

10-1-1991

The New Colombian Constitution: Democratic Victory or Popular Surrender?

William C. Banks

Edgar Alvarez

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Foreign Law Commons](#)

Recommended Citation

William C. Banks and Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. Miami Inter-Am. L. Rev. 39 (1991)

Available at: <http://repository.law.miami.edu/umialr/vol23/iss1/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

THE NEW COLOMBIAN CONSTITUTION: DEMOCRATIC VICTORY OR POPULAR SURRENDER?*

WILLIAM C. BANKS**

EDGAR ALVAREZ***

I. INTRODUCTION	40
II. A BRIEF HISTORY OF CONSTITUTIONAL REFORM IN COLOMBIA AND THE UNITED STATES	45
A. <i>From the Declaration of Independence to the U.S. Constitution</i>	45
B. <i>Adoption of the 1886 Constitution in Colombia</i>	48
III. THE LEGITIMACY OF EXTRA-LEGAL CONSTITUTIONAL CHANGE	61
A. <i>Some Parameters</i>	61
B. <i>Perspectives on Constitutional Legitimacy in the U.S.</i>	65
1. The 1787 Constitution	65
2. Two Centuries Under the Constitution	73
a. Constitutional Change by Judicial Interpretation	74
b. The Adoption of the Fourteenth Amendment	74
c. Constitutional Changes in the States	76
d. Conclusions	78
C. <i>Constitutional Legitimacy in Colombia</i>	79
1. The 1886 Constitution	79
2. The 1991 Constitution	80
a. The President's Power to Issue Decree 1926	80
b. Achieving Peace	81
c. The Decree and the People's Primary Constituent Power ...	82

* A spanish translation of this article is scheduled to appear in *Temas Jurídicos*, Colegio Mayor de Nuestra Señora del Rosario, Facultad de Jurisprudencia, Colombia (expected Winter 1992).

** Professor of Law, Syracuse University. B.A., University of Nebraska, 1971; J.D., University of Denver, 1974; M.S., University of Denver, 1982.

*** Doctor en Jurisprudencia, Universidad del Rosario, Bogotá, 1976; Master in Comparative Jurisprudence, New York University, 1986; J.D., Syracuse University, 1990.

d. Limitations on the Assembly's Powers	83
IV. COLOMBIA'S CONSTITUTIONAL FUTURE	85

I. INTRODUCTION

Nobel laureate Gabriel García Márquez's mythical Macondo is a town of fantasy where the surreal becomes quotidian. It is the land where people lose their memory and must resort to fortune-tellers who read their past in cards, where children of sinful unions are born with pig's tails, and those condemned to one-hundred years of solitude do not have a second opportunity on earth. Looking at recent events in Colombian politics, one wonders whether the life of the nation is following a script by its foremost writer. Where else, but in Macondo, could one find a defeated rebel, his former hostage, and the one who negotiated the hostage's release, all presiding over the assembly writing the country's new Constitution? Where else do the people entrust members of a terrorist group responsible for the killing of eleven Supreme Court Justices with the task of amending the Constitution in order to strengthen the judiciary?

Contradiction and conflict have dogged Colombia's life as a republic. One of its faces portrays stability. Until replaced this past July, Colombia's 1886 Constitution was, after that of the United States, the oldest uninterrupted constitution in the Americas. In a part of the world dominated by militarism and regular coups, Colombia has had mostly civil and elected governments and a commitment to constitutional republicanism. Yet, at the same time, wearing its profile of strife and turmoil, Colombia has suffered through eleven civil wars between 1811 and 1957, during which few people bothered to participate in the constitutional machinery for democracy. Since the end of the 1953-57 military dictatorship, the level of violence and conflict in society has only worsened. Guerrilla war, drug violence, and political division have risen to unprecedented levels.¹

From one perspective, constitution-makers in Colombia have responded to society's crises admirably. Constitutional revision has been ongoing and frequent—popularized among the nation's elite

1. See HERNANDO VALENCIA VILLA, *THE GRAMMAR OF WAR* 1-2 (1986); Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM L. REV. 1, 7 (1990).

to the level of indoor sport. So viewed, constitutional reform has effectively and unrelentingly moved Colombia down the path of democracy. From another perspective, and despite these appearances, constitutional reform has been only a game played among the political parties and the powerful to quell short-term squabbles among the players. Thus, "Colombia is a blockaded society, a nation besieged by republican rhetoric whose leadership seems to be incapable or unwilling or both of sharing the state power and opening the avenues of economic development and democratic modernization. . . ."² Though non-mainstream groups have not been formally fenced out of government and its offices, at least since 1974, the reality is the continuing dominance of those who have always been in power. Instead of improving Colombian society, constitutional reform has simply maintained the status quo and thus has denied many Colombians access to the government, its resources and opportunities.³ These charges, made in 1986 by Colombian constitutional scholar Hernando Valencia Villa, were partly prophetic. From a then pervasive guerrilla war, conditions only deteriorated over the next few years. In 1989 and 1990, however, the stalemate gave way to an unprecedented movement for fundamental reform of the Constitution, its institutions, and the legal system which it ordains.

While the President and his government were actively seeking to negotiate a political peace with guerrilla groups and fighting a bloody war against Medellín's drug leaders, a grassroots campaign persuaded the President to permit the voters to decide in a plebiscite whether they wished to consider fundamental constitutional reform. Through the convocation of an elected constituent assembly, the reformers wanted, among other things, to strengthen the judiciary and the criminal justice system. The people approved the concept in May of 1990. Strengthened by this approval, President César Gaviria and his government broadened negotiations with guerrilla and other political movements. As a result, the nascent constitutional reform process involved groups formerly excluded, even ones that until recently had operated as terrorist guerrillas. After the Supreme Court rejected a challenge to the constitutionality of the assembly and struck down limits which the President and political parties agreed to impose on its authority, an assembly was elected by the people in December 1990. A new constitution

2. VALENCIA, *supra* note 1, at 199-200.

3. *Id.* at 201-02.

was drafted and made effective by its own terms seven months later.⁴

In at least one important sense, the new Colombian Constitution is a departure from the constitutional tinkering of the past 105 years—it was illegally adopted, in violation of the amending clause of the 1886 Constitution. While its creation caused considerable controversy and bitterly divided the nation's Supreme Court, the new Constitution eventually emerged amid a wave of optimism.⁵

Those interested in constitutions and constitutionalism thus have an opportunity to examine a new case of fundamental constitutional reform, one which presents interesting and rich comparisons with the constitutional history of the United States. Like the new Colombian Constitution, the U.S. Constitution of 1787 was adopted in violation of its predecessor. Thus, as is the case now in Colombia, the U.S. could not rely on its existing constitution or any other rule in its legal system to validate a fundamental change in society. Now, as then, illegality is all but conceded. Like the United States did more than 200 years ago, Colombia must look outside its legal system for principles to justify this radical break with existing rules.⁶

Popular sovereignty legitimated the U.S. Constitution through the unique device of the constituent ratifying conventions in the states. Indeed, the U.S. constitution-makers popularized the theory of popular sovereignty to such an extent that the idea of the people's right to make and change their government without regard for the existing rules of change has been widely exported. However, popular sovereignty has taken on talismanic qualities here in the U.S., serving at times to obscure central antidemocratic characteristics of the Constitution.⁷ Along with the theory, the capacity of

4. The new Constitution became effective on July 5, 1991. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 380 [hereinafter COLOM. CONST.].

5. The peace that the new Constitution is expected to bring Colombians, however, may prove elusive. Only six days after the Constitution became effective, terrorists blew up a runway at the Caribbean resort of Cartagena and, in an unrelated incident, killed five policemen in San Martín de Loba. N.Y. TIMES, July 12, 1991, at A3. At the same time, attacks against oil installations and pipelines slowed oil exports, and an unsuccessful attempt to kidnap the Mayor of Cali (Colombia's third largest city) left two policemen dead. James Brooke, *2 Rebel Armies Create Chaos as Colombia Longs for Peace*, N.Y. TIMES, July 17, 1991, at A8.

6. See *infra* text accompanying notes 100-114.

7. See generally MICHAEL KAMMEN, *SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE* (1988).

popular sovereignty to serve as political slogan rather than real democratic ideal has also ventured abroad. Not surprisingly, the Colombian assembly delegates supported their reform with the claim that they were acting on behalf of the people. The new Constitution is, from this perspective, perhaps illegal but nonetheless valid.

The Colombian venture presents risks. Part of the political price of a broad-based reform movement with an unusually representative constituent assembly is constitutional provisions that are perhaps not in the best long-term interests of Colombia—a ban on the extradition of Colombians being the foremost example.⁸ The process of selecting the assembly itself was not entirely immune from questionable politics. Three of the delegates, members of formerly terrorist organizations, were named by the government prior to the elections held for the remaining seventy members. In addition, concessions guaranteeing guerrilla groups power in a new government could only worsen the violence if ongoing political accommodation is not maintained.⁹ It may be, however, that Colombia had no choice. Colombians have had enough experience to realize that constitutional reform is not a panacea, that changes in the written law do not necessarily produce social changes. This time, however, the nation was disintegrating, and strong measures were essential. The seriousness of the crisis precipitated deeper reform and a more democratic process than at any prior time in Colombian history.

The test of the validity of the new Colombian Constitution is a test of time. Constitutional legitimacy is determined by the peoples' acceptance of the Constitution, the fit between the new set of rules and society.¹⁰ If the new charter is widely regarded as more just, or even as necessary to solve practical problems in Colombia, over time it will be regarded by the people as legitimate. Until now, Colombian constitutional reform has been as much an effort to avoid societal problems as it has been a means to solve them. The violence and social division which grew out of inattention to basic needs apparently caused Colombian leaders to recognize that

8. COLOM. CONST. art. 35.

9. See, e.g., COLOM. CONST. transitory art. 12 (authorizing the President to select, in his discretion, as many congressmen as he may determine to be appropriate in representation of demobilized guerrilla movements; congressmen so appointed need not meet the qualifications applicable to those popularly elected).

10. See *infra* text accompanying notes 100-114.

a societal collapse would be inevitable without a genuine commitment to a more open, democratic, and responsive government.

Part Two of this Article reviews the parallel histories of constitution-making in Colombia and the United States. The comparison reveals a number of similarities, the most important of which is the illegality of the pathbreaking charters in each respective society. Part Three assesses the legitimacy—both in Colombia and the United States—of constitutional reform outside the amending clauses. Section A of Part Three begins by reviewing the parameters of the constitutionalist's criteria for constitutional legitimacy. Section B then traces the problem of legitimacy through two periods of constitutional crisis in the United States: the making of the federal constitution and the enactment and ratification of the Fourteenth Amendment. Further, Section B briefly reviews selected instances of state constitution-making and the states' legacy of making changes outside the amending clause. Section B concludes by reminding the reader of the powerful role played by American federal judges who, through the act of constitutional interpretation, may effectively change the Constitution outside the formal rules of change. Section B's lesson is that popular sovereignty, whether mythical or real, has legitimized much "unlawful" constitutional change in the U.S., and that the simple and brief federal constitution has endured for so long with relatively few amendments, in part because the courts have construed the Constitution to fit the times.

Section C assesses the legitimacy of constitutional reform in Colombia. The starting point is the 1886 Constitution, itself adopted under conditions of dubious legality. From there, the Article examines the making of the 1991 Constitution, and carefully analyzes the October 1990 decision of the Colombian Supreme Court which, by a vote of fourteen to twelve, supported the right of the people to have a constitutional assembly with unrestricted authority to change the 1886 Constitution. The majority reached a result consistent with democratic principles, although its rationale is not altogether lucid. In the end, the majority recognized that the Court's role is only to assure the procedural propriety of constitutional reform undertaken within the Constitution's rules. Because the process which produced the new Constitution stemmed from the people's desire to change the 1886 Constitution outside its amendment prescriptions, the Court properly concluded that it could not impose the old constitution's legal norms to determine

the validity of the new one.

Part Four concludes that it is too soon to determine the legitimacy of Colombia's new Constitution. The political fact of its existence is stunning, given the relative political and social chaos of the country only months before its adoption, and the abyss of violence into which the nation had fallen. The deals erected to make this reform possible may prove to be either acts of brave genius, or of bold stupidity. Time will tell. What the law and lawyers can say now is that there is ample precedent to support extra-legal constitutional change in Colombia. Whether the slogan of popular sovereignty will be sufficient to lend momentum to popular acceptance of the Constitution also remains to be seen. The real test of legitimacy, the actual acceptance by Colombians, will depend on the new Constitution's ability to facilitate a more open, democratic, and progressive government.

II. A BRIEF HISTORY OF CONSTITUTIONAL REFORM IN COLOMBIA AND THE UNITED STATES

A. From the Declaration of Independence to the U.S. Constitution

In 1776, thirteen formerly British colonies established their own governments after declaring independence from a sovereign they found destructive of their "inalienable Rights" of "Life, Liberty and the pursuit of Happiness."¹¹ While most of the new states were busy drafting their own constitutions between 1776 and 1778,¹² the Continental Congress spent two years drafting and approving the first national Constitution, the Articles of Confederation, which in 1777 proposed to the states "The United States of America."¹³

The Articles of Confederation were not ratified by all thirteen states until 1781, although the Congress had been following their modest dictates since the Declaration of Independence.¹⁴ The Articles created an especially weak and rudimentary union. The only

11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

12. DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 15 (1990).

13. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 239 (1940).

