power while, in others, referendums are seen at most as an important part of a constitution-making process but not as the primary means through which the constituent subject acts. As I have argued elsewhere, I think that the latter view is the correct one.[16] Moreover, the argument presented in Chapter 10 of the book rests on that view. There, I distinguish between constitutional and constituent referenda. The former takes place when a proposed constitutional change is approved as part of the procedures established in the constitutional amendment rule (and therefore it has a constituted nature); the latter are instances where the sovereign people, acting through the electorate, exercises its constituent power directly, that is, in the absence of a commission. Under this approach, the use of the ordinary amendment process contained in the constitutional text to alter the material constitution, even if it involves a (constitutional) referendum, would invade the exclusive jurisdiction of the constituent power.

The exercise of constituent power can thus (and in my view should) be accompanied by a referendum, but it requires more intense instances of popular

[16] See Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*; Joel I. Colón-Ríos, "Constituent Power and Referendums", *Contemporary Political Theory* (2021).

participation and intervention as those considered in the book (e.g. elected constituent bodies, imperative mandates, primary assemblies). But even if that approach is accepted, as Roznai notes, the question becomes if there are any limits to the kinds of constitutional changes that could be adopted through a sufficiently democratic constituent process. He suggests three specific potential limitations. The first one has to do with international law and, as Roznai notes, I do not address it directly in the book.[17] Roznai writes that "from the perspective of international law, it is quite clear that a state must meet its international obligations regardless of local legislation that contradicts them, whether it is ordinary or constitutional legislation". The question is thus whether an entity called to exercise constituent power (e.g. a constituent assembly) is subject to the international law obligations applicable to the state in which it operates. Roznai offers a possible answer: those limits may apply in the "external juridical sphere" but have "difficulties affecting the legal validity of norms domestically". If one assumes a situation of a constituent assembly that has been tasked to draft a constitution without been subject to a mandate limiting the kind of content to be created, that answer is probably the right one.

That is to say: whether international law is superior to domestic law *in the domestic legal system* is ultimately determined by the constitutional law of the country at issue. For example, the general rule applicable in some jurisdictions is that an ordinary law contrary to an international obligation is legally valid domestically, even if such an act would entail a clear violation of international law. In other jurisdictions, the constitution may place international law above domestic law and even above the constitution itself. In the latter case, a law or constitutional amendment contrary to a state's international obligation would not only be illegal under international law but also invalid in the domestic legal system. But note, however, that the ultimate decision about whether a conflict between a domestic statute (ordinary or constitutional) and an international obligation results in the invalidity of the former, is to be found in the national constitution. Accordingly, it would be odd to maintain that a constituent assembly authorised to create an entirely new constitutional order is legally bound to respect rules of international law that are domestically binding *because* of a rule contained in the very constitution that it has been called to replace (naturally, the question of whether the members of a constituent assembly have a moral or political obligation to respect international law is a different one).

The idea of violating international law seems, on its face, problematic: what comes to mind, for example, are the adoption of constitutional provisions contrary to international human rights obligations. However, the type of international obligations that is likely to be contradicted by a new constitution are those connected to, for example, international investment treaties that may limit the state's ability to

[17] For Roznai's take on this topic, see Yaniv Roznai, "The Boundaries of Constituent Authority", 52 *Connecticut Law Review* 1381 (2021).

regulate the economy or to protect the natural environment. We could be in a different situation if the constituent assembly is subject to a mandate such as that applicable to the current Chilean Constitutional Convention: "The text of the new constitution that will be submitted to referendum shall respect...the international treaties ratified by Chile that are currently in force".[18] In the Chilean case, that provision is non-justiciable[19] but suppose the following.[20] The people of X jurisdiction are asked the following question in a popularly initiated referendum: "Do you wish to convene a Constituent Assembly for the creation of a new constitution consistent with all of this country's international obligations?". According to the argument in the book, such a referendum question, if answered in the affirmative, should be understood as a constituent (and imperative) mandate, legally enforceable against the constituent assembly.

