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# The Illegality of the Constitution

Richard Kay

*University of Connecticut School of Law*

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# THE ILLEGALITY OF THE CONSTITUTION

*Richard S. Kay\**

There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it.

Edmund Randolph  
1787<sup>1</sup>

The central role of the Constitution of 1787 in our constitutional law and scholarship is, of course only natural. The well-established and terrible power of judicial review is supported, in the general understanding, by the belief that the Constitution created, limited, and defined the institutions of American government. The power of courts to invalidate government action is accepted only because the courts are seen as the mouthpiece of the Constitution. This is the understanding which is taught to every school child<sup>2</sup> and which is pled by every official who bows to a judicial decree insisting that no person is above the law.<sup>3</sup> Notwithstanding evidence that the document itself is often no more than a peripheral feature of judicial decisionmaking, a constitutional law or a constitutional scholarship without a Constitution will be unthinkable for a long time to come.

It seems appropriate, therefore, to investigate the origins of the constitutional text. When we do, however, a paradox emerges: This foundation of American legality was itself the product of a blatant and conscious illegality. But this illegality is indeed a para-

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\* Professor of Law, University of Connecticut School of Law. This article, in part, is a revised version of material originally published in Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111 (1984), in which I compared the developments in the United States in 1787-89 to the constitutional changes in Canada in 1980-82. The research necessary for that article and this one were supported by the Canada-United States Law Institute.

1. 1 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 262 (1911).

2. The idea that courts interpret the Constitution in constitutional adjudication "is a view more frequently expressed by the millions of Americans who stagger through life without the benefit of a modern legal education." Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051 (1984).

3. Perhaps the best known example is President Richard Nixon's decision to comply with court orders demanding production of the White House tapes, a decision which finally led to his resignation. In turning over the first set after a decision by the Court of Appeals for the District of Columbia Circuit, his lawyer announced, "This President does not defy the law." R. NIXON, *RN: THE MEMOIRS OF RICHARD NIXON* 937 (1978).

dox and not a contradiction. For it is exactly its break with prior legality that invested the Constitution with the power it still exercises over us and with its, at least formal, primacy in our legal system. Moreover, this phenomenon is perfectly general. Every legal system is governed, at the end, by principles whose authority cannot be found in law.

## I. LEGALITY, LEGITIMACY, AND THE AUTHORITY OF CONSTITUTIONS

Every legal system sits upon a political bottom. A familiar illustration in the literature of constitutional theory traces, by a process of regression, the sources of validity for, say, a city ordinance. The ordinance is valid because enacted in the manner provided in the City Charter. The Charter is valid because promulgated in accordance with the terms of a legislative enabling act. The enabling act is valid because enacted by the legislature in a way authorized by the Constitution. At this point, ordinarily, the chain of legality must stop. The Constitution is binding law, but not because it was created under the authority of some higher instance of positive law.<sup>4</sup> The source of the legal quality of the Constitution—and therefore, the source of the legal quality of all valid law—must be found in some phenomenon other than law.

Many have attempted to characterize that phenomenon. Hans Kelsen wrote of a “basic norm,” the validity of which is presupposed.<sup>5</sup> H.W.R. Wade described it as a matter of political fact.<sup>6</sup> H.L.A. Hart gave the matter its most illuminating explanation in postulating a legal system’s rule of recognition. His model will be the basis for the following discussion. The rule of recognition provides the ultimate criteria for identifying valid law but is not itself validated by prior positive law.<sup>7</sup> Since this rule of recognition accounts for the binding legal force even of the Constitution, it is plausible to refer to it as the “preconstitutional” rule.<sup>8</sup> In England, it is often said that the preconstitutional rule is: “What the Queen in Parliament enacts is law.” In the United States the conventional understanding of the legal system would lead to a preconstitutional rule which, with respect to federal law, is: “The Constitution, and

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4. P. FITZGERALD, SALMOND ON JURISPRUDENCE 111-12 (1966); H. HART, THE CONCEPT OF LAW 103-04 (1961); K. OLIVECRONA, LAW AS FACT 96 (1971); Wade, *The Basis of Legal Sovereignty*, 1955 CAMB. L.J. 172, 196.

5. H. Kelsen, PURE THEORY OF LAW 46-48, 194-200 (1967).

6. Wade, *supra* note 4, at 188; *see also* P. FITZGERALD, *supra* note 4, at 58-59, 84-87, 111-12.

7. H. HART, *supra* note 4, at 103-05.

8. *See* Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

what the institutions of the federal government enact, within the limits and according to the procedures of the Constitution, are law."<sup>9</sup>

What creates a preconstitutional rule and the criteria by which it may be criticized cannot, themselves, be questions of law.<sup>10</sup> This is true even though the subject is the character of the legal system. Indeed, it is just because the question is one of defining the ultimate control over the rules of law that those rules, themselves, cannot provide a solution.<sup>11</sup> For Hart the rule of recognition exists in a particular legal system only by virtue of its acceptance as such. While the rule of recognition must be regarded as law by participants acting within the system (from the "internal" point of view),<sup>12</sup> its status as the ultimate rule depends on a finding that the necessary acceptance is present<sup>13</sup> and can only be confirmed from outside the legal system.<sup>14</sup> That is to say, the establishment and identification of the preconstitutional rule must be matters of fact.<sup>15</sup>

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9. The examples cited are, of course, highly simplified. In the United States the failure of the judiciary, whose determinations are accepted as binding statements of law, simply to follow the prescriptions and proscriptions of the written Constitution indicate that the text may provide merely one component of a more complex preconstitutional rule. See Kay, *supra* note 8. In any highly developed legal system the preconstitutional rule will be a complex, compound set of criteria. See H. HART, *supra* note 4, at 92-93; cf. Finnis, *Revolutions and Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 44, 68-69 (2d Ser. 1973).

10. Nonetheless, some commentators have referred to the underlying criteria for validity of laws as themselves rules of the common law. See W. JENNINGS, *THE LAW AND THE CONSTITUTION* 156-63 (5th ed. 1959); Dixon, *The Common Law as an Ultimate Constitutional Foundation*, 31 AUSTL. L.J. 240 (1957); Slattery, *The Independence of Canada*, 5 SUP. CT. L. REV. 369, 379-81 (1983). While this characterization is attractive in that it conforms with the fact that these criteria commonly show up in judicial decisions, see H. WADE, *CONSTITUTIONAL FUNDAMENTALS* 25-40 (1980), it is anomalous in that the common law itself is ordinarily understood to be subordinate to and alterable by statutory law. That understanding is just one manifestation of the generally accepted view that the common law is a product of an established legal system. As such it cannot comfortably contain the defining standards of that system. See Wade, *supra* note 4, at 186-87; cf. P. FITZGERALD, *supra* note 4, at 58-59, 84-87.

11. See H. HART, *supra* note 4, at 103-07.

12. See *id.* at 107-08.

13. See *id.* at 111-14.

14. Cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 91-93 (1962) (noting the limited nature of debates accompanying both political and scientific revolutions). On the insufficiency of the internal point of view in understanding law, see Weisbrod, *Looking at Law*, 16 CONN. L.R. 1007 (1984).

15. See H. HART, *supra* note 4, at 106-07; Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEG. STUD. 165, 168-69 (1982); Slattery, *supra* note 10, at 379-81; Wade, *supra* note 4, at 188. Hart's emphasis on fact distinguishes his view from Kelsen's theory of the "Basic Norm." For Kelsen the validity of the ultimate norms of positive law is supplied by a "Basic Norm," the validity of which is not demonstrated, but presupposed. See H. Kelsen, *supra* note 5, at 194-202. The critical difference, for our purposes, is that the Basic Norm is not grounded in the factual circumstances and behavior of the participants of the legal system. See *id.* at 208. Compare H. HART, *supra* note 4, at 105-06. Kelsen's position is a consequence of his insistence on the impossibility of deriving a norm from a fact, an

When the preconstitutional rule is settled we can productively inquire into the validity of a rule of law by reference to the preconstitutional rule.<sup>16</sup> We are then adopting an internal point of view. Such inquiries will be referred to here as questions of "legality." In contrast there are periods of profound constitutional doubt and constitutional change. At such times it is the preconstitutional rule itself which is in dispute. But since there can be no legally correct resolution of such disputes, they can be debated only in terms external to the legal system. Such discussion will be referred to here as a question of "legitimacy."

The term "legitimacy" will, therefore, be used in a rather special sense. In particular it will denote the acceptability of a preconstitutional rule with respect to the attitudes and beliefs of a particular society. This is in keeping with Hart's notion that the preconstitutional rule is determined by the attitudes and beliefs of the participants in the legal system. Claims of the legitimacy of a preconstitutional rule are, therefore, claims of "fit" between the preconstitutional rule and the characteristics of the society involved.<sup>17</sup> This contextual legitimacy, of course, is an enormously complex matter. For example, Hart emphasized the critical reflective attitude of the officials administering the law, in contrast to attitudes in the general population. But "official" and "popular" attitudes are not independent phenomena. Furthermore, the very legal system which is at issue may mold as well as be molded by the underlying social factors. Finally social attitudes and beliefs are the product of diverse and sometimes contradictory factors—historical, economic, religious, geographical and so forth. This amalgam of influences provides the political underpinning on which any legal system must finally rest.

Any discussion of the legitimacy of a preconstitutional rule

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"ought" from an "is." See H. Kelsen, *supra* note 5, at 193; N. MACCORMICK, H.L.A. HART 25-26 (1981); J. RAZ, *THE AUTHORITY OF LAW* 125-26 (1979). Kelsen's Basic Norm, therefore, is, as he states, not a tool of ethical-political analysis. It is rather a logical consequence of the existence of a legal system. See H. Kelsen, *supra* note 5, at 9; Kelsen, *Professor Stone and the Pure Theory of Law*, 17 STAN. L. REV. 1128, 1142-43 (1965). The discussion in the text, which focuses on the ethical-political factors which form the defining characteristics of a legal system, relies, therefore, on the kind of analysis best explicated by Hart.

16. To some extent that inquiry may be conducted by an examination of the express rules of the legal system and the statements of its officials. But often such information will be insufficient either because of a divergence between these artifacts and the actual operation of the legal system or because verbal formulations are inherently inexact. See H. HART, *supra* note 4, at 144-50. In such cases we will need to know more about the way society works outside the formal machinery of the legal system.

17. This use of the term is similar to that employed by Weber as describing a phenomenon which is contingent on the facts of an actual society. See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 124-32 (T. Parsons ed. 1964).

must involve two aspects—its contents and its origins. Each must be compatible with the relevant characteristics of the society whose law it governs. Thus, with regard to content, a society with a uniform and strongly rooted tradition of belief in a revealed religion may require a preconstitutional rule in which the standard of valid law involves reference to an accepted medium of revelation. But even the specification of accepted criteria of validity might be insufficient if the rule issues from what is perceived as a corrupt origin. Thus, a constitutional system which has substantively adequate rules of constitutional validity might be incapable of achieving the necessary respect if its historical source was the edict of a foreign conqueror. In sum, questions concerning the character of an existing preconstitutional rule, as well as the probability or propriety of a change in it, necessarily demand reference to the social organizations, the customs and practices, the history and the moral and political principles of that group of human beings who are to live under the system of law which that rule is to define.<sup>18</sup>

So long as a legal system is in place and generally effective, its legitimacy ordinarily will be assumed. As soon, however, as the basis of the system (not just the validity of a particular rule) is brought into question, issues of legitimacy necessarily arise. This kind of argument may be of little moment so long as such doubts are isolated. Occasions may arise, however, when it is fair to say that a whole society is engaged in critical discussion of the basis of its law. In those cases the justification and denunciation will appeal to standards of legitimacy.

When a new preconstitutional rule emerges out of such a period it is fair to characterize such change, at least in a narrow sense, as revolutionary in a way which no change, no matter how substantial, authorized by law can be. Of course this kind of revolution need involve no tumult or bloodshed. It may even leave undisturbed the day-to-day rules and practices of political and legal insti-

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18. Legal, like pre-legal, social rules have no common identity or basis of existence in time save that of the group of human beings which accepts them. In times of crisis, the lawyer is obliged to admit that his judgments rest on a critical assessment of the identity of an object which normally he regards as "artificial and anomalous" and legally barely intelligible—viz, the great "unincorporated society" in which he lives.

Finnis, *supra* note 9, at 70.

The meaning given legitimacy, is, it will be noted, something of a catch-all incorporating all of the inexact non-legal factors which will be relied on in deciding the propriety of a possible basis of the legal system. It, therefore, does not respond to Prof. Hyde's opposition between legitimacy on the one hand and other reasons for adhering to a legal system such as "habit, fear of sanctions, and individual conviction that the requested compliance is in the actor's interest." Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wisc. L. Rev. 379, 388.

tutions. But it works changes which are literally fundamental in creating the foundations of law while itself resting on no law.

It was that kind of revolutionary change which occurred in the United States in 1787-89.

## II. THE EVENTS OF 1787-89

### A. *The Articles of Confederation*

The Articles were submitted by the Continental Congress to the various state legislatures for ratification on November 17, 1777.<sup>19</sup> Sixteen months earlier Congress had declared the colonies to be "free and independent states" having full power to do the "things which independent states may of right do."<sup>20</sup> The Articles were to have no effect until accepted by every state legislature. Largely due to differences over various state claims to western lands, the last state did not approve until March, 1781.<sup>21</sup> This ratification brought into being for the first time a legal entity known as "The United States of America." The Articles were in effect for eight years until the institution of the new constitutional government in 1789.<sup>22</sup>

The nature of that first constitution was clear from the face of the document itself. The Articles established a "perpetual" union of the states and granted some significant, but limited, national powers to a Congress of state delegates. In Congress, each State had a single vote, and no important action could be taken without the assent of nine states. The Articles declared that "[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."<sup>23</sup> Any change of the Articles themselves required the unanimous agreement of the state legislatures.<sup>24</sup> The Articles, therefore, while establishing a substantial federation for its time,<sup>25</sup> created not a national government, in any modern sense, but "a firm league of friendship."<sup>26</sup>

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19. *ENCYCLOPEDIA OF AMERICAN HISTORY* 98 (R. Morris ed. 1961).

20. The Declaration of Independence, para. 32 (U.S. 1776).

21. B. BAILYN, D. DAVIS, D. DONALD, J. THOMAS, R. WIEBE & G. WOOD, *THE GREAT REPUBLIC* 302-04 (1977) [hereinafter cited as B. Bailyn, D. Davis].