14. BERNARD BAILYN, DAVID B. DAVIS, DAVID H. DONALD, JOHN L. THOMAS, ROBERT H. WIEBE & GORDON S. WOOD, THE GREAT REPUBLIC 300-04 (1977).

central organ was a Congress, and the Congress was really a creature of the states. Each state had one vote, and delegates were chosen and financed and could be recalled by the states each in their own fashion. Moreover, the important congressional powers could not be exercised unless nine of thirteen states assented.¹⁵ No mechanism existed to enforce national decisions on the states other than the admonition in the Articles that "every State shall abide" by congressional decisions.¹⁶ States could and did behave as if compliance with the Constitution was optional.¹⁷ Finally, the Articles could only be amended with the consent of all thirteen states.¹⁸ When drastic measures were eventually recommended to strengthen national economic powers under the Articles, one recalcitrant state could and did routinely block the change.¹⁹

Thus, the new national government lacked power to coerce the states or the people, and its inability to raise funds greatly hindered the revolutionary war effort.²⁰ After the war, foreign and domestic debts could not be paid, while new foreign and domestic trade restrictions threatened the very existence of the Confederation.²¹ Many state governments were corrupt and inefficient, and some states began to take advantage of convenient ports or cheap goods at the expense of neighboring states. When trade wars developed, Congress was powerless to intervene.²²

Eventually, important trading states sought to make agreements to facilitate commerce. Although the Articles specified that any trade agreements must be approved by Congress,²³ some states proved willing to participate in a general trade convention without congressional authorization or ratification. At Annapolis, Maryland, in 1786, delegates of five states met, but only for three days.²⁴ They concluded that action on trade problems was "inadvisable" in light of "so partial and defective a representation."²⁵ Instead, moved by the need to reach a broad interstate agreement on trade, the delegates at Annapolis reported to the legislatures of their

15. ARTICLES OF CONFEDERATION, art. X (1781).

16. *Id.* art. XIII.

17. BAILYN, *supra* note 14, at 325-28.

18. ARTICLES OF CONFEDERATION, art. XIII (1781).

19. FARBER & SHERRY, *supra* note 12, at 24-25.

20. *Id.*

21. *Id.*

22. BAILYN, *supra* note 14, at 325-29.

23. ARTICLES OF CONFEDERATION, art. VI (1781).

24. FARBER & SHERRY, *supra* note 12, at 25-26.

25. *Id.* at 26.

states a broader agenda. Their report noted "important defects in the System of the Federal Government" which were "of a nature so serious as . . . to render the situation of the United States delicate and critical" ²⁶ They called for a meeting in Philadelphia in May of 1787 of delegates of all the states "to take into Consideration the situation of the United States to devise such further Provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union." ²⁷ Their resolution called for the Philadelphia product to be reported to Congress, and, after congressional agreement, for the changes to be sent for ratification in every state (as contemplated by the amending clause of the Articles).

After some delay, Congress adopted a resolution in favor of the Philadelphia Convention in terms echoing the Annapolis resolution, except for the narrowing specification that the Convention was "for the sole and express purpose of revising the Articles of Confederation." ²⁸ Before the date set for the Philadelphia meeting, all of the states except New Hampshire and Rhode Island had followed Virginia's lead by having the state legislature appoint a delegation to Philadelphia. The New Hampshire delegation arrived soon after the Convention began. Rhode Island refused to participate. ²⁹

One charge frequently leveled against the 1787 convention is that the delegates were motivated simply by self-interest and protection of property, theirs and that of others of their aristocratic class. ³⁰ The delegates (merchants, planters, bankers, and lawyers) were truly the elite. They wielded great power in society due to family ties, service in the military and in Congress, and as governors, in diplomacy and administration. In addition, their values were not truly democratic. In fact, the delegates were openly hostile to popular state legislatures and other democratic features of the Articles. Their goals were to restrain democratic power; install representative devices and republican government; and to insert checks and balances in government, largely to protect their vested

26. *Id.*

27. *Id.*

28. 3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 13-14 (1911).

29. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 10-11 (Yale Press ed. 1913).

30. See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (MacMillan Press ed. 1929).

interests in property and power. However, their elitism should be seen in light of the larger goal of erecting a viable national government on what was at the time weak foundations. The partisan, sectional, and faction-ridden politics of the time held little hope for a new nation; it was widely believed that the diverse society emerging in the Confederation would lead to popular upheaval or monarchy. Only by creating a strong national government could these tendencies be defeated or at least checked.³¹

The most important events of the years 1787 to 1789 are well known. Far from "revising" the Articles, the Philadelphia delegates proposed a new structure of government, to be ratified by specially elected state conventions. When New Hampshire became the ninth ratifier in June of 1788, the Constitution became effective by its own terms. By the spring of 1789, the new government was in place subordinate to the new Constitution.³²

B. Adoption of the 1886 Constitution in Colombia

After gaining independence from Spain, Colombia, Ecuador, Panamá, and Venezuela became a single state: La Gran Colombia.³³ Besides Bolívar's prestige and influence, there was little to hold together his dream of a unified Latin America that would counter-balance the power of the United States to the North.³⁴ During its brief existence, La Gran Colombia adopted at least two constitutions, respectively in 1821 and 1830.³⁵ The former created a strong central government and regarded territorial divisions (departments and provinces) as merely administrative units, totally dependent on Bogotá. The latter was a belated attempt to answer the demands for regional autonomy that ultimately led to the separation of Venezuela and Ecuador. Following the secession of these two countries, Colombia became La Nueva Granada and had be-

31. FARBER & SHERRY, *supra* note 12, at 24-26; Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COM. 57, 71 (1989).

32. See JENSEN, *supra* note 13, at 102-39.

33. See generally 10 LUIS MARTINEZ DELGADO, ACADEMIA COLOMBIANA DE HISTORIA, HISTORIA EXTENSA DE COLOMBIA (1970); ALFREDO VÁZQUEZ CARRIZOSA, El Poder Presidencial en Colombia (Enrique Dobry ed. 1979) [hereinafter VÁZQUEZ]. See also VALENCIA, *supra* note 1, at 112-70.

34. See VÁZQUEZ, *supra* note 33, at 41.

35. Some argue that the preparatory document of Angosturas (December 17, 1819), and Bolívar's decree assuming dictatorial powers (August 27, 1828) can both be regarded as constitutions. Under this view, the number of constitutions during the existence of La Gran Colombia was four. See VALENCIA, *supra* note 1, at 112.

tween 1830 and 1853 three constitutions (1832, 1843, 1853)³⁶ all of which preserved a centralist form of government, although with increased concessions to the provinces. The process by which territorial entities increased their autonomy at the expense of Bogotá's control over local affairs gained momentum with the adoption of the 1858 Constitution that, once again, renamed the country. The new Confederación Granadina was followed, in 1863, by the United States of Colombia.³⁷

While a few of the constitutional changes chronicled so far were achieved through peaceful mechanisms, most of them came in connection with civil wars. Although only once in Colombian history has a civil war led rebels to the Presidential Palace,³⁸ it has become recurrent practice to blame civil wars on the existing constitution and then change it.

Finally, in 1886, Colombia adopted the Constitution that would provide the institutional framework of the country for the next hundred years. The transition to this more centralist Constitution, however, did not conform to the rigorous requirements of Article 92 of the 1863 Constitution.³⁹ Article 92, not unlike Article XIII of the Articles of Confederation, required unanimous ratification of amendments by the Senate of Plenipotentiaries in which each State had one vote. Also parallel to the early U.S. experience are President Núñez's attempts to dismantle the federal system and restore central authority through the amending process. These attempts ran aground because of the ratification rule.⁴⁰ Then, in 1885, what began as an internal conflict over the legitimacy of the

36. Again, some argue that the *Ley Fundamental de La Nueva Granada* (November 17, 1831) was the first constitution of this period. See VALENCIA, *supra* note 1, at 112.

37. Name adopted by the 1863 Constitution to identify the country and reflect its federal structure.

38. Mosquera's rebellion in 1861. See CARLOS RESTREPO PIEDRAHITA, 25 AÑOS DE EVOLUCIÓN POLÍTICO CONSTITUCIONAL, 1950-1975, at xxi (Foreword by Alfonso López Michelsen) (1976) [hereinafter 25 AÑOS].

39. The Colombian Constitution provided:

This Constitution can only be amended . . . with the following formalities:

- 1) That the reform be requested by a majority of State Legislatures.
- 2) That the reform be debated and approved by both Houses. . .
- 3) That the reform be ratified by unanimous vote of the Senate of Plenipotentiaries in which each State has one vote.

It can also be amended in a convention called by Congress for that purpose at the request of all State legislatures, and composed of an equal number of delegates for each State.

CONSTITUCIÓN DE LOS ESTADOS UNIDOS DE COLOMBIA art. 92 (1863).

40. See VALENCIA, *supra* note 1, at 162.

State Government in Santander, evolved into a rebellion against the Federal Government. On June 17, in the battle of La Humereda, the rebels inflicted a severe defeat to the loyalists. Ironically, the steamer *Maria Emma*, which carried most of the rebels' munitions and supplies, accidentally caught fire and sank after the battle was over, carrying with it the rebels' hopes for success. When the news reached Bogotá, President Núñez took advantage of the sudden turn of events. In a speech from the presidential house's balcony, Núñez laconically announced that "the Constitution of Rionegro⁴¹ has ceased to exist."⁴² On September 10, Núñez issued a decree inviting the governors of the nine states to appoint two delegates each, in order to discuss the possibility of a new constitution. The eighteen members of the National Council of Delegates drafted the Agreement Regarding the Bases of Constitutional Reform, a document that was subsequently approved by 619 of 633 municipal councils. Article I of the Agreement conferred upon the National Council of Delegates the status of constitutional Convention. The Convention adopted the 1886 Constitution which, upon its signature by the President, became effective in August of that year. The electorate, however, had no role in the process, not even indirectly through representation in the local legislatures that approved the Bases, because "the municipal councils only represented the President's will."⁴³

Under the new Constitution, the United States of Colombia ceased to exist. The balance between national and local governments was achieved through a model defined as "administrative decentralization and political centralization." The former states became departments,⁴⁴ all legislative powers were vested in the national Congress;⁴⁵ the judicial power was organized in a hierarchical structure with the Supreme Court at its summit;⁴⁶ and the President was vested with all executive powers.⁴⁷ At the local level, the executive power in each department was to be exercised by governors⁴⁸ freely appointed and removed by the President. Gover-

41. Name given to the 1863 Constitution, after the city where it was adopted.

42. See VÁZQUEZ, *supra* note 33, at 15.

43. 1 CARLOS E. RESTREPO, *ORIENTACIÓN REPUBLICANA* 110 (1972), quoted in 1 DIEGO URIBE, *CONSTITUCIONES DE COLOMBIA* 182 (1977).

44. COLOM. CONST. OF 1886, art. 5.

45. *Id.* art. 76.

46. *Id.* art. 136.

47. *Id.* art. 120.

48. *Id.* art. 181.

nors, in turn, would appoint and remove mayors.⁴⁹

Between 1886 and 1957, Colombia underwent three successive periods of radically partisan governments. The Conservative Party clung to power until 1930, and in the process successfully fought two more civil wars against the Liberal Party. In 1930, the economic depression and a split of conservative votes between two candidates opened the door for the Liberals' return to the Presidency. After four consecutive periods of liberal governments, Conservative Mariano Ospina assumed the Presidency.

On April 9, 1948, the assassination of Jorge Eliécer Gaitán (one of the defeated Liberal candidates in the 1945 election) triggered the violent popular uprising known as El Bogotazo. Reacting to the rebellion, the government unleashed a campaign of repression against Liberals that grew to a state of undeclared civil war known as La Violencia. On November 9, 1949, when the House of Representatives announced its intention to impeach the President, Ospina responded by closing Congress and dispatching the army to prevent its members from convening. Amid the prevailing climate of repression, the Liberal Party refused to take part in the 1949 election and a Conservative (Laureano Gómez) was elected for the 1950-54 presidential period.

The new President promptly created an all-Conservative Congress that enacted Legislative Act 1 of 1952, which convened a constitutional assembly to reform the 1886 Constitution. None of the sixty-two members of this assembly was to be popularly elected. Meanwhile, the civil war had reached degrees of violence never before known in the country's history. On June 13, 1953, a military coup under the direction of Gustavo Rojas toppled the government and promised to restore peace. The dictatorship, initially welcomed as a necessary short term measure to rescue the country from chaos and lawlessness, soon settled into a permanent military government. Taking advantage of the constitutional assembly convened by Gómez, Rojas had the assembly "legitimize" his taking of the Government,⁵⁰ and appoint him President for the 1954-58 period. In 1957, when Rojas was maneuvering to have himself appointed for a third period, Gómez and Alberto Lleras (leader of the

49. *Id.* art. 194. Legislative Act 1 of 1986 eliminated governors' power to appoint mayors, and made the latter elective officers. ACTO LEGISLATIVO No. 1 DE 1986 (Colom.) (In Colombian constitutional law, amendments to the constitution are called "Legislative Acts").

50. ACTO LEGISLATIVO No. 1 DE 1953 (Colom.).

Liberal Party) met in Spain and agreed to cooperate to secure a return to constitutionalism. Overcoming old political rivalry, the two leaders agreed on the creation of the National Front, a system in which, during the next sixteen years, public offices would be equally split between Liberals and Conservatives. According to the agreement, the constitutional amendment needed to implement the National Front "requires popular approval. A new constitutional assembly would be seen with utmost alarm. For this reason, we are of the opinion that the most expeditious and effective proceeding, and also the most democratic . . . is that the amendments be subject to popular approval or rejection through a plebiscite."⁵¹ Ironically, and notwithstanding the democratic plea of the 1957 agreement, the 1886 Constitution did not provide for amendment by plebiscite.