In that kind of situation, international obligations would legally limit the type of constitutional content that a constituent assembly can adopt, *because* such a limit arises from a popular decision. The second limit proposed by Roznai is that "the exercise of constituent power cannot result in the abolition of rights such as freedom of expression and assembly, and political rights, which are necessary in order for constituent power to reappear in the future". The question here is what does "cannot result" mean in Roznai's formulation. If it means that an exercise of constituent power that abolishes those rights would be illegitimate, then this is something that I not only agree with but that I have explicitly defended elsewhere.[21] If "cannot result" means that the abolition of those rights by a constituent assembly would be *illegal* then, I also agree, as that is one of the main implications of understanding such an entity as acting on a mandate to create a constitution. As noted in Chapter 10 of the book, "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".[22] The violation of that limit (a limit arising from a direct popular decision), would not only create a problem of legitimacy but also one of legal validity.

The third limit proposed by Roznai is that "the exercise of constituent power must be consistent with the idea of 'the people'". "If 'the people' or some part thereof are excluded from the polity and are no longer able to exercise constituent power", Roznai writes, "this should influence the legitimacy of the constitution-making process". Again, it is difficult to disagree with this point, particularly when presented from the perspective of legitimacy. However, if considered from the

[18] Article 135, Chilean Constitution of 1980, as amended in 2019.

[19] And for good reasons, since it arose from a decision of the elites and not, for example, from a popular initiative.

[20] See Article 136, *ibid.*

[21] Colón-Ríos, *Weak Constitutionalism* (n 14).

[22] Colón-Ríos, *Constituent Power and the Law* (n 5) 291.

perspective of legality, I think Roznai's point would still stand. Indeed, in Chapter 9 of the book, I argue that inherent in a commission to exercise constituent power there is an obligation to respect the identity of the constituent subject. This is another way of saying that a constitution-making body cannot transform itself into a sovereign entity: the assembly not only has to abide by the limits that accompany its commission, but it cannot alter the entity who issued the commission in the first place. Assuming a democratic context (that is, a constitution-making process initially based on an inclusive conception of the people), the kind of situation described by Roznai would be *ultra vires* the constitution-making body's mandate. In this sense, I think there is much in common and very little disagreement between Roznai's views and mine.

V. IMPERATIVE MANDATES, JUDICIAL REVIEW, AND HISTORY

I have mentioned a few times already that in the book, I argue that constituent assemblies should be understood as subject to an imperative mandate, and that that mandate can be judicially enforced. Roberto Gargarella's intervention takes issue with the method through which that argument (as well as some others) is made. He writes that "in occasions, the positions [I maintain] look more like statements than as arguments, while in other occasions, they appear as arguments in need of additional support". Sometimes, Gargarella maintains, I present certain views as "if they were justified just because of their genealogy or their reputable origins" (e.g. because they find support in the writings of Rousseau) or because they are reflected in some judgments. Even if those views are at first sight attractive, Gargarella worries that since many of them (like, for example, the notion of the imperative mandate), "lost all or almost all the support they had once received throughout the history of political thought", "additional and renewed justificatory efforts" are needed to defend them.

I think that is a fair and powerful criticism. Should what past authors and courts have said about, for example, constituent power, be in any way decisive about the desirability of certain constitutional arrangements today? Put in that way, the answer must be 'no'. My objective in the book, however, was different. What I wanted to show is that institutions like the imperative mandate or primary assemblies, which as Gargarella writes were rejected by most jurisdictions centuries ago, are not simply superficially attractive from a democratic perspective. Rather, they are in fact entirely consistent with, if not required by, the notion of the people's constituent power, a notion currently embraced in most constitutional orders. Accordingly, if one takes that notion seriously, one cannot simply ignore those alternative arrangements or treat them as remnants of a past that has been rightly left behind; one must bring them back to current discussions as possible democratic improvements to the constitutional status quo. Those discussion would not only

have to consider whether those institutions find support on this or that constitutional theory, but must also include questions such as how would they impact contemporary party systems, how likely are they to increase popular participation in politics, and what kind of results they are likely to provide.