22. M. JENSEN, *THE ARTICLES OF CONFEDERATION* 239 (1940).

23. Articles of Confederation art. II (U.S. 1781).

24. *Id.* at art. XIII.

25. Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 *YALE L.J.* 142 (1978).

26. Articles of Confederation art. III. See B. BAILYN, D. DAVIS, *supra* note 21, at 302-03.



The shortcomings of the Articles have been recounted many times.<sup>27</sup> Although it oversaw important accomplishments in the successful conclusion of the Revolutionary War and the organization of the Northwest Territories, it was, in a literal sense, constitutionally incapable of dealing adequately with the country's persistent problems. Effective economic policy was frustrated by the failure to give the Congress authority to tax, to regulate commerce or to control credit, and by an inability to deal with the delinquency of many states in their financial contributions. With respect to external relations, the central government was incompetent to establish national tariff or trade policies, resulting in a serious disadvantage in competing or negotiating with other countries. In all of those matters, the fragmentation of political authority was a major obstacle to progress. Moreover, the state governments, to which most important public decisionmaking had been confided, were increasingly inefficient and corrupt, and consequently regarded with diminished public respect.<sup>28</sup> In the last years of the 1780's, it was widely perceived that any solution to these difficulties would involve a significant augmentation of national power.<sup>29</sup>

In January, 1786, the Virginia legislature proposed that a convention be held in Annapolis in September, to consider solutions to the commercial problems plaguing the confederation.<sup>30</sup> Only five states sent delegates. They merely proposed that Congress call another convention to be held in Philadelphia the following spring. The Philadelphia convention was to consider not just commercial matters, but "to devise *such further provisions* as shall appear to [the delegates] necessary to render the Constitution of the Federal Government *adequate to the exigencies of the Union.*"<sup>31</sup>

Partially in response to the argument that such a convention was contrary to the lawful amendment procedure provided in the Articles, Congress for a time ignored the request.<sup>32</sup> By February, 1787, however, a majority of the states had elected delegates to the convention. Congress then issued a call for a convention for "the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and

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27. See e.g., B. BAILYN, D. DAVIS, *supra* note 21, at 325-29, and the sources cited at 350. But see Note, *supra* note 25.

28. See B. BAILYN, D. DAVIS, *supra* note 21, at 325-28.

29. *Id.* at 329.

30. See M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 33 (1964).

31. *THE FEDERALIST* No. 40, at 258 (J. Madison) (J. Cooke ed. 1961); C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 61-63 (MacMillan Press ed. 1929).

32. See note 37 *infra* and accompanying text.

confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”<sup>33</sup>

The main features of the events of that extraordinary summer of 1787 are now well known to every student of American history. The delegates proposed an entirely new government. Their plan was not submitted to the state legislatures but was ratified by specially elected conventions in each state.<sup>34</sup> When the ninth state, New Hampshire, ratified in June of 1788, the Constitution by its own terms could come into effect. Shortly thereafter, when Virginia and New York followed suit, the inauguration of the new regime was assured.<sup>35</sup> In the spring of 1789, the new government was organized, and the Constitution became the supreme law of the land.<sup>36</sup>

### B. *The Legality of the Constituent Process*

#### 1. The Convention of 1787

Under the Constitution, the final authority of the state legislatures which underlay the Articles was scrapped. This change was more than a mere legal revision under a continuing preconstitutional rule. The extra-legal character of the change was understood even prior to the convention and helps explain Congress's reluctant participation.<sup>37</sup>

The same recognition surfaced early in the deliberations of the convention itself. On May 29, Edmund Randolph of Virginia put before the convention three resolutions proposing a wholesale replacement of the Confederation by a strong national government.<sup>38</sup> As the plan's opponents were quick to point out, the Congressional resolution calling the convention, as well as the instructions to a number of state delegations, restricted the convention's mission to "revising the Articles of Confederation and reporting . . . alterations and provisions therein."<sup>39</sup> Randolph's "Virginia Plan" proposed replacement, not revision. To approve the resolution, therefore, Charles Pinckney of South Carolina argued, would mean

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33. 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 13-14 (1911).

34. M. JENSEN, *supra* note 30, at 102-05.

35. *Id.* at 138-39.

36. ENCYCLOPEDIA, *supra* note 19, at 121.

37. In his notes on the congressional debates of February 21, 1787, Madison wrote that objections to the Convention centered in part on the feeling that such a course "tended to weaken the federal authority by lending its sanction to an extra-constitutional mode of proceeding." 5 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 96 (2d ed. 1891).

38. See M. JENSEN, *supra* note 30, at 39-42.

39. 3 M. FARRAND, *supra* note 33, at 13-14.

"their business was at an end."<sup>40</sup> William Paterson of New Jersey warned the delegates that they "ought to keep within [the Articles'] limits, or [they] should be charged by [their] constituents with usurpation. . . . [T]he people of America were sharp-sighted and [would] not be deceived."<sup>41</sup> The objection was put sharply in an anti-constitutional tract published during the ratification debate:

They [the Convention] had no other authority to act in this matter, than what was derived from their *commissions*—when they ceased to act *in conformity thereto*, they ceased to be a federal convention, and had no more *right* to propose to the United States the new form of government, than an equal number of other gentlemen, who might voluntarily have assembled for this purpose—The members of the convention therefore, admitting they have the merit of a work of supererogation, have thereby inferred no kind of obligation on the States to *consider*, much less to adopt *this plan of consolidation*. The consolidation of the union! What a question is this, to be *taken up and decided by thirty-nine gentlemen* who had no publick authority whatever for *discussing it*!<sup>42</sup>

In reply, the advocates of the new constitution made a half-hearted legal argument. Madison asserted that the new government was not so different from the Confederation government and was a mere "alteration."<sup>43</sup> "The truth is," he later wrote, "that the great principles of the Constitution proposed by the Convention, may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation."<sup>44</sup> The critical legal question, however, was not whether the Constitution was "absolutely new" but whether it could reasonably be construed as a "revision" of the prior instrument. On this there is little doubt. The supporters of the Constitution also sought comfort in the language of the Congressional authorization, which had called on the convention to propose such alterations as would "render the federal constitution adequate to the exigencies of Government & the preservation of the Union."<sup>45</sup> That being the convention's charge, Randolph argued, "it would be treason to our trust, not to propose what we found necessary."<sup>46</sup> Given the deficiencies in the existing government, a delegate to the North Carolina ratifying convention explained, "[i]t was found impossible to improve the old system

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40. 1 M. FARRAND, *supra* note 1, at 39.

41. *Id.* at 178; remarks of E. Gerry, *id.* at 42-43; remarks of J. Lansing, *id.* at 249; M. Jensen, *supra* note 30, at 42-43, 52-57.

42. The Letters of a "Republican Federalist" in C. KENYON, *THE ANTIFEDERALISTS* 114 (1966).

43. *THE FEDERALIST* No. 40, *supra* note 31, at 260-61.

44. *Id.* at 262. For a modern argument that there was significant continuity between the Articles government and the new Federal government, see Note, *supra* note 25, at 160-65.

45. 3 M. FARRAND, *supra* note 33, at 14.

46. 1 M. FARRAND, *supra* note 1, at 255.

without changing its very form.”<sup>47</sup> However, in light of the strict and specific language of the congressional call, this liberal interpretation was highly implausible. It is hard to dispute the common sense of John Lansing’s observation that “N[ew] York would never have concurred in sending deputies . . . if she had supposed the deliberations were to turn on a consolidation of the States, and a National Government.”<sup>48</sup>

If the legal argument on behalf of the convention’s actions was unconvincing, other, non-legal justifications would have to be devised. Some supporters of the proposal minimized the importance of any departure from the legally established procedure on the ground that the convention’s recommendations had no juridical significance. Hamilton felt no difficulty because “[w]e can only propose and recommend—the power of ratifying . . . is still in the states.”<sup>49</sup> The convention, Madison wrote, was “merely advisory and recommendatory” and its proposal was “of no more consequence than the paper on which it is written.”<sup>50</sup> This was, of course, a concession and not a response to the claim of *ultra vires*.

Other defenders met the accusation more boldly. The convention’s trespass of its legal boundaries was justified by the gravity of the situation facing the country and the incapacity of existing institutions to meet it. James Wilson of Pennsylvania, subsequently one of the nation’s first great authorities on constitutional law, told his fellow delegates at Philadelphia that “[t]he House on fire must be extinguished, without a scrupulous regard to ordinary rights.”<sup>51</sup> Similarly, Colonel Mason insisted that in “certain crises . . . all the ordinary cautions yielded to public necessity.”<sup>52</sup> He pointed to the negotiation of the 1783 Treaty with Great Britain, during which the American envoys had exceeded their powers but in so doing had “raised to themselves a monument more durable than brass.”<sup>53</sup> In

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47. 3 M. FARRAND, *supra* note 33, at 351 (remarks of R.D. Spaight in the North Carolina Convention, July 30, 1788); see THE FEDERALIST No. 40, *supra* note 31, at 265; M. DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 23 (1981).

48. 1 M. FARRAND, *supra* note 1, at 249.

49. *Id.* at 295; to the same effect, see *id.* at 253 (remarks of J. Wilson).

50. THE FEDERALIST No. 40, *supra* note 31, at 264. To the same effect was the speech of Edmund Pendleton in the Virginia Convention: “Suppose the paper on your table dropped from one of the planets; the people found it, and sent us here to consider whether it was proper for their adoption; must we not obey them?” 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 38 (2d ed. 1891). Similar expressions may be found by Davie and Maclaine in the North Carolina Convention, 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 23, 204 (2d ed. 1891).

51. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 469 (1911).

52. 1 M. FARRAND, *supra* note 1, at 338.

53. *Id.*

*The Federalist* No. 40, Madison wrote:

[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.<sup>54</sup>

"That is," concluded Charles Beard, commenting on this language, "the right of revolution is, at bottom, the justification for all great political changes."<sup>55</sup>

## 2. The Ratification Process

Quite apart from the legal incapacity of the convention, the proposed Constitution was itself inconsistent with the existing law of constitutional change. Article 13 of the Articles of Confederation, which declared the union to be "perpetual" and in which each state undertook to observe "inviolably" the Articles, barred any alteration unless it "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."<sup>56</sup>

The convention did not propose an "alteration" consistent with that Article. It did submit its product to Congress, but not for approval. Rather it was hoped that Congress would do no more than transmit the draft to the states. Moreover, under the terms of the proposed Article VII, state approval was to come not from the legislatures, but from conventions elected especially for the purpose in each state. Finally, even the state conventions would not have to approve unanimously. The agreement of nine states would be sufficient to make the Constitution effective "between the States so rati-

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54. THE FEDERALIST No. 40, *supra* note 31, at 265 (quoting the Declaration of Independence). James Iredell made the same kind of defense in his argument in the North Carolina convention:

It has been objected, that the adoption of this government would be improper, because it would interfere with the oath of allegiance to the state. No oath of allegiance requires us to sacrifice the safety of our country. When the British government attempted to establish a tyranny in America, the people did not think their oath of allegiance bound them to submit to it. I had taken that oath several times myself, but had no scruple to oppose their tyrannical measures. The great principle is, The safety of the people is the supreme law.

4 J. ELLIOT, *supra* note 50, at 229.

55. C. BEARD, *supra* note 31, at 223; see also *id.*, at 223-25; Palmer, *The American Revolution: The People As Constituent Power*, in THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION 1763-1789, at 338, 356-57 (J. Greene ed. 1968).

56. Articles of Confederation art. XIII (U.S. 1781).

ying.”<sup>57</sup> This procedure was a clear breach of the perpetual undertakings of the Articles and was so understood by the new Constitution’s supporters and opponents. It was, asserted one anti-Federalist in the New York Convention

so flagrant a violation of the public faith of these states, so solemnly pledged to each other in the Confederation, as makes me tremble to reflect upon; for, however lightly some may think of *paper* and *parchment* constitutions, they are recorded, sir, in that high court of appeals, the Judge of which will do right, and I am confident that no such violation of public faith ever did, or ever will, go unpunished.<sup>58</sup>

One of the most hotly argued issues in Philadelphia was what form the report of the convention to Congress ought to take. The ratification article reported by the committee on detail called for the Constitution to be submitted to the Congress “for their approbation.”<sup>59</sup> Since each state cast a single vote in Congress and since unanimity would doubtless be required, the prospects for this form of ratification were practically non-existent. The convention amended the article so to provide simply that the Constitution be laid before Congress but not for approval or disapproval. Elbridge Gerry of Massachusetts warned that Congress would take “just umbrage” at being so casually removed from the constituent process.<sup>60</sup>

The majority, however, did not prize legality among its most important objectives. Indeed the illegality of the process was a good reason for bypassing Congress. Thomas Fitzsimmons of Pennsylvania argued this procedure would “save Congress from the necessity of an Act inconsistent with the Articles of Confederation under which they held their authority.”<sup>61</sup> In the end any embarrassing reference to the Congress—or indeed to any of the institutions or rules of the Confederation—was just omitted. Instead the convention approved a letter to be sent to Congress with the draft Constitution: “We have now the Honor to submit to the Consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.”<sup>62</sup> No mention was made of the power of the convention or the legality of the ratification procedure. In both respects the document spoke for itself.

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57. U.S. CONST. art. VII.

58. 2 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 401-02 (2d ed. 1891). (statement of Thomas Tredwell.) See also Patrick Henry’s denunciation in the Virginia Convention of the Constitution’s “utter annihilation of the most solemn engagements of the states.” 3 J. ELLIOT, *supra* note 50, at 21.

59. 2 M. FARRAND, *supra* note 51, at 189.

60. *Id.* at 560. Gerry found an ally in, of all people, Alexander Hamilton.

61. *Id.*

62. *Id.* at 583.

Congress received the proposal three days after the convention adjourned

with no unseemly expression of pleasure; indeed, as Bancroft says, it had been in reality invited "to light its own funeral pyre." No body can be expected to decree gladly its own demise; but there seems to have been no special desire on the part of the moribund Congress to prolong its own futile life.<sup>63</sup>

Nevertheless, the opposition voiced in Congress was harsh. Richard Henry Lee, one of the Constitution's most effective opponents, denounced the Philadelphia delegates as "monarchy men . . . aristocrats, and drones" and reminded the Congress that it was being asked to acquiesce in the "subversion of the constitution under which they acted."<sup>64</sup> Lee's argument, however, was unsuccessful. And to avoid the unseemliness of "decreeing its own demise," Congress transmitted the Constitution to the state legislatures without any recommendation.<sup>65</sup>

The subsequent ratification procedure, calling for the approval of conventions in nine states, departed from the amending procedure of the Articles in two ways: by eliminating any substantive role for the legislatures and by dispensing with unanimity. In the convention Oliver Ellsworth had urged that the Constitution be treated as an amendment to the Articles to be approved by the state legislatures. Gouverneur Morris responded directly: Ellsworth's position "erroneously supposes that we are proceeding on the basis of the Confederation. This convention is unknown to the Confederation."<sup>66</sup> Similarly, with regard to unanimity, Gerry "urged the indecency and pernicious tendency of dissolving in so slight a manner, . . . If nine out of thirteen can dissolve the compact, Six out of nine will be just as able to dissolve the new one hereafter."<sup>67</sup> Morris responded again. He agreed that as a matter of law less than

63. A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 198 (1935).

64. M. JENSEN, *supra* note 30, at 121.

65. *Id.*

66. 2 M. FARRAND, *supra* note 51, at 92. It was further argued that, since the new constitution might work some changes in state constitutions, the legislatures which existed under those constitutions ought not be asked to act inconsistently with them. *Id.* at 92-93 (remarks of J. Madison).

67. *Id.* at 561. The impropriety of dissolving the confederation by less than unanimous consent was also put forward vigorously in the ratification debates. See, e.g., *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents* in C. KENYON, *supra* note 42, at 33 n.1, and the remarks of William Lancaster in the North Carolina Convention, *id.* at 415-16. The same idea was also expressed by William Lenoir in the North Carolina Convention in response to the argument that North Carolina would be isolated if it did not ratify: ". . . I would put less confidence in those states. The states are all bound together by the Confederation, and the rest cannot break from us without violating the most solemn compact. If they break that, they will this." 4 J. ELLIOT, *supra* note 50, at 204.

unanimous consent of the *legislatures* under the Confederation was insufficient. But an appeal to the people outside the established legal system could alter the federal compact "in like manner as the Constitution of a particular State may be altered by a majority of the people of the State."<sup>68</sup> Furthermore, since the Constitution would only bind the states that did ratify, no state would be coerced into the new system.<sup>69</sup> These responses, of course, did not argue that the ratification was legal but that it was proper, legal or not. In *The Federalist* No. 40, Madison readily conceded the legal necessity of unanimous agreement under the Articles but suggested that the requirement was so foolish that he could "dismiss it without further observation."<sup>70</sup>

In short, the entire ratification process was undertaken without legal sanction and, in significant part, in contradiction to law. In essence, it was an exercise in peaceful revolutionary change. Charles Beard summarized this point:

If today the Congress of the United States should call a national convention to "revise" the Constitution, and such a convention should throw away the existing instrument of government entirely and submit a new frame of government to a popular referendum, disregarding altogether the process of amendment now provided, we should have something analogous to the great political transformation of 1787-89. The revolutionary nature of the work of the Philadelphia Convention is correctly characterized by Professor John W. Burgess when he states that had such acts been performed by Julius or Napoleon, they would have been pronounced *coups d'etat*.<sup>71</sup>

### C. *The Legitimacy of the Constituent Process*

The justifications for revolution, of course, cannot be justifications of law.<sup>72</sup> Rather, they must rely on considerations of justice, policy, or necessity which outweigh the demands of legality. Sufficient justification of this sort may make the change in legal regime legitimate in the sense discussed above. For the reasons already suggested, this legitimacy depends upon the particular values and traditions of the society involved. By definition, legitimacy can never be the subject of any authoritative pronouncement by courts or legislatures.

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68. 2 M. FARRAND, *supra* note 51, at 92.

69. *Id.* at 469 (remarks of J. Madison and J. Wilson).

70. THE FEDERALIST No. 40, *supra* note 31, at 263; see Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 LAW & CONTEMP. PROBS. 283, 285 (1982).

71. C. BEARD, *supra* note 31, at 217-18.

72. But see Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).



The political actors who brought the Constitution into effect were well aware of the need for political, non-legal justifications for their actions. This is not to say that the abandonment of the established amending procedures was primarily based on the framers' appreciation of the jurisprudential underpinnings of constitutional law. Practical politics was a substantial consideration. The sweeping changes the framers desired simply could not acquire the approval of every legislature. James Wilson was blunt: "I am not for submitting the national government to the approbation of the state legislatures. I know that they and the state officers will oppose it."<sup>73</sup>

But it would be an injustice to the founding fathers to suggest that their choice of methods was purely tactical. Their arguments for replacing congressional and legislative approval with ratification by popularly elected, ad hoc conventions show that they understood that their proposed reform was more than just a revision within a continuing legal system. They knew they were laying the foundation of a new legal system. They were consciously setting out what they hoped would be a new preconstitutional rule. The debate on the propriety of the change, therefore, could not be profitably framed as a question of law. It had to take place, in James Wilson's words, "upon original principles."<sup>74</sup>

The original principle upon which the advocates of the Constitution relied was, above all, the sovereignty of the people.<sup>75</sup> Although there were differences as to its application, this concept was the universal dogma of American political thought at the end of the eighteenth century. On this idea the very independence of the American nation was founded in the Declaration of Independence.<sup>76</sup> Wilson, writing in 1791, distinguished the sources of authority on which the British monarchy was said to rest—some original contract between the king and the people, divine right, or

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73. 1 M. FARRAND, *supra* note 1, at 379. See 2 M. FARRAND, *supra* note 51, at 90 (remarks of N. Gorham); *id.* at 562 (remarks of J. Wilson); M. Jensen, *supra* note 30, at 69. The political aspects of the ratification procedure were not lost on its opponents. Luther Martin, in his "Genuine Information" delivered to the Maryland legislature in November, 1787, noted that "the warm advocates of this system, fearing it would not meet with the approbation of Congress" and legislatures bypassed those bodies in order "to force it upon them, if possible, through the intervention of the people at large." 3 M. FARRAND, *supra* note 33, at 228.

74. 3 M. FARRAND, *supra* note 33, at 143 (statement in the Pennsylvania Convention).

75. See *id.* at 142-43; M. JENSEN, *supra* note 22, at 55.

76. The Declaration recited the "self-evident" truth that governments derive "their just Powers from the Consent of the Governed" and affirmed the ineradicable "Right of the People to alter or to abolish" their governments and to institute a new one "on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their safety and happiness." Declaration of Independence para. 2. (U.S. 1776).

even "the dark foundations of conquest"—from the only legitimate source of governmental power in America: "With us, the powers of magistrates, call them by whatever name you please, are the grants of the people."<sup>77</sup>

The mere invocation of the sovereignty of the people, however, could not justify bypassing the Congress and the legislatures. Those institutions, too, could claim the authority of the people. In the late eighteenth century the classical notion of mixed government composed of institutions representing the different interests in society had given way to the idea that every organ of government derived its power solely from the sovereign people.<sup>78</sup> How, then, could an appeal to the people be the basis of an argument for circumventing their elected representatives? For ordinary decisions of law and government, the ordinary lawmaking institutions might be adequate surrogates for the people. But when, in a constituent process, the character and powers of those institutions themselves were in issue, it was natural (if not logically necessary) that they be viewed as defective vehicles for the expression of the popular will.<sup>79</sup> The people would have to speak with an alternate voice, one which was independent of, and which would transcend the agencies of government which were to be abolished.<sup>80</sup>

The method for expressing this alternate, constituent voice in the United States had become obvious by 1787. This was the special constitutional convention. The revolution itself had been the product of ad hoc committees and assemblies.<sup>81</sup> While post-independence constitution-making in the states had, at first, been the work of the existing legislatures, the theoretical unsoundness of this technique was increasingly recognized, and special constitutional

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77. Wilson, *Lectures on Law*, in *THE WORKS OF JAMES WILSON* 316-17 (McCloskey ed. 1967).

78. For a perceptive discussion of the changing nature of the recognized authority for government in this period in American history, see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). The older view was expounded by John Adams who defended constitutions mixing popular, aristocratic and monarchical elements. The newer view was exemplified in a criticism of Adams by John Stevens: "Government was not a balancing of people and aristocracy, but only the distribution and delegation of the people's political power. . . . For Stevens the parts of government had lost their social roots. All had become more or less equal agents of the people." *Id.* at 584.

79. See *id.* at 276-81; R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION* 217 (1966).

80. R. PALMER, *supra* note 79, at 354-57.

81. See *THE FEDERALIST* No. 40, *supra* note 31, at 265; G. WOOD, *supra* note 78, at 313-31. The spontaneous organization of the people of a community for the purpose of laying down the fundamental definition of their government goes back, in American history, as far as the Mayflower Compact in 1620 and the Fundamental Orders of Connecticut in 1639. See Arendt, *Constitutio Libertatis*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION, 1763-1789*, at 579 (J. Greene ed. 1968).

conventions were utilized.<sup>82</sup> "It was an extraordinary invention," the historian Gordon Wood has written, "the most distinctive institutional contribution, it has been said, the American Revolutionaries made to Western politics. It not only enabled the constitution to rest on an authority different from the legislature's, but it actually seemed to have legitimized revolution."<sup>83</sup> Revolution had "become domesticated in America."<sup>84</sup>

The submission of the proposed constitution to special ratifying conventions in the states, therefore, swept away any legal objection to the Constitution. The people's constituent power was always held in reserve and could undo whatever legal and governmental systems it had created.

From [the people's] authority the constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it?<sup>85</sup>

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82. See G. WOOD, *supra* note 78, at 276-309, 318-43. Col. George Mason of Virginia saw a danger to the primacy of any Constitution founded on the exercise of the ordinary lawmaking powers of the state legislatures. 2 M. FARRAND, *supra* note 51, at 88-89. For some contemporary observers the element of fiction in the distinction between the people represented in government and the people represented in convention was evident. Noah Webster asked what was special about a convention. It was only "a body of men chosen by the people in the same manner they choose members of the Legislature, and commonly composed of the same men; but at any rate they are neither wiser nor better. The sense of the people is no better in a convention, than in a legislature." (Quoted in G. WOOD, *supra* at 379.)

83. G. WOOD, *supra* note 78, at 342.

84. R. PALMER, *supra* note 79, at 231. See C. BEARD, *supra* note 31, at 222-25; Corwin, *The Worship of the Constitution* in 1 CORWIN ON THE CONSTITUTION 47, 55 (Loss ed. 1981); Dellinger, *supra* note 70, at 289-90.

To the operation of these truths we are to ascribe the scene, hitherto unparalleled, which America now exhibits to the world—a gentle, a peaceful, a voluntary, and a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind.

2 J. ELLIOT *supra* note 58, at 432-33 (statement of James Wilson in the Pennsylvania Convention.) See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("[The people] acted upon it in the only manner in which they can safely, effectively, and wisely, on such a subject, by assembling in Convention.")

85. Wilson, *supra* note 77, at 304. See also Wilson's comment in the Pennsylvania ratifying convention: "As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in this last instance, is much greater; for the people possess over our constitutions control in *act*, as well as right." 2 J. ELLIOT, *supra* note 58, at 432. Compare the argument of Luther Martin against the legitimacy of ratification by ad hoc conventions:

[O]nce the people have exercised their power in establishing and forming themselves into a State government, it never devolves back to them, nor have they a right to resume or again to exercise that power, until such events take place as will amount to a dissolution of their State government. . . . [The proposed ratification procedure]

On this view, the failure to follow established forms ceased to be a defect. It was, instead, the greatest virtue of the ratification process. Hamilton wrote in *The Federalist* No. 22:

It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several Legislatures; it has been exposed to frequent and intricate questions concerning the validity of its powers; . . . and has in some instances given birth to the enormous doctrine of a right of legislative repeal. . . . The possibility of a question of this nature, proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority.<sup>86</sup>

The new Constitution would be approved by the people themselves and their "approbation [would] blot out antecedent errors and irregularities."<sup>87</sup>

Of course it is possible to discern some distance between the abstract idea of the consent of the people and the actual ratification procedure in state conventions. Even if we put aside our modern conviction that the definition of "the people" ought not to be restricted by considerations of race, sex and wealth,<sup>88</sup> significant questions remain about the results of 1787-89. It seems clear there was some chicanery in the process.<sup>89</sup> Estimates of the proportion of the population actually favoring the Constitution are largely guesswork but most observers agree that the division was a close one.<sup>90</sup>

These real questions, however, are largely beside the point, which is the extent to which the ratification process contributed to the legitimacy of the new Constitution. The debate on the Constitution was a truly national one and, for the intelligence and intensity which the opposing sides brought to it, was remarkable for any time

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has a tendency to set the *State governments* and their *subjects* at variance with each other, to *lessen the obligations of government*, to *weaken the bands of society*, to introduce *anarchy* and *confusion*, and to *light the torch of discord and civil war* throughout this continent.

L. Martin, "Genuine Information" in 3 M. FARRAND, *supra* note 33, at 230 (emphasis in original). Thirty years later Chief Justice Marshall responded summarily to this position in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819), in which Luther Martin was counsel for the State: "It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country."

86. THE FEDERALIST No. 22, at 145-46 (A. Hamilton) (J. Cooke ed. 1961). Madison made the same point in the Virginia Convention. 3 J. ELLIOT, *supra* note 50, at 94.

87. THE FEDERALIST No. 40, *supra* note 31, at 233 (J. Madison). See G. WOOD, *supra* note 78, at 533-34.

88. See J. ELY, *DEMOCRACY AND DISTRUST* 6 (1980).

89. See J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-88*, at 187-248 (1961).

90. See *id.* at 249; C. BEARD, *supra* note 31, at 237-38; M. JENSEN, *supra* note 30, at 138-46.

and place.<sup>91</sup> That debate culminated in the state conventions, which were perceived as the best devices available for approximating the popular will. The result was that the Constitution was regarded as the product of a process in which the ultimate source of legitimacy, the sovereignty of the people, was expressed as fully and as clearly as the accepted political beliefs and institutions of the time allowed.<sup>92</sup>

### III. THE LEGITIMACY OF THE CONSTITUTION OVER TIME

As used here, legitimacy turns on the acceptability of the substance and origins of a preconstitutional rule to participants in the legal system. Furthermore, that acceptability is always a current acceptability. The legitimacy of the Constitution of the United States in 1987 cannot be debated on the limited basis of the events and circumstances of 1787-89 without considering attitudes and values in the United States in 1987. A Constitution which we can be reasonably sure was immune to a claim of illegitimacy in the tenth year of its existence may, because of changed perceptions, be cogently attacked as illegitimate in its hundredth year.

None of this is to say that the circumstances surrounding the promulgation of constitutional rules are irrelevant to disputes about legitimacy. The participants in a legal system will judge the acceptability of its fundamental rule, partly, on the basis of their understanding of the propriety of the process that brought it about. Thus a basic rule, understood to originate in divine revelation, may maintain its legitimacy only as long as the underlying religion thrives. When that underlying belief dissolves, either some other justification for accepting the rule will develop or the rule will no longer govern the legal system.<sup>93</sup>

Several factors determine the likelihood of such criticism. First will be the probability that the procedure which gave birth to the constitutional regime will be regarded (or remembered) as ap-

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91. See M. JENSEN, *supra* note 30, at 122; J. MAIN, *supra* note 89 *passim*.

92. The rapidity with which the Constitution came to be accepted shows the conformity of the ratification process with the political values of the period. See notes 115-124 *infra* and accompanying text.

93. This is another way of saying that a new legal system has been established. The "old" preconstitutional rule is, then, no more than a historical artifact. See H. HART, *supra* note 4, at 117. In the terminology used in the text, a constitutional rule based on it would be subject to charge of illegitimacy, although its formal legality remained unimpaired. The evolution of Canada from a dependency of the United Kingdom to an independent nation with an ill-defined but clearly internal locus of sovereignty, without changing the formal rules governing the legal systems illustrates this phenomenon. See Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 137-41 (1984).

propriate. Beyond that, however, the content of the rules must maintain a minimum fit with the social requirements of the society.<sup>94</sup> At some point even a rule promulgated in a manner still deemed unexceptionable will fail to satisfy the practical demands made upon the legal system, creating doubts as to its legitimacy in the context of new social and political facts.<sup>95</sup>

Moreover, the legitimacy of a given constitutional regime will, in some measure, be generated by its own momentum. That is, a given fundamental constitutional rule will be accepted simply by virtue of its acknowledged status over time. In such cases, the events which generated it may acquire respectability from the Constitution instead of the other way around.<sup>96</sup> So long as constitutional arrangements perform their function fairly well, roughly coincide with the values and needs of the society, and are not perceived as originating from an affirmatively perverse source, their legitimacy is unlikely to be seriously questioned.<sup>97</sup> The costs of a major revision of the underlying political premises of a legal system are so substantial that such a process will not be undertaken frequently.<sup>98</sup> The authors of the Declaration of Independence were

94. See Postema, *supra* note 15, at 178.

95. This will more certainly be the case if the preconstitutional rule provides static, inflexible criteria of validity as would be the case when it specifies conformity to an unamendable written constitution. Whether a radically amended constitution could be defended as legitimate under the same standard of legitimacy as earlier versions is a difficult question, particularly when the earlier amending formula is itself altered. See Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1 (1969).

96. Olivecrona suggests that the Roman legal system was founded originally on a presumed religious obligation:

Over a period of several hundred years great changes in the psychological basis of the constitution necessarily took place. When government has been carried on for a long time according to a set of rules, such rules are supported by habits of thought and many other factors. The old creed may be undermined and the ritual acts reduced to mere formalities; but for numerous reasons respect for rules may never the less be upheld and the forms reverently observed.

K. OLIVECRONA, *supra* note 4, at 103. Cf. W. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 32-33 (1981); Hyde, *supra* note 18, at 411.

97. See Postema, *supra* note 15, at 178-189.

98. The existing Constitution acquires a presumption in its favor merely by being the status quo. Thus, Dicey believed that it was only *changes* in the Constitution which ought to be referred to the extraordinary judgment of the people:

It is I think of immense importance that people should realise that a small & transitory political majority, though it necessarily exercises the powers, has not the authority of the nation. . . . [O]n matters of constitutional change I do not think a small majority has any moral right to act with vigour. The presumption is in favor of the existing state of affairs, because on the whole it may be assumed to be the permanent will of the nation. Add to this that a constitutional change once made is, or ought to be, final, and therefore ought not to be made by any body of men who do not clearly represent the final will of the nation.

A.V. Dicey to L. Maxse, Jan. 1, 1895, quoted in R. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST 161 (1980). In a more practical sense the persistence of a constitution over time is sure to result in the entrenchment of interests that will present

undoubtedly right in claiming that "all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed."<sup>99</sup>

Although the Constitution was concededly illegal in its inception and ratification, its authority was justified on the basis of the political sanction provided by the approval of "the people."<sup>100</sup> But given the ferocity of the ratification debate, a contemporary observer surely would have been skeptical about the prospects for long-term general acceptance. Governor Clinton of New York was not particularly extreme in his criticism when he charged that the Constitution was "founded in usurpation."<sup>101</sup> The claim was not infrequently made that the Constitution was the result of a conspiracy by the wealthy to betray the Revolution and impose an aristocratic government.<sup>102</sup> "If we are to listen to the participants," one commentator has written, "the struggle over the Constitution was a dispute between contending social interests over a question no less vital than the future of republican government in America and the world."<sup>103</sup> Given this level of argument, given the questionable tactics often used in the ratifying conventions,<sup>104</sup> and given the closeness of the result in some of the critical states,<sup>105</sup> it is something of a wonder that the Constitution was soon embraced, not grudgingly, but often with near veneration by the very people who had so violently denounced it.<sup>106</sup> The issue of legitimacy rapidly disappeared.

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obstacles to any serious reconsideration. This tendency, of course, is accentuated when the same political interests are the most likely initiators of constitutional change. See Cairns, *The Politics of Constitutional Conservatism*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 28, 40-43* (K. Banting & R. Simeon eds. 1983).

99. Declaration of Independence, para. 2. (U.S. 1776). The factors referred to in the text, therefore, involve a rough combination of what Weber described as the "legal" and "traditional" bases of legitimacy. See M. WEBER, *supra* note 17, at 324-29, 382-86.

100. See notes 74-86 *supra* and accompanying text.

101. Quoted in M. JENSEN, *supra* note 30, at 145.

102. See L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 115 (1978). The complete writings of the Antifederalists have recently been compiled in seven volumes. *THE COMPLETE ANTI-FEDERALIST* (H. Storing ed. 1981). A useful collection of such writings is *THE ANTIFEDERALISTS*, *supra* note 42. One writer has commented that "the ratification controversy was a struggle between contending social interests, calling forth an intensity of rhetoric seldom equalled in American disputes." L. BANNING, *supra*, at 105.

103. See Banning, *Republican Ideology and the Triumph of the Constitution 1789 to 1793*, 31 WM. & MARY Q. 167 (1974).

104. See generally J. MAIN, *supra* note 89, at 187-248.

105. See *id.* at 249; C. BEARD, *supra* note 31, at 237-38.

106. The quick apotheosis of the American Constitution was a phenomenon without parallel in the western world. Nowhere has fundamental constitutional change been accepted with so much ease. Nowhere have so many fierce opponents of a constitutional revision been so quickly transformed into an opposition that claimed to be more loyal than the government itself.

There were several reasons for the quick acceptance of the Constitution. For all its defects the ratification process stimulated as extensive and thorough a national debate as was then possible. And the approval of the state conventions was also—again in the context of those times—about as democratic a procedure as could be devised. Thus, the practically universal recognition of the ultimate sovereignty of the people provided a powerful reason for accepting the people's verdict and getting on with other national business.<sup>107</sup> Furthermore, the actual governmental arrangements which the new Constitution established were not so radical as to place them outside of generally accepted notions of republican government.<sup>108</sup> Consequently, despite the antifederalists' protestations to the contrary and the vehemence of their arguments, the differences as to the manner in which the new Constitution was created and its main features, were not differences of deep principle.<sup>109</sup>

Furthermore, once the constitutional government was in place, its advantages relative to reasonably possible alternatives must have been seen rather differently. One historian has argued that the classical political orientation of the antifederalist statesmen resulted in a conviction that constitutional changes were always for the worse, so the protection of liberty now depended on a scrupulous adherence to the newly established constitutional rules.<sup>110</sup>

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Banning, *supra* note 103, at 168. See Elkins & McKittrick, *The Founding Fathers: Young Men of the Revolution*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION, 1783-1789*, at 379-95 (J. Greene ed. 1968). The collapse of the Antifederalist position is illustrated by the case of Luther Martin of Maryland, a member of the Constitutional Convention who denounced the new Constitution savagely in the subsequent ratification debate, see note 85 *supra*, and who, shortly afterwards, became known as the Federalist "bull-dog." See Roche, *The Founding Fathers: A Reform Caucus in Action*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION, 1763-1769*, at 437, 466 (J. Greene ed. 1968); Schechter, *The Early History of the Tradition of the Constitution*, 9 AM. POL. SCI. REV. 707 (1915).

107. The Declaration of Independence had not been ratified at all, and the Articles of Confederation had been ratified by the various state legislatures. The Constitution, however, was submitted for ratification to "the people themselves," actually to "popular ratifying conventions" elected in each state. A few spoilsports pointed out that this was not significantly more "democratic" than submitting the documents to the legislatures (since the conventions themselves would necessarily be representative bodies and much the same cast would likely be chosen as the people's representatives). But the symbolism was important nonetheless. . . . It is also instructive that once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny. Why should that be? Those who had opposed ratification certainly hadn't agreed to such an arrangement. It's quite remarkable if you think about it, and the explanation has to be that they too accepted the legitimacy of the majority's verdict.

J. ELY, *supra* note 88, at 5-6 (1980); see L. BANNING, *supra* note 102, at 106; M. DIAMOND, *supra* note 47, at 54; Banning, *supra* note 103, at 169.

108. See Banning, *supra* note 103, at 169.

109. See L. BANNING, *supra* note 102, at 106; Elkins & McKittrick, *supra* note 106, at 395.

110. See Banning, *supra* note 103, at 177-87.



Whatever the precise reasons, perceptions changed once the Constitution achieved the privileged position of *status quo*. Now the burden of proof on the question of legitimacy would rest on those who would challenge the existing regime. In that sense the Constitution became more secure with every year.

Of course, the Constitution was to suffer more than one challenging jolt in the subsequent course of American history. Most obvious is the national cataclysm of the Civil War from which the Constitution emerged significantly changed. But in the critical debates leading up to the war, proponents of each position often grounded their arguments in an interpretation of the Constitution.<sup>111</sup> Even secession itself was sometimes justified as consistent with the constitutional scheme of 1787.<sup>112</sup> That question of constitutional construction having been settled by the war, the nominal legitimacy of the Constitution was, if anything, enhanced.<sup>113</sup> Furthermore, reverence for the constituent process was, and continues to be, a significant part of the regard which the Constitution enjoys. Serious, and occasionally violent, constitutional differences have occurred but these are matters arising within a professed common allegiance to what is almost universally declared to be the binding law of the Constitution. Its authority has been treated as Jefferson found it treated in France in the debates of the National Assembly, "like that of the Bible, open to explanation, but not to question."<sup>114</sup> "The divine right of kings never ran a more prosperous course than did the unquestioned prerogative of the Constitution to receive universal homage."<sup>115</sup>

111. See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 115-231 (1982). This is not to say that certain participants did not, sometimes, reject wholesale the authority of the Constitution. While some abolitionists attempted a constitutional argument against slavery, see R. COVER, *JUSTICE ACCUSED* 154-58 (1975), other denounced the Constitution and its rather explicit protection of slavery. See *id.* at 150-54.

112. See H. HYMAN & W. WIECEK, *supra* note 111, at 208-15. In his inaugural address to the Confederate Provisional Congress in February 1861, Jefferson Davis cited the Declaration of Independence but also insisted that the secession and formation of a new southern government had "not proceeded from a disregard on our part of just obligations, or any failure to perform every constitutional duty." It was only "by abuse of language that their act has been deemed a revolution." *JEFFERSON DAVIS AND THE CONFEDERACY AND TREATIES CONCLUDED BY THE CONFEDERATE STATES WITH INDIAN TRIBES* 10 (R. Gibson ed. 1977). An explicit post-war refutation of this position is *Texas v. White*, 74 (7 Wall.) U.S. 700 (1868).

113. See Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1303-05 (1937).

114. Thomas Jefferson to James Madison (Aug. 28, 1789), reprinted in 3 *THE WRITINGS OF THOMAS JEFFERSON* 96, 99 (H. Washington ed. 1871); see Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 356-57 (1981), and sources cited in *id.* at 356 nn.23-24.

115. Corwin, *The Worship of the Constitution*, *supra* note 84, at 47 (quoting Woodrow Wilson). See Cahow, *Comparative Insights into Constitutional History: Canada, The Critical Years*, 45 *LAW & CONTEMP. PROBS.* 33, 40-42 (1982); Hamilton, *Constitutionalism*, in 2

The main point to be learned from an examination of the beginnings of the Constitution, is not the fitness of one or another preconstitutional rule. On the contrary, it shows that we cannot settle on a correct position in this regard as a matter of law or logic. The creation of, or change in, the preconstitutional rule will reflect the needs and values of the time in which it is effective and will draw its legitimacy from its conformity with those needs and values. And since that legitimacy is always a current matter, any preconstitutional rule is always provisional, subject to change when social and political factors require it. The great change of 1787-89 was obvious because it involved an alteration of both the preconstitutional rule and the formal accouterments of that rule, the Articles of Confederation and the institutions of government created under it. Similar changes which leave the formal aspects of the legal system untouched may not command our attention in the same way but they surely occur.<sup>116</sup> It is the possibility of such changes that makes sensible our continuing discussion about constitutional fundamentals. In this respect we are always in a situation like the one that confronted the founders in 1787-89.

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ENCYCLOPEDIA OF THE SOCIAL SCIENCES 255 (1937); Monaghan, *supra* note 114. Of course, the occasional, idiosyncratic attack on the legitimacy of the Constitution is not unknown in American history. See L. SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870, reissued 1973).

116. Professor Ackerman suggests that there have been three critical constitutional turning points in American history in which, by virtue of extraordinary popular participation, the underlying constitutional rules were "legitimately" changed. These are: 1) the Constitution of 1787-89 and its entrenchment in the period of the Marshall Court, 2) the Civil War and the Civil War Amendments, and 3) the capitulation of the Old Court in 1937 to the welfare state initiated by the New Deal. See Ackerman, *supra* note 2, at 1051-71. Only the first of these involved simultaneous formal and substantive changes. The adoption of the Civil War amendments might also be so classified given their rather blatant departure from the process prescribed by Article V. See *id.* at 1063-69.