On May 10, 1957, faced with overwhelming but peaceful civilian opposition, Rojas relinquished power, left the country, and appointed a military junta to govern. The junta, acting in coordination with the two political parties, held the December 1, 1957, plebiscite in which the people declared that the Constitution of the country was that of 1886 subject to both the amendments adopted by 1947 and those adopted through the plebiscite. Among the latter, Article 13 provided: "Henceforth, constitutional reforms can only be made by Congress, in the manner established by Article 218 of the Constitution,"⁵² which in turn provides that constitutional amendments can only be introduced by Legislative Acts passed by Congress in two consecutive sessions.

After 1957, several amendments were adopted. Two of them never became effective: Legislative Act 2 of 1977 and Legislative Act 1 of 1979. By the former, Congress authorized the creation of a constitutional assembly that would revise and amend the Constitution without being subject to the constraints of Article 218. Prior to 1978, the Colombian Supreme Court had held that its duty under Article 214 to "guard the integrity of the Constitution"⁵³ did not include the judicial review of constitutional amendments because they were not mentioned in the list of enactments subject to the Court's scrutiny.⁵⁴ In its decision of May 5, 1978,⁵⁵ the Court

51. 25 AÑOS, *supra* note 38, at 54.

52. COLOM. CONST. art. 13 (1886).

53. COLOM. CONST. OF 1886, art. 214.

54. Decision of Oct. 28, 1955, Corte Suprema, 81 Gaceta Judicial [G.J.] 362 (Colom.); Decision of Nov. 28, 1957, 84 G.J. 430 (Colom.).

held the proposed assembly unconstitutional, concluding that to guard the integrity of the Constitution necessarily implied protecting the integrity of Article 218.⁵⁶ Relying on Article 2 of the Constitution,⁵⁷ the Court distinguished between primary and secondary (or derivative) constituent powers.⁵⁸ Only the people have primary or "sovereign" powers.⁵⁹ Congress' powers are merely derivative and, therefore, must be exercised in conformity with the terms of the grant.⁶⁰

On November 3, 1981, the Court invalidated Legislative Act 1 of 1979.⁶¹ Although the actual holding was narrow, striking the Act for procedural defects in its adoption,⁶² the Court intimated in dictum that in amending the Constitution, Congress may be subject to more than merely procedural constraints. The Court said that, at least theoretically, constitutional amendments are unconstitutional whenever they offend "fundamental constitutional values that are, nonetheless, cast in none of the Constitution's clauses . . . and that touch upon the constitution's spirit or telos."⁶³

The emergence of Supreme Court review of constitutional amendments made the next important event inevitable: a challenge to the validity of the amendments adopted by the 1957 plebiscite. In spite of the broad dictum in the 1981 decision, the opinions striking down Legislative Act 2 of 1977 and Legislative Act 1 of 1979 relied on what the Court perceived as procedural defects in the amendment attempts. Since the plebiscitary procedure followed in 1957 was not listed in the Constitution as a means of amendment, would the Supreme Court hold those amendments unconstitutional? In its decision of June 9, 1987,⁶⁴ the Court held

55. Decision of May 25, 1978, Corte Suprema, 107 Foro Colombiano 408 (Colom.).

56. *Id.* at 424.

57. "Sovereignty essentially and exclusively resides with the nation, and from it all public powers emanate which shall be exercised in conformity with this constitution." COLOM. CONST. OF 1886, art. 2.

58. Decision of May 5, 1978, Corte Suprema, 107 Foro Colombiano 422 (Colom.).

59. *Id.*

60. *Id.* at 423.

61. Decision of Nov. 3, 1981, Corte Suprema, 144 G.J. 358 (Colom.).

62. The opinion offers two reasons for the decision: (1) that the integration of the House's Committee where the project of amendment was first approved was made in violation of Article 172 of the Constitution which guarantees representation to minority political groups, (2) that the different projects had been merged in violation of regulations concerning Congress' discharge of legislative duties. 144 G.J. at 391, 401.

63. *Id.* at 388.

64. Decision of June 9, 1987, Corte Suprema, 16 JURISPRUDENCIA Y DOCTRINA [J.& D.] 807 (Colom.).

that it lacked jurisdiction to pass on the constitutionality of acts of "political character"⁶⁵ and that, in general, it would not review the exercise of the primary constituent power.⁶⁶ Declining to entertain the challenges, the Court declared that "when the people, in exercise of their sovereign and inalienable power, decide to pronounce with regard to the constitutional statute that is to govern their destiny, they are not, nor could they be, subject to the juristic normativeness that precedes their decision."⁶⁷

While these developments were taking place, the country was slowly but steadily slipping into lawlessness. At least two forces combined to this end. First, leftist guerrilla movements controlled in the 1960s but never completely eradicated, acquired renewed strength. Prominent among them was the M-19 group, born amid allegations that former dictator Rojas's defeat in his 1970 presidential bid was the result of the government's fraud.⁶⁸ Second, the rise of Colombia to its present position as world leader in the supply of cocaine bred a new class of criminals that the country's judiciary was neither prepared nor equipped to combat. In 1984, hired guns assassinated Rodrigo Lara, the Minister of Justice who had launched an aggressive campaign to denounce and bring to justice drug traffickers and the politicians who profited from the trade. Lara's death was only the first in a long list of assassinations that includes an Attorney General, twelve Justices of the Supreme Court, hundreds of judges, lawyers and journalists, as well as thousands of anonymous peasants caught in the middle of the war between army and guerrillas.⁶⁹ Confronted with corruption, fear, violence, and inherently weakened by the inquisitorial system in which judges investigate crimes, the judiciary faltered.

In early 1988, the editorial columns of the Bogotá newspaper *El Espectador* (whose editor in chief was also murdered by hired guns linked to drug kingpins) recalled the momentous circumstances leading to the 1957 plebiscite and suggested that the evils caused by drug trafficking and guerrilla warfare called for a similar

65. *Id.* at 808.

66. *Id.*

67. *Id.* at 807.

68. The acronym M-19 stands for Movement of April 19, the day on which the allegedly tainted elections were held. On the circumstances surrounding the 1970 presidential election see 3 JUDITH TALBOT CAMPOS & JOHN F. McCAMANT, *CLEAVAGE SHIFT IN COLOMBIA: ANALYSIS OF THE 1970 ELECTIONS* (Harry Eckstein & Ted Robert Gurr eds. 1972).

69. Twig Mowatt, *When a Hit Man Wants Out, They Take Him In*, N.Y. TIMES, Aug. 14, 1991, at A4.

demonstration of popular will to amend the Constitution, primarily to strengthen the judiciary. President Barco endorsed the idea. On February 20, 1988, partisan negotiations reached an agreement calling for the creation of a Commission of Institutional Readjustment that was to draft constitutional amendments that would then be submitted to a popular referendum. This agreement never became effective, however, because the Council of State, empowered by the Constitution⁷⁰ to review certain executive actions, suspended the process.⁷¹

After the Council of State's decision, and in conformity with Article 218, the Government decided to submit to Congress a proposal for sweeping constitutional amendments. The 1988 session of Congress approved the Government's project with significant modifications. In 1989, when the amendments were being debated anew according to Article 218, the House of Representatives, responding to public demands by drug traffickers, included in the proposed new Constitution an absolute ban on the extradition of Colombians. Faced with this turn of events, President Barco, who had launched an aggressive law-enforcement campaign that relied heavily on extradition to the U.S. of drug traffickers indicted in American courts, decided to withdraw the project.

The House of Representative's handling of the proposed 1989 amendment dampened hopes that the established political institutions would be up to the task of constitutional change. It was time for the people to act. Early in January, 1990, students of the Law School at the prestigious El Rosario University took to the streets seeking to build popular support for the idea of constitutional reform through a popularly elected assembly. The popular movement was successful. For the second time in his presidency, Barco was willing to entertain the suggestion of a process for constitu-

70. COLOM. CONST. OF 1886, art. 141.

71. Decision of May 12, 1988, Corte Suprema, 17 J. & D. 593 (Colom.). The Council of State, in the exercise of its administrative jurisdiction, reviews actions falling within the category of an "administrative act." Although a full explanation of that concept is beyond the scope of this paper, it suffices to say that the agreement was found to be an administrative act within the Council's jurisdiction. Through it, President Barco exercised his Executive powers to convene an extraordinary session of Congress to choose the members of the Commission of Institutional Readjustment from lists prepared by the President. According to Article 153 of the Administrative Code, the Council of State may suspend administrative acts that are preparatory of a definitive act that would be unconstitutional and preclude the Executive from implementing the final act. The decision characterizes the agreement as preparatory of a definitive act that would be unconstitutional (a constitutional amendment adopted without complying with Article 218 of the Constitution) and suspends it.

tional amendment outside formal existing rules. In light of his previous frustrated attempt, Barco must have realized that overwhelming popular support had to be shown for the idea to succeed.

Taking advantage of the upcoming May 27, 1990 presidential election, Barco issued Decree 927 which directed the electoral authorities to tally, together with the votes cast for President, the voters' answers to the following question: "In order to strengthen participatory democracy, do you vote for the convocation of a constitutional assembly representative of all social, political, and regional forces of the Nation, democratically and popularly elected to reform Colombia's Political Constitution?"

On May 25, 1990, the Supreme Court upheld the Decree,⁷² rejecting, among others, charges raised by the country's Attorney General.⁷³ Carefully reading the language of Decree 927, the Court concluded that it merely assigned to certain public officers the clerical task of counting votes.⁷⁴ For the Court, the Decree was not a constitutional reform, nor did it call for a plebiscite or a referendum.⁷⁵ Denying that Decree 927 had any constitutional effect, the Court asserted that it could not pass on the validity of the convocation of a constitutional assembly because such act "has not occurred, *nor can it be said that it will occur with the affirmative vote of a majority of the population.*"⁷⁶

One of the arguments raised by the Attorney General against the constitutionality of Decree 927 was that it did not constitute a proper exercise of presidential powers. According to Article 121 of the Constitution, the President has, in case of domestic strife, authority to exercise, "in addition to those powers granted by domestic law, such others as the Constitution grants for times of war or of disturbance of the public order, and those which, in accordance with the Law of Nations exist in time of war."⁷⁷ This provision,

72. Decision of May 25, 1990, Corte Suprema, 19 J. & D. 542 (Colom.).

73. See *infra* notes 76-77 and accompanying text. In Colombia the Attorney General is elected by Congress, and is not a member of the President's Cabinet.

74. 19 J. & D. at 546.

75. *Id.*

76. *Id.* (emphasis added).

77. It has always been understood in Colombian constitutional law, that among the powers the President may exercise under Article 121 is that of issuing decrees that have the force of laws. Although the Constitution does not grant this power expressly, it provides that the Executive can temporarily suspend the applicability of some acts of Congress. A pre-condition to the exercise of these legislative powers is that the President issue a decree declaring that the "public order is disturbed and that the whole or a part of the country is in a State of Siege." COLOM. CONST. OF 1886, art. 121. In the instant case, this was done by

according to the Attorney General, allows the President only the authority to take measures aimed at "preserving the institutional order, not at changing it, since [the latter] would amount to accepting the reasons of those who dissent from the constitutional regime."⁷⁸ Dismissing the charge, the Court recalled recent outbursts of criminal activity, "attributable not only to guerrilla movements and the narco-traffic, but to other forms of organized crime."⁷⁹ In light of this reality, the Court added:

[It is clear that the institutions] as now designed, do not suffice to confront the diverse forms of violence they must face. It is not that the institutions have become, per se, a destabilizing factor, but that they have lost all effectiveness and have ended up being inadequate; they fall short when it comes to fighting forms of intimidation and attack not even imagined a few years ago.⁸⁰

Although the Court made no mention of its prior decisions striking down Legislative Acts 2 of 1977 and 1 of 1979, it is clear that Decree 927 was radically different from those frustrated attempts to amend the Constitution. Although innocuous in nature, Decree 927 was a masterful display of ingenuity. While leaving the Constitution untouched, it managed to create a political engine for change that would be hard to ignore.

Eighty-eight percent of the voters in the presidential election of May 27, 1990 answered the President's question in the affirmative.⁸¹ Despite this significant show of popular support, President Barco decided to leave the implementation of the process to the incoming government of President César Gaviria. On August 2, 1990, the President-elect and the leaders of those political movements whose candidates received in the aggregate ninety-six percent of the votes cast on May 27, signed a political agreement purporting to establish the rules to be followed in amending the 1886 Constitution.⁸² The most significant points of this agreement

Decree 1038 of 1984. All decrees issued under Article 121 are subject to automatic judicial review by the Supreme Court. *Id.*

78. Decision of May 25, 1990, Corte Suprema, 19 J. & D. 543 (Colom.).

79. *Id.* at 545.

80. *Id.*

81. See text preceding *supra* note 72. The dissenters, looking at the high rate of abstentionism among the electorate, observed that the result was not endorsed by a majority of the citizens entitled to vote. Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. 985, 986 (Colom.), citing Presidential Decree 1926 of 1990.

82. Besides the triumphant Liberal Party, the other signatories of the agreement were the National Salvation Movement (a dissenting branch of the Conservative Party, led by

included:

1. The President would issue a decree convoking the electorate to decide whether to convene a constitutional assembly. If the vote was in the affirmative, the electorate would then elect its members and determine the limits of their powers.