As Gargarella notes, the book does not engage in that latter type of discussion, which would have to draw not only from constitutional theory, but from political philosophy, democratic theory, sociology, political science. Of course, this is not to mean that in the book I do not defend particular arrangements. I nonetheless defend them from the perspective of constitutional theory: I seek to show that they are firmly grounded on generally accepted doctrines or conceptions. A key example, which Gargarella takes issue with, is the idea that I previously alerted to that "in the absence of any specific limits that can be derived from a referendum question", a constituent assembly would at the very least "be bound by two limits that are inherent in a commission to draft a constitution on behalf of the sovereign: the assembly has to actually draft a constitution *and* respect the identity of the constituent subject (i.e., it cannot transform itself into a sovereign entity)". Gargarella maintains that instead of defending that idea, I simply declare it. He also writes that he does not "understand why those two are the most fundamental limits faced by an assembly", and gives several interesting examples of situations in which an assembly may decide not to abide by those limits (either by coming short from writing a constitution or by going beyond its mandate, as the Philadelphia Convention did).

Here I think there is an actual disagreement, even if minor, between us. First, the reason I only identify the two limits mentioned above, is not because they are more fundamental or more important than other limits or because they outweigh any other type of consideration. It is, rather, because if one has a mandate to do something (e.g. write a constitution), at the very least one is required to do *that*. Moreover, in order for a mandate to work as a mandate, the individual or entity acting under it cannot have the power to replace, or change the identity of, the individual or entity issuing it. Second, I agree that there are instances in which a constituent assembly, for different reasons, goes beyond (or otherwise fail to comply) with the mandate it has been given, and that in hindsight, such acts would be more than justified. But that is true of anyone acting under a mandate. For example, even in a civil law context, an individual acting under a mandate can usually justify non-compliance in certain situations. The fact that those exceptional situations may exist (e.g. that the Philadelphia Convention did well in going beyond amending the Articles of Confederation) says little about whether an assembly should normally respect the conditions inherent in a general constitution-making mandate.

Gargarella also advances a different critique, one focused on my views about the potential role of the courts in enforcing the content of a constituent mandate.

Suppose that a constituent assembly convened for the specific purpose of drafting a federal constitution (a mandate that would be contained in a referendum question) decides to create a unitary state, and an individual or group challenges that action in a (already existing) constitutional court. According to the view defended in the book, the court would have a good justification to review that decision. As Gargarella notes, I maintain that such a review power should only be exercised in rare situations, and that sometimes the best course of action would be a judicial indication of the need of a new referendum. He nonetheless writes that he "would resist" recognising these judicial powers, "[p]articularly so considering the interpretative problems we have for 'deciphering' the messages of the constitution-making body", and the disagreement prevalent in contemporary societies. In light of what he calls the problem of "judicial motivation", he asks whether "given present, normal conditions", we should actually expect judges to act carefully, to be deferential to constitution-making bodies, as opposed to using those opportunities to "strengthen their powers, extend their functions, increase their influence, [and] fortify their possibilities to extort the other branches as to obtain more benefits and privileges".

These are important concerns, and the only possible answer I can give in this short essay is the following. First, given that constitution-making is, by itself, a rare occurrence (even in countries that have historically adopted multiple constitutions), the exercise of this judicial power would also be rare. Second, as suggested above, in the best scenario, an assembly's compliance with its mandate would be determined by the citizens themselves in a referendum, and not by a court. Third, the courts' review power in these instances would of a special nature: courts would be assessing a decision not in terms of its consistency with an entire constitution, but in terms of its consistency with the mandate contained in a single referendum question. Moreover, the court would ideally be operating in a context of heightened popular mobilisation (if not, there would be other problems present in the constitution-making process), which by itself could go a long way in influencing judicial behaviour. It is certainly possible to imagine cases where a court would nonetheless find a way to increase its power even in that type of context. Even though that risk is present, the alternative (at least in situations where an assembly's decisions are not subject to popular ratification) would to treat a constitution-making body as a sovereign entity.

