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Taming the Prince: Bringing Presidential Emergency Powers Under Law in Colombia

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Abstract

Can courts check presidential power exercised in a crisis—and should they? The case of Colombia, which recently turned on its head a history of presidential overreach and judicial rubber-stamping, provides an answer in the affirmative.

As in much of Latin America, throughout Colombia's post-independence history, bloodshed fueled authoritarian tendencies, with presidents exploiting the need for "order" to centralize power. One critical weapon in the presidential toolkit was the power to declare a state of emergency. During the twentieth century, these decrees became a routine pretext for the President to govern unilaterally, acquiesced to by the legislature and rarely challenged by the courts.

That pattern has since come to an end. Since 1992, the Constitutional Court has proven an unexpectedly strong counterweight to presidential power, especially in its strict review of presidential emergency decrees. Under a model of substantive judicial review, the Constitutional Court has taken for itself the authority to review the factual basis giving rise to a crisis, and the adequacy of the President's rationale for declaring it. Decrees that, as in the past, attempted to manufacture a crisis or which would exceed the President's constitutional powers have been struck down. This paper discusses some of the Court's successes in that ambit, and argues for the portability of this model to other national contexts.

It has long been a grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its own existence in great emergencies.
Abraham Lincoln*, Speech on the Results of the Presidential Election,* 1864

No form of government can survive that excludes dictatorship when the life of the nation is at stake.
Clinton Rossiter*, Constitutional Dictatorship*

The law must tolerate a certain degree of disobedience; it cannot be otherwise. But when this inevitable degree of tolerable disobedience is exceeded, human coexistence becomes difficult, even impossible, especially when the laws being threatened are those that guarantee the very possibility of coexistence. When this happens, order has been replaced by disorder.
Colombian Constitutional Court, Judgment C-179/94, on States of Exception

In a region of troubled democracies, Colombia has long been a "strange and paradoxical"[1] regime combining stable political institutions, regular elections, and a moderately strong judiciary with chronic inequality, violence, and a weak rule of law.[2]

Much of Colombia's post-independence history has been defined by violence.[3] After independence in 1810, Simón Bolívar's dreamed-of federation of *Gran Colombia*, covering present-day Ecuador and Venezuela, as well as Colombia, dissolved in 1830 and intractable conflict broke out soon thereafter. Deep societal rifts over the questions of land reform, centralism versus federalism, and the role of the Roman Catholic Church in Colombian society led to periodic skirmishes, earning this period the title, "the Era of Civil Wars" (1863-1880). On the heels of the devastating War of a Thousand Days (1899-1903), Colombia was hit with the loss of Panama, which seceded with the backing of the United States. Robust economic consolidation in the following decades was spoiled when the Liberal Party's chokehold on power precipitated a series of crude reprisals by the Conservatives that drove the country anew into chaos, the brutal period of fighting known today as "La Violencia" (1946-1958), during which an estimated 180,000 people were killed. Even outside that high point of violence, for most of the twentieth century Colombia remained the most violent country in all of the Western Hemisphere. In the last five decades, at least 220,000 Colombians have lost their lives in the fighting between government forces and groups that include left-wing FARC militias, "vigilante" paramilitary groups, and actors in the illegal drug industry, with about 7 million citizens displaced from their homes.[4]

Time and again, one major casualty of the violence was the rule of law. A pattern had been set in which Colombian presidents exploited the urgent need for "order" and "authority" to turn separated powers into president-led dictatorship.[5] For much of the twentieth century, Colombian democracy was a high-security regime of emergency decrees and mass arrests just a few steps shy of authoritarianism.[6]

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[1] Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 DEMOCRATIZATION 46, 50-52 (2003).

[2] Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, INDIANA J. GLOBAL LEG. STUD., 16(1) 173, 185 (2009), Juan Fernando Jaramillo Pérez, *Colombia's 1991 Constitution: A Rights Revolution*, in NEW CONSTITUTIONALISM IN LATIN AMERICA 313, 313 (Detlef Nolte and Almut Schilling-Vacaflor eds., 2016).

[3] *See generally* MARCO PALACIOS, BETWEEN LEGITIMACY AND VIOLENCE: A HISTORY OF COLOMBIA, 1875-2002 (2006), DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF (1993), MICHAEL J. LAROSA and GERMÁN MEJÍA, COLOMBIA: A CONCISE CONTEMPORARY HISTORY (2nd ed. 2012).

[4] By way of comparison, the death toll under Argentina's military regime, the bloodiest of the twentieth-century Latin American dictatorships, reached approximately 30,000 people. A thorough study of patterns of violence and displacement in Colombia is ABBEY STEELE, DEMOCRACY AND DISPLACEMENT IN COLOMBIA'S CIVIL WAR (2017).

[5] ANTONIO BARRETO ROZO, LA GENERACIÓN DEL ESTADO DE SITIO: EL JUICIO A LA ANORMALIDAD INSTITUCIONAL EN LA ASAMBLEA NACIONAL CONSTITUYENTE DE 1991 43 (2011).

[6] JORGE GONZÁLEZ JÁCOME, ESTADOS DE EXCEPCIÓN Y DEMOCRACIA LIBERAL EN AMÉRICA DEL SUR: ARGENTINA, CHILE Y COLOMBIA (1930-1990) (2015), Uprimny, *supra* n. 1 at 53 (on scholars' difficulty in characterizing Colombia's formally democratic and factually antidemocratic and authoritarian system, and

Just a few years ago, it seemed as though the bloodshed would catalyze another hyper-presidential shift. Between 2002 and 2010, President Alvaro Uribe managed to parlay a law-and-order campaign against FARC guerrillas into two consecutive four-year terms, the second requiring a constitutional amendment to allow his reelection. In 2006, shortly after winning a second term in a landslide election, the popular Uribe proposed a fresh package of constitutional reforms intended to augment presidential powers and open the door for indefinite presidential reelection. In 2009, Act 1354-2009, a bill providing for a popular referendum to reform the Constitution on these terms made it through both houses of Congress.

Against all odds, however, the proposed referendum never took place. Early in 2010, the Constitutional Court of Colombia stepped in, ruling Act 1354-2009 "unconstitutional in its entirety."[7] The Court's logic was as follows: an amendment could *revise* the Constitution, but it could not *substitute* it, and these proposed reforms entailed such dramatic changes to the face of Colombian presidentialism as to threaten to replace it with something new entirely.[8]

The audacious ruling halted Uribe, and the particular variant of hyper-presidentialism he seemed to be driving at, in its tracks.[9] For those familiar with the young court's track record since its inception in 1992, this was not surprising. In one early decision, the Constitutional Court had infuriated the political branches by striking down a law criminalizing the personal use of drugs, including cocaine, as an unconstitutional violation of privacy.[10] In 2002, the Court invalidated several articles of the Code of Criminal Procedure mandating settlement payments for victims of violence on the grounds that these limited victims' access to court and thereby denied them their right to "truth and to justice."[11] In 2008, the Court issued a decision finding manifest inadequacies in the public health care system and ordering the government to dramatically restructure it.[12] In 2016, the Court surprised the nation by ruling that bans on same-sex marriage were unconstitutional.[13]

The seeds of the Court's head-on confrontation with Uribe in 2010 had been planted two decades before, in a judgment that concerned a decree by President César Gaviria declaring a state of emergency due to a spike in violence and abductions.[14] It would turn out to be of vital importance to the Colombian separation of powers. For decades, emergency decrees were used

describing the state of siege as one of the "key elements in explaining the particular evolution of Colombian politics and its legal system").

[7] Press Release No. 9 of February 26, 2010 (on Decision C-141/10 of 2010 on the constitutionality of Act 1354 of 2009, convocation of a constitutional referendum).

[8] The Court's (in)famous "substitution doctrine," has been applied to other constitutional reforms, and has received abundant scholarly attention. Takes critical of it include VICENTE F. BENÍTEZ ROJAS, CONSTITUCIÓN POPULAR, NO JUDICIAL (2014), Vicente F. Benítez R. and Julián D. González E., *Cuando las constituciones callan: omisiones constitucionales relativas y la Sentencia C-579 de 2013,* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, AÑO XXI 437 (2015), Santiago García-Jaramillo and Francisco Gnecco-Estrada, *La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo*, 133 VNIVERSITAS, 59-104 (2016) and Juan González Bartolomeu, *La onda de la constitución: La Corte Constitucional de Colombia y su doctrina sobre la sustitución,* paper prepared for Yale SELA Conference (Santiago de Cuba, 2017). For defenses *see* Carlos Bernal, *Unconstitutional Constitutional Amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine,* 11 INT. J. OF CON. L. 339 (2013), Gonzalo Andrés Ramírez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy in* DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 213 (Thomas Bustamante and Bernardo Gonçalves Fernandes eds., 2016).

[9] Assessing this judgment as democracy-defending, *see* SAMUEL ISSACHAROFF, FRAGIME DEMOCRACIES 147-152 (2015), David Landau, *Abusive Constitutionalism,* 47 U.C. DAVIS L.REV. 189, 203 (2013).

[10] *Rechazo general a la despenalización*, EL TIEMPO (ARCHIVO) (May 7, 1994) (discussing the repercussions of the decision). Decision C-221/94 of 1994 of the Constitutional Court of Colombia. A summary of the decision is available in English at: http://english.corteconstitucional.gov.co/sentences/C-221-1994.pdf.

[11] Decision C-228/02 of 2002.

[12] Decision T-760 of 2008. A summary of the decision is available in English at: https://www.escr-net.org/caselaw/2009/decision-t-760-2008.

[13] Decision SU-214/16 of 2016.

[14] Decision C-004/92 of 1992. A summary of the decision is available in English at: http://english.corteconstitucional.gov.co/sentences/C-004-1992.pdf.

by Colombian presidents to concentrate the State's powers in their own hands, allegedly with the aim of imposing order on the fractious nation. In essence, emergencies lasted years, even decades, permanently altering the face of Colombian democracy. With this backdrop, the Court's 1992 decision, which upheld Gaviria's decree but established the Court's power of substantive judicial review over future ones, represented a bold strike against one of the President's most deeply entrenched prerogatives. Since that date, the Court has struck down or modified over 40% of emergency decrees.[15] Each time, infuriated politicians launched countermeasures to clip the Court's wings. In the main, though, these came to naught.