2. The assembly could not revise parts of the Constitution not listed in the agreement, "and, particularly, it could not modify the period of those [officials] elected [in 1990], or matters that affect obligations of the Colombian State by virtue of international treaties, or the Republican System of Government." The second of these restrictions precluded the assembly from tampering with the U.S.-Colombia 1979 Extradition Treaty,⁸³ and thus reaffirmed Barco's determination to disassociate the constitutional reforms from the drug traffickers' demands for a ban on extradition.

3. The assembly would otherwise have powers to modify constitutional provisions dealing with a long list of subjects that the agreement spelled out in great detail and that covered practically every imaginable aspect of the country's institutional framework. Consistent with the above mentioned restrictions, the extended enumeration of topics that the assembly could consider did not include any reference to the extradition of Colombians.

4. There would be seventy members in the assembly, all elected by the people on December 9, 1990. In addition, the government could appoint two or more in representation of guerrilla organizations that were, at that time, demobilized and negotiating the return of their members to civil life.

5. With the exception of the representatives of guerrilla organizations above-mentioned, nobody being tried for criminal acts, or requested for extradition, or serving time for a prior conviction, could be elected to the assembly.

6. In the first ten days of meetings, the assembly would adopt procedural regulations to be followed in the adoption of the amendments.

7. The final product of the assembly's deliberations would be

Alvaro Gómez, and recipient of the second highest number of votes in the presidential election), the M-19 Democratic Alliance Movement (name adopted by the former M-19 guerrilla group after its metamorphosis into a political party), and the Conservative Party.

83. Treaty of Sept. 14, 1979, entered in force March 4, 1982, not published in TIAS. Reprinted in 1 KAVASS & SPRUDZ, EXTRADITION LAWS AND TREATIES OF THE U.S. 140.1 (1989).

subject to judicial review by the Supreme Court for the sole purpose of verifying that the amendments did not invade subjects beyond the assembly's competence and that they were adopted in compliance with the internal rules of the assembly.

On August 24, 1990, President Gaviria issued Decree 1926,⁸⁴ convoking the electorate in accordance with the terms of the agreement of August 2. In addition, Decree 1926 announced rules concerning the nomination of candidates to the assembly, the judicial review of the results of the election, and other related matters. Pursuant to Article 121 of the Constitution, the Supreme Court undertook its obligatory constitutional review of Decree 1926 and on October 9, 1990 upheld it by the narrowest possible margin.⁸⁵ Fourteen justices found most of the Decree consistent with the Constitution about to be amended, while twelve others would have held it unconstitutional. The most significant aspect of the decision, however, is that the majority struck down all limitations on the assembly's powers which were listed in the political agreement of August 2nd and later incorporated in Decree 1926. For all practical purposes, after the Court's decision, the assembly was to have the primary sovereign power.

Apparently conceding that the proposed mechanism to amend the Constitution did not conform with either Article 13 of the 1957 Plebiscite or Article 218, the Court affirmed that:

[the law's] ontological being is found in the realm of values thus demanding the inquiry into the utility or inutility of legal norms to accomplish certain ends that are deemed valuable to the community. . . . One of those values is peace, not only universally recognized as such, but expressly mentioned in the preamble to our Constitution

Therefore, for philosophical and jurisprudential reasons, in order to determine whether [Decree 1926] is constitutional, it is not enough to confront it with arts. 218 of the Constitution and 13 of the [1957] plebiscite; [it is necessary] to take into account its virtuality to bring peace. Although it is impossible to assure that the Decree will necessarily lead to the longed for peace, this Court cannot foreclose that possibility.⁸⁶

84. This Decree, like its predecessor, Decree 927, was issued in reliance on the powers given to the President by Article 121 of the Constitution.

85. Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. 985 (Colom.).

86. *Id.* Compare what the same justices had said only five months before in the decision upholding Decree 927: "It is not the task of this Court to evaluate the convenience of the

After spelling out the moral, extra-constitutional basis for its decision, the Court also relied on more traditional principles of constitutionalism. Arguing that the primary constituent power rests with the people,⁸⁷ the majority reasoned that the people can, at any time, adopt a new constitution without being subject to the limitations imposed by the prior constitution.⁸⁸ The only restrictions binding the primary constituent power are those that the people themselves decide to abide by.⁸⁹ Were it otherwise, the Court reasoned, one would reach the "absurd conclusion" that the 1886 Constitution was invalid because it was not adopted conforming to the amendment provisions of its 1863 predecessor.⁹⁰

Then, taking a new look at the vote of the May 27 plebiscite, the Court concluded that by voting "yes" the people had simultaneously triggered and established the limitations to their constituent power.⁹¹ According to the majority, the plebiscite's question itself,⁹² limited the electorate's power to amend the Constitution by requiring that the amendments be made (1) for the purpose of strengthening the democratic system of government, and (2) through a mechanism representative of all national forces.⁹³ Other restrictions contained in Decree 1926, notably those listing the permissible subjects of the reform and limiting the assembly's competence, were not the result of people's self-determination, but of the political agreement of August 2nd. Consequently, they were unconstitutional.⁹⁴

The October 9, 1990 decision does not unequivocally determine who holds the primary constitution-making power. The opinion overtly proclaims that "the nation, that is, the people who inhabit this country, is the primary constitution-maker from whom all derivative or constituted powers emanate."⁹⁵ Nevertheless,

measure taken [by the Government], nor is it to predict whether with that measure the situation of crisis will be overcome or if, on the contrary, it will turn out to be a new frustration; [the Court's] task is limited to the application of the legal norm. . ." Decision of May 25, 1990, Corte Suprema, 19 J. & D. at 545 (Colom.).

87. The Court found this principle in Article 2 of the Constitution. See *supra* note 57 and accompanying text.

88. Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. 985, 1000 (Colom.).

89. *Id.* at 1001.

90. *Id.* at 1000.

91. *Id.* at 1001.

92. See text preceding *supra* note 72.

93. Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. 985, 1001 (Colom.).

94. *Id.* at 1002.

95. *Id.* at 1000.

other parts of the opinion seem to suggest that such power rested with the assembly, that the assembly's power was not derivative or constituted, but was itself the primary constituent power. In this respect, the Court not only characterized the assembly as being "sovereign,"⁹⁶ but, more significantly, it struck down as an inappropriate limitation *on the primary constitution-maker*⁹⁷ the restrictions embodied in Decree 1926. These substantive and procedural limitations provided that:

[O]nce approved by the assembly, [the text of the amendments] will be sent to the Supreme Court of Justice [and this tribunal will decide] whether the amendments, in whole or in part, conform to the list of subjects approved by the citizens . . . on December 9, 1990. In addition, [regulations adopted by the assembly for its own functioning] will expressly indicate those procedural requirements the compliance with which will also be subject to the Court's control.⁹⁸

While this language created judicial review ONLY FOR THE ASSEMBLY'S ACTS and not for the people's decision to create the assembly, the Court struck it down, reasoning that it allowed the judiciary "to revise acts of the primary constitution-maker."⁹⁹ Consistent with the Court's holding that the only valid limitations on the assembly's powers were those adopted by the May 27 popular decision, the majority could have said that it would review the acts of the assembly only in light of these limitations, and for procedural defects. The Court's reluctance to review the acts of the assembly, even for their procedural propriety, suggests that the majority interpreted the process that began on May 27 as vesting in the assembly primary constitution-making power.

III. THE LEGITIMACY OF EXTRA-LEGAL CONSTITUTIONAL CHANGE

A. *Some Parameters*

Because constitutions are made to last, they generally contain amending mechanisms to preserve their integrity and protect them from being overridden. Sometimes, however, because the amendment process is too difficult, or because sweeping changes are

96. *Id.* at 1004.

97. *Id.* at 1006.

98. *Id.* at 1002.

99. *Id.*

sought, constitutional reform occurs outside the prescribed amendment method. When an attempt is made to set aside an old constitution, the source of validity of the new one can hardly be found in its predecessor. Logically, a quest for authority legitimizing fundamental constitutional reform is paradoxical. Either the former constitution was the supreme law of the land, in which case a new constitution made in violation of its rule of change cannot be valid,¹⁰⁰ or it was not, in which case the basic premise upon which constitutions are framed is illusory. Despite logic, however, history shows that fundamental constitutional changes do occur and more importantly, are accepted as valid.

Intuitively, it may be easier to brush aside the question of authority when the new constitution follows an act of rebellion. Since, by definition, rebellions cannot be governed by pre-established rules, neither can the revolutionaries' attempt to re-institute legal order. There is a legitimizing power to revolution. But, when the transition from one constitutional order to the other is not accompanied by bloodshed and open rebellion, when the historic sequence of events does not show an abrupt rupture between prior and subsequent legal orders, is the change revolutionary?

If revolutionary change occurs where "the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself,"¹⁰¹ then any time the rule for change is ignored, revolutionary

100. Logic dictates that, within a legal system, the validity of a new rule can only be assessed in light of pre-existing rules in effect at the time the enactment takes place. Confronted with this issue, the Colombian Supreme Court held:

Were we to accept that constitutional amendments are to be examined in light of their own normativity, each new reform would become a breach in the legal order because the natural continuity according to which a new constitution or amendment must find support in the old constitution would no longer exist . . . amending clauses would become innocuous, superfluous.

. . . .

Law born from or created by a revolution cannot be judged in light of the pre-existing legal order because the essence of a revolution is, precisely, the destruction and change of the existing juristic order.

Decision of Nov. 3, 1981, Corte Suprema, 144 G.J. 387 (Colom).

101. 1 HANS Kelsen, 20TH CENTURY PHILOSOPHY SERIES: THE GENERAL THEORY OF LAW AND STATE 117 (Aners Wedber trans., 1945). In determining whether a revolution has occurred, Kelsen adds:

it is . . . irrelevant whether or not th[e] replacement is effected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From

change has occurred and legitimacy itself is in issue. According to this view, there is no conceptual difference between the process of adoption of the Articles of Confederation in 1777, and that of the 1787 Constitution, or between the adoption of the 1886 and 1991 Colombian Constitutions. Inasmuch as all these processes entail the replacement of pre-existing constitutional orders by means which they themselves did not sanction, they all may be regarded as illegal and revolutionary. More importantly, in each instance the legitimacy of the revolutionary change must be determined by reference to criteria outside the legal system. This is because each legal system has its own first principle, a criterion that determines the legitimacy of all other rules. This criterion can be referred to, in H.L.A. Hart's terminology, as the rule of recognition of the system.¹⁰² The rule of recognition assesses valid law, but is not itself validated by prior law. The only possible question about this rule is factual—its own existence.¹⁰³ In addition, the legal system also contains procedural rules that dictate how changes to pre-existing law can be introduced.¹⁰⁴ The connection between the rule of recognition and rules of change is obvious since one of the criteria used to assess the validity of a new rule is its conformity with the rules governing its enactment.¹⁰⁵ Compliance with the rules of change, however, does not suffice to ensure the validity of the new law.

For Hart, all rules, including the rule of recognition, persist in a legal system only because and so long as they are accepted by the people. Acceptance of a rule occurs when the members of the society regard the behavior required by the rule "as a general standard to be followed by the group as a whole."¹⁰⁶ Mere convergence of behavior does not suffice, since this is also a feature of social habits¹⁰⁷ but universal compliance is not necessary.¹⁰⁸ Citizens must recognize the conduct required by the rule as a pattern to which

a juristic point of view, the decisive criterion is that the order in force is overthrown and replaced by a new order in a way that the former had not itself anticipated.

Id.

102. H.L.A. HART, *THE CONCEPT OF LAW*, 92, 102 (1961) [hereinafter HART CONCEPT]; H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 359 (1983).

103. HART CONCEPT *supra* note 102, at 245.

104. *Id.* at 93.

105. *Id.*

106. *Id.* at 55.

107. *Id.* at 54.

108. *Id.*; see also Kelsen, *supra* note 101, at 119-20.

behavior must conform, and that failure to live up to the pattern justifies the imposition of the consequences prescribed by the rule.¹⁰⁹ In modern society it is impractical to demand from all citizens the degree of legal knowledge that this notion of acceptance requires. For this reason, in complex contemporary legal systems, acceptance is confined to such an understanding by "the officials or experts of the system; the courts which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is."¹¹⁰ The people "manifest [their] acceptance, largely, by acquiescence in the results of these official operations."¹¹¹ However, they can always withdraw their acceptance—a revolution may occur.¹¹²

Thus, assessing the legitimacy of a fundamental constitutional change is necessarily complex. The measurement of acceptance is prone to all sorts of subjective influences in modern societies. The views of officials and that of citizens must be taken into account, allowing for varying social factors related to wealth, race, religion, regional differences, cultural and ethnic differences, and the like. As difficult as it is, the efficacy of fundamental constitutional change must refer not only to these variables, but others as well, such as societal traditions, patterns of social organization, and moral principles.¹¹³

In sum, although constitutional reform outside of the amendment process may be contradictory, the contradiction is not illegitimate if it is accepted. Just as contracting parties may ignore a clause forbidding revocation of a contract by agreeing to a new contract that derives its authority from the agreement of the parties, a new constitution may derive its authority from a source outside the formal legal system. It is critical to Hart's theory that acceptance may follow an illegal act; it can catch up.¹¹⁴ Constitutions which are adopted in violation of the instructions authorizing their drafting, just like unpopular judicial opinions, may gain validity over time, depending on their acceptance.