Gargarella's final challenge (which in some ways overlap with Zoran Oklopcic's critique, discussed below) points to what appears to be a more general problem. He calls this the problem of "'historic abstinence' or, more precisely, the absence of political history in the book". He says that the book "misses to consider crucial information, and in a way that does not help/encourage us to pay attention to contextual data that would be crucial to understand the scope and limits of the legal analysis" presented. Gargarella is certainly right that, particularly when discussing

specific judgments, I only provide the details that I considered necessary to understand the facts of the case and the reasoning of the judges. This is of course not ideal, but in the context of this project, I don't think it is as problematic as Gargarella suggests. The key example he discusses illustrates why. Gargarella refers to a discussion of a decision of the Venezuelan Supreme Court of Justice, in which I argue that the court incorrectly treated the Constituent Assembly of 1999 as a sovereign entity. My discussion of that decision had a specific aim: to exemplify the ways in which some courts have treated sovereignty and constituent power as equivalent. Gargarella notes that my discussion of that case did not incorporate "some extremely important facts, which are crucial for understanding and evaluating the legal arguments at stake".

"During those days", he explains, the court "decided to self-dissolve because it could not stand the extreme abuses committed by the Constituent Assembly. In the words of the Chief Justice...Cecilia Sosa -who resigned in August 1999- 'The court simply committed suicide to avoid being assassinated. But the result is the same. It is dead'". To fully understand those statements, one would not only have to explain that the court continued to exist and issued multiple judgments after Justice Sosa's resignation, and that the decision was described as a 'self-dissolution' because, *in practice*, it meant that while the assembly was in place, it had a (sovereign) power superior to it. One would also have to explain the reasons behind the climate of extreme political polarisation present when the decision was rendered, as well as the nature (and possible justifications) of the actions of the assembly and of the reaction of some judges in the Supreme Court of Justice. Understanding that climate, however, is not necessary to see the ways in which the majority of the court failed to distinguish between constituent power and sovereignty. Gargarella says that given the political history behind the decision, the court's argument lacks "legal validity". Perhaps he means that it was made under duress or that it is simply a disguised exercise of political power. Be that as it may, it is the same kind of argument that courts in other jurisdictions have developed in support of their refusal to exercise the review powers discussed earlier.

VI. MAKING CONSTITUTIONAL THEORY

While Gargarella points toward what he sees as an absence of political history in the book, Oklopcic's questions the extent to which my examination of the language of constituent power through constitutional history can contribute to our understanding of its relationship with law or, more specifically, of its alleged juridical character. My focus will be on that challenge, even though Oklopcic's essay also contains insightful comments about the nature of *constituted* power and of the notion of constitutional change, as well as an interesting discussion of the place of

territoriality in discussions about constituent power.[23] For Oklopcic, "those who chose to resort to the language of constituent power throughout the course of history did so not because they suddenly discovered its eminently juridical character, but because treating it as eminently juridical seemed to be politically advantageous -in *concrete situations,* at a given place and time". Under this view, in describing constituent power as a juridical concept, I am ultimately making a political argument. That is to say, I am using the concept of constituent power as a rhetorical device, just as past political actors did; the adjective 'juridical' simply serves to accentuate that function. For example, it may be, that my ultimate aim is to provide additional support to a democratic conception of constitution-making, to make extra-constitutional (but democratic) changes more palatable to courts, or to criticise the "political pretensions" of liberal constitutionalism.

As he suggests, I am sympathetic to those aims. However, Oklopcic suspects that I would "still want to insist" in the "eminently juridical character of the notion of constituent power" put forward in the book. Oklopcic rightfully asks: how could this be? "How realistic is it to expect that a concept that emerges from a regionally contained, linguistically delineated and theoretically selective inquiry about eminently state-centred doctrines of constituent power ends up playing 'a *key* role in determinations of legal validity' outside of the contexts in which it emerged?" Moreover, in describing constituent power as a juridical concept, I may (unintentionally) contribute to the ambitions of some jurists to "a complete hegemony over the terms on which political matters turn into legal form". These are powerful ideas, and they are not easy to respond to because, in the end, they may be right. Let me begin by explaining what I mean by 'juridical'. As Oklopcic suggests, whatever 'juridical' means, it is clear that it means something different from (and perhaps it is the opposite of) 'political'. A juridical concept, as I understand it, is a concept that is not part (or not necessarily part) of positive law, but that is deployed by citizens, government officials, and judges to determine what counts as law or that otherwise has other legal implications.

In a public law context, there are many concepts like this: separation of powers, federalism, parliamentary sovereignty, and the rule of law (I imagine one could also find examples in private law). For instance, a court may determine that the actions of a Prime Minister are legally invalid because they would entail a change in an Act of Parliament (and that determination may rest on the concept of parliamentary sovereignty), or that a statute affecting the tenure of judges is invalid because it would violate the concept of the separation of powers. When I write that constituent power is a juridical concept, or that it should be understood as a juridical concept, I mean that like those other concepts, it can (and has) played a role in the making of determinations of legal validity. Proposed constitutional changes, for example, have

[23] For Oklopcic's approach to constituent power, see his *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press, 2018).

been identified as valid because they have been the result of what has been described as an exercise of 'constituent power'. It is true, as Oklopcic writes, that through history, political actors and constitutional theorists have resorted to the language of constituent power in concrete situations and for particular purposes (e.g. the legitimation of a new constitution, the limiting of parliament's law-making power). Moreover, it may be that in each of those contexts, 'constituent power' assumed different, or at least slightly different, meanings. That is, meanings that served the ultimate political goals of the relevant actors.

From this perspective it does look odd to call constituent power an "eminently juridical": it is clearly used to achieve *political* objectives, even if those objectives eventually assume a legal form. Note, however, that the same is true of other concepts that would fall under my understanding of 'juridical'. The concept of parliamentary sovereignty, for example, emerged as a result of a series of political struggles between Parliament and the Crown. Moreover, political actors have resorted (and still resort) to it to achieve specific political objectives (discussions about the Brexit referendum provide a recent and notable example), and there are still debates about the nature and limits of parliamentary sovereignty. However, none of that means that the concept of parliamentary sovereignty does not have legal implications, or that the fact that it has had legal implications is of minor importance. On the contrary, to embrace the concept of parliamentary sovereignty commits one to the idea that any rule that is contrary to an Act of Parliament (including a judge-made rule) is not law. Similarly, to embrace the concept of constituent power also commits one to certain views about what should count as (constitutional) law and about how constitutions should be made.

Whether the specific content of those commitments is a democratic one depends on one's understanding of constituent power. That is to say, seeing constituent power as a juridical concept is only desirable (from a democratic perspective) if one thinks that constituent power can only legitimately belong to the people. It is only then that its exercise would be seen as involving, participatory constitution-making processes, primary assemblies, constituent assemblies bound by imperatives mandates, and so on. In the book, I examined the ways in which the language of constituent power has been used in the past to argue of those kinds of political practices. While some of those practices (as Gargarella points out) were eventually left behind, they were left behind by democracy's opponents[24] and should perhaps be rescued by today's democrats. In this sense, what I tried to do was to highlight the historical connections between constituent power and those democratic practices and then show that, once accepted, those connections may have actual legal implications. For example, the idea that the bearer of the constituent power is the people can provide a strong basis for a legal argument

[24] E.g., by those who defended the constituent power of the nation as opposed to the constituent power of the people).

according to which a constitutional change so fundamental that it amounts to the creation of a new constitution should be considered invalid if adopted by a legislative super-majority, and that it should instead take place through a highly participatory procedure.

But note -and I think this is the critical point- that those juridical roles were always there. Think, for instance, of the anti-popular implications -in terms, for example, of who would be treated as a full citizen by law- of the idea of the constituent power of the nation, discussed in Chapter 5 of the book). The question, in that sense, is not whether constituent power should be understood as a 'juridical' concept or not, but about the content to be attributed to it. Accordingly, Oklopcic is certainly right that mine is a political intervention, that presenting constituent power as a 'juridical' concept ultimately serves the role of supporting certain political ideas about constitution-making and constitutional change. However, far from risking a colonisation of politics by lawyers, I think that what this illustrates is that constitutional thought (and the resulting constitutional law) is ultimately produced in a terrain of political struggle. It may be that rather than responding to Oklopcic's important challenge, I have simply restated it. As I noted at the beginning of this section, I think that Oklopcic is right that the concept that I am describing as 'juridical' (in light of what I meant by that term) is also, in a very fundamental sense, 'political'. Our disagreement, I believe, is that while I maintain some faith in constitutional theory's potential to move in the direction of radical democracy, Oklopcic worries that those attempts are, at best, destined to fail or, at worst, waiting to be co-opted or to turn counterproductive. And on that point, I am afraid he may be right as well.