Within a few years, observers were astonished at the boldness of the young court. "Who are these guys?" asked *Semana* magazine in 1997.[16] Bringing emergency powers under the rule of law was "no mean feat," writes constitutional scholar Rodrigo Uprimny, in Colombia, where these powers were "improperly utilized for several decades, even to the extent of putting at risk the maintenance of the rule of law."[17] The Court's record has been far from perfect, but it has succeeded where no other institution in Colombia's history could in thwarting state overreach and protecting core human rights from arbitrary violations.[18]

How has Colombia's Constitutional Court bucked a nation- and continent-wide trend of strong presidents and rubber-stamp courts to become "one of the success stories of judicial activism and autonomy in Latin America"?[19] How has the Court emerged as a defender of individual rights in a time of violence? How, in a seemingly barren environment for democracy, has the Court defended the separation of powers and stopped the President from using the language of political exigency to monopolize the powers of the State?

This article offers a brief history of the abuse of the emergency in Colombian history before turning to the post-1991 regime, when a new Constitution and a new Constitutional Court were established to impose accountability on the furthest reaches of presidential discretion. I describe the robust regime of substantive judicial review applied by the Court to strike down emergency decrees that threaten to go beyond defined constitutional limits. Finally, I consider what place Colombia's lessons may have in other systems. Few regimes boast a judiciary as active, not to say activist, as Colombia's, but many are witnessing a moment of creeping institutional changes at the hands of emboldened executives (presidential as well as prime ministerial) speaking in the language of political necessity. This is a situation Colombia's experience certainly speaks to, and for which its example is particularly vital.

A. The Emergency in Colombia's Political History

Is the "state of emergency" a natural phenomenon, some external force majeure that hits a political regime, or a legal one? Assuredly both. States of emergency have been declared during disasters natural and political—droughts, floods, earthquakes, as well as economic crises, revolts, demonstrations, and civil war. But the state of emergency is also most definitely a human creation, a particular decision by the State on what institutional response is necessary to face a crisis, with all the usual dangers of human error to which such decisions are subject.

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[15] Twenty-three of fifty-four executive decrees related to the state of emergency were nullified or modified by the Court between 1992 and 2018. Data collected for the period of 1992-2018 by the author from the Court's website, http://www.corteconstitucional.gov.co/relatoria/.

[16] Héctor Riveros, *¿Quiénes son esos señores?*, SEMANA (July 07, 1997).

[17] Uprimny, *supra* n. 1 at 47.

[18] On occasion, the Court's review has been mainly rhetorical, as some critics have pointed out. Libardo Ariza y Antonio Barreto, *La Corte Constitucional frente a la excepcionalidad: 10 años de control material laxo y discursivo* in DERECHO CONSTITUCIONAL –PERSPECTIVAS CRÍTICAS 139-171 (2001).

[19] Juan Carlos Rodríguez-Raga, *Strategic Prudence in the Colombian Constitutional Court, 1992-2006*, 80 (unpublished Ph.D. diss, U. Pittsburgh, 2011). On the strength of the Colombian court, *see*, among many sources, Alec Stone Sweet, *Constitutional Courts* 816, 820, 826, *in* MICHEL ROSENFELD AND ANDRÁS SAJÓ, EDS, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816-830, 826 (2012), Gretchen Helmke and Julio Ríos-Figueroa, *Courts in Latin America, in* COURTS IN LATIN AMERICA 1, 23 (Gretchen Helmke and Julio Ríos-Figueroa eds., 2011).

In their day-to-day functioning, constitutional democracies depend on keeping the powers of the State separate to prevent the threat of tyranny.[20] Yet when an emergency strikes—invasion, internal rebellion, a natural disaster, or even a sharp economic downturn—a quicker, forceful, more decisive response may be needed. For a republic of divided powers, the challenge, as Abraham Lincoln put it, is be "strong enough" to survive great emergencies without becoming "too strong for the liberties" of its people.[21] How can constitutional democracy survive crisis without destroying itself?

For some, the answer is simple: There can be no suspension of the constitution without destroying the rule of law itself. As Hans Kelsen movingly wrote while the Weimar Republic crumbled, "One must remain true to his colors, even when the ship is sinking." Few democrats are as uncompromising as Kelsen, however.[22] (The German Basic Law's regime of militant democracy was a direct response to the "ghosts of Weimar," and the notion that the Republic, under the sway of Kelsenian positivism, had committed suicide by slavishly following its own laws to the letter.[23])

For all others, the answer lies in a temporary concentration of power for the purpose of self-defense, what the American political scientist Clinton Rossiter called "constitutional dictatorship."[24] Ubiquitous in regimes from Ancient Rome to wartime United States, constitutional dictatorship was necessary, Rossiter explained, because "the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis."[25] Rossiter recognized the dangers of this institution even as he championed it ("Dictatorship, even when softened by a popular adjective like constitutional, is a very nasty word"[26]), and the question left by his work remains: how can dictatorship be truly *constitutional?*[27]

At its most basic level, constitutional dictatorship involves the voluntary, limited delegation of legislative power from the representative assembly to the executive.[28] Constitutional dictatorship admits of a variety of institutional configurations, but broadly speaking, there are two

[20] A classic statement among many is that of James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47,* in THE FEDERALIST PAPERS 243 (Clinton Rossiter ed., 1991).

[21] Lincoln, *Speech on the Results of the Presidential Election* in 1864, in ABRAHAM LINCOLN: GREAT SPEECHES 66 (Roy P. Basler ed., 1991).

[22] Jack Balkin and Sanford Levinson, *Constitutional Dictatorship,* 94 MINN. L.REV. 1789, 1800 (on Machiavelli's discussion, in *Discourses on Livy,* of the collapse of republics "obeying their own laws").

[23] This much-repeated phrase originated from Eduard Dreher, *Das parlamentarische System des Bonner Grundgezetses im Vergleich zur Weimarer Verfassung* in NEUE JURISTISCHE WOCHENSCHRIFT 130, 132 (1950). On the logic of militant democracy, see Suzanne Baer, *Violence: Dilemmas of Democracy and Law*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 63 (David Kretzmer and Francine Kershman Hazan eds., 2000). The idea that Weimar, under the thrall of Kelsenian positivism, committed a principled suicide is clearly refuted by Article 49 of the Weimar Constitution, which contained the blueprint for constitutional dictatorship. Far from weak, this regime was, if anything, too strong, as I attempt to show in other work. Katz, "The Weimar Presidency" (manuscript on file with author).

[24] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 5-6 (1963) ("Wars are not won by debating societies, rebellions are not suppressed by judicial injunctions, the reemployment of twelve million jobless citizens will not be effected through a scrupulous regard for the tenets of free enterprise, and hardships caused by the eruptions of nature cannot be mitigated by letting nature take its course."). Other theorists of constitutional dictatorship include CARL SCHMITT, DICTATORSHIP (2013 [1928]); CARL FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (1941); and Frederick M. Watkins, *The Problem of Constitutional Dictatorship*, in PUBLIC POLICY 324 (C.J. Friedrich and Edward S. Mason eds., 1940).

[25] Rossiter, *supra* n. 24 at 5.

[26] *Id.* at 13.

[27] Balkin and Levinson, *supra* n. 22, at 1797-98, esp. fn. 36 (discussing the distinction between "constitutional" and "unconstitutional dictatorship," and Carl Schmitt's distinction between "sovereign" and "commissarial dictatorship").

[28] Rossiter, *supra* n. 24 at 9-10.

approaches to designing a constitutional order to make room for it.[29] The first is to build the emergency *into* the Constitution. As in the Roman Republic, the Dictator exercises power according to specific procedures that bring the constitutional dictatorship into being, structure its scope and reach, and ultimately end it.[30] The second approach is to "bend the Constitution," so to speak, allowing an emergency regime to be conjured *ex post facto* through piecemeal delegations and legislation.[31] In 1940, Britain's political parties agreed to suspend the (unwritten) constitutional norms of parliamentary democracy until the end of the war, and although it remained a democracy, no elections were held between 1935 and 1945.[32]

These competing approaches roughly track the historical divide between the Continental and the Anglo-Saxon legal traditions. The former features precise and detailed statutory frameworks specifying triggering mechanisms (enabling acts, a declaration of martial law, a wholesale transfer of power from Parliament to Prime Minister or similar) and clear delineations of the scope the of the emergency and the temporary dictatorial powers to be wielded by the executive. The latter contemplates a handful of temporary ad hoc changes (suspension of habeas corpus and restrictions of other liberties, military commissions, extraordinary surveillance powers) which kick the constitutional system into temporary crisis mode before the other branches step in to reequilibrate it after the crisis has passed.[33] The risk of the former is authorizing a dictatorship that swallows up the rule of law in its entirety; the latter, tolerating one that creeps into being without manageable standards or time limits.[34]

Colombia falls under the first category. Like other Latin American nations, its earliest constitution combined U.S.-style presidentialism with the Continental tradition of written, codified law.[35] Nearly ubiquitous in these texts was an institution surviving from ancient Roman dictatorship, the state of siege.[36] Early Latin American constitutional drafters were glad to preserve

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[29] Jeffrey K. Tulis and Stephen Macedo, *Introduction,* in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 4-5 (Tulis and Macedo eds., 2010) (reviewing the contrasting conclusions of the volume's contributors as to whether emergencies should be constitutionalized or left outside of the constitutional order entirely).

[30] Under the Roman Republic, a state of siege could be declared in one of a specific list of situations (war, consular incapacity, droughts and pestilence, and so on). Following an enabling decree by the Senate, one of two consuls would appoint a dictator to wield emergency powers for a limited period of time, usually six months, or until his mission had been completed. BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 18-19 (1993).

[31] Self-contained emergency regimes have been built into national constitutions including that of India (Constitution of India, Part 18) and South Africa (Chapter 2, Art. 37 of the Constitution, and the State of Emergency Act 1997). They can also be found in international charters like the Inter-American Convention on Human Rights (Article 27) and the European Convention on Human Rights (Article 15). These use identical language that permits a Convention state to temporarily derogate from their Convention obligations "to the extent and for the period of time strictly required by the exigencies of the situation." (Certain rights, however, can never be suspended, such as the prevention of torture and ex post facto laws.) The International Covenant on Civil and Political Rights (ICCPR) uses much of the same language (Article 4).

[32] Balkin and Levinson, *supra* n. 22 at 1796.

[33] *Id.* at 1799-1802 (contrasting the Machiavellian and Lockean theories of constitutional dictatorship), Bruce Ackerman, *The Emergency Constitution,* 113 YALE L.J. 1030, 1041-42 (2004). On the Lockean notion of executive prerogative, *see infra* n. 141.

[34] Ackerman, *supra* n. 33 at 1031 (calling for a "reconsideration of the self-confident American belief that we are better off without an elaborate set of emergency provisions in our own Constitution, and that we should rely principally on judges to control our panic-driven responses to crises"), Kim Lane Scheppele, *Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life,* in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 124 (Tulis and Macedo eds., 2010), Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PENN. J. CON. LAW 1001 (May 2004).

[35] ROBERTO GARGARELLA, THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776-1860 2, 217 (2010) and ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION 20-44 (2013).

[36] Out of 103 nineteenth-century constitutions from sixteen Latin American countries, all but two contained provisions for emergency powers. Brian Loveman argues that regimes of exception were greatly abused in Latin American history and that, unless abolished or severely limited, "transitions to elected civilian governments [will] guarantee neither democracy nor constitutional rule." LOVEMAN, *supra n.* 30 at 19, 404. Others in Latin America have concluded the same. For example, participants in the 1986 Andean Jurists Commission expressed strong support for excluding from constitutional texts laws authorizing any

this institution, which they viewed as a relief valve to be opened whenever domestic politics grew too overheated. Although *criollo* revolutionaries professed great admiration for the American and French Revolutions, in the main they considered their populations too rude and unschooled for self-rule and limited government.[37] Their constitutions reflected this skepticism, with greater powers concentrated in the hands of the government in the name of preserving political order.[38]

Even against this backdrop, Colombia's Constitution of 1886—the first in the young nation with staying power—was one of the most centralist and authoritarian in all of Latin America. Unceasing civil and political strife and suffering in the middle decades of the nineteenth century shifted Colombian constitutional thought away from its liberal origins toward the "ultra-centralism" of the Constitution of 1886, under which the President's hand was dramatically strengthened at the expense of the other branches in the name of protecting order and stability.[39] Great power was concentrated in the State, and unlike in the separation of powers of James Madison and Alexander Hamilton, the three branches were arranged in a hierarchical pyramid: the President, followed by the legislature and the judiciary, in that order.[40]

Under Article 121 of the Constitution, the President had almost total control over the state of siege. Article 121 provided,

> In case of a foreign war or of internal disturbance, the President may, after consultation with the Cabinet and with the written consent of all the Ministers, declare a state of siege or a disturbance of the public order in the Republic or a part of it.
>
> Such a declaration shall invest the President with all the powers conferred by the laws of [Colombia], or failing these, by the Law of Nations, to defend the rights of the Nation or repress the disturbance. Within these limits, extraordinary measures or provisional legislative decrees dictated by the President shall be of a binding character, provided they bear the signatures of all the Ministers.
>
> The Government shall declare the restoration of public peace whenever the internal disturbance or foreign war shall have ceased; and shall send to Congress a report of the reasons that induced the measures. All officers shall be responsible for abuses committed in the exercise of the extraordinary powers confided to them.

Not only could the President declare a state of siege, and decide when it had ended; under it, his delegated powers were essentially unlimited. He could run the State single-handedly via decrees, deploy national troops to suppress subversive or undesirable groups, place all sorts of limits upon civil and political liberties, for instance, by criminalizing protest, and set up special tribunals of necessity and hale in civilians to be tried before them.

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kind of emergency powers. Diego Garçiá Sayán, *Estado de emergencia en la región andina,* COMISIÓN ANDINA DE JURISTAS 58 (1987).

[37] Jorge González Jácome, *Emergency Powers and the Feeling of Backwardness in Latin America*, 26 AM. U. INT. L.REV. 1073, 1074 (2011). The revolutionary Simón Bolívar (1783-1830) expressed as much in his 1819 Angostura Address, calling it "a marvel" that "so weak and complicated a government" as the American one had survived. Simón Bolívar, *The Angostura Address (February 15, 1819)*, *in* EL LIBERTADOR: WRITINGS OF SIMÓN BOLÍVAR 31-53, 36 (Frederick H. Fornoff and David Bushnell eds., 2003).

[38] GARGARELLA, *supra* n. 35 at 27 (ENGINE ROOM) (on how post-revolutionary elites' distrust of the masses translated into institutions that curtailed citizens' political rights), Gabriel Negretto and José Antonio Aguilar, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship,* 21 CARDOZO L.R. 1797, 1799-1811 (1999-2000) (criticizing the lack of a state of exception in early Latin American constitutions, which they argue led to a tradition of flagrant disrespect for legality).

[39] Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INTL. & COMP. L.R. 59-90, 68 (1995), GARGARELLA, *supra* n. 35 at 11, 31-32 (ENGINE ROOM) (describing how violence led to increasing constitutional conservatism, and classifying the 1886 Constitution as a "conservative" constitution grounded upon the "conviction that the use of coercion was necessary for recovering or imposing order" linked to a comprehensive project of moral perfectionism).

[40] MARÍA JOSÉ MAYA CHAVES, CONTROL CONSTITUCIONAL Y PRESIDENCIALISMO MONÁRQUICO (1886-1910) 21 (2015).

Over the years, persistent violence and resulting state campaigns to repress anti-government subversives and squash internal rebellions would make the state of siege a permanent fixture of Colombian democracy, in place during 70 of the 105 years the Constitution remained in effect. With political repression and rights violations becoming routine, Colombia evolved into what was, for all intents and purposes, an electoral dictatorship.[41] Presidents grew reluctant to hand back their extraordinary powers and would instead exercise them for long stretches at a time with the legislature's tacit acquiescence, even absent a real disturbance. Extending the state of siege as long as possible, the President would then pressure legislators to convert emergency decrees into permanent law in exchange for lifting the state of siege.[42] In 1927, the Supreme Court gave its blessing to the practice with the twin doctrines of presidential "implicit powers" (*facultades implícitas*) and presidential preeminence in preserving public order.[43] The spate of killings between 1948 and 1958 known as *La Violencia*, resulted in a power-sharing pact between Colombia's Conservative and Liberal parties, but little change to the formal powers of the president. In fact, in the ensuing years, these faculties were strengthened. In 1968, a constitutional amendment formalized the President's power to use emergency decrees to deal with economic crises. Such decrees were used to reform Colombia's tax structure in 1974 and to nationalize a bank, reform taxes, and define new financial crimes in 1982. With the '80s a period of "Hobbesian" violence for Colombia, the country rocked by political assassinations and the "narcotization" of armed conflict, the country remained in a continual state of emergency from 1984 until the new constitution was established in 1991.[44]

Emergency powers thrived in Colombian democracy for another reason: the weakness of the judiciary. The brutal truth," writes Luz Estella Nagle, "is that [in Latin America] the judiciary has long been little more than a maidservant—a Cinderella to the other branches of government."[45] At independence, a strong, independent high court was a poor fit for Colombia for a number of reasons. Courts traditionally had a lesser role in the Continental legal tradition. Under the French sources of law imported by Colombia, courts did not "make" case-law or set binding precedent; they had no power to invalidate laws passed by representative assembly and could only resolve particular cases according to existing laws duly enacted by the political branches. The devastation wrought by the Spanish Inquisition did little to rehabilitate courts' image in the New World, either, and Spain's efforts to use an ever-growing body of statutory and administrative directives to exercise control over the restless colonies furthered revolutionary *criollos*' impression that courts were mainly enforcers for the Crown. As a result, Latin American countries often understood the separation of powers as "aimed at protecting both the executive and legislative branches from immoderate judicial interference."[46]

Despite the fact that the Colombians claimed the U.S. Constitution as a model in designing their own institutions, and that the work of the American Supreme Court was well known to Latin Americans by the 1880s, Colombia's Supreme Court was not granted the power of judicial review until 1910, after nearly three decades of "monarchic presidentialism."[47] Although the

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[41] BARRETO, *supra* n. 5. The extensive literature on the state of siege in Colombian constitutional history includes MAYA CHAVES, *supra* n. 40, CARLOS PELÁEZ, ESTADO DE DERECHO Y ESTADO DE SITIO: LA CRISIS DE LA CONSTITUCIÓN EN COLOMBIA (1955), CARLOS RESTREPO PIEDRAHITA, LAS FACULTADES EXTRAORDINARIAS: PEQUEÑA HISTORIA DE UNA TRANSFIGURACIÓN (1973), LIBARDO JOSÉ ARIZA, FELIPE CAMMAERT AND MANUEL ALEJANDRO ITURRALDE, ESTADOS DE EXCEPCIÓN Y RAZÓN DE ESTADO EN COLOMBIA (1997), JÁCOME, *supra* n. 6; Mauricio García Villegas, *Estado, derecho, y crisis en Colombia*, 17 REVISTA ESTUDIOS POLÍTICOS DE LA UNIVERSIDAD DE ANTIOQUIA 11-44 (2006), Mauricio García Villegas, *Constitucionalismo perverso, normalidad y anormalidad constitucional en Colombia: 1957-1997*, in EL CALEIDOSCOPIO DE LA JUSTICIA COLOMBIANA 317-370 (Boaventura de Sousa Santos and Mauricio Garcia Villegas eds., 2001), Mary Luz Tobón-Tobón and David Mendieta González, *Los estados de excepción en el régimen institucional colombiano,* 16 REVISTA OPINIÓN JURÍDICA UNIVERSIDAD DE MEDELLÍN 67 (Jan-Feb 2017).
[42] ROGER W. FINDLEY, FERNANDO CEPEDA ULLOA, AND NICOLÁS GAMBOA MORALES, INTERVENCIÓN PRESIDENCIAL EN LA ECONOMÍA Y EL ESTADO DE DERECHO EN COLOMBIA 170 (1983).
[43] BARRETO, *supra* n. 5 at 27-33.
[44] *Id.* at 35-37.
[45] Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INTL. L.J. 345 (1999).
[46] Nagle, *supra* n. 39 at 68.
[47] *Id.* at 67, 69-70.

advent of judicial review was a big change from a theoretical point of view, in practice, early judicial review in Colombia was fairly toothless. This was particularly so when it came to emergency decrees, review of which consisted entirely of checking whether the President had obtained the signature of his own Cabinet in their passage, a laughably easy standard to meet.[48]

Over the years, the Supreme Court's disadvantage only grew, both in relative and objective terms. Far from checking the President, it suffered the indignation of having its powers continually eroded by presidential decree. A partial list includes a 1949 decree requiring a three-fourths majority of the Court to challenge decisions relating to emergency decrees; one from 1956 which created a Chamber of Constitutional Affairs to resolve constitutional challenges, whose members would be appointed by the Government, thus effectively bypassing the Supreme Court; and another which in 1981 required a supermajority on the Court for *any* decision implicating constitutional issues.[49]

As Rodrigo Uprimny points out, paradoxically, in weak democracies emergency powers are both more *necessary* and more *dangerous*—more necessary because weak regimes are more vulnerable to outside threats; more dangerous because, for the same reason, the return to normalcy is more difficult, and the dangers of abuse of power much greater.[50] The weakness of Latin America's democratic institutions meant that they were unable, on the one hand, to quell the internal unrest that threatened them, and on the other, to resist the sway of strongman leadership that destroyed the State's democratic foundations. From the late nineteenth century to the early-to-mid twentieth, the threat of crisis would be a constant refrain as country after country slid from constitutional republic into presidential dictatorship.[51]

B. The Constitution of 1991: Decisionism Contained, the Rule of Law Strengthened

Over the last three decades, the spread of written constitutionalism has marked the transition from authoritarianism to democracy for many countries, from legal impunity for state-perpetuated atrocities to the rule of law. Touchstones of the new order are written bills of rights defending human dignity and other fundamental rights and constitutional courts equipped with judicial review.[52] In Latin America's "new constitutionalism," new rights-protecting bodies have been set up, Ombudsmen and citizens' councils, for instance, to make rights effective and check discretionary action by State powers; meanwhile, the spread and reach of rights themselves have been extended by the "constitutionalization" of ordinary politics and social relations.[53]

Colombia's Constitution of 1991, the thirteenth to govern the nation since independence in 1810, is locally referred to as the "Constitution of Rights" for its commitment to new rights of the social, economic, and collective variety. Under its watch, Colombia has built one of the strongest rights-protecting systems in the world. On the strength of innovative judicial tools like the *tutela* individuals can file their own challenges to rights violations before the powerful

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[48] *Id.* at 68, Rodríguez-Raga, *supra* n. 18 at 89.
[49] Nagle, *supra* n. 39 at 72.
[50] Uprimny, *supra* n. 1 at 47-48.
[51] Loveman, *supra* n. 30.
[52] Alec Stone Sweet, *Constitutions and Judicial Review*, *in* COMPARATIVE POLITICS, 3rd ed. 161 (Daniele Caramani ed., 2014) ("By the 1990s, the basic formula of the new constitutionalism—(1) a written, entrenched constitution, (2) a charter of rights, and (3) a review mechanism to protect rights—had be- come standard"). On the "third wave of judicial review," *see, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 90 (2003).
[53] *See* DETLEF NOLTE AND ALMUT SCHILLING-VACAFLOR, NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES (2012), *passim,* but especially Nolte and Schilling-Vacaflor, *Introduction: The Times they are a Changin': Constitutional Transformations in Latin America since the 1990s*, 3-30, Albert Noguera Fernández, *What do we mean when we talk about "Critical Constitutionalism"? Some Reflections on the New Latin American Constitutions,* 99-122, Roberto Gargarella, *Latin American Constitutionalism Then and Now: Promises and Questions,* 143-162, Rickard Lalander, *Neo-Constitutionalism in Twenty-first Century Venezuela: Participatory Democracy, Deconcentrated Decentralization or Centralized Populism?,* 163-182, Jonas Wolff, *New Constitutions and the Transformation of Democracy in Bolivia and Ecuador,* 183-202, and Jaramillo Pérez, *supra* n. 2.

Constitutional Court, in the process broadening the reach of constitutional rights and remedies in everyday life.[54]

The Constitution of 1991 was the product of long-standing institutional failure. By the mid-'70s, a sense of crisis hung around Colombian democracy. The political system was deplored for its elitism, corruption, and failure. More glaringly, the rampant violence had not been contained, despite the constant state of siege and the President's almost unlimited powers. Public opinion started to coalesce around the idea of constitutional reform: a more proactive and responsive Congress, a stronger judiciary, greater inclusivity and popular participation at the local level. Even the President was supportive. Between 1974 and 1990, each of Colombia's presidents, seeing the writing on the wall, championed a proposal for constitutional overhaul.[55] But each time, the proposals stalled in the fragmented legislature, whose approval the 1886 Constitution required for any constitutional amendment. Meanwhile, the Supreme Court refused to approve any amendments that circumvented Congress, no matter how ineffectual.

Ironically, it took yet another extraordinary presidential decree to break out of the impasse. In 1988, after the failure of yet another package of reforms—these included new controls on private campaign donations, stricter rules for transparency in political parties, new mechanisms to strengthen congressional control over the Cabinet, and the creation of a federal public prosecutor and a judicial council of ethics—President Virgilio Barco called a snap (unofficial) referendum on whether to hold a constituent assembly to rewrite the constitution. In 1989, a series of political assassinations culminating in the killing of the Liberal candidate for president, Luis Carlos Galán, brought to a head the nation's disgust with political violence. Galán's murder unleashed a wave of student mobilization calling for constitutional reform, culminating in the "Seventh Ballot," an unofficial ballot cast by over one million Colombians alongside their votes in the official March 1990 elections calling for an assembly to rewrite the constitution.[56] Shortly after, Barco called for a referendum to be held in May on convening a National Constituent Assembly. The referendum passed comfortably.

After this victory, President Barco used his state of siege powers to issue a decree calling for another plebiscite—this time binding—to be held alongside the May presidential election. This time, the Supreme Court stepped aside and permitted the assembly to go forward on these terms.[57] In August 1990, President-elect César Gaviria and major party leaders hammered out an agreement specifying the procedures for electing delegates to the constituent assembly, as well as the scope of issues to be reformed. In October, the Court again narrowly upheld this arrangement.[58]

On December 9, 1990, national delegates were elected, many of them newcomers who rebuked traditional elites and parties.[59] No one party gained a majority, with five parties finishing with 5 or more percent of seats. The stalwart Liberal Party, which dated back to the mid-nineteenth century, not only captured just 34 percent of seats, it underwent a massive atomization into twenty or so separate lists with little in common in terms of policy. Yet against all appearances, the Assembly managed unexpected efficiency and agreement. Proposals were drawn up by five drafting committees, then voted on by plenary sessions. Out of thirteen sections of the final text drafted by these committees, ten earned the support of two-thirds of delegates or more, and

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[54] *See infra,* n. 66.

[55] RAFAEL BALLEN M., CONSTITUYENTE Y CONSTITUCION DE 1991, 16–81 (1991).

[56] For an account of the student movement, and its critical role in the passage of the 1991 Constitution, see JULIETA LEMAITRE, EL DERECHO COMO CONJURO (2009), esp. Chapter 2 ("El movimiento estudiantil de 1989"), 79-120.

[57] Decision 2149E of the Supreme Court of Justice of 24 May 1990.

[58] Decision 2214E of the Plenary Session of the Supreme Court of Justice of 9 October 1990.

[59] Ana María Bejarano, *The Constitution of 1991: An Institutional Evaluation, in* VIOLENCE IN COLOMBIA, 1990-2000: WAGING WAR AND NEGOTIATING PEACE 64-65 (Charles Berquist et al. eds., 2003). This section on the history of the Assembly relies heavily on MANUEL CEPEDA ESPINOSA, POLÉMICAS CONSTITUCIONALES (2007), MANUEL JOSÉ CEPEDA ESPINOSA AND DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 6 (2017), MANUEL JOSÉ CEPEDA ESPINOSA, LA CONSTITUYENTE POR DENTRO: MITOS Y REALIDADES (1993), John Dugas, *El desarrollo de la Asamblea Nacional Constituyente, in* LA CONSTITUCIÓN DEL 1991 45 (John Dugas ed., 1993), and LEMAITRE, *supra* n. 56, 121-160.

74% of its total provisions.[60]

Some believe that the Assembly's very fragmentation aided cooperation by throwing a veil of ignorance over the identities of future winners and losers of reform.[61] For Julieta Lemaitre, party fragmentation yielded to a cross-factional consensus around two guiding principles: first, the idea that Colombia's bloodiest episodes of violence had been the product of political exclusion, and therefore, that solid constitutional foundations could only be built where all affected actors were included in the process of designing them; the eclectic M-19 grouping, with 27% of seats, included ex-guerrillas, intellectuals, community organizers, and there was representation from the right wing, and from indigenous communities and labor organizers, too. Second, in the new constitutional regime, "taking rights seriously" was critical (a phrase that, from the work of Ronald Dworkin, came to appear in speeches by Manuel José Cepeda, legal advisor on constitutional affairs, and President Gaviria himself).[62] The unbridgeability of citizens' individual rights would become an unmovable tenet separating the new Constitution from the barbarism and bloodshed of the past, which explains in large measure President Gaviria's zeal and efficacy in supporting and guiding the Assembly's work, even proposals aimed at reducing presidential power (for instance, the President's discretionary power to intervene in the economy, which Gaviria felt was counterproductive when unsupported by congressional action). The Constitution was officially declared completed on July 4, 1991, in a televised signing ceremony featuring youth choirs singing hallelujah.

Two critical institutional features of the new text were a sharp reduction in the President's powers and the strengthening of the judiciary. As in other Latin American "new constitutionalisms," the Colombian Constitution created a dense thicket of actors to participate in the business of responsible governance, either through direct oversight of the President, or by participating in overlapping functions.[63] As before, it was Gaviria's own government that championed giving Congress the power to censure individual cabinet ministers, and it also pushed for the creation of "autonomous and independent organs" such as the Ombudsman (*Defensoría del Pueblo*), which can halt governmental abuses and protect human rights, by, among other things, filing *tutelas* on citizens' behalf, presenting reports to Congress, or proposing bills.

The most important oversight institution, of course, was the newly independent and powerful Constitutional Court.[64] A new nomination system requiring the involvement of multiple branches in order to prevent any one from predominance was patterned after that of the German Constitutional Court (a model for the Colombian court in a jurisprudential sense, too).[65] Judges would be chosen for eight-year terms from lists of candidates put forward by the President, the Supreme Court of Justice, and the Council of State, and voted on by the Senate.[66]

Another sign of the newly strengthened judiciary was the breadth of its review powers and of constitutional protections generally. Across jurisdictions, but especially in Latin America, the "constitutionalization of politics" describes the process by which constitutional norms and values come to inhabit, even "invade," ordinary legal, political, and social spheres and

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[60] CEPEDA ESPINOA, *supra* n. 59 at xii (POLÉMICAS).
[61] GABRIEL NEGRETTO, MAKING CONSTITUTIONS: PRESIDENTS, PARTIES, AND INSTITUTIONAL CHOICE IN LATIN AMERICA 167 (2013).
[62] LEMAITRE, *supra* n. 56, 123-28.
[63] David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 338–40 (2010) (on the heterodox roles these diverse oversight bodies play).
[64] Today, the Constitutional Court is one of four high courts of Colombia, along with the Council of State, which rules on administrative matters; the Supreme Court of Justice, the highest court of ordinary jurisdiction; and the Superior Council of the Judiciary, which resolves jurisdictional disputes between high courts and also functions as an ethics body.
[65] Luisa Conesa Lebastida, *La tropicalización de la proporcionalidad: la experiencia de Colombia y México en el ámbito de la igualdad,* 77 UNED. REVISTA DE DERECHO POLÍTICO 351 (Jan-April 2010), Silvana Insignares-Cera and Viridiana Molinares-Hassan, *Juicio Integrado de Constitucionalidad: Anáslisis de la Metodología Utilizada por la Corte Constitucional Colombiana* 124 VNIVERSITAS 91, 95 (2012) (describing Decision C-673/11 of 2001's discussion of German proportionality analysis).
[66] Political Constitution of Colombia, Article 239.

relationships.[67] Put another way, the practical reach of constitutional protections is extended so that, in theory, no actor, public or private, can violate these with impunity.

The 1991 Constitution provided for the constitutionalization of politics in several respects. First was the placing of rights outside of, or above, the vagaries of ordinary politics. With the memory of brutal State-sponsored excesses against civilians still fresh, constitutional drafters wanted to make sure that rights could no longer be made subservient to political will. Strict limits were slapped upon the Government's ability to violate individual rights for reasons of expediency. Core constitutional rights, including the right to habeas corpus, could no longer be suspended for any reason, even during a state of emergency.[68] Human rights emanating from international treaties such as the American Convention on Human Rights were also placed outside the President's discretionary power.[69] Civilians now had to be tried in a civil court, repudiating the practice, common in the 1980s, of haling civilians before military tribunals for alleged collaboration with guerrillas.[70]

The Constitution's reach was also broadened through new legal actions, in particular the *tutela,* which allows individuals to bring direct constitutional challenges to disputed State practices. With few formalities required to file it (approximately 4 million have been filed since its inauguration) and *res judicata* effect (for the first time in Colombia's history), the *tutela* has revolutionized the constitutional landscape, and in particular citizens' access to justice.[71] The *tutela* functions as a "bridge," says former Constitutional Court justice Manuel José Cepeda, "between reality and the Constitution," giving content, enforceability and immediacy to rights that once seemed merely theoretical.[72]

Finally, courts' powers of review now extended over a broader set of state actions: statutes, legislative and executive decrees with the force of law, referendums, and even international treaties or, where challenged by individual citizens, amendments to the Constitution.[73]

One of the Court's most important areas of review was not a new one. Emergency decrees had been under the control of the old Supreme Court, although as we see below, the Constitutional Court has exercised this power quite differently. It is no exaggeration to say that, in its review of emergency decrees, the Constitutional Court has managed to effectuate a drastic redrawing of the landscape of governmental accountability, transforming itself from a rubber stamp to a thorn in the President's side and a watchdog of democracy.

C. Subordinating Authority to Law: States of Exception and the Constitutional Court

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[67] Liliana Carrera Silva, *La acción de tutela en Colombia,* 5 REV. IUS 72, 74 (Jan/Feb. 2011). Formalizing the similar theory of "judicialization of politics," *see* Alec Stone Sweet, *The European Court of Justice and the judicialization of EU governance,* 5 LIVING REV. IN EUR. GOVERNANCE 7, 7 (2010) (defining the process in which non-judicial agents of governance are influenced by "judicial lawmaking – defined as the law produced by a judge through normative interpretation, reason-giving, and the application of legal norms to facts in the course of resolving disputes").

[68] Article 214.

[69] "In all cases, the rules of international human rights law shall be observed. The powers of government during the states of exception and judicial controls and guarantees of rights shall be established by law in accordance with international treaties. Measures adopted must be proportionate to the gravity of the events." Article 214, ¶2.

[70] Article 213.

[71] Rodríguez-Raga, *supra* n. 19 at 314, Carrera Silva, *supra* n. 67, at 75-76 ("Undoubtedly, since its establishment in the 1991 Constitution … the *tutela* has become the most important procedural institution of constitutional status in Colombian history. It has brought about a true judicial revolution, and with it the most tangible democratic progress in the country by reifying the effectiveness of constitutional rights on a day-to-day basis, in the most basic everyday life of Colombians.") On the *tutela* as an instrument for social transformation, *see* Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates, in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 127 (Gargarella et al. eds., 2006), and *see generally* GARCÍA VILLEGAS et al. ¿JUSTICIA PARA TODOS?: SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA (2006).

[72] Quoted in Gabriel Bustamante Peña, *El origen y desarrollo de la acción de tutela en Colombia*, SEMANA (September 2011).

[73] Article 241.

The histories of judicial review and the state of siege in Colombia are deeply intertwined. When judicial review was first introduced in 1910, it was primarily aimed at giving the Supreme Court some control over presidential state of siege powers, grossly abused and practically dictatorial at that point.[74] Yet for the first ninety years of its existence, judicial review was conservative and timidly exercised, deployed mainly to protect property rights of wealthy citizens. When it came to the state of siege, court review was essentially a formality.

After Colombian democracy was reestablished in 1958 post-*La Violencia*, new power-sharing agreements and judicial safeguards were imposed, supposedly to tame the President. In 1968, judicial review was reintroduced as a constitutional amendment.[75] Yet courts continued to treat presidential pronouncements on emergencies with enormous deference. Other than a limited procedural review to see if these had the requisite number of signatures from cabinet-members, nearly all emergency decrees were upheld. Review became marginally stricter in the '80s, when the notion of *conexividad* began to give the Supreme Court's review some substantive content, applied to nullify decrees that lacked a sufficient connection to a true emergency. Still, during this period, the Court upheld over nine out of ten decrees that invoked a state of "internal commotion."[76]

Things changed dramatically after 1991. The state of emergency had been a locus of presidential abuse and excess, and drafters were determined to undo the mistakes of the past. One of most interesting features of the Constitution is its comprehensive, carefully designed framework for states of emergency. It sets out *three types* of emergencies, each with its own procedures and limits. These were: (1) *external war,* (2) *internal disturbance,* and a (3) serious or imminent *threat to the economic, social, or ecological order* of the nation.

Typifying the new pluralistic approach to good governance, this system folded in greater participation from the other branches in initiating, managing, and terminating a state of emergency. The President could still trigger an emergency with a decree signed by the cabinet ministers.[77] What was new was that, with a day after passage, these decrees had to be reviewed by the Constitutional Court to assess their constitutionality.[78] To the greatest extent possible, the "normal functioning" of the other branches would not be interrupted during emergencies.[79] Congress would preserve its power to legislate, and it could call itself into session to hear reports presented by the Government explaining its conduct.[80] In a Type Three emergency, Congress could even repeal, edit, or add on to executive acts via decrees of its own.[81] Finally, the new regime abandoned the practice of official immunity, allowing Congress or the Court to hold the President and cabinet ministers politically or criminally responsible for abusing power during states of exception.[82]

To this landscape of countervailing oversight powers were added concrete textual limits. As noted, certain core constitutional and human rights could not be trenched upon, no matter the circumstances.[83] The Government could wield only powers "strictly necessary" to defend the nation and restore normal conditions.[84] All decrees had to have a "direct and specific connection" with the situation described by the original declaration; the President could not, in other words, opportunistically redefine the boundaries of the emergency after the fact. There were

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[74] MAYA CHAVES, *supra* n. 40 at 17-18.

[75] Cepeda Espinosa, *supra* n. 59 at 26. The amendment even specified a maximum period in which the Court had to rule on the constitutionality of emergency decrees, anticipating that delays could be used by the Court to avoid having to issue a judgment. Incidentally, the reform included a proposal to create a Constitutional Court, but this, of course, failed.

[76] Rodríguez-Raga, *supra* n. 19 at 89.

[77] Declarations of war, Type 1, also required approval by the Senate, unless the President was taking necessary defensive action to repel a foreign invasion. Article 212.

[78] Art. 214.

[79] *Id.*, ¶ 3.

[80] Art. 152, Art. 213, ¶2.

[81] Art. 215.

[82] Art. 214, ¶5.

[83] Art. 214.

[84] Arts. 212 and 213.

strict time-limits: Type Two emergencies (internal disturbance) would expire after ninety days unless extended by the Senate, a maximum of two times.[85] Type Three, the grab-bag category, could last only up to 30 days, and the President had to stipulate a provisional end-date from the start.[86] Type One (conventional war) was obviously unsuited to a fixed end date, but the text mandated that, as soon as the "war" or "the causes that gave rise to the state of internal disturbance com[e] to an end," the Government had to "declare the public order to have been restored."[87] (On various occasions, the Constitutional Court has since rejected decrees attempting to extend a state of emergency for just this reason.)

A 1994 framework statute, the *Ley de Estados de Excepción* (LEEE), expanded on this framework. "The State of Exception is a regime under law," it declared, and accordingly, "arbitrary excesses cannot be committed using a declaration of emergency as pretext."[88] In exceptional circumstances, the Act authorized the Government to place restrictions on the press, freedom of movement, and freedom of assembly, and, with a court's permission, to intercept or record private communications, search private residencies, and preventatively detain individuals for suspected involvement in criminal activity.[89] However, when peacetime laws were suspended, or rights violated, the Government had to list the reasons why each infringement was necessary.[90] And, echoing Article 214 of the Constitution, core individual rights and freedoms, including the right to life, freedom of thought, personal integrity, habeas corpus, and basic judicial safeguards, could never be violated.[91]

The 1994 Act also provided a set of legal criteria that all emergency actions had to meet, which have proven critical in guiding the Court's review. Decrees had to be rationally related to a disturbance and aimed at relieving it. They had to be necessary for achieving that end. They had to be proportional to the severity of the crisis, especially to the degree that they violated citizens' rights. They had to be non-discriminatory.[92] Where peacetime laws had to be suspended, a decree had to lay out the reasons why these were incompatible with the state of exception.[93]

From the get-go, the Constitutional Court interpreted its review powers broadly. In 1992, the Court established its authority to review emergency decrees not only on procedural grounds, but also based on their content. The Government had argued that a grave security risk was about to be triggered by the expiration of a number of prison terms, including those of the men who had assassinated politicians Luis Carlos Galán and Jorge Enrique Pulido in the late '80s. In an opinion reminiscent of *Marbury v. Madison*, the Court gave its blessing to the Government, but stressed that emergency decrees would require a convincing case that triggering events really were *out-of-the-ordinary* and could not be met with ordinary means available to the Government.[94]

This, it turned out, was a non-trivial standard to meet. In 1994, the Court rejected a proposed emergency decree based on almost exactly the same fact pattern. This time, the Court rejected two of the Government's premises: one, that an emergency could be triggered by nothing more than lower courts interpreting a criminal statute (e.g. to require the prisoners' release), and two, that the release of a certain number of individuals (here, around 800) could *per se* give rise to a threat to public order.[95]

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[85] Art. 213.
[86] Art. 215.
[87] Art. 214.
[88] Ley 137 de 1994 Nivel Nacional, Diario Oficial 41379 of June 3, 1994, Art. 7.
[89] *Id.*, Arts. 27, 28, and 38.
[90] *Id.*, Arts. 8 and 14.
[91] *Id.*, Arts. 4 and 7.
[92] That is, no emergency could authorize the Government to discriminate for reasons of race, language, religion, national or family origin, or political or philosophical belief. This, however, did not preclude measures targeted at members of rebel groups. *Id.*, Art. 14.
[93] *Id.*, Arts. 9-14.
[94] Decision C-004/92 of 1992.
[95] Decision C-300/94 of 1994. Why the Court treated the two situations differently, however, is not clear. *See* the discussion in Clara María Mira González, *Los estados de excepción en Colombia y aplicación del principio de proporcionalidad: un análisis de seis casos representativos,* REV. OP. JUR. UNIV. DE MEDELLÍN 141, 144-149 (Jan-Feb. 2016).

In 1995, the Court rejected another decree invoking an emergency on the grounds of a spike in "common crime, organized crime and subversion."[96] The Court reasoned that the unrest besetting the country was not "situational, transitory, or exceptional," but rather the product of long existing, "deeply-rooted pathologies."[97] President Ernesto Samper had been wrong to construe a pattern of ongoing violence as a novel, threatening occurrence, and there was no reason, therefore, to resort to emergency measures above and beyond the normal resources at the State's disposal. Samper took the decision much as might be expected, threatening a constitutional amendment to clip the Court's wings and once more limit review of emergency decrees to procedural criteria. A proposal along these lines was debated in both chambers during the second half of 1996 but was ultimately rejected.

In 1997 and 1999, the Court struck down two decrees issued in the wake of the Asian financial crisis, when Colombia found itself cash-strapped and saddled with a 17% unemployment rate. Here, the Court found that, because Colombia's economic woes had been "totally predictable," they were not grounds for declaring an emergency.[98] Although it refused to issue "an exhaustive list of the sum of powers and authorities presently possessed by the Government to face the collapse of tax revenues," the Court insisted that such ordinary measures would have sufficed to guide the nation out of the downturn. This decision, too, launched another proposal from the Executive to prohibit the Court from exercising substantive review of decrees declaring states of emergency. This time, Samper was hit by a wave of scandals alleging ties between his campaign and the drug cartels, and support for the proposal dried up.

Under the administration of the hardliner Alvaro Uribe, the Court weathered a number of dramatic clashes. Uribe's use of emergency decrees represented a high point of contention and controversy for the Court, at least since the early '90s.[99] In his two terms, the president issued a flurry of decrees clustered around three episodes—the first in 2002, related to an alleged outbreak of violence and criminality; in 2008, in response to an alleged judicial crisis due to backlogs and the imminent release of more prisoners; and finally in 2010, related to shortages in the financing of the public health system. Out of a total of twenty-one decrees issued by Uribe, the Court struck down nine, upheld seven, and found five partly enforceable.[100] As before, the Court reasoned that the majority of these lacked a grounding in real, bona fide emergency situations; the facts identified by Uribe were the product, as the Court wrote in a 2010 opinion, of "known, structural, recurring, and foreseeable" systemic failings coming to a head, and therefore had to be addressed by ordinary legislative means.[101]

Some of the Court's most spectacular clashes with President Uribe did not strictly concern the emergency at all, yet they too helped to define the outer limits of presidential power. There was the notorious "substitution doctrine" invoked by the Court in 2010 to prohibit Uribe from running for a third term in office by constitutionalizing indefinite presidential reelection.[102] And in 2004, by a 5-4 vote, the Court struck down the Anti-Terrorism Act, which would have permitted the military to conduct warrantless arrests, home searches, and wiretaps. The Act's broad power grant to the police was, needless to say, highly controversial. Yet President Uribe's high approval ratings at the time—77% in June 2004, according to one poll—seemed to signal that the population leaned more toward the *uribista* hardline stance against guerrillas and terror than civil liberties. The showdown between the interventionist court and the popular president

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[96] Presidential Decree No. 1370 (Aug. 16, 1995).

[97] Decision C-466/95 of 1995.

[98] Decision C-122/97 of 1997, Decision C-122/99 of 1999. The latter upheld the President's decree as it pertained to certain sectors representing "the most vulnerable segments of the population," which justified emergency measures: financial actors involved in microcredit, savings, housing finance; as well as public financial institutions.

[99] Pedro Pablo Vanegas Gil, *La Constitución colombiana y los estados de excepción: veinte años después*, 27 REVISTA DERECHO DEL ESTADO n.º 27, 261, 285-86 (July-Dec 2011) (describing three periods in the use of emergency powers since 1992: one of heavy use in the early-to-mid nineties, a second period of relative calm from about 1998 to 2008, and a third from 2008-2011 in which use was again regular).

[100] Data collected by author, see n. 15, *supra*.

[101] Decision C-252/10 of 2010, and *see* Decisions C-070/09 of 2009, C-802/02 of 2002.

[102] *See* n. 8, *supra*.

attracted a great deal of media scrutiny, but ultimately, the Court struck down the proposed act for narrow technical reasons having to do with its passage.[103]

Under President Juan Manuel Santos, such clashes took on a different valence. Compared to Uribe, Santos' use of the state of emergency was, if not any less frequent, certainly less controversial, centered mainly around catastrophes having to do with avalanches and flooding in the southwestern regions and smuggling and paramilitary violence on the border due to the rapidly deteriorating situation in Venezuela. The Court upheld the majority of these decrees.[104]

Even in a healthily functioning democratic regime, the balance between powers is fragile, and Colombia appears to be trending back in a pro-presidential direction. When it comes to the nomination of justices, over the years the political branches have figured out how to game the system in some measure, and there is evidence of growing conservatism among the Court's new members.[105] In 2014, the Court's reputation took a hard tumble when a scandal broke over bribe-taking by several justices, including Chief Justice Jorge Pretelt, who had allegedly accepted money from an energy company in exchange for granting it a favorable ruling forgiving certain owed fees and duties.[106] In 2015, Congress attempted to crack down on this "cartel of the robe" (*cartel de la toga*) with the Balance of Powers Act. Besides reinstalling the ban on presidential reelection and establishing a rule unseating congressmembers found guilty of corruption, the Act created a "supercourt" to hear cases against justices (the *Tribunal de Aforados*) whose decisions appeared to improperly favor their own or a party's interests, and a Judicial Council to oversee the Court's fiscal integrity.[107] The Act's bark proved worse than its bite, however, as both of the new bodies were declared unconstitutional by the Constitutional Court, and efforts to revive them died in Congress in 2017.[108] The Court also received mixed reviews for its role in the 2016 peace agreement and the constitutional amendments leading up to it.[109] Walking a very careful line between insistence on procedural regularity and lenience toward temporary transitional measures, the Court earned criticism from both the *uribista* Right, which objected bitterly to the peace agreement's generous terms (Uribe remained a fearsome social media presence and critic of the peace accords as a private citizen and, until recently, as a senator), and from the left, which feared that the Court's uncharacteristic legalism would scuttle negotiations.[110] With the recent election of the center-rightist Iván Duque as President, criticism of Court activism figures to continue.

Still, the larger perspective on these events suggests that there will be little, if any, walking back of the heavy judicialization of presidential powers over the state of exception. Such review has not been the target of the brunt of the political attacks, which have done little to rein in the Court's powers, in any case. It remains to be seen whether the changing composition of the Court itself will effectuate a retreat, but there can be little doubt that, from a historical point of

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[103] Decision C-141/10 of 2010 and Decision C-816/04 of 2004. Rodríguez-Raga, who interviewed several of the justices years afterward, describes both of these decisions as highly politically motivated. Rodríguez-Raga, *supra* n. 19 at 101-2.

[104] Out of eighteen emergency decrees issued by the Santos administration and surveyed here, thirteen were upheld by the Court.

[105] Everaldo Lamprea, *When Accountability Meets Judicial Indepence: A Case Study of the Colombian Constitutional Court's Nominations*, GLOBAL JURIST, Vol. 10 (2010).

[106] In 2014, reporting on a national survey, *Semana* noted that the Court had a disapproval rating of 57%, even though it had been "one of the institutions most respected by Colombians a few years ago." (The Armed Forces were the most trusted political institution, although they, too, had an approval of under 50%.) *Por qué las instituciones están en crisis*, SEMANA (Nov. 15, 2014).

[107] Acto Legislativo 2002 del 1 julio 2015 "Por Medio del Cual se Adopta una Reforma de Equilibrio de Poderes y Reajuste Institucional y se Dictan Otras Disposiciones." Available at: http://wp.presidencia.gov.co/sitios/normativa/actoslegislativos/ACTO%20LEGISLATIVO%2002%20DEL%2001%20JULIO%20DE%202015.pdf.

[108] Decision C-373/16 of 2016; *Réquiem por el tribunal de aforados,* SEMANA (Oct. 24, 2017).

[109] *See, e.g.,* David Landau, *Constitutional implications of Colombia's judicialized peace process,* CONSTITUTIONNET Blog (July 29, 2016).

[110] For the latter position, *see* Antonio Barreto-Rozo and Jorge González-Jácome, "The Colombian Constitutional Court at the Crossroads of Peace," INT. J. OF CON. L. *Blog* (August 2017) (pointing out how previous peace efforts in the 1950s and 1960s were abruptly ended by politicians seeking a return to legal "normalcy" after *La Violencia,* and how this lesson was enshrined in the Article 22 of the 1991 Constitution, which gives the President special powers to pursue peace negotiations with guerrillas).

view, the state of siege has been transformed into an entirely different institution. The quasi-untouchable status of emergency decrees has effectively disappeared. Between 1984 and 1991, less than one in ten of decrees of internal commotion were declared void by the Supreme Court; since 1992, that figure is close to six in ten, counting decrees struck down in part.[111] It is no exaggeration to say that the Constitutional Court's review of emergency decrees has proven a crucial obstacle to the revival of unfettered presidentialism in Colombia.[112]

D. Lessons in an Overseas Context: Judicial Survival Strategies, Executive Prerogative, and Substantive Review

Cautionary tales have been written about the mindless transplanting into new soil of legal precepts[113] and institutions,[114] but bearing in mind important lessons about context-specificity and interpretive hubris, a great deal can be learned from the Colombian Court's example. In fact, at the present moment of strongman leadership and illiberal nationalist movements borne aloft atop manufactured "crises," a jurisprudence demanding that crisis-talk hew to clear articulable standards is a tonic.

For courts in young or troubled democracies, obedience and cooperation by the political branches cannot be taken for granted. Bold displays of might can often go spectacularly wrong, as Russia's Constitutional Court discovered after making an enemy of President Boris Yeltsin. In 1993, Yeltsin dissolved Parliament and suspended the Court, then replaced the latter with a "superpresidential" system in which it had vastly reduced powers.[115] Courts in neighboring Peru, Ecuador, Argentina, Venezuela, as well as more recently in Eastern Europe, have also been severely punished for similar "overreach."[116] How has the Colombian Court avoided this fate?

The simple answer is that by 1991, political and legal culture in Colombia was ripe for a strong judiciary, having turned decidedly against the notion that unbound presidentialism was the solution to the nation's crises. Throughout Colombia's history, periods of particularly gross State overreach or lawlessness were followed by judiciary-strengthening reforms: the inception of judicial review in 1910 after three decades of "monarchic presidentialism"; the constitutionalization of judicial review in 1968 after *La Violencia*, and of course the 1991 Constitution, a clear product of the nation's disgust at State impunity, corruption, abuse of power, and decades of unchecked

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[111] *See* n. 15, *supra.*

[112] Vanegas Gil, *supra* n. 99 at 286.

[113] From an impressive body of literature*, see, e.g.,* Pierre Legrand, *The Impossibility of "Legal Transplants*," 4 MAASTRICHT J. OF EUR. AND COMP. L. 111, 120 (1997) ("what can be displaced from one jurisdiction to another is, literally, a meaningless form of words. To claim more is to claim too much. In any meaningful sense of the term, 'legal transplants,' therefore, cannot happen."), William Ewald, *Comparative Jurisprudence (I): What was it like to Try a Rat?*, 143 U. PENN. L.R. 1889, 1896 (1995) ("Understanding a foreign legal system cannot—in a very strong sense of 'cannot'—be obtained solely by heaping up nuggets of information."). Summarizing this debate, *see* Günther Frankenberg, *Constitutional transfer: the IKEA theory revisited,* 8 INT. J. OF CON L. 563, 563-570 (2010). For a similar summary and methodological critique of the discipline, *see* Ran Hirschl, *On the blurred methodological matrix of comparative constitutional law, in* THE MIGRATION OF CONSTITUTIONAL IDEAS 39-66 (Sujit Choudhry ed., 2006).

[114] Describing failings in the design, drafting, and implementation of the Iraqi Constitution drafted under U.S. occupation, *see, e.g.,* ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION x-xi (2009) and Saad Jawad, *The Iraqi Constitution: Structural Flaws and Political Implications,* LSE MIDDLE EAST CENTRE PAPER SERIES / 01(November 2013).

[115] Ginsburg, *supra* n. 53 at 101-4.

[116] For example, in 2000, the Peruvian Constitutional Tribunal ruled against Fujimori's bid for a third term. Unlike Uribe, Fujimori simply refused to comply with the decision. Rodríguez-Raga, *supra* n. 19 at 80. On the Venezuelan Supreme Court's doomed resistance against the Chávez-controlled Constituent Assembly, *see* Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court battles Hugo Chávez over the creation of the 1999 Constitution*, 14 INT. J. OF CON. LAW 555, 573-578 (2016). On the possibility of, and limitations upon, constitutional courts acting as barriers against institutional deformation caused by populism, see Michaela Hailbronner and David Landau, *Introduction: Constitutional Courts and Populism,* in VERFASSUNGSBLOG and I-CONNECT BLOG: SYMPOSIUM, CONSTITUTIONAL COURTS AND POPULISM (2017).

violence.[117] By the late '70s and '80s, even a string of presidential incumbents had come to accept that the powers of the president should be reduced.

The Constitution of 1991 did not fail to translate these impulses into concrete institutional arrangements. It provided for an unmistakably strong and independent court, with its enhanced scope and powers of review, new tools like the *tutela* to grant it popular reach and visibility, and a new nomination process to free it from dependence on the political branches and guarantee it greater independence.[118] Whatever can be said about the Court's activist tendencies, a large role for it was mandated by the very language of the Constitution.[119] When it came to the state of emergency, the Court was not just permitted to review decrees, it was *required* to do so.[120] Long catalogues of unabridgeable rights and language requiring a "direct and specific connection" between an emergency decree and a specific, real-world development, invited judicial scrutiny and would necessarily mandate heavy court involvement.

The Court's performance also owes something to the broader phenomenon known as "the new Latin American constitutionalism," which spread across the continent in the nineties in the wake of the dictatorships of mid-to-late-twentieth century.[121] The new constitutionalism dovetailed with the global spread of written constitutionalism, and it entailed certain similar features like judicial review, written bills of rights, and constitutional courts.[122] But it had its own flavor, chiefly an insistence on the legitimacy endowed new constitutions and governments by the broadly participatory constituent assemblies that had gave them life, as well as by the effective protection of rights these regimes made possible.[123] New legal devices affording the individual citizen the possibility to make good on her own rights signaled the onset of this new paradigm, which "guaranteed the total submission of all forms of power—whatever their origin, public or private—to the Constitution and concretely, to the rights incorporated therein."[124]

This geopolitical context helps to contextualize and explain the Court's sheer popularity among ordinary Colombians. Buoyed by the *tutela* and the *acción popular,* the Court's reputation as a defender of rights grew on the strength of its commitment to aiding economically marginalized groups, the creativity and sophistication of its jurists, and its bold use of innovative remedies.[125] The *tutela*'s explosion in popularity (10,732 were filed in 1992; 617,000 in 2016) has broadened the Court's reach and its "populist" appeal.[126] *Tutelas* and another legal tool, the compliance action to ensure the laws are upheld (*acción de cumplimiento*), have allowed the Court to step in for a sclerotic, unresponsive bureaucracy in the areas of pensions, health care, settlement payments for the displaced, compensation for the destruction of food supplies, and so forth.[127] When it came

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[117] CEPEDA ESPINOSA, *supra* n. 59 at 26, NEGRETTO, *supra* n. 61 at 167.
[118] *But see* Lamprea, *supra* n. 105 (criticizing the nomination system as lacking transparency, guided by crude partisan considerations, and ultimately fomenting a trend toward conservatism in the ensuing years).
[119] Schor, *supra* n. 2 at 14 ("There are three important characteristics of the Colombian Constitutional Court that helped it emerge as a powerful protector of rights for groups marginalized from political power: a new method of judicial appointment; a new mechanism of judicial review; and a transformation in how rights are conceptualized").
[120] Art. 214, ¶ 6.
[121] Roberto Gargarella, *El nuevo constitucionalismo latinoamericano: promesas e interrogantes*, REVISTA TODAVÍA 21 (May 2009), Nolte and Schilling-Vacaflor, *supra* n. 53 at 3.
[122] See n. 53, *supra.*
[123] GARGARELLA, *supra* n. 35 at 21 (ENGINE ROOM).
[124] Liliana Carrera Silva, *La acción de tutela en Colombia,* 5 REV. IUS. 27 (Jan/Feb. 2011).
[125] David M. Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT. L.J. 189, 202 (2012), Schor *supra* n. 2 at 17 (on the Court's abandonment of formalism and adoption of more flexible balancing tests).
[126] Landau, *supra* n. 125 at 216-221 (identifying the Court's foray into "large-scale judicial populism").
[127] Manuel José Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOB. STUD. L. REV. 529 (2004). A fascinating literature discusses how courts in transitional or weak democracies can actually prove more popularly responsive than presidents and legislatures, particularly where enforcement mechanisms are weak. *See, e.g.,* Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 52 (Adam W. Czarnota et al. eds., 2005), Stephen Gardbaum, *The Place of Constitutional Law in the Legal System*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 169, 175 (Michel Rosenfeld and András Sajó eds., 2012), and *see generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL

to enforcing pension regulation, for instance, former justice Manuel Cepeda Espinosa recalls, "We were the bureaucracy."[128]

Perversely, too, such institutional weakness—specifically, that of Colombia's legislature and political parties—has redounded to the Court's benefit. The august lineage of Colombia's Liberal and Conservative parties, among the oldest in Latin America, belies a reality of ideological incoherence, unrepresentativeness, factionalism, top-heaviness, elitism, exclusivity, and corruption.[129] The Constituent Assembly had tried to revive and open up the party system, but its immediate effect was to compound the problem: from two mainstream parties there were seventy-two officially recognized in 2002, 45 with representation in Congress.[130] A 2003 constitutional reform somewhat remedied the fragmentation, yet complaints of non-competitive elections, party corruption and indiscipline, and legislative ineffectiveness persist.[131] The fact remains that with a weak, fractured Congress, censuring an "activist Court" proves very difficult.[132]

Careful cultivation of the Court's image has also helped to shield it from attempted reprisals when politicians feel it has grown meddlesome. The Court has aided its cause by pioneering enforcement mechanisms that promote inter-branch dialogue: round tables and legislative-style hearings that bring together political, business, and community leaders, for instance. In the follow-up to a 2004 decision on internally displaced persons, the Court called upon elected officials to find a constitutionally acceptable solution and helped coordinate the hammering out of a new legislative framework.[133] There is some evidence, too, that notwithstanding its activist, crusader reputation, the Court has shown "strategic prudence" in its jurisprudence, avoiding showdowns with a strong administration and saving displays of boldness for occasions where it anticipates that the political branches will face high costs in sanctioning it.[134]

The Colombian court has attracted its share of notice and criticism for being high-handed and unaccountable, as well as casuistic and unprincipled in its jurisprudence.[135] An unapologetic proponent of a "realist approach" and balancing tests, the Court has made itself a potential target for criticisms of indeterminacy.[136] Its heavily sociological opinions and innovative remedies require it to delve far into areas outside classical judicial competence, and occasionally its opinions can seem imprudent, implausible, even "quixotic."[137]

LAW 227 (2008) (discussing weak-form judicial review as a method for enforcing social and economic rights).

[128] Quoted in Landau, *supra,* n. 125, 224.

[129] Eduardo Pizarro Leongómez, *Giants with Feet of Clay: Political Parties in Colombia*, *in* THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 78, 78-79 (Scott Mainwaring et al. eds., 2006), Scott Mainwaring, *Party Systems in the Third Wave*, 9 J. OF DEM. 67 (July 1988).

[130] Bejarano, *supra* n. 59 at 64-65, Jonathan Hartlyn, *Presidentialism and Colombian Politics*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY: THE CASE OF LATIN AMERICA, vol. 2, 220 (Juan Linz and Arturo Valenzuela eds., 1994).

[131] Mónica Pachón and Matthew S. Shugart, *Electoral reform and the mirror image of inter-party and intra-party competition: The adoption of party lists in Colombia*, 29 ELECTORAL STUDIES 648 (2010).

[132] Maurice Kugler and Howard Rosenthal argue that the *tutela* has actually worsened Congress' disadvantage by allowing politically disadvantaged groups to punch above their weight and occupy legislative resources they otherwise could not access, *Checks and Balances: Institutional Separation of Political Powers*, in INSTITUTIONAL REFORMS: THE CASE OF COLOMBIA 75-102, 90, 97 (Alberto Alesina, ed., 2005).

[133] Roberto Gargarella, *Un papel renovado para la Corte Suprema. Democracia e interpretación judicial de la Constitución*, in TRIBUNALES CONSTITUCIONALES Y CONSOLIDACIÓN DE LA DEMOCRACIA 267 (Suprema Corte de Justicia de la Nación, Dirección General de la Coordinación de Compilación y Sistematización de Tesis, ed., 2007).

[134] Rodríguez-Raga, *supra* n. 19 at 75, Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court, 1992-2006,* in COURTS IN LATIN AMERICA 81, 81-82 (Gretchen Helmke and Julio Ríos-Figueroa eds., 2011).

[135] *See, e.g.,* n. 8, *supra.*

[136] Schor, *supra* n. 2 at 189. As the late Justice Scalia put it memorably if uncharitably, balancing interests is like "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (SCALIA, J., dissenting) (1988).

[137] *See* Nagle, *supra* n. 39 at 89, and JULIETA LEMAITRE RIPOLL, DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES (2009) (discussing the idea that Colombians "fetishize" constitutional rights and rely excessively on legal solutions to deeply rooted socioeconomic problems).

The Court's review of the state of emergency betrays the same patterns. The emergency in Colombia was always plagued by indeterminacy, and the specific criteria enshrined in the Constitution and the 1994 Act on States of Exception clearly attempt to provide some firmness to the process. While these may provide rigor to the *process* of review, they do not obviate highly fact-specific forays by the Court into questions of policy—for instance, on safety standards in building construction in its 2011 decision on Santos' post-flood emergency measures[138]—or highly ad hoc assessments of whether the President has acted "reasonably" in tying factual reality to a legal creation.

Yet there are good reasons to defend the Court's method, too. As a matter of theory, rights regimes are polyvalent, and balancing is an inherent feature of constitutional review, because no right can be categorical when its full exercise would intrude upon that of another.[139] Miguel Schor argues that the Colombia court's role as a rights defender necessitates some pragmatism and flexibility, whereas the formalist method is more suited to courts that limit themselves to enforcing the separation of powers.[140] (The Colombian example suggests that this claim is only half-true, however: having constitutionalized the President's obligation to "weigh the factual preconditions that give rise to the declaration of a state of emergency,"[141] and the Court's duty to review these for their objective validity, unavoidably, the Constitution itself invites the Court to undertake a jurisprudence of balancing.)

A defense of substantive review against its critics is particularly important at the present moment, where globalized, deterritorialized wars are making emergencies increasingly vague, and constitutional barriers against them porous. Because it is in the very logic of constitutional dictatorship that constitutional barriers collapse during the emergency, procedural review of emergency powers is simply insufficient to stop arbitrary excess and prevent rights from being sacrificed to expediency. In the U.S., for example, courts ordinarily review emergency executive action according to the question of whether Congress has authorized such action.[142] But precisely because the emergency undermines the conditions for effective checking and balancing by Congress, an effect partisanship and ideology only worsen,[143] this review has done little to stop an unbroken string of legislative abdication and delegations to the President.[144]

A further question exists about the appropriate *scope* of Court review. The Colombian Court has certainly faced its share of criticism for wading into impermissible areas, from too narrow (technical policy) to too wide (constitutional amendments, especially the peace process).[145] Its review over executive emergency decrees has generally been considered successful and beneficial,[146] but elsewhere, judicial review over presidential emergency power is forbidden territory. This critique is particularly strong in the North American context, where, as noted, Lockean ideas of the untouchability of executive "prerogative" continue to pervade thinking on the separation

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[138] Judgment C-226/11 of 2011, ¶4.1.

[139] Mattias Kumm, *Alexy's Theory of Constitutional Rights and the Problem of Judicial Review, in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 201 (Matthias Klatt ed., 2012) (explaining that the core claim of Alexy's *A Theory of Constitutional Rights* is that constitutional rights are principles and that proportionality analysis is necessarily at the heart of reasoning about what principles require in real contexts).

[140] Schor, *supra* n. 2 at 192.

[141] Judgment C-226/11 of 2011, ¶2.4.1.

[142] *See* Joseph Bessette, *Confronting War: Rethinking Jackson's Concurrence in* Youngstown v. Sawyer, *in* THE LIMITS OF CONSTITUTIONAL DEMOCRACY 194, 194-95 (Tulis and Macedo eds., 2010), Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2674 (2005), Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 909 (1982).

[143] Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers,* 119 HARV. L. REV. 2311, 2347-50 (Jun. 2006), Tushnet, *supra* n. 142 at 2678-79.

[144] Scheppele, *supra* n. 34 (*Law in a Time of Emergency*).

[145] *See* n. 8, *supra,* PEDRO MEDELLÍN TORRES, EL PRESIDENTE SITIADO: INGOBERNABILIDAD Y EROSIÓN DEL PODER PRESIDENCIAL EN COLOMBIA, and Nagle, *supra* n. 39 at 81 (arguing that the Court's activism has "exceeded all foreseeable expectations," in light of which the extensive powers given to it "appea[r] to have been ill-conceived and poorly orchestrated").

[146] *See* Tobón-Tobón and and Mendieta González, *supra* n. 40, Vanegas Gil, *supra* n. 99 at 286, and Uprimny, *supra* n. 1. *But see* Mira González, *supra* n. 95 at 144-149 (criticizing the Court's review as unprincipled and overly permissive).

of powers.[147] Presidential scholar Harvey Mansfield writes that, by nature, executive prerogative "goes where the law cannot" to prevent a weak state from collapsing in on itself. Democracies cannot escape the need for discretionary emergency power, because the "generalities of law do not conform to the particularities of human beings."[148]

Has Colombia's present regime of regulation of the state of emergency purchased consensus, lawfulness and transparency at the cost of incoherence and indecision? Some do think so.[149] But its recent history with the state of emergency suggests a more beneficial kind of *modus vivendi* where the President refrains from frivolous declarations of emergency and the Court refrains from unnecessary meddling. For example, after heavy rains and flooding killed 400 people and left over 3 million displaced in 2010, Santos issued a series of decrees commandeering private infrastructure and telecommunications to aid devastated populations resettle quickly. The Court upheld the entire package with the minor exception of insisting that language exempting new facilities from feasibility studies be amended so as to protect individuals from shoddy constructions.[150] The give-and-take, as well as the Court's record of upholding the majority of Santos' decrees, which it considered put forward in good faith, is typical of these recent interactions.

The state of emergency in the Colombian Constitutional Court offers yet another example of how assumptions about the appropriate role for courts need to be conditioned upon relative institutional capacity in the political system. Other studies have looked at roles played by the Colombian Court that fall outside a classical understanding of judicial power: deepening democracy and rights protection, compensating for the failure of other state institutions, protecting the nation from institutional degradation and collapse.[151] Many see these heterodox roles as warranted by the political circumstances in Colombia. But I would push the point further: across political contexts, the state of emergency is one in which legislatures are particularly disadvantaged and in which, therefore, greater judicial review is appropriate.

It would be overclaiming to argue that Colombia poses a frontal challenge to the theory of constitutional dictatorship. But it does call into question a particular institutional application of the theory which requires that emergency regimes, and particularly presidential power under them, be liberated of rule-of-law constraints. In fact, Colombia's recent history of successful institutional responses to emergencies under judicial review, as well as its past of unregulated executive prerogative and endemic state weakness, suggests that unilateralism is no guarantor of "strength" as neo-Lockeans would understand it. Today, highly regulated emergency powers remain a viable tool for the President to manage disorder, and do not appear to be hampered by cacophonous interventions or delay.

E. Conclusion: Presidential Regimes Between Weakness and Strength

By 1991, some Colombians would have gladly accepted a new constitutional system that purchased lawfulness and transparency at the expense of coherence and action if this would avoid repeating the worst parts of a history of presidential abuse. In fact, Colombia's recent

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[147] Some important statements of this position are HARVEY C. MANSFIELD, TAMING THE PRINCE (1989), BENJAMIN KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER (2009), and ERIC A. POSNER and ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2013). On Lockean prerogative and its role in modern U.S. law, see Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency*, 67 THE REVIEW OF POLITICS 1, 77 (Winter, 2005).

[148] MANSFIELD, *supra* n. 147 at xx-xxi and 41.

[149] MEDELLÍN TORRES, *supra* n. 145.

[150] Judgment C-226/11 of 2011.

[151] David Landau, *A Dynamic Theory of Judicial Role,* 55 B.C.L. REV. 1501, 1561-62 (2014) (noting that the heterodox roles played by "the emerging constitutional courts and constitutional orders of what scholars have called the 'global south' merit analysis on their own terms. These courts face a set of institutional and social problems that often dwarf those found in more mature democracies") and David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law,* 51 HARV. INT. L.J. 319, 319 (2010) (arguing that many of the "legislation-substituting" functions the Court has taken into its own hands "are sensible given Colombia's institutional context, even though virtually all existing theories of judicial role in American and comparative public law would find this kind of legislative substitution inappropriate").

history with judicial review of the state of emergency suggests a more beneficial kind of accommodation has been achieved.

Today, the President's power to decree a state of emergency has been brought under law. These decrees must meet several conditions. They have to be grounded in clear and convincing reasons. All measures adopted by the government under their aegis must be stipulated to in advance in writing. They must be rationally related and proportional to the severity of the crisis. Constitutional rights may be temporarily limited in an emergency, but they can never be suspended, and certain "core" rights are beyond the government's power to infringe, under any circumstances. Emergencies cannot be used to suspend or dissolve the other branches of government.

This regime has been brought about by the extraordinary step of entrusting review of presidential emergency power to a court. Although the idea of judicializing these powers remains controversial and criticized, especially in common-law jurisdictions such as the United States, my aim in this account has been to defend the model from the main objections leveled against it—indeterminacy, delay, and weakness. Colombia may have been uniquely primed by its violent history to accept radical institutional reforms and a radical rethinking of the emergency in particular, but it would be a mistake to ignore similar pathologies in other constitutional democracies: the normalization of high-security regimes, infringements upon citizens' constitutional protections in the name of necessity, the concentration of extraordinary security-related powers in executives, and the infiltration of the vocabulary of the emergency into everyday political language. This very visible possibility of gradual, creeping abuses should encourage us to see the present time, "not as a moment when the rule of law should be suspended, but precisely a moment when the rule of law needs to be strengthened."[152]

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[152] Scheppele, *supra* n. 34 at 1004 (*Law in a Time of Emergency*).