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Legal Rhetoric and Revolutionary Change

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LEGAL RHETORIC AND REVOLUTIONARY CHANGE

Richard S. Kay

I. CONSTITUTIONAL AND REVOLUTIONARY CHANGE

We usually suppose that a particular human society has in place, at a given moment, some fairly stable set of legal and governmental institutions, defined and limited by certain describable rules. Those rules, in turn, reflect some set of social and political values. This arrangement of laws, institutions, constitutional rules and values may be said to define a constitutional regime. Although the term "revolution" is used in a number of different ways, it is often employed to denote a particularly acute change in the character of such a regime. We assume, that is, that constitutional changes can be great or small. It is possible to measure such changes along two different axes. First, a constitutional change may alter the substance of the existing constitutional rules of government. Such changes may be great -- as when an absolute monarchy is replaced by a parliamentary democracy-- or small-- as when the number of legislators is marginally reduced or increased. Second, a

William J. Brennan Professor of Law, University of Connecticut, School of Law. A shorter version of this article was presented at the Conference on Constitutional Transitions: Hong Kong 1997 and Global Perspectives held in Hong Kong, May 29-June 1, 1997. I am grateful for the helpful comments on a prior draft provided by Carol Weishrod and for the diligent research of Matthew R. Peterson and Laura Morris. Today these rules are almost always found in written constitutions. As some of the historical material discussed below illustrates, however, the existence of a "constitutional regime" and the possibilities of constitutional change do not depend on that contingency.
constitutional change may be measured by the extent to which it conforms to or deviates from existing constitutional rules for making such changes. A constitutional change effected by the established procedure for amendment and within the limits prescribed by an existing constitution would, on this measure, effect no real change. Only an alteration carried out in violation of the rules for constitutional amendment would be considered a genuine change in the constitutional regime. In one sense, this second standard does not recognize degrees of change. A constitutional alteration would either be lawful or unlawful. But there are minor and major illegalities. The failure to secure the attesting signature of the presiding officer of a specified amending body may be compared with the legally unauthorized promulgation of a new constitution by presidential decree.

We might use the word "revolution" when there is a sufficiently significant change according to either of these criteria. Thus, it might describe the legally irregular replacement of a head of state even when the new officer acts under exactly the same rules as his predecessor. Similarly, we would call a change revolutionary if it made a great enough change in the political underpinning of state authority— even if it were accomplished with a punctilious regard to existing rules of constitutional change. For example, after the demise of the Communist regime in Hungary in 1989 the Hungarian constitution was amended to provide for a government premised on democratic decision-making and respect for the rule of law. Although these amendments were effected without breaching the existing constitutional rules, the new Constitutional Court referred to these events as providing "a new quality to the state, to laws and to the
political system" and amounting to a "system change."^2

At the extreme, these two measures of constitutional change may converge. It may make little sense to talk about a "lawful" constitutional change which alters the essential nature of the legal and political system which the constitutional rules are to govern. A legal limitation may be found implicit in the very word "amendment" provided for in a constitutional text. There are cases where constitutional courts have found attempted constitutional amendments invalid because they effected too drastic a change in the constitutional system notwithstanding the fact they were enacted in a procedurally perfect manner.\(^3\)

This essay will not deal with the difficulties of classifying such marginal cases. Its focus is on the use of legal rhetoric to justify even revolutions which satisfy both set of criteria. That is, I will deal here with constitutional changes that, first, effect a basic alteration in the political suppositions of the constitution (or which clarify such suppositions in cases where two acutely different candidates are in contest) and, in addition, which are accomplished by a departure from the positive law of constitutional change in place at the relevant time. As an abstract matter, one would suspect that an appeal to the existing positive law could have little role in the rhetorical justification


employed by people making such revolutions. But as the cases examined in this paper illustrate, it is not uncommon for a revolution to attempt to justify itself in terms of "law."

The word "law," of course, is capable of such broad application that this fact alone may tell us little about the character of revolutionary justification. When the Latvian Supreme Soviet reasserted the independence of the Latvian Republic on May 4, 1990, it did so by declaring the 50 years of Soviet incorporation "null and void" and the dormant Latvian Constitution of 1922 "re-established." That revolution was thus explicitly justified on grounds of law but, significantly, not the law of the regime it was displacing. A more expansive appropriation of legal authority is manifest in the Iranian Constitution of 1979 adopted in the wake of the fundamentalist Islamic revolution of that year. The preamble describes the foundations of the new state as a response to the imperatives of the Koran (which are liberally quoted), and calls for legislation which would "revolve around the Koran and the Sunnah." A revolution may (and many have been) premised on the requirements of the laws of nature or, as is the case with the Bolshevik Revolution of 1917 discussed below, by the historical laws of human society.

The phenomenon under discussion, however, extends beyond

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5 IRAN CONST. (Adopted October 24, 1979), Preamble reproduced at <http://www.uni-wuerzburg.de/law/ir00000.html>.
these broad invocations of legal authority. Revolutions are frequently justified by the citation of positive law and, more particularly, by the positive law of the political regime that was supplanted by the revolution. So, to take a familiar example, the American revolutionaries of the eighteenth century sometimes phrased their right of self-government on law only in the broadest sense, as illustrated by the Declaration of Independence's reference to the "laws of nature and nature's God." But they also regularly formulated their grievances as violations of the common law "rights of Englishmen" or insisted on the presence of inherent limitations on the legal authority of the Parliament at Westminster.6 As this example demonstrates, reliance on positive law can and does combine and overlap with other forms of legal, moral or political argument.

The principal focus of this essay, therefore, is on the use of positive law argument in the justification of the kinds of revolutions I have described. It will be seen that the role of legal rhetoric differs along a range extending from almost total reliance to partial explanation to outright rejection. In the next section I will briefly

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examine three instances of revolution in each of which legal justification played a different part. In the last section I will suggest some general factors associated with different occasions of revolutionary change that may explain why law is or is not an attractive component of revolutionary justification and will examine the three examples in light of those factors.