A related comparative measure of legitimacy is the fairness of the amending process. There is widespread agreement that consti-

109. HART CONCEPT, *supra* note 102, at 56.

110. *Id.* at 59.

111. *Id.* at 60.

112. *Id.* at 58.

113. Kay, *supra* note 31, at 60-61.

114. HART CONCEPT, *supra* note 102, at 149-50.

tutions should not be amenable to change through the process used for making normal legislation. In theory, amending clauses should be made difficult enough to prevent whimsical and short-sighted constitutional changes. They should not be so difficult, however, that overwhelming dissatisfaction with the constitution may not reasonably be translated into constitutional reform. If the amending process is too easy, a society cannot rely on the continuation of its basic legal principles and traditions. If the amending process is too difficult, it should not be assumed that the failure to amend reflects the approval of the governed.

Acceptance theory and popular sovereignty rely heavily on the amending clauses of constitutions. Thus, the question of how difficult the process should be is one of the most important for constitutional reformers to resolve. While it is not the intention here to suggest an optimal process for amending the Colombian or any other constitution, one reasonable expectation to insure ongoing legitimacy through consent of the governed, is that the consent required to amend the constitution should not be more difficult to manifest than that which was required to adopt the constitution.

The remaining sections of Part Three examine the role of popular sovereignty and acceptance, and the fairness of the amendment process in the validation of extra-legal constitutional changes in Colombia and the United States. Together, these ideas have been central to Colombian and U.S. experiences with constitutional change.

B. Perspectives on Constitutional Legitimacy in the U.S.

1. The 1787 Constitution

Only a decade after a bloody revolution freed them from the Crown, the Framers precipitated another revolt: the peaceful but extra-legal abandonment of the nation's first charter. How did it become possible to put into place a constitution where the will of the people subordinated that of sovereign states and their legislatures? How did the people become, in the words of James Madison, "the fountain of all power?"¹¹⁵

Like so much of what moved the American colonists, the theory of popular sovereignty has English roots and a distinctive En-

115. 2 FARRAND RECORDS, *supra* note 28, at 476.

lightenment character. The English origins trace to the Magna Carta in 1215 and to the King's acknowledgement of the concept that written law could limit absolute authority. For the next five hundred years, the British tradition of constitutionalism developed to support the ideas of limited government and the protection of individual rights.¹¹⁶ Although Enlightenment scholars did not agree on the origins of sovereignty, some concluding that it was merely a reflection of raw power and others arguing that consent of the governed was a prerequisite, they did abandon the previous divine right theories.¹¹⁷

For the colonists, and later the state and federal constitution-makers, the Enlightenment tradition offered the best of both worlds. It provided a wealth of philosophical guidance on developing a new government which their distance from Europe—both physical and intellectual—allowed them to ignore or embrace to best suit their interests. Gradually, the political thinkers, many of them eventual Framers, developed a distinct political consciousness.¹¹⁸

Perhaps the most influential political idea inherited by the colonists was John Locke's social contract theory.¹¹⁹ It was Locke's view that because people, by nature, are free, equal, and independent, they can only justly be subjected to political power by their own consent. It is advantageous for people to join and contract to form a social community so they can ensure peace, comfort, and safety, in life and in their property. However, they must in turn carry the burden of being bound by the rules of the community—the social contract.¹²⁰ The government that Locke would establish is limited, based on specified and agreed-upon conditions. Thus, from the time of Locke, signs existed of a direct relationship between the government and its people.

The colonial defiance of Britain that followed the Stamp and Sugar Acts of 1764 and 1765 spoke not of an interference by England with the colonies, but rather that the taxes had a "manifest tendency to subvert the rights and liberties of the colonists."¹²¹

116. FARBER & SHERRY, *supra* note 12, at 3.

117. *Id.* at 4.

118. *Id.*

119. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., student ed. 1988).

120. *Id.*, 2d Treatise § 87.

121. KARL J. FRIEDRICH & ROBERT G. McCLOSKEY, *FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION* xviii (1954). See also KAMMEN, *supra* note 7, at 17.

Later, the First Continental Congress resolved that the colonists' rights were based "on the immutable law of nature, the principles of the English Constitution, and the several charters or compacts."¹²² The restraint of colonial leaders was soon overtaken by the populism of Thomas Paine's *Common Sense*, which provided the impetus for the Declaration of Independence by proclaiming that there should be "no such a thing . . . as power of any kind, independent of the people."¹²³ Paine's pamphlet was widely read in the colonies; at least 300,000 copies were sold.

Perhaps the best known statement of the right of the people as sovereign to change their government is the lofty third sentence of the Declaration of Independence:

That to secure these Rights [to life, liberty, and the pursuit of happiness], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute a new Government, laying its Foundation on such Principles, and organizing its powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹²⁴

Although the right "to alter or abolish" is not to be used "for light and transient causes," a "long train of abuses and usurpations," especially if "evin[cing] a design to reduce [the people] under absolute despotism," creates a duty "to throw off such government, and to provide new guards for their future security."¹²⁵ The first plan for a national government in the Articles of Confederation was a modest one, reserving for the states their "sovereignty, freedom, and independence."¹²⁶ However, the intellectual and political history of the colonies and of the independence movement reveals an emerging acceptance, if not an embracing, of popular sovereignty.¹²⁷ This suggests as a tenable theory that the colonies seceded from Britain as a fledgling union, rather than as independent states, in order to better protect the colonists from an oppressive foe.¹²⁸

122. JENSEN, *supra* note 13, at 66.

123. Quoted in Jack P. Greene, *Paine, America, and the "Modernization" of Political Consciousness*, 93 POL. SCI. Q. 73, 89 (1978).

124. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

125. *Id.*

126. ARTICLES OF CONFEDERATION art. II (1781).

127. See KAMMEN, *supra* note 7, at 11-28.

128. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution*

When the Philadelphia Convention began in 1787, popular sovereignty was hardly an entrenched idea. Only two state constitutions adopted prior to 1787 were ratified by the people, and most were enacted through the ordinary legislative process.¹²⁹ The actual emergence of popular sovereignty at the Convention was a decidedly practical phenomenon—the delegates needed to shore up their authority to act in the radical way they proposed.¹³⁰ They wasted little time in establishing their ambitious intentions. After settling rules of organization and procedure and establishing a secrecy rule, the Convention passed the first of the Virginia plan resolutions, calling for a national legislature, executive, and judiciary. The Articles were thus discarded from the start.¹³¹

When the Virginia plan was introduced, two delegates, including Patterson, author of the much less nationalist New Jersey plan, objected because of the “want of power in the Convention to discuss and propose it.”¹³² Thereafter, Pennsylvania delegate James Wilson sought to avoid the underlying sovereignty question when he correctly noted that the Convention’s authority to propose a constitution was not limited, only its power to adopt it.¹³³ Even more revealing was the defense of the Virginia plan and its proposal for popular ratification offered by Randolph, its primary author. For Randolph, “the salvation of the Republic was at stake” so that “it would be treason to our trust, not to propose what we found necessary. . . . There are certainly seasons of a peculiar nature where the ordinary cautions must be dispensed with; and this is certainly one of them.”¹³⁴ After more vigorous debate, the New

Outside Art. V, 55 U. CHI. L. REV. 1043, 1048. See also FARBER & SHERRY, *supra* note 12, at 38-39. The debate over whether the states themselves became sovereign nations upon separation from Britain also had important practical implications for property ownership. Prior to independence, some states were granted title to immense tracts of land by the crown. If the states gained their independence separately, previous ownership would be called into question, a theory pressed often though unsuccessfully by those seeking to appropriate previously claimed lands between 1775 and 1784. Vested interests clearly sought to protect this theoretical flank, a tactic consistent with the gradual drift of convention discussion away from the relationship of the states to each other to the legitimating effect of ratification by the people. *Id.* at 39-40.

129. FARBER & SHERRY, *supra* note 12, at 38.

130. See KAMMEN, *supra* note 7, at 12.

131. The extra-legal character of the Convention was understood by some even before the Convention. See 5 JONATHAN ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787*, at 96 (2d ed. 1891).

132. 1 FARRAND RECORDS, *supra* note 28, at 178.

133. *Id.* at 253.

134. *Id.* at 255.

Jersey plan was defeated on June 19, 1787, and the delegates moved on to the consideration of other nationalist inventions.

Perhaps the clearest indication that the delegates did not feel bound by their instructions is that the first proposal concerning ratification, made on May 29, 1787, along with the original Virginia plan resolutions, proposed approval of the changes by the Congress and by state assemblies chosen by the people for that purpose.¹³⁵ Thus, even the original proposal bypassed the state legislatures and did not expressly require the unanimity mandated by the Articles. However, throughout the Convention, the question of their own authority caused the delegates great concern and produced much discussion. Practically, these debates focused on the method for ratifying the new constitution, although philosophically their concern was in defining a new relationship between the people, the states, and the nation.

After defeat of the New Jersey plan, debate over ratification recurred on July 23, 1787, when the Convention agreed to popular ratification along the lines of Randolph's original proposal, leaving the drafting to the Committee on Detail.¹³⁶ The draft of the Committee on Detail provided that the Constitution would be "laid before the United States in Congress assembled, for their approbation," and then ratified by an unspecified number of state conventions.¹³⁷ By August 30, the delegates reached the ratification section of the Committee's draft, and they debated how many states should ratify to make the document effective. The Convention settled on nine, probably because it had been used in the Articles as a requirement for the passage of acts of Congress. Then, the delegates of eight states—against opposition from those of the remaining three—agreed to delete the requirement for congressional approval. Although bitter disputes caused the issue to reemerge one week later, no new arguments were made and the eventual Article VII omitted any reference to congressional approval, requiring only that nine states ratify the Constitution in conventions chosen for that purpose.¹³⁸

Reflecting its concern for the method of ratification, the Committee on Detail prepared a draft of the preamble which first sought to preserve the dual character of sovereignty still un-

135. See JENSEN, *supra* note 13, at 39-42.

136. FARBER & SHERRY, *supra* note 12, at 42-44.

137. *Id.* at 44.

138. *Id.* at 44-46.

resolved from the Declaration of Independence and the Articles. The draft preamble began: "We the people of *and* the States of"¹³⁹ Eventually the Committee took out the "and," but that still left the problem of ratification—if nine states could make the constitution effective, there was no way to know in advance which nine they would be, or whether all thirteen would ratify. The Committee of Style cleverly avoided the problem by simply omitting the reference to the states, producing the actual preamble, "We the People of the United States"¹⁴⁰ Thus, the preamble evolved to its finished form not through some philosophical metamorphosis but through clever drafting to mask an unresolved question.¹⁴¹

Lockean influence on the finished Constitution is easily seen. The "People of the United States" ordained and established the Constitution "in order to form a more perfect Union."¹⁴² Through the Constitution they "granted" legislative power, "vested" the President with executive power and "vested" the courts with judicial power.¹⁴³ Later amendments limited powers of the state and national governments and secured specific rights in the people.¹⁴⁴ Although the Constitution does not contain language comparable to the "right . . . to alter or abolish" found in the Declaration of Independence, similar language was proposed by Madison.¹⁴⁵ In fact, during ratification, both Madison and Hamilton argued in *The Federalist* for the continued existence of such a right.¹⁴⁶ For Madison the power was real and independent of the Constitution; for Hamilton, it was mere eloquence which legally added nothing to the Article V amending clause.¹⁴⁷

The arguments over the authority of the Philadelphia Conven-

139. 2 FARRAND RECORDS, *supra* note 28, at 152; *see also* KAMMEN, *supra* note 7, at 12, 21.

140. U.S. CONST. pmbl.

141. KAMMEN, *supra* note 7, at 12.

142. U.S. CONST. pmbl.

143. U.S. CONST. arts. I, § 1; II, § 1; III, § 1.

144. U.S. CONST. amend. I-X, XIII-XV.

145. *See* HERNAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 185 (1897). Madison proposed the following: "That the people have an indubitable, inalienable and indefeasible right to reform or change their Government, whenever it may be found adverse or inadequate to the purposes of its institution." *Id.*

146. *THE FEDERALIST* No. 39 (James Madison), No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

147. *See* PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* 226 (1990).

tion to do more than propose amendments to the Articles of Confederation continued in the ratification debates. In the Virginia Convention, for example, Patrick Henry renewed his charge that the authority to create a new constitution could be given only by the states, not by the people:

What right had [the delegates] to say, We the people? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of We the people, instead of, We, the states? . . . The people gave them no power to use their name. That they exceeded their power is perfectly clear.¹⁴⁸

One response to the critics was that of Wilson: the Convention merely proposed changes, and popular ratification would legitimate anything the Convention proposed, even if the changes usurped the authority given in the Articles.¹⁴⁹ This argument, of course, merely conceded the Convention's lack of legal authority. Madison's argument in response to the critics was legal but unconvincing. For Madison, the Convention did have the express authority to propose a wholly new Constitution. He found authority in the Annapolis Convention and congressional resolutions for the Philadelphia Convention "to frame a national government, adequate to the exigencies of government, and of the Union; and to reduce the Articles of Confederation into such form as to accomplish these purposes."¹⁵⁰ Thus, the new Constitution was an "alteration," albeit a substantial one, of the Articles.¹⁵¹ But was the new constitution a "revision" as contemplated by the congressional resolution? Hardly.

The adoption of the Constitution violated the amending process of the Articles of Confederation. First, it omitted the state legislatures and breached the unanimity requirement.¹⁵² Second, while the delegates submitted their work to Congress, it was not submitted for its approval as required by the Articles. To avoid the awkwardness of "decreeing its own demise," Congress sent the

148. Virginia Ratifying Convention (June 4, 1788), 3 ELLIOT, *supra* note 131, at 22-23 (emphasis in original).

149. See Wilson's remarks at the Pennsylvania Ratifying Convention (December 4, 1787), in 2 ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE RATIFICATION OF THE FEDERAL CONSTITUTION* 470 (2d ed. 1891).

150. THE FEDERALIST No. 40, at 260-62 (James Madison) (Clinton Rossiter ed., 1961).

151. *Id.* at 260-61.

152. U.S. CONST. art. VII.

Constitution to the states' legislatures without an "approval or disapproval."¹⁵³ The delegates candidly admitted that they were violating the Articles' amending clause. Randolph appealed to "necessity," and argued that the new and stronger national government was essential to the preservation of the union;¹⁵⁴ Madison made similar claims in *The Federalist*.¹⁵⁵ The fact that in the end the preamble was accepted without question simply strengthens the conclusion that the delegates knew that they had broken from the confines of the Articles.

Eventually Congress and all thirteen states did ratify the Constitution, this within two years after the ninth state had acted. Did the ratification by Congress and the thirteen states retroactively validate the Constitution as proper amendments to the Articles? Although such claims have been made by some who would otherwise reject the Constitution as illegal,¹⁵⁶ these apologists miss the point. No doubt, the Philadelphia delegates violated their mandate,¹⁵⁷ but the making of the U.S. Constitution was more than illegal—it was revolutionary. The revolutionary Constitution was ratified according to its own terms and it then began to serve as the charter for the nation. An assessment of its legality is simply irrelevant. The Convention's work lacked political legitimacy, but the Convention was not a government. The delegates hoped to and did persuade the voting public. At the very least, they initiated a dialogue between the people as electorate and ultimate sovereign. Only a developing acceptance by the people has given the Consti-

153. MERRILL JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 121 (Louis L. Snyder ed. 1964).

154. 5 ELLIOT, *supra* note 131, at 352-56, 499-502, 532-34.

155. *THE FEDERALIST*, No. 40, at 265 (James Madison) (Clinton Rossiter ed. 1961).

[The delegates] must have reflected that in all great changes of established governments forms ought to give way to substance; that a rigid adherence in such cases to the former would render nominal and nugatory, the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness," since it is impossible for the people spontaneously and universally, to move in concert towards their object; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens.

Id.

156. See, e.g., Thomas Reed Powell, *Changing Constitutional Phases*, 19 B.U. L. REV. 509, 511-12 (1939).

157. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017-23 (1984); John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COM. 57 (1987); but see Amar, *supra* note 128, at 1048.

tution legitimacy. The Civil War remains in our collective memory as proof of the legitimating power of popular consent.

2. Two Centuries Under the Constitution

There have been hundreds of proposals to modify the Article V amending clause¹⁵⁸ and countless judicial challenges alleging that amendments were inconsistent with the Constitution.¹⁵⁹ Yet, Article V remains intact and the courts have never questioned the failure of the Philadelphia Convention to follow the instructions of the Articles of Confederation.¹⁶⁰

While constitutional tension has been a recurring factor of life in the United States, two important national traits have helped preserve the Constitution intact. The first is the institution of judicial review along with the great power of the federal courts to interpret the Constitution to accommodate changing conditions and new problems. The second characteristic is the American tendency to ignore illegality in the service of practical ends. The Union nearly ended with the Civil War when neither the Constitution nor public officials could peacefully put an end to the horrors of slavery. In patching up the Union after the War, Congress effectively forced constitutional change on the Southern states by abusing the amendment process of Article V. As with the flaws in the events of 1787-1791, these improprieties were overlooked. A brief review of this phenomenon follows.

158. Article V of the U.S. Constitution permits amendments by a two-thirds vote of both Houses of Congress or in a convention called by the legislatures of two-thirds of the states, followed in either case by ratification by legislatures or conventions in three-fourths of the states. Article V has never been amended, although limitations on the amending power contained in the Article—regarding slavery and state representation in the Senate—were lifted in 1808 by sunset clauses inserted in the original document. See Amar, *supra* note 128, at 1066. Some of the proposals to amend Article V are described in SUBER, *supra* note 147, at 321-26.

159. See, e.g., *Hawke v. Smith*, 253 U.S. 221 (1920); *The National Prohibition Cases*, 253 U.S. 350 (1920); *Dillon v. Gloss*, 256 U.S. 368 (1921); *U.S. v. Sprague*, 282 U.S. 716 (1931) (all upholding the 18th amendment); *Fairchild v. Hughes*, 258 U.S. 126 (1922); *Leser v. Garnett*, 258 U.S. 130 (1922) (upholding the 19th amendment).

160. In *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820), the Supreme Court, in deciding when the Contracts Clause became effective, ruled that the ninth state sufficed to make the Constitution operative. In so doing, the Court ignored the question of violating the amending procedures of the Articles. See also *Brittle v. People*, 1 Neb. 198, 210 (1873) (In the course of a decision refusing to invalidate the Nebraska constitution for procedural flaws in its adoption, the Nebraska Supreme Court noted that the U.S. Constitution was valid, and in line with the requirements of the Articles.).

a. Constitutional Change by Judicial Interpretation

As a practical matter, constitutions are subject to change outside their amending clauses wherever judicial interpretation is permitted. In the United States the doctrine of judicial review, so boldly stated by Chief Justice Marshall in *Marbury v. Madison*,¹⁶¹ has been perhaps the most important feature of the constitutional system. The Court has often served to reduce dissatisfaction with the Constitution through interpretive rulings, thereby appeasing the tendency to resort to constitutional amendment and deflecting criticism of the rigorous requirements of Article V.

The judiciary has thus served to reinforce the idea that the U.S. Constitution enjoys widespread popular consent.¹⁶² For over half of U.S. history under the Constitution, no amendments were approved. But it would be naive to claim that these (1804-1865 and 1870-1913) were periods of constitutional contentment. Important judicial decisions alleviated immediate crises through interpretation of the Constitution,¹⁶³ although the judiciary did nothing to help society avoid the cataclysm of the Civil War.¹⁶⁴ While "judicial activism" has been frequently accused of resulting in questionable legal decisions, most of the ongoing political debates about the proper role for the judiciary concern whether the activist agenda will be conservative or liberal, not whether the courts should be activist.¹⁶⁵

b. The Adoption of the Fourteenth Amendment

Ironically, the Fourteenth Amendment, the most important source of constitutional protection against abuses of rights by state governments, was itself proposed and adopted under circumstances of dubious legality.¹⁶⁶ After the Civil War, the legislatures in the

161. 5 U.S. (1 Cranch) 137 (1803).

162. See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

163. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1856); Report of a Committee of the New York State Bar Assoc., 13 REP. OF THE N.Y. ST. B.A. 140 (1890); Frederic Coudert, *Judicial Constitutional Amendment, As Illustrated by the Devolution of the Institution of the Jury from a Fundamental Right to a Mere Method of Procedure*, 13 YALE L.J. 331 (1904).

164. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

165. But see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

166. See generally HAROLD HYMAN AND WILLIAM WIECEK, *EQUAL JUSTICE UNDER LAW:*

Southern states were chosen under regulations imposed by federal military governors. The Fourteenth Amendment was originated in the Congress, then sent to the states for ratification. The Southern states were included in the ratification process, even though they were not yet represented in Congress and thus had no role in fashioning or debating the proposed amendment.¹⁶⁷

While the Southern states could have been excluded from the ratification process on the same theory which excluded them from Congress—that their rebellion justified their exclusion until they demonstrated commitment to the Union—there were theoretical and practical reasons for including the Southern states in the ratification process. First, it had always been maintained that the rebellion was illegal. States could not simply secede through the rebellious actions of individuals,¹⁶⁸ they thus continued to exist as legal entities. Second, it was by no means clear that ratification would be possible without the votes of the Southern states.¹⁶⁹

Tennessee ratified the Fourteenth Amendment soon after Congress acted, but only after the governor told a special session of the legislature that ratification was the state's ticket to readmission to the Union. There is no official record that these were the terms for Tennessee's readmission. The common understanding as reflected in the governor's speech, however, prompted quick passage with little debate after the absent members who opposed the amendment were rounded up and held in custody to ensure a quorum.¹⁷⁰ After the other Southern states rejected the amendment, military reconstruction of the state governments occurred. Ratification soon followed, even though many states suffered election irregularities in the selection of new legislators.¹⁷¹

Some Northern states rescinded their ratification after the coerced votes in the South, but their rescissions were ignored. While it had been argued by some members of Congress that three-fourths of the Northern states would suffice for ratification, others believed that all of the states should be counted. Even after the Southern votes were counted, the Secretary of State issued con-

CONSTITUTIONAL DEVELOPMENTS, 1835-1875, at 115-231 (1982); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1063-69 (1984).

167. See HYMAN & WIECEK, *supra* note 166, at 419-434.

168. *Id.* at 217.

169. FARBER & SHERRY, *supra* note 12, at 322-23.

170. JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 21 (1984).

171. See FARBER & SHERRY, *supra* note 12, at 322-24.

flicting statements regarding ratification. Eventually, he published a statement that the amendment was in force based not on his view of the effectiveness of the ratification process but on a congressional resolution stating that ratification had occurred.¹⁷²

Like the adoption of the Constitution, that of the Fourteenth Amendment was irregular at best. In both instances the will of the people prevailed over legality. Both victories were eventually vindicated by history.¹⁷³

c. Constitutional Changes in the States

While Article V of the Constitution remains intact, most states have modified their amending clauses.¹⁷⁴ Some states distinguish "amendment" from "revision," either in their amending clauses or by including the equivalent of a "right to alter or abolish" clause similar to the one in the Declaration of Independence.¹⁷⁵ For example, the current 1870 Constitution of Tennessee cites as its enabling authority the "alter or abolish" clause of the 1834 Constitution, rather than the amending clause.¹⁷⁶ The 1870 Constitution's amending clause was changed in a 1953 convention called by the legislature, a method for amendment not explicitly contemplated in the amending clause of the 1870 constitution.¹⁷⁷ The Tennessee reformers, like those in Bogotá and Philadelphia, acted outside their legal authority.

On another occasion, a group of constitutional reformers did not fare so well. From 1790 to 1842, Rhode Island was a state without a constitution. The Dorr Rebellion, in 1841, called a People's Convention to replace the 1663 colonial charter, which favored the rich landowners, with a constitution that suited popular interests. A large majority of voters ratified the people's constitution, and rejected an alternative constitution drafted by the incumbent government. Yet, the efforts of the governor elected under the people's constitution were thwarted when the incumbent refused to step

172. *Id.* at 322-23.

173. Thomas Powell, *Changing Constitutional Phases*, 19 B.U. L. REV. 509, 511-12 (1939) (concluding that the Fourteenth Amendment is effective notwithstanding its ratification process).

174. See SUBER, *supra* note 147, at 334-55 for a description of state histories of amending their amendment clauses.

175. *Id.* at 227-28.

176. TENN. CONST. art. I, § 1.

177. SUBER, *supra* note 147, at 352.

down on the grounds that the people's constitution had no effect.¹⁷⁸ President Tyler supported the incumbent with federal troops while Dorr (the would-be governor) was arrested. The Dorr Rebellion was defeated, and the incumbent government produced a compromise constitution which the voters adopted in 1842.¹⁷⁹ Two rebels prosecuted for their acts in support of Dorr's constitution pursued their claims before federal courts, but the U.S. Supreme Court refused to decide which one had been the legitimate government of Rhode Island when the events occurred.¹⁸⁰

In 1935, the Supreme Court of Rhode Island held that its legislature could call a constitutional convention under the constitutional clause granting the "right to make and alter" the constitution, even though the amending clause said nothing about the permissibility of conventions.¹⁸¹ According to the court, the people of Rhode Island could "make and alter" the constitution through "an explicit and authentic act of the whole people," which the court construed to require a simple majority vote of the state electorate, to ratify the convention's work.¹⁸² It was held not necessary that the people expressly vote to authorize the convention.

The 1849 constitution of California did not have the equivalent of an "alter or abolish" clause. When reformers wanted to replace the entire constitution, they first amended the amending clause to provide for the possibility of wholesale change.¹⁸³ While Californians could have adopted a new constitution without resorting to the intermediate amendment, their effort to build an "alter or abolish" clause into the constitution illustrates a simultaneous commitment to positive law and to popular sovereignty.

The Iowa Constitution has an amendment clause and a provision stating that "all political power [lies] in the people."¹⁸⁴ When the Iowa Legislature made procedural errors in passing a constitutional amendment, and the people subsequently ratified it, the Iowa Supreme Court held the amendment invalid. In this case, the amendment was not rescued by the express recognition of popular sovereignty in the Constitution.¹⁸⁵

178. *Id.* at 350-351

179. *Id.*

180. *Luther v. Borden*, 48 U.S. 1 (1849).

181. *In re Opinion to the Governor*, 55 R.I. 56, 178 A. 433 (1935).

182. *Id.* at 437.

183. SUBER, *supra* note 147, at 229, 336.

184. IOWA CONST. art. I, § 2.

185. *Koehler v. Hill*, 60 Iowa 543, 15 N.W. 609 (1883).

d. Conclusions

Considering that a legal right to revolt may be a contradiction in terms, the "alter or abolish" clauses likely reflect either a moral right or a power to amend. That the Declaration of Independence and virtually every "alter or abolish" clause in state constitutions refer to the "inalienability" or "indefeasibility" of the right reminds us of an appeal to higher law. Together, the Rhode Island, Iowa, and California examples reflect what centuries of constitutionalism have taught—that sovereignty ultimately resides with the people, above and beyond any statement in the positive law or the authority of any court. When the people choose to prescribe procedural rules for constitutional change, however, they may be held to them by the courts.

Validation of revolutionary change must look beyond the legal system to other values such as justice or necessity. If the change fits the needs of the nation or state, it may be regarded as legitimate notwithstanding the inability of a court or public official to so adjudge it. Both the Framers in 1787 and the Congress after the Civil War had practical and philosophical motives for their actions. Practically, the Framers understood that their proposals simply could not gain the unanimous approval of every legislature as required under the Articles. Likewise, the post-war Congress realized that coercion would be required to obtain ratification of the Fourteenth Amendment. Philosophically, the Framers knew that a stronger national government was essential, a government more powerful than those able to veto an amendment to the Articles would accept. They also believed that the new compact should be between the government and the people, subject to their popular approval by ratification. The 1866 Congress did not want to legitimate the Southern States' secession.

The most distinctive contribution made by the revolutionaries was not the reliance on popular sovereignty by itself, but instead the institutional manifestation of popular sovereignty in the constituent assemblies.¹⁸⁶ Prior to the Philadelphia Convention, special assemblies had fomented the Revolution and crafted some state constitutions.¹⁸⁷ After Philadelphia, the state ratifying conventions effectively legitimated the constitutional revolution. In ef-

186. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 342 (1969).

187. *Id.* at 279-309, 313-43.

fect, the constituent ratifying assembly represented a reserved power, an authority to correct mistakes made by the delegates.¹⁸⁸ Admittedly, "the people" actually represented were of one race, one gender, and wealthy. Further, it is still unclear whether those who participated did in fact favor the new Constitution.¹⁸⁹ Still, the ratification process made the debate national and, for the times, remarkably open and democratic.¹⁹⁰

Although the difficulty of the Article V amendment process could easily have transformed dissatisfaction with the Constitution into rebellion, the interpretive powers of the courts have helped avert constitutional crises. As experiences in the states have shown, the people themselves could ignore Article V and amend the Constitution in some other way.¹⁹¹ That they have not done so is a testament to the people's ambivalence and to the success of the political system in deflecting, responding to, and absorbing political society's injustices.¹⁹²

C. Constitutional Legitimacy in Colombia

1. The 1886 Constitution

Given the historical events that led to its adoption, the legality of Colombia's 1886 Constitution cannot be defended as an exercise of existing constitution-making powers. It may be argued, however, that not unlike the events surrounding the Philadelphia Convention, Núñez's convocation of the Council of Delegates and the subsequent drafting of the Bases by the Council were merely proposals and did not violate the amendment provisions of Article 92 of the 1863 Constitution. It was at the critical stage of ratification in the United States, and at the vesting of constituent powers in the National Council of Delegates in Colombia, that the old orders were broken. Thus, legitimacy of the 1886 Constitution turns on the source of the Municipal Councils' power to grant constituent authority to the Delegates.

If the Municipal Councils in Colombia had been actually rep-

188. See the comments of Philadelphia delegate James Wilson in *THE WORKS OF JAMES WILSON* 304 (McCloskey ed. 1967); 2 ELLIOT, *supra* note 131, at 432.

189. JACKSON MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-88*, at 249 (1961).

190. Kay, *supra* note 31, at 74-5.

191. Amar, *supra* note 128, at 1054.

192. See KAMMEN, *supra* note 162, at 3-39 (1986).

representative of the people,¹⁹³ popular sovereignty would have had the same legitimating function in Colombia that it had in the U.S. However, because the Councils were only representative of Núñez's will,¹⁹⁴ the legitimacy of the 1886 Constitution is inextricably tied to the success of the President's rebellion against the pre-existing order.¹⁹⁵

2. The 1991 Constitution

The political movements for constitutional reform of the late 1980s evolved in 1990 into a legal process. This process began with Decree 1926 which afforded the electorate an opportunity to decide whether a constitutional assembly should be convened and, if so, to then elect its members and to define the limits of its powers. To assess the legitimacy of the reform process, one must start with Decree 1926 and the Court decision which upheld its validity.

a. The President's Power to Issue Decree 1926

Decree 1926 invokes Article 121 of the 1886 Constitution as the source of its authority. In case of foreign war or domestic strife, Article 121 vests in the Executive exceptional powers, including temporary legislative authority. The Court has held that these powers can only be exercised for the purpose of dealing with the emergency giving rise to the declaration of "state of siege;" there must be connectivity between the measures taken by the Executive and the circumstances provoking the state of siege.

The majority had no difficulty in finding the requisite connectivity. After quoting from its May 25 decision that upheld Decree 927,¹⁹⁶ the Court stated that a "strengthening of the political institutions [was] necessary in order to face the diverse forms of attack

193. The Colombian Supreme Court makes this assumption in its October 9, 1990 decision, when it asserts that to question the people's power, as primary constituent, to adopt a new constitution would cast doubts on the validity of the 1886 Constitution. Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. 1000 (Colom.).

194. See *supra* notes 38-39 and accompanying text.

195. The dissenters to the October 9, 1990 decision of the Colombian Supreme Court recognized this when they argued that "only war victors (Gen. Tomás Cipriano de Mosquera in 1863 and President Núñez in 1886) resorted to extra-constitutional ways in order to justify the constitutions then adopted." Decision of Oct. 9, 1990, Corte Suprema, 19 J. & D. at 1017 (Colom.).

196. Decision of May 25, 1990, Corte Suprema, 19 J. & D. 542 (Colom.).

to which public peace has been submitted.”¹⁹⁷ The dissenters conceded that, in general, there was sufficient connectivity.¹⁹⁸ Nevertheless, they argued that, notwithstanding the need for reform, the assembly could possibly concern itself with constitutional reforms having no connection with the state of siege.¹⁹⁹ They also argued that, since the President’s legislative powers under Article 121 are temporary, any legislation enacted under that Article should be void once the emergency has passed. This being so, the adoption of constitutional norms through “state of siege” mechanisms is inappropriate in light of the expectation of permanency that accompanies a constitution.²⁰⁰

Although the majority did not respond to the dissenters’ arguments, it appears that the dissent relies on the false premise that the validity of the reform process depends on the scope of the President’s powers. The people, from whom the delegates to the assembly derived their constitution-making power, are not bound by the limitations that Article 121 imposes on the President. It was not the President, but the people through the assembly, who eventually adopted constitutional changes unrelated to the causes of the state of siege and gave them permanent character.

b. Achieving Peace

The majority argued that the validity of Decree 1926 was to be judged taking into account “its virtuality to achieve peace.”²⁰¹ According to the dissent, by engaging in this “voluntaristic determination as to whether a constitutional assembly is convenient for the country because of its aptness to secure peace,”²⁰² the majority abandoned its constitutionally prescribed role.²⁰³ It invaded the policy-making sphere reserved to the legislature.²⁰⁴ The decision, in the dissenters’ eyes, threatened to transform the constitutional jurisdiction into “a spurious exercise of active governmental functions” and the Court into a third house of the legislature.²⁰⁵ The

197. Decision of Oct. 9, 1990, 19 J. & D. at 997.

198. *Id.* at 1026.

199. *Id.*

200. *Id.*

201. *Id.* at 999.

202. *Id.* at 1008.

203. *Id.* at 1007.

204. *Id.* at 1008.

205. *Id.*

dissenters concluded that "to adopt the criterion of determining the validity of a legal norm in light of its utility or inutility to achieve peace is to fall into the most aberrant subjectivism, and [would place the country], not in the sphere of values, but of juridical uncertainty and arbitrariness."²⁰⁶

However, the Court's decision does not itself judge the efficacy of constitutional amendments in bringing about peace. Instead, the Court states that "although it is impossible to assure that the Decree will necessarily lead to the longed for peace, this Court cannot foreclose that possibility."²⁰⁷ The majority thus recognized that it was not the Court's role to second-guess the President's political choice of consulting the electorate about the desirability of a constitutional amendment through a popularly elected assembly. Any other decision would, indeed, have engaged the Court in the political activism that the dissenters so strongly criticize and would have put the Court on a collision course with the people's will as expressed on May 27, 1990.

c. The Decree and the People's Primary Constituent Power

The Court's principal argument is that the people's power to change the Constitution is unlimited²⁰⁸ as reflected in Article 2 of the 1886 Constitution: "Sovereignty resides essentially and exclusively with the Nation, and therefrom all public powers emanate" However, as the dissenters pointed out, Article 2 does not state that the people have sovereign powers. In their view, the Article was needed to ensure and clarify the transition between the federal system of 1863 (in which the several states claimed to be sovereign) and the unitary system adopted in 1886, when one, and only one, State could claim to be the reconstituted Colombian Nation.²⁰⁹ The dissenters' historical interpretation of Article 2, however, is belied by the fact that long before any transition from federalism to centralism Colombian Constitutions included provisions similar to Article 2.²¹⁰

206. *Id.* at 1011.

207. *Id.* at 999.

208. *Id.* at 1000-02.

209. *Id.* at 1027.

210. See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA art. 2 (1821) ("Sovereignty essentially resides with the nation"); CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA art. 3 (1830) ("Sovereignty radically resides with the Nation. Therefrom all political powers emanate which can only be exercised under the terms of this Constitution.").

Straddling this indeterminacy, the Court ultimately gave pre-eminence to the will of the electorate and refused to stand in the way of a highly popular mechanism for constitutional change. In doing so, the majority decision conformed with the principle of popular sovereignty, but begged the question of whether Article 2 did indeed give the people the power they were already in the process of exercising. The dissenters strayed even further from the mark by purporting to rely on a historical analysis of Article 2 and then going out of their way to legitimize the 1957 plebiscite that was not in issue, by arguing that it is only when there is institutional chaos²¹¹ that Article 2 confers upon the people the power to change the constitution outside of the amending clause.

d. Limitations on the Assembly's Powers

The Court concluded that Decree 1926, to the extent that it prescribed the topics that the assembly could address, contained a limitation on the powers of the people to amend the constitution.²¹² In the majority's view, this limitation of subject matter was an attempt by the Executive to limit the people's election of the assembly to enumerated and limited powers. Thus, the decree impermissibly restricted the primary constituent power.²¹³

The political agreement of August 2nd as incorporated in Decree 1926, disabled the assembly from "modify[ing] the period of those [officials] elected [in 1990], or matters that affect obligations of the Colombian State by virtue of international treaties, or the Republican System of Government." These were the only effective limitations suggested by the political parties and the government, because the list of subjects that the assembly could study and amend was so comprehensive as to enable a sweeping amendment of the 1886 Constitution.

The first of these limitations, dealing with the assembly's incompetence to modify the term of public officials elected in 1990, represents an obvious attempt by the politicians to protect their own interests. If the limitation had been sustained, Congress could

211. According to the dissent, this was the situation in 1957 when Colombians adopted constitutional amendments through a plebiscite, because then Congress had been closed, a dictator had just relinquished power, and the government was in the hands of a non-representative body. Decision of Oct. 9, Corte Suprema, 19 J. & D. at 1017 (Colom.).

212. *Id.* at 1002.

213. *Id.*

have enacted, before the end of the 1990-1994 legislative term, an Article 218 constitutional amendment reversing these modifications introduced by the assembly that were not favored by current members of Congress. The majority may have reasoned that if the assembly wanted to introduce substantial reforms of Congress, its success could depend on an immediate dissolution of the present Congress and its replacement by a new one elected under the new rules.

The second limitation dealt with matters related to the country's obligations under existing international treaties. Of the numerous treaties to which Colombia is a party, only two have generated public controversy in recent years. One is the Concordat, a treaty between Colombia and the Holy See, which practically outlaws divorce by referring marital disputes among citizens who celebrate a Catholic marriage to Church tribunals.²¹⁴ The other is the extradition treaty with the United States.²¹⁵ It is unclear whether the majority, in eliminating this restriction to the assembly's powers, had in mind the opening of an opportunity for the assembly to free Colombian Catholics from the marital bond and Colombian drug traffickers from prosecution in the U.S.

The majority's rationale for striking down all subject matter limitations on the assembly is plausible only in two scenarios. First, if Decree 1926 effectively curtailed the people's sovereign power, the limitations were obviously unconstitutional. Second, if the May 27 plebiscite created a nascent constitutional assembly whose members were to be elected at some later time and, simultaneously, transferred the people's sovereign power to this abstract entity, any attempt to limit the latter's competence would also be unconstitutional. The first is not persuasive because the proposed limitations would become effective, if at all, only with the people's approval in the December 1990 vote; they would have been, therefore, self-imposed. The second hypothesis, although not articulated in the October 9 opinion, and expressly disavowed in the Court's May 25 decision,²¹⁶ is the only position consistent with the majority's view of Decree 1926. By virtue of this change of heart, the electorate's response to Decree 927 became the foundation of the reform process. The expression of the sovereign will on May 27

214. Concordat between Colombia and the Holy See of June 12, 1973.

215. Treaty of Sept. 14, 1979, *supra* note 83.

216. Decision of May 25, 1990, *supra* note 72, at 546; *see also* text accompanying *supra* notes 65-66.

created a profound political fact that neither the Executive nor the judiciary could neglect. While the Executive understood its mandate to take all necessary steps to put the process into motion, the Court was certainly aware of what occurred on May 27 when a majority decided to abandon years of strict constructionism of Article 218 of the Constitution in order to uphold the process.

IV. COLOMBIA'S CONSTITUTIONAL FUTURE

Popular sovereignty became a talisman in revolutionary America. This slogan was conveniently used for political purposes by the Framers in 1787, by the ratifiers after that, and by Chief Justice Marshall when he sought to justify the doctrine of judicial review. In the same way that the U.S. constitutional model has been widely exported, so has the concept of popular sovereignty and its capacity to serve political ends.

The Colombians have embarked upon fundamental reform in the name of the people. Their new Constitution is real, a political fact. A Colombian legal scholar has maintained that the leading constitutional scholars in Colombia "all share the same view of constitutionalism as legal craftsmanship and constitutions as instruments for governments and parties to impose political order as well as social peace on warring but perfectible Colombians."²¹⁷ According to Valencia, constitutional reformism "works as an efficacious strategy of self-legitimation through which the leading classes and parties have attempted to create a consensus and succeeded to prevent a change."²¹⁸ Writing in 1986, Valencia could not foresee the reform of 1990-91. Perhaps he would regard the new Constitution as still another victory of the forces of order, purchased from those who hold the nation hostage at the price of constitutional integrity.²¹⁹

It is unclear whether the invocation of popular sovereignty to legitimate the reform process in Bogotá reflects a genuine public demand for a new set of societal rules and institutions. Instead, it could simply be another episode of constitutional reform serving as a shield to protect the less populist and shorter term political goals of those in power. Legally, it makes no difference. The Colombian electorate indicated by plebiscite that they wanted a chance to

217. VALENCIA, *supra* note 1, at 27.

218. *Id.* at 39-40.

219. *Id.* at 198-99, 201.

vote for a constitutional assembly, and did just that by conferring their primary sovereignty upon a popularly elected body.

The legitimacy of a society's first organizing principle—popular sovereignty in Colombia and in the United States—is dependent upon its continuing acceptance by the people. While acceptance must be measured over time, the efficacy of the process for promulgating the new Colombian Constitution remains important. Whether Colombians arrive at consensus or not will depend in part upon their reaction to that process.

Some in Colombia have rejected the new Constitution as being simply illegal—unauthorized by the prior constitution. Others object to the political concessions made in constituting the assembly, and the presence there of recently active terrorists. Others have the perception that the assembly decided to ban extradition of drug traffickers only because it had a metaphorical gun at its collective head. Cynics might take some solace, however, in recalling the true nature of the covenant made by the Philadelphia delegates in 1787 and later ratified by representatives of the people. Democracy was hardly the watchword in 1787. Most power given to the federal government was taken from the states, which had been closest to the people, their desires, and needs. The invocation of popular sovereignty during the constitution-making period was at least as much a political ploy as a reflection of a social principle. The nationalists simply had to find a way to circumvent state sovereignty in order to get their plan adopted.²²⁰ Popular acceptance of the Constitution was to some extent assured at the outset by the provision of Article VII which calls for ratification by state conventions and not by legislatures. Yet, Article V does not permit popular initiatives, the most direct measure of popular consent, as a method of constitutional amendment.²²¹ Hart concedes that "[f]ailure to exercise an amending power as complex in its manner of exercise as that in the United States Constitution, may be a poor sign of the wishes of the electorate, though often a reliable sign of its ignorance and indifference."²²² Popular sovereignty was, in part, a fiction.²²³ It remains, in part, a fiction.

220. See KAMMEN, *supra* note 7, at 12-28.

221. For a discussion of the anti-democratic possibilities attending Article V, see Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J. L. REF. 409 (1987).

222. HART CONCEPT, *supra* note 102, at 76.

223. See, e.g., KAMMEN, *supra* note 7, at 13-28; see also text accompanying *supra* notes 99-113.

In the United States, the prospects for a general long-term acceptance of the Constitution would not have seemed especially good in 1789. The ratification debates were bitter and divided, and many continued to charge that the Constitution was a plan by the rich to create an aristocracy. The opposition subsided quickly, due partly to a recognition that a democratic act had been done, partly because the new system seemed less radical and therefore preferable to the obvious alternatives.²²⁴ Subsequently slavery, secession, and the Civil War threatened the Constitution. But the Civil War settled the secession question, and the post-war Amendments, technically adopted in violation of Article V, helped to add momentum to a constitutional system whose legitimacy was growing every day.

The new Colombian Constitution may also gain legitimacy over time through popular acceptance. The problem with the acceptance theory is that it may reflect only a fictional legitimacy. Acceptance is normally manifested largely by acquiescence and adherence by the masses to the will of the public officials. Although citizen understanding of the legal system is theoretically required, public participation is not.²²⁵ Thus, on the one hand, the acceptance theory liberates insofar as it permits self-amendment, even of the most basic norms. On the other hand, judging the efficacy of a legal system by reference to the acquiescence or the mere obedience of the people would amount to a toleration of almost any legal system, no matter how cruel or barbaric. It could even validate a system where the people are oppressed through either coercion or social conditions and not permitted reasonable participation in governance.

This Article has shown that the condition of constitutional legitimacy is dependent upon local circumstances. Nonetheless, the experience of state and federal constitution-making in the United States provides a helpful comparative perspective from which the Colombian reforms may be viewed. United States history has shown that popular sovereignty may legitimate a new charter with or without an opportunity for popular ratification. While ratification in state conventions was remarkably effective in marshalling

224. See Kay, *supra* note 31, at 67-70.

225. See HART CONCEPT, *supra* note 102, at 76. Hart's acceptance theory has been criticized, fairly in our view, for not dealing with the relationship between the people and the officials in manifesting acceptance. See Gabriel Mosonyi, *Legal Obligation, Social Acceptance and the Separation of Law and Morals*, 6 CONN. L. REV. 36, 37 n.14 (1973).

support and diffusing disagreement with the new federal Constitution, several states produced effective republican constitutions without ratification.²²⁶ Perhaps Colombia has too.

In at least one sense, the recent process of constitutional reform in Colombia began more democratically than the 1787 United States counterpart. The plebiscite that produced the *Constituyente* in Colombia involved the people directly in convoking the assembly and electing nearly all of its members. Dissimilarly, the Philadelphia delegates were chosen by the state legislatures after these representative bodies voted to join the Convention. In contrast, Article 380 of the new Colombian Constitution declares that it is effective "from the day of its promulgation."

By not providing for popular ratification of the new Colombian Constitution the people and the assembly may have missed an opportunity to enhance the worth of their hard work. The Colombian people no doubt delegated their constituent power to the assembly. But, the new Colombian Constitution could have been presented, like the United States Constitution, as a proposal to the people. Popular ratification accomplishes two important things. First, it gives the people another chance to decide whether they want a new charter, this time with the proposal in front of them. With an opportunity for popular ratification, the Colombian electorate could have more effectively decided whether the new Constitution "strengthen[s] the democratic-participatory system of government through representative mechanisms" as they called for in their May 1990 plebiscite. Second, popular ratification more effectively counters the positivist argument that the new Constitution was not authorized and is therefore illegal. Treating the new document as a proposal for the people, produced by an assembly elected by the people, and requiring their approval would have been an unequivocal exercise of primary sovereignty. After such a showing of popular support for reform, the positivist would have had to concede its legitimacy or admit that Colombians must forever live with Article 218 of the 1886 Constitution or resort to a *golpe de estado*.

As noted earlier,²²⁷ any measure of a constitution's acceptance must take into account the difficulty of constitutional amend-

226. FARBER & SHERRY, *supra* note 12, at 38; see also R.I. CONST. arts. 7, 21 of the Bill of Rights; SUBER, *supra* note 147, at 351.

227. See text following *supra* note 114.

ments. The amending processes in the Articles of Confederation and in Colombia's 1863 Constitution were too onerous, requiring unanimous ratification by every local legislature. In Colombia, Article 218 of the 1886 Constitution may have been unfair in granting exclusive amending power to a legislature which was not actually representative.²²⁸ In the United States, there have been periodic and ongoing debates concerning the difficulty of the Article V process. Hundreds of proposals have been introduced in Congress to make the process easier, always in the context of the sponsor's favorite substantive reform.

The new Colombian Constitution broadens considerably the options for amendment. Three alternative methods are permitted: By special legislation of the Congress (like the predecessor Article 218), by calling of a special constitutional assembly, or by referendum of the people.²²⁹ Before the present equivalent of Article 218 process may begin, ten members of Congress, twenty percent of the municipal or departmental legislatures, or five percent of the registered voters must present a legislative proposal for amendment to Congress. As in the past, Congress must consider the measure in two consecutive sessions. Upon approval by a majority of those in attendance in the first session, the proposal is published by the government. In the second congressional session, no changes may be debated or considered that were not introduced in the first session. To become effective, the amendment must be approved by a majority of the members of both houses of Congress in the second session.²³⁰

The constitutional reform process of 1990-91 is expressly sanctioned in the new Constitution. Instead of the relatively unfettered process that saw President Barco call for the plebiscite that began the recent reform, the new Constitution permits Congress to order a plebiscite through the enactment of ordinary legislation. If at least one third of eligible voters vote for the creation of a special constitutional assembly, a special election follows and the right of Congress to amend the Constitution on its own volition is suspended. The elected assembly then adopts its own procedural regulations, subject to Congress determining, in its statute calling for the plebiscite,²³¹ the "competence, period and composition" of the

228. See VALENCIA, *supra* note 1, at 46; VÁZQUEZ, *supra* note 33, at 19.

229. COLOM. CONST. art. 374.

230. *Id.* art. 375.

231. *Id.* art. 376.

assembly.

A public referendum to amend the Constitution occurs either to negate certain amendments approved by Congress, or to adopt new constitutional provisions. If Congress enacts an amendment concerning fundamental rights listed in the Constitution, or affecting the mechanism of popular participation created by the new Constitution, or concerning Congress in general, then five percent of the voters may act within six months of its enactment to request a referendum to defeat the new provision. The amendment is defeated by a majority vote of at least one quarter of eligible voters.²³² Additionally, the Executive or five percent of eligible voters can propose to Congress the calling of a referendum on constitutional amendments whose text must be incorporated in the statute ordering the referendum. In this case, the voters must be given the opportunity to pass separately upon each theme or article of the amendment.²³³ Finally, the new Constitution provides that amendments, however made, are subject to review for constitutionality, within one year of their enactment and then only to determine whether they have followed the processes prescribed in Title XIII, the amending title.²³⁴

These changes enhance democratic government and promise to be a more accurate measure of citizen acceptance of the Constitution. The longstanding practice of amendment by special legislation is retained, but local officials and voters are given more practical access to the system, while the constitutional assembly is expressly recognized. The election of a constitutional assembly may be held only if one-third of the eligible voters approve. Likewise, the referendum provides the people with a check on the Congress if that body becomes too willing to amend the Constitution's protection of individual rights. The extent to which the new provisions for amendment manage to straddle the gulf between making change too easy to protect fundamental values and too hard to ensure effective consent will, once again, become clearer over time. Of course, whatever the character of the amending provisions, no positive law can ever abrogate the primary sovereign power. The Colombian reformers must simply trust that the populist methods

232. *Id.* art. 377.

233. *Id.* art. 378. This provision is apparently in response to the events surrounding the 1957 plebiscite, when voters faced a comprehensive list of reforms and could only approve or reject the entire package.

234. COLOM. CONST. art. 379.

now available will forestall the impulse to abandon the Constitution. While the failure to amend a constitution due to a burdensome amending clause is an imperfect measure of continuing consent,²³⁵ courts can and do play a critical role in fashioning and indicating popular consent by interpreting constitutions. In both the United States and Colombia, constitutional change has occurred through judicial interpretation. Consistent with the acceptance theory, citizen consent to a constitution may be determined either by reference to what the courts say or to what the fundamental rules themselves provide. As the courts in the United States have sought to mold the Constitution to changing times, the fiction of popular sovereignty has served to bind the nation and provide stability, while judges have diminished the consequences of the myth for the people by protecting them from majoritarian processes and originalist interpretations of the Constitution.²³⁶ Colombia has had a similar experience with judicial review since the beginning of this century.²³⁷

Will this episode of "lawlessness" breed disregard for the stature of the Constitution in Colombia? Probably not. Although the 1886 Constitution lasted for more than one hundred years, Colombia's juridical and constitutional history suggests that the 1991 reform falls into the pattern of constitutional changes made during times of crisis.²³⁸ Moreover, constitutional change is arduous, it requires commitment and seriousness of purpose. Rather than breeding disrespect for law, the possibility of constitutional change outside the existing rules for change reminds us of the responsibility lawyers have to make law accessible, understandable, and just.

As citizens and lawyers, we are bound by our existing rules, but not irrevocably. Because of self-imposed procedural rules we cannot uniformly modify or ignore laws we do not like. Yet, we can persuade those who hold the primary sovereign power to seek fundamental constitutional revision, including changing the rule for change itself. We can and must shape the rules of change themselves, so that they fairly but not too easily permit the popular will to call for reform. We can remain watchful for unacceptable rules,

235. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 236-37 (1980).

236. See KAMMEN, *supra* note 7, at 14. See generally WILLIAM WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* (1988); KAMMEN, *supra* note 162, at 29-39 (1986).

237. See VALENCIA, *supra* note 1, at 202.

238. *Id.* at 42-44.

and we must do so. Finally, when fundamental change is made through an exercise of popular will, our perspective shifts, but our responsibility as lawyers and citizens remains.