II. THREE REVOLUTIONS

This section will review some of the justifications associated with three revolutions, the English Revolution of 1688-1689, the secession of the Southern states of the United States in 1861 and the establishment of the short-lived Confederate States of America, and the overthrow of the Provisional Government of the Russian Republic in November, 1917 and its replacement by the Soviet Russian state. Necessarily, my description of these events is a drastically limited one, intended only to illustrate the particular issues of constitutional change which are my principal focus. The first and last examples represent extremes in the use of legal justification. The English revolutionaries attempted to maintain, as far as possible, a perfect continuity with pre-existing law, often denying that any illegality or change in the law had occurred. The Bolsheviks in 1917 made the eradication of the existing legal framework a central point of their revolution and made no effort to shelter under a positive law authority. The 1861 secession presents a middle case. It was, under the circumstances, impossible to maintain that the seceding states' new status was in legal continuity with the United States. But the secessionists often asserted, nonetheless, that their revolution was consistent with and, indeed, in perfect fidelity to, the principles that
underlay the Constitution they were repudiating.

_A. England, 1688-89_

In December, 1688, in the face of a Dutch invasion led by his nephew and son-in-law, Prince William of Orange and widespread disaffection among the political classes, King James II fled England for France. In February, 1689 both Houses of a makeshift Convention, summoned by William, resolved that James "having withdrawn himself out of the Kingdom has abdicated the Government and the Throne is thereby vacant." Shortly thereafter the Convention voted that William and his wife, Princess Mary, James' daughter, should be proclaimed King and Queen of England. This "Glorious Revolution" was a critical moment in a longstanding controversy over the fundamental character of the English constitution. The seventeenth century witnessed intense and sometimes violent disputes about the relative power of King and Parliament. After the civil war, Commonwealth, Protectorate and Restoration, those differences remained unresolved. James II, a Roman Catholic, brought them to a head by his insistence on using what he took to be the constitutional prerogatives of the monarch to remove many of the statutorily imposed civil and political disabilities of his co-religionists. His failure in that attempt and the inauguration of a new king who, in significant measure, owed his title to the support of the constitutional opposition and a quasi-parliamentary vote, did not exactly settle the constitutional question. But, henceforth, the direction of political events turned increasingly toward a recognition of parliamentary authority.⁸

The Revolution of 1688-89 thus meets one of the criteria of

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"revolution" specified above, as it was a decisive factor in settling a
profound difference on the nature of the state and legal system. And,
critically for our discussion, it also meets the second criterion: It was
accomplished by breach of existing law. James II had not abdicated
in the common sense of that word. Even if he had, under existing,
and at this time still largely uncontested, law, the succession was to
his eldest male heir. James had an infant son who had also escaped
to France but whose succession was unacceptable because the child
could not be expected to be raised as a Protestant. And the next in
line after that prince was not William of Orange but his wife, Princess
Mary, followed by her sister Princess Anne. While many people
conceded that the rules of hereditary succession might be changed by
act of parliament, the body that installed the new king and queen was
no parliament. A genuine parliament could be called only by a king
and William of Orange, when he called the Convention, was not yet
king. After the accession of William and Mary the new sovereigns
assented to a bill declaring the Convention a Parliament but the
curative acts passed by that body and its successor were obviously
incapable of eliminating the original legal defects.9

Notwithstanding the incontrovertible fact that the revolution was
effected by breach of positive law, the men who made the revolution
were determined to explain it as consistent with the law of England.
This policy was manifested, in the first instance, by a widely
promoted and widely believed distortion of the facts associated with
the revolution. While, by law, a king could not be deposed a king
could abdicate. Thus, on the opening day of the Convention, one of

9 See F. W. Maitland, The Constitutional History of England,
the most eminent lawyers in England assured his colleagues that "[t]he question is not, whether we can depose the king; but, whether the King has not deposed himself."\textsuperscript{10} Some of the participants were able to find the "abdication" voluntary by relying on the king's departure from the kingdom, conveniently ignoring the fact that he had acted in the face of a foreign invasion of 15,000 troops. The king "was not force[d]" said one speaker but he "did abandon his palace by night, and did go to sea."\textsuperscript{11} Others focused on the king's own intentionally "unconstitutional" actions as evidence of a voluntary renunciation of the throne. "He hath by these Acts mention'd manifestly declar'd, That he will not Govern According To The Laws....." This was as much as to say "[t]his part of the Contract I am Weary of, I do Renounce it...."\textsuperscript{12}

The same reworking of the relevant facts helped the revolutionaries deal with the legal right of the infant Prince of Wales on the abdication of his father. The child, James Francis Edward, had been born on June 10, and indeed, the prospect of a Catholic heir (James' older daughters by a previous marriage were both Protestants) was one of the factors precipitating the revolution. The revolutionaries responded by declaring (and no doubt sometimes believing) that this child was not the king's issue at all, that the Queen had suffered a miscarriage and another "suppositious" baby had been smuggled into the pretended delivery room in a warming pan. This

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\textsuperscript{11} Grey's Debates, \textit{supra} note 10, at 8 (Gilbert Dolben).

\textsuperscript{12} The Debate at Large Between the Lords and Commons at the Free Conference Held in the Painted Chamber 24 (1710) (George Treby) \textit{reproduced in A Parliamentary History}, \textit{supra} note 10, [hereinafter The Debate at Large].
\end{flushright}
account was entirely specious and, although the Prince of Orange had called for an investigation in his invasion manifesto, no one seemed particularly eager to undertake it. Nonetheless, on the rare occasions when members of the Convention mentioned the Prince of Wales, they took the truth of this ridiculous story more or less for granted.\footnote{13}

Even such creative reconstruction of the facts, however, could not establish a legal title for William of Orange. There was, at the end, no way plausibly to describe his succession in a way that was consistent with accepted notions of hereditary right. This fact was usually ignored but, when confronted with it, speakers tended to emphasize the limited and temporary character of the deviation from law. There were, to be sure, some voices urging that the events of the autumn and winter of 1688-89 should be viewed as a thorough dissolution of the government and as an occasion for reconstructing it on an entirely new basis. This was the position of John Locke.\footnote{14}

Among the men in charge, however, it was a distinctly marginal approach. For the most part the revolutionaries understood themselves to be participating in a process which was as much like the pre-existing system as was possible in extraordinary circumstances. The historian, Mark Goldie, accurately described the situation:

\footnote{13}{See H. Nenner, The Right to Be King: The Succession to the Crown of England, 1603-1714 151-57 (1995); W. Speck, supra note 8, at 102-03.}

The convention was an ordinary parliament, imperfect only in the absence of one estate, the king, and only exercising extraordinary power, as it was historically entitled to do, by supplying the vacancy [of the throne]. The kingship of James was dissolved, but not the constitution.  

Thus a contemporary described the process as one pressed on the nation only by "the extremity of affairs" and noted the revolutionaries' aversion to "new speculations or schemes of government."  

"No man, I hope," asserted Richard Temple in the Convention Commons, "thinks there is just ground for any apprehension of an intention to change the government." And a century later Blackstone regarded the actions of the Convention as justified by the fact that it confronted "an entirely new case in politics" but that even then "the Constitution was kept entire."

The entire process of revolutionary change in 1688-89 was expressed in legal form. The deliberations of the Convention, in essence a revolutionary assembly, were conducted as nearly as possible according to parliamentary practice. The questions debated were, to a remarkable degree, debated as issues of law. On the first day of substantive discussion in the Commons House one member stated the central (and one would have thought one of the most legally obvious) question before them, the right of James II to keep his throne. "I would know from the Long Robe," he declared, "whether you can depose the king, or no." The importance of legal regularity

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16 3 G. BURNET, A HISTORY OF HIS OWN TIMES 814-815 (1823).
17 THE DEBATE AT LARGE, supra note 12, at 47.
18 1 W. BLACKSTONE, COMMENTARIES *211, *214.
19 GREY'S DEBATES, supra note 10, at 11 (Christopher Musgrave).
was never long absent from the Convention debates. Lord Macaulay described amendments proposed by the Lords to the Commons' resolution on the vacancy of the throne as "verbal and technical . . . met by verbal and technical answers." Indeed, a stranger hearing the debates would have been hard pressed to distinguish them from the arguments in a court of law. Old statutes, legal judgments and learned treatises were cited and disputed. On more than one occasion a group of learned lawyers was called in to deliver opinions on questions of law being debated in Lords and Commons. (It was impossible to consult the judges as a real parliament would do since their very judicial status was put in doubt by the debatable state of King James' title.) In the end, of course, there was no way both to make the revolution and to maintain perfect fidelity to law. But, as far as it lay within their power, the revolutionaries of 1688-89 lived up to the statement of one member of the Convention: "There is no danger of shaking our fundamentals in this case; but we are pursuing those methods that agree with our laws and constitution."

B. The American South, 1860-61

In the months from December, 1860 through June, 1861 eleven southern American states, acting mainly through specially elected conventions, attempted to sever their relationships with the remaining states of the United States and, necessarily, with the federal

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21. The Debate at Large, supra note 12, at 57 (Paul Foley).
government of the United States. Those states enacted "secession ordinances" declaring themselves free and independent states. At the same time they created a new federal structure which they named the Confederate States of America. The delegates of six states met in Montgomery, Alabama in February, 1861 and approved a provisional Constitution. A government was organized and a permanent Constitution was adopted the following month to which the other seceding states later adhered. This government continued to operate with substantial effectiveness for about four years until the final defeat of the Confederate military in the Spring of 1865.

Secession was the denouement of the long and bitter American sectional controversy over the legal status of African slavery. The Southern states, heavily dependent on slave labor, saw the compromises over that institution which had been built into the 1787-89 Constitution breaking down under an increasingly intense abolitionist assault. This was manifested in the resistance by the

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22 The texts of the ordinances are reproduced at <ftp://sunsite.unc.edu/pub/academic/history/marshall/military/civil_war_usa/CSA_documents/ordin.al>. Of the eleven states only Tennessee did not act by convention. Its legislature passed a proposed secession ordinance in May which was approved in a referendum in June. Irregular assemblies purported to pass secession ordinances for Missouri and Kentucky which, although recognized by the Confederate government, were never generally effective. J. J. Burgess, The Civil War and the Constitution 1859-1865, 249 (Kennekath Reprint 1971) (1901); C. Eaton, A History of the Southern Confederacy 34-35 (1954).

23 Delegates from South Carolina, Alabama, Mississippi, Louisiana, Florida and Georgia drafted the provisional Constitution. By the time the permanent Constitution was approved they had been joined by delegates from Texas. On the secession and drafting of the Constitutions see generally M. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism (1991); D. Dumond, The Secession Movement, 1860-1861 (1963).
Northern representatives in Congress to the extension of slavery in the federal territories and new states and in the refusal of northern state governments to cooperate in the return of fugitive slaves, a policy codified in the "personal liberty" laws enacted in many jurisdictions. With the election of Abraham Lincoln in November, 1860, Southern politicians concluded that the structural devices of the federal Constitution were inadequate to prevent the permanent entrenchment of a federal government controlled by anti-slavery forces. As will be discussed, the secession which followed was sometimes premised on large notions of constitutional government, but there can be doubt that slavery was the critical substantive issue. "All knew," as Lincoln said in his second inaugural address, "that this interest was somehow the cause of the war."

As the overt object of the secessions and establishment of the Confederate government was the explicit termination, in one part of the country, over one part of its population, of one legal-political system and the construction of another to replace it, it was beyond the rhetorical powers of the secessionists to express these acts as merely the execution of legal rules within the existing constitutional system. Nevertheless, arguments denying any breach with the constitutional law of the United States were ubiquitous in the explanations of the acts of secession. With his state on the verge of separation, United States Senator John Hemphill of Texas lectured his colleagues on the legal right of secession citing Vattel, Blackstone and St. George Tucker, the preeminent American commentator on Blackstone.

24 See DUMOND, supra note 23, at 118-19.
25 1 DOCUMENTS OF AMERICAN HISTORY 442 (H. Commager ed., 1948) [hereinafter AMERICAN DOCUMENTS].
26 CONG. GLOBE, 36th Cong., 2d Sess. 591-96 (1861).
Senator Robert Toombs of Georgia expressed his conviction as to the compatibility of law and secession more dramatically: "We will stand by the right; we will take the Constitution; we will defend it by the sword with the halter around our necks!"\(^\text{27}\)

In his inaugural address as President of the new Confederate States, Jefferson Davis made an even more explicit defense of the constitutional propriety of the actions of the southern states. It was only "by abuse of language that their act has been denominated a Revolution. . . . [T]he transition from the former Union to the present Confederacy, has not proceeded from a disregard on our part of just obligations, or any failure to perform any constitutional duty." He went on to refer to the new provisional Confederate Constitution, modeled closely on the Constitution of 1787: "The Constitution formed by our Fathers is that of these Confederate States, in their exposition of it; and, in the judicial construction it has received, we have a light which reveals its true meaning."\(^\text{28}\) One secessionist Virginian summed up the position: "We quit the Union, not the Constitution."\(^\text{29}\)

Some of the legal arguments on behalf of secession were almost technical. Since all powers not delegated to the United States by the Constitution were expressly reserved to the states and, since the right of secession was not so delegated, it remained in the states. By the same token, there was no power granted to the federal government to

\(^\text{27}\) Quoted in 2 A. Stephens, A Constitutional View of the Late War Between the States 119-20 (Kraus Reprint, 1970)(1868).

\(^\text{28}\) Quoted in id., at 341-43.

coerce a seceding state to return to the Union. But this was, as one later commentator put it, "a mere jugglery with words." More serious arguments were premised on law in a larger sense— not on a construction of the Constitution as positive law but on an interpretation of what kind of legal-political institution the Constitution was. That understanding of the Constitution may be observed in the wording of many of the secession ordinances. Five of the states copied verbatim the title of the South Carolina enactment: "An Ordinance to dissolve the union between the State of South Carolina and other States united with her under the compact entitled 'The Constitution of the United States America.'" That is, the states treated the Constitution as a "compact" which might, on sufficient cause, be dissolved. Their conduct was not authorized by the Constitution but was an exercise of the underlying authority that made the Constitution and which, by the same authority, could unmake it.

The secessions of 1861 and the Civil War that followed brought to a point a profound disagreement about the nature of the Constitution that had been mooted with varying degrees of intensity almost from the moment of its ratification. The Virginia and Kentucky Resolutions of 1798 and 1799 (written respectively by James Madison and Thomas Jefferson), protesting the federal Alien and Sedition Acts, had posited a state right to nullify acts of the federal government that violated the new Constitution. This power

30 See J. BURGESS, supra note 22, at 74-75.
31 Quoted in id. at 76.
32 This language was adopted by South Carolina, Mississippi, Alabama, Louisiana, North Carolina and Arkansas. The Texas ordinance is almost identical referring to "the Compact styled 'the Constitution of the United States of America.'"
was derived from a particular understanding of the relative roles of state and federal government in the constitutional system— that the "powers of the federal government . . . result[] from the compact to which the states are parties" and that "the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction."³³

This idea that the states maintained a separate juridical existence anterior to and, in some ways, superior to the federal Constitution, manifested itself in different forms and places through the first half of the nineteenth century. It was taken up by delegates of New England states protesting the War of 1812 at the Hartford Convention in 1814³⁴ and was relied on by South Carolina in its attempt to "nullify" the federal tariffs of 1828 and 1832.³⁵ It received its most extended defense from John C. Calhoun of South Carolina. Calhoun described the relations of the states to the federal government as that of "superior to subordinate— the creator to the created." The relations between states were, it was true, one of binding compact, but

[a]s parties to the constitutional compact, they retain the right, unrestricted, which appertains to such a relation in all cases where it is not surrendered, to judge as to the extent of the obligation imposed by the agreement or compact, -- in the

³³ The first quotation is from the Virginia Resolution of 1798, the second from the Kentucky Resolution of 1799. *Reprinted in American Documents, supra* note 25, at 182, 184.


³⁵ See A. Schlesinger, *The Age of Jackson* 95 (1945).
first instance, where there is a higher authority; and in the last resort, where there is none. 36

This "Compact Theory" was the central constitutional prop of the secessionists. Its most considered elaboration in that context was that of Alexander Stephens who served as the Vice-President of the Confederate government. Stephens' defense was written after the Civil War but it faithfully summarized much of the justification put forward at the time of secession.

According to Stephens, the Constitution was a compact not between individuals but between the "peoples" of the various states. As there was no positive law governing the kind of obligation imposed by such a compact, it was regulated by "the great moral law which governs the intercourse between independent sovereign powers, peoples or nations." Under that law a party may be released from the compact upon its breach by the other parties. Since, in the case of the Southern states, "thirteen of their confederates had openly and avowedly disregarded their obligations under that clause of the Constitution which covenanted for the rendition of fugitives from service," "the legal as well as moral right, on the part of [the Southern

36 J. CALHOUN, A DISCUSSION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 277-78 (Legal Classics Library ed. 1993) (1851). Calhoun's preferred remedy for an act of the federal government found by a state to be unconstitutional was its "nullification" by that state. He went on to say that the state would, nevertheless, be bound by its compact to respect properly enacted amendments to the Constitution authorizing the nullified federal act, so long as such amendment was "consistent with the character of the Constitution [and] the ends for which it was established. . . ." If, on the other hand, the amendment "... would radically change the character of the Constitution. . . ." a state might properly secede. "This results, necessarily, from the nature of a compact,— where the parties to it are sovereign; and, of course, have no higher authority to which to appeal." Id. at 300-01.
states], according to the law of nations and nature, to declare [themselves] no longer bound by the compact, and to withdraw from the Union under it, was perfect and complete. 37

As might be expected under the circumstances, legal rhetoric was by no means the exclusive form of justification offered in connection with the secession. Many speakers (including many who subscribed to the idea of compact) were not afraid to invoke a right of revolution. One editor reminded his readers of the "inherent right of a free people" "to change a government or to utterly abolish it and to establish a new government." 38 But for many others it was important to distinguish their action from "revolutionary" action. (In response to the threat of secession President Buchanan had denied the existence of a legal right while conceding the right of any state or section to take its chances on revolution. 39) Addressing the Senate in January, 1861, Hemphill of Texas felt it essential to address the question of whether secession were "a legal or revolutionary right." 40 One Virginia Convention delegate took pains to make clear that "the people of a state, acting as a state, acting unanimously... are neither in a condition necessarily of revolution, nor are they rebels, traitors

37 1 Stephens, supra note 27, at 496-97. For pro-war expressions of more or less the same arguments see e.g. CONG. GLOBE, 36th Cong., 2d Sess. 323-26 (1861)(speech of Daniel DeLanette of Virginia, citing, inter alia, the "common law" rule that parties to a contract are released on its breach by another party); SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860 142-43 (W. Freehling & C. Simpson eds., 1992)(speech of Henry L. Benning, Nov. 19, 1860, Milledgeville, Georgia); DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SUCCESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860) reprinted in 2 A. STEPHENS, supra at 671-76.

38 Quoted in Dumond, supra note 23, at 121.

39 See 1 Burgess, supra note 22, at 83.

40 CONG. GLOBE, 36th Cong., 2d Sess. 591 (1861).
or insurgents, when they undertake, for just causes, to withdraw from this Federal authority.\textsuperscript{41} As other expressions of fidelity to the Constitution already quoted make clear, this was an important and persistent element of the secessionists' case.

This "legal" justification of secession was different in kind from that associated with the Revolution of 1688-89. The question for most secessionists was not what the law of the Constitution of the United States permitted but the circumstances in which that constitution might be said to retain its authority. Daniel C. DeJarnette of Virginia speaking in Congress in January 1861 denied that secession would amount to "revolution." But he also objected to President Buchanan phrasing the critical issue as whether or not secession was a "constitutional remedy." This was, he said, a "transparent sophism."

No one pretends that the Constitution itself provides such a remedy, or gives origin to such a right. The right is one of the prerogatives of sovereignty. The same sovereign power by which the states severally acceded to the compact will enable them to secede from it. . . . Truly the framers of this Government never intended it to be held together by force; nor can it, so far as it is a confederation between states, be preserved by force.\textsuperscript{42}

The secessionists' understanding of the Constitution was, of course, a contested one. In response to South Carolina's assertion of a state power to nullify federal legislation and to secede, President


\textsuperscript{42} Cong. Globe, 36th Cong., 2d Sess. 325 (1861) (paragraph break omitted).
Jackson, in 1832, had issued a lengthy proclamation insisting that even if they were founded in compact, the Constitution formed a government, not a mere league, and, as such, it could not be dissolved by the unilateral decision of a state. If opponents of the federal government felt "morally justified by the extremity of oppression," he conceded, they might commit a "revolutionary act." But it was "confounding the meaning of terms" to call it a constitutional right.43 And when he took office in March, 1861, Abraham Lincoln repeated these themes in refusing to recognize the validity of the attempted secessions. Any "government proper" must be understood to be "perpetual" in contemplation of universal law. No such government "ever had a provision in its organic law for its own termination" and the only way to destroy it must be by "some action not provided for in the instrument itself." On this view, "no state upon its mere motion can lawfully get out of the union," and violent attempts to do so were "insurrectionary or revolutionary acts."44

It is obvious that this was not a difference which could be resolved by a mere inspection of the terms of the constitutional text. This was a legal dispute in the sense that it was about law but, at the end, it could not judged by criteria employing what H.L.A. Hart called the "internal point of view," which supposes a shared

43 AMERICAN DOCUMENTS, supra note 25, at 262, 266.
44 AMERICAN DOCUMENTS, supra note 25, at 385. Like the good lawyer he was, Lincoln put forth an alternative argument. Even if the Constitution were "but an association in the nature of contract merely" mere breach by one party would not release others unless all the states agreed to rescind it. Id. A more extended criticism of the legality of secession was delivered by Joel Parker, the Royall Professor of Law to the students at the Harvard Law School in 1861. J. PARKER, THE RIGHT OF SECESSION: A REVIEW OF THE MESSAGE OF JEFFERSON DAVIS TO THE CONGRESS OF THE CONFEDERATE STATES (1861).
acceptance of some settled source of legal authority. Rather, it was a self-conscious disagreement about the nature of such authority, about the content of the "rule of recognition." It could be considered only from a point of view external to the legal system. Each side could, in that kind of dispute, appeal to the artifacts of the law, not as authoritative rules, but as ingredients of a position based on political history and morality.45

C. Russia, 1917

On the morning of November 7, 1917 forces under the control of the Military Revolutionary Committee of the Petrograd Soviet occupied strategic points and public buildings in the Russian capital. That evening they arrested most members of the Provisional Government of the Russian Republic. At the same time, the Second All-Russia Congress of Soviets met, declared the Provisional Government deposed, took authority into its own hands, and set up a new "provisional workers' and peasants' government" to be administered by a Council of People's Commissars. Despite a plea on behalf of the Provisional Government, issued by a self-constituted Committee to Save the Country and Revolution, to "preserve the continuity of the only legal authority," the new Soviet government quickly established itself, and went on to survive foreign invasion and civil war and to endure for more than seventy years.46

The makers of the Bolshevik revolution made no attempt to legitimate their action by reference to pre-existing law. To the extent authority was cited it was to three hierarchically related institutions—the Military Revolutionary Committee, the Petrograd Soviet and the Second All-Russia Congress of Soviets. The first public announcement of the revolution was issued by the "Military Revolutionary Committee" at 10:00 a.m. on November 7:

The Provisional Government is deposed. All state authority has passed into the hands of the Military Revolutionary Committee, the organ of the Petrograd Soviet of Workers' and Soldiers' Deputies acting in the name of the Petrograd proletariat and the garrison.\textsuperscript{47}

For the next twenty four hours bulletins and orders continued to be issued in the name of this Committee. The Committee had been in existence for only about two weeks. It had been created by the Petrograd Soviet (under the presidency of Trotsky and control of the Bolshevik Party) on the pretense that the capital was under a military threat from the Germans to which the military command of the Provisional Government was inadequate. Its real purpose, of course, was the one to which it was put on November 7, the seizure of power.\textsuperscript{48}

The Military Revolutionary Committee was a committee of and acted on behalf of the Petrograd Soviet. On the first afternoon after

\begin{flushleft}
\textsuperscript{47} Reproduced in BUNYAN & FISHER, supra note 46, at 100.
\end{flushleft}
the takeover Trotsky reported to the Soviet announcing that the Provisional Government "no longer exists" and that the Petrograd garrison was under the control of the Committee. The Soviet had been organized in March after the fall of the imperial regime and contemporaneously with the establishment of the Provisional Government. It had been modeled on the original Petersburg Soviet which had arisen during the 1905 revolution, a spontaneous assembly representing striking workers. The 1917 version also followed from the spontaneous decision of various groups of workers and soldiers to send representatives to a central body. Similar bodies sprang up in cities and rural areas across Russia. They were, as Lenin observed, devoid of "all bureaucratic formalities and limitations" with no fixed membership. From its beginning the Petrograd Soviet wielded a formidable influence. It declined to associate itself formally with the Provisional Government, although one of its leaders, Alexander Kerensky, did become a member of that Government. During the nine month life of the "February Revolution" the Petrograd Soviet functioned alongside the formal government in an arrangement of "dual power" where, as E. H. Carr observed, public authority was shared by the two bodies "whose attitude to each other swung uneasily between rivalry and cooperation." In terms of legal regularity they presented a distinct contrast: "the Provisional Government, which was the legal successor of the Tsarist government and recognized as such by the outside world, and the self-constituted and

50 See Carr, supra note 46, at 71; Bunyan & Fisher, supra note 46, at 4.
51 Quoted in Carr, supra note 46, at 131.
therefore revolutionary Soviet of Workers' Deputies." 52

The formal assumption of power after the Bolshevik coup of November 7, however, was not by the Petrograd Soviet but by the Second All-Russia Congress of Soviets whose scheduled meeting on that date had influenced the timing of the revolution. This was another ad hoc assembly consisting of delegates from urban and regional Congresses of Soviets which were, in turn, built up, in a haphazard way from the most local level. By the time the Congress met on the evening of the seventh the Bolsheviks were in control of Petrograd. It only remained for the Congress to proclaim the new order, which it did the next day:

Supported by an overwhelming majority of the workers, soldiers, and peasants, and basing itself on the victorious insurrection of the workers and the garrison of Petrograd, the Congress hereby resolves to take governmental power into its own hands. 53

The Congress then created the Council of People's Commissars to administer the new government and adjourned. 54

The hallmark of the bodies that made the October Revolution was their informality. As the resolution of the Congress of Soviets indicated, it was the insurrection that provided the occasion for the seizure of power, an insurrection unauthorized by either the Congress or by the Petrograd Soviet. When the revolutionaries proceeded to create the structure for a new state the next year, it was characterized by the same disdain for constituted authority. The Constitution of what the document called the Russian Socialist Federative Soviet

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52 Id. at 71.
53 BUNYAN & FISHER, supra note 46, at 121-22.
54 Id. at 121-23; CARR, supra note 46, at 98-99.
Republic was approved by the Fifth All-Russia Congress of Soviets in July, 1918. A Constituent Assembly which had been long planned had met in January but had been forcibly dissolved by the Bolshevik government. When the Third All-Russia Congress of Soviets met a few days later it put into effect a provisional constitution and set a constitutional drafting process in motion, after having been challenged by its President, I.A. Sverdlov, to decide whether the new regime was "to have any link with the bourgeois order or whether the dictatorship of workers and peasants will be finally and irrevocably constituted."\textsuperscript{55} The new Constitution was put together in slapdash fashion over the next six months, probably on the expectation that imminent world revolution would consign it to a transitional role. It was approved before the drafting process was finished with almost no debate and with the understanding that the final editing would be done by the Congress's Central Executive Committee. Unlike many constitutions, it announced no political or legal authority for the constituent power other than its adoption by the All-Russia Congress, thus exemplifying its own pronouncement that the Congress is the "supreme authority" in the Republic.\textsuperscript{56} It was a constitution for what Lenin had called "a new type of state, unknown to history. . ."\textsuperscript{57}

The pointed absence of positive law justification in the October Revolution is put in sharper relief when compared with the ambivalent attitude toward law exhibited by the Provisional Government created by the February Revolution. The legal genealogy

\textsuperscript{55} Quoted in CARR, supra note 46, at 121.


\textsuperscript{57} Quoted in BUNYAN & FISHER, supra note 46, at 398.
of that government was a contested question throughout its existence. It had been established, in the first instance, under the authority of the Fourth State Duma, the Parliament which had itself been authorized by the imperial edict of Nicholas II at the time of the 1905 Revolution. On March 10, 1917, with civil disturbances intensifying, the Emperor had dissolved the Duma. 58 Nevertheless, on March 12 after government ministers fled the capital, members of the Duma met informally and set up a "Committee of the Duma." That Committee in turn appointed a group of ten ministers forming the first Provisional Government. 59 It is plain that at least some of the participants in this process regarded themselves as taking only those actions necessary to preserve the possibility of a restoration of legal regularity. 60

The legal title of the Provisional Government also has to be considered in light of the abdications of the Tsar and his brother. On March 15 Nicholas II executed an instrument of abdication purporting to "hand down our inheritance to our brother, Grand Duke Michael Alexandrovich." But the next day Grand Duke Michael refused to accept authority in a document which was itself referred to as an abdication. In it he declared himself in favor of a Constituent Assembly which would settle all constitutional issues. Until such a

58 GOLDER, supra note 49, at 278.
59 See BUNYAN & FISHER, supra note 46, at 2-4.
60 Rodzianko, the President of the duma is reported to have said "I am not a revolutionist. I shall not raise a hand against the Supreme Power, have no desire to do so. But, on the other hand, there is no government." Excerpt from the Memoirs of V. V. Shulgin, quoted in GOLDER, supra note 49, at 267. One account of the revolution gives the full name of the Committee as the Provisional Committee of Members of the State Duma for the Restoration of Order in the Capital and for the Establishment of Relations with Public Organizations and Institutions. M. STEINBERG AND V. KRUSTALEV, THE FALL OF THE ROMANOVS: POLITICAL DREAMS AND PERSONAL STRUGGLES IN A TIME OF REVOLUTION 53 (1995).
resolution, however, he "beseech[ed] all citizens of the empire to subject themselves to the Provisional Government which is created by and invested with full power by the State Duma."\textsuperscript{61} The government could thus trace its status, albeit in rather attenuated fashion, to both Duma and Tsar, the positive law authorities of the prior regime.

Indeed, the artifacts of that regime never entirely disappeared throughout the brief life of the Provisional Government. The Duma never reassembled but the Committee of the Duma maintained, as one commentator put it, a "shadowy existence" meeting from time to time to hear reports from government ministers.\textsuperscript{62} The Committee seems to have been consulted as well in connection with the several changes in the composition of the government. At a meeting of the Committee on September 7, one member claimed that it was still "the only legal Assembly, the only legal authority." He was corrected by the Duma President, Rodzianko who described the Committee as "the only source of authority." At the same meeting the members discussed the problem of a possible interregnum since the Duma's (and derivatively the Committee's) mandate was set to expire November 28, while the scheduled opening of the Constituent Assembly was not until December 11.\textsuperscript{63} In the third week of October, however, the Government, in a move to the left occasioned by an attempted military coup, issued a decree announcing that, in light of the onset of elections to the Constituent Assembly, "the Fourth Duma is dissolved," a verdict grudgingly accepted by members of the

\textsuperscript{61} Both instruments of abdication are reproduced in GOLDER, supra note 49, at 297-99. Details of the abdication are given in STEINBERG AND KHURSTALEV, supra note 60, at 60-65, 96-105.

\textsuperscript{62} BUNYAN & FISHER, supra note 46, at 4.

\textsuperscript{63} GOLDER, supra note 49, at 411-12.
Committee.  

None of this is to say that legal continuity was a central element of the legitimacy of the Provisional Government. Indeed, the question of what gave the Provisional Government its authority was an explicitly contested matter. In the initial hours of the Revolution it was unclear whether the Duma was acting in the exercise of some pre-existing constitutional authority or as a surrogate for the revolutionary people.  In response to the claim that Prince Lvov, the head of the new government, was authorized by the appointment of the late Emperor, (Just before his abdication Nicholas had agreed to orders designating Lvov as head of the government, although the latter had already been chosen by the Committee of the Duma.  an article in Izvestia insisted that the "Revolution does not need the approval of the former Monarch." And it expressed the same sentiment more forcefully in an editorial in April:

[I]t was not the abdication of Nicholas, and after him Michael Romanov, that called to power [the Provisional Government]. The Provisional Government was called to power by the will of His Majesty, the Revolutionary People, and no one else.  

The more radical characterization of the revolution posited that the Government was effectively the creature of the Petrograd Soviet

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64 Id. at 413. On the general relation of the Provisional Government and the Duma see M. Florinsky, The End of the Russian Empire 112-14 (Collier ed. 1961)(1931).
65 See Golder, supra note 49, at 266-67 (Memoirs of Shulgin). In its very first declaration the new government referred to both aspects in the same phrase: "[T]he unanimous revolutionary enthusiasm of the people, fully conscious of the gravity of the moment, and the determination of the State Duma, have created the Provisional Government." Id. at 312.
66 Steinberg and Khustalev, supra note 60, at 62.
67 Quoted in Golder, supra note 49, at 316.
and responsible to it. According to Izvestia the latter body "did not, for weighty reasons, take upon itself Executive Power, but handed it to the Council of Ministers."68 But this understanding was clearly rejected by the Government although "the Ministers were not quite clear in their own minds as to whom they were responsible and by what authority they were in office."69 Certainly, the Provisional Government took certain actions—the arrest of the imperial family, the dissolution of the Duma and the proclamation in September of the "Russian Republic," which were hard to reconcile with any notion of legal continuity.70 But when the end came in November, the last head of the government, Alexander Kerensky, took pains to distinguish the legal status of his government from that of the Bolshevics. On November 6 he informed a consultative assembly, meeting in preparation for the Constituent Assembly, that the Bolshevics were engaged in "treason" and that an "insurrection" was taking place. "From a legal point of view it can be so termed, and I have proposed an immediate judicial investigation. . . .and ordered arrests to be made." And he repeated that "in the language of the law [there was] a state of insurrection. . . . [I]t is an attempt to incite the rabble against the existing order. . . ."71

That characterization was not one which the Bolshevics wished to contest. The slogan "All power to the Soviets" was an implicit rejection of any legitimate power existing by virtue of positive law. Lenin had praised the Soviets for their spontaneous irregular formation. "[T]hese organs," he had written in 1906, "were founded exclusively by the revolutionary strata of the population, they were founded outside all laws and regulations in an entirely revolutionary

68 Id.
69 Id. at 304.
70 Id. at 299-300, 412-13, 539.
71 Quoted in Bunyan & Fisher, supra note 46, at 87-89.
way...“\(^{72}\) And as the 1917 Revolution was underway he again referred to the Soviets as powers not emanating from a law previously discussed and passed by a parliament, but a direct initiative of the popular masses from below and on the spot, a direct ‘usurpation,’ to employ the current expression.\(^{73}\)

The actions of the infant Soviet government were consistent with this stance. They show a commitment to an undisguised break with the institutions of the fallen regime. According to the Soviet legal theorist A. Y. Vyshinsky, writing some years later, those who thought "it [would] not be necessary for [the revolution] to shatter the state machine in its entirety—only to eliminate the monarchist remnants and the bureaucratic and military privileges" were expressing a "cynical perversion of the Marxist doctrine of the state."\(^{74}\) In the event, the Bolshevik revolutionaries were not reluctant to shatter the remaining legal institutions. For example, a number of the imperial judicial institutions had continued to operate during the period of the Provisional Government. One of the new Soviet officials described the new government’s action with respect to the State Senate—"the High Court of the Empire:"

Many of our Comrades were worried by questions of what would happen if we destroyed old laws and were left without any organs of justice. Some believed it was necessary to retain them, and it was suggested merely that commissars should be appointed for these institutions and should participate in the examination of every case question. We solved the problem in a revolutionary manner. The Military Revolutionary Committee gave us some soldiers, and they dispersed the Senate; the Senators offered no resistance, and in half an hour

\(^{72}\) Quoted in Carr, supra note 46, at 84.

\(^{73}\) Id. at 86.

the Senate was liquidated.\textsuperscript{75}

Similarly, when a Justice of the Peace wanted to examine places of detention, citing provisions of the relevant Code, he was sent away with the response that "we were applying paragraphs of the revolutionary code" and the next day all Justice of the Peace courts were closed.\textsuperscript{76}

The same attitude partially explains the decision to dissolve the much awaited Constituent Assembly. The meeting of that body had been planned from the very beginning of the February Revolution as a means to settle all constitutional questions. The Bolsheviks had been one of the most vocal parties in support of the Assembly and critical of the government for delaying its meetings. The Provisional Government had scheduled elections for November 25 and the Soviet government allowed them to be held. The Assembly (in which the Bolsheviks were a decided minority) met on January 18 but was not allowed to convene for a second session.\textsuperscript{77} Apart from its political advantages, the decision to dismiss the Constituent Assembly is indicative of the new dispensation's attitude toward the continuity of pre-revolutionary legal institutions. The Constituent Assembly was very much the creature of the February Revolution. Indeed, in December, the ministers of that government, now imprisoned in the Peter and Paul Fortress, issued a statement "handing over our power to the Constituent Assembly" and asking that body to order their release so they could report to it "on the work of the Provisional Government."\textsuperscript{78}

\textsuperscript{75} Quoted in \textit{Bunyan & Fisher, supra} note 46, at 286 (Koslovsky's Recollections).

\textsuperscript{76} \textit{Id.} at 287.

\textsuperscript{77} See \textit{Carr, supra} note 46, at 105-23; \textit{Bunyan & Fisher, supra} note 46, at 339-40.

\textsuperscript{78} \textit{Bunyan & Fisher, supra} note 46, at 353.
Lenin, in an pamphlet anonymously published in December, argued that the Constituent Assembly only made sense from the "formal, juridical" standpoint associated with the view that Russia was undergoing a democratic, bourgeois revolution. He had concluded, however, that the conditions were in place for the immediate implementation of a proletarian revolution. In that context, where the most urgent need was the establishment of a dictatorship of the proletariat, the Constituent Assembly was an anomaly whose only proper course was "an unconditional acceptance of the Soviet power."\textsuperscript{79} In these circumstances it was inconsistent with the correct understanding of the revolution to, as Lenin had scornfully written earlier, "confidently acquiesce[] in the most legal, most loyal, most constitutional course."\textsuperscript{80}

III. THE ROLE OF LEGAL JUSTIFICATION

It remains to consider whether there are some general kinds of explanations for the presence or absence of positive law justifications by revolutionaries, for whether they choose to build on -- or build against -- an existing constitutional order. In the simplest terms, such rhetorical justification will be employed to the extent that "legality" is regarded as an important political value in the circumstances of a particular revolution. Before examining the kinds of conditions that might lead to such a state of affairs, however, it may be useful to say something more about the relationship between law and the kinds of revolutions which are the subject of this study.

As stipulated, a revolution is a rejection of a set of political suppositions that underlie, or are claimed to underlie, a certain regime

\textsuperscript{79} CARR, supra note 46, at 114.

\textsuperscript{80} Quoted in BUNYAN & FISHER, supra note 46, at 65.
and its replacement with some competing set of principles. A revolution occurs when such a transformation cannot be accommodated within the existing constitutional structure; the rules of which must be broken in order to vindicate this second set of values. Thus, in 1688-89, the preferred allocation of law-making power between king and parliament could not, in the particular circumstances, be implemented without violating the (largely uncontested) constitutional rules of the hereditary monarchy. In this sense, revolution may be understood as the sacrifice of legal form to political substance.

The problem under investigation arises where legal regularity is itself a critical political value, one of comparable importance to those substantive values that prompt the revolution.

The evaluation of those circumstances can be approached in a number of ways all of which come down to an examination of the same question: How is "the law," as an institution, regarded among the relevant people in the relevant society? It is clear that this is, first of all, a question of the history and traditions of the society whose legal and political system is changing. In societies with a well entrenched legal system, where the rules and processes of the law are held in high esteem, a legal explanation of revolution may appear attractive. Beyond this, the value of legal explanation will turn on the extent to which the revolution may be understood as directed against the existing legal system. Put another way, to what degree was the law identified with the substantive evils against which the revolution was directed? Where the law is inseparable from the state that is under attack, a revolution directed at the latter in the name of the former may suffer from an unsustainable case of "cognitive dissonance." On the other hand, where the law is seen to have an existence independent of the target state, a "legalistic" revolution is more plausible.
Legal Rhetoric and Revolutionary Change

With these factors in mind we can return to the three revolutions described and the varying attitudes to law that accompanied them. The circumstances of late seventeenth century England present as compelling a case for the importance, indeed for the indispensability, of legal justification as might be imagined. This was a society where, as Macaulay had put it, "history is regarded as a repository of titled deeds, on which the rights of governments and nations depend." 81 In the upper classes knowledge of the law was widespread being, as Howard Nenner has noted, "an essential part of [the Englishman's] equipment for society." 82 The political history of England was largely formed out of the contests of claims of legal right. More particularly, there was a widely and deeply held belief that there was a law for the king as well as for the subject, a belief exhibited as early as the thirteenth century in Bracton's dictum that the king does not make the law but the law makes the king. 83 By the seventeenth century even the conquest of 1066 had been rewritten as the lawful consequence of a "trial by battle" so that William I succeeded to a throne already hedged with legal limitations, limitations which he and his successors repeatedly engaged to honor. 84 It was a familiar idea that the shape of government was a matter of contract, charter and oath.

The importance of maintaining the authority of the law had particular force in the late seventeenth century. That is because, for most of the political actors, the disadvantages of abandoning the law had been made painfully and personally clear. The experiences of civil war and commonwealth had put advocacy of rebellion outside

81 1 MACAULAY, supra note 20, at 20.
82 NENNER, supra note 8, at 3.
acceptable political argument. The same experience had raised the regard for the virtues of the existing monarchical constitution almost to reverence. At the Convention even the radical playwright, Robert Howard, insisted that nothing the Convention did indicated "an intention or a likelihood of altering the course of the government." There was a related and more practical reason why legal continuity had a special appeal for the revolutionaries of 1688-89. These men had a substantial stake in the laws of the kingdom. Their estates, their titles and their property depended on a regard for law. In the Convention Commons one member reminded his colleagues that "in the state of nature, we should have little title to any of our estates." They understood the value of hereditary right. The Lockean characterization of the revolution as involving a dissolution of government and an entirely fresh start thus had few charms for them.

Beyond this general aversion to upsetting legal regularity, the very principles on which the revolutionaries of 1689 relied in removing the king were such as to reinforce the importance of adherence to law. In fact, for most of the seventeenth century -- apart from the paroxysm of 1640 to 1660 -- political differences had been debated within the boundaries of what was taken to be an established and authoritative system of law. From the first part of the century, these differences were argued explicitly in terms of legal rules. Indeed, most of the issues found their way into litigation -- from the Case of Proclamations, to the Ship-Money Case, to the Bloody Assizes, Godden v. Hales and the Seven Bishops' Case. The Exclusion

86 THE DEBATE AT LARGE, supra note 12, at 44.
87 GREY'S DEBATES, supra note 10, at 18.
88 See generally WESTON & GREENBERG, supra note 8.
89 See generally MAITLAND, supra note 9, at 237-80.
Controversy, the great test of wills between parliament and Crown during the reign of Charles II, was debated, in large measure, in terms of what were supposed to be pre-existing legal rights and powers.90

The period preceding the revolution demonstrates how critical legal characterization was in defining positions. The anxiety over the accession of the Catholic James II was prompted, in part, by a conviction that a King adhering to the Church of Rome was incapable of submitting to English law. When James succeeded in 1685, he told his Council that the laws of England "were sufficient to make the king as great a monarch as he could wish."91 But his understanding of what the "laws of England" permitted a king with respect to ecclesiastical matters and the rights of Catholics was considerably broader than that of his opponents. His insistence on a constitutional authority to dispense with laws on particular occasions or to suspend them altogether was based on an interpretation of law. The resistance to such powers was premised on a conflicting interpretation. These questions had, in fact, been mooted and litigated over a long period.92 To take a position on one side or the other was to make a legal claim.

The legal core of the constitutional dispute leading up to the revolution was evident in the prosecution of the Seven Bishops in June, 1688. The Bishops were charged with seditious libel for the publication of a petition to the king protesting his order requiring the reading, in all churches, of his Declaration of Indulgence. That Declaration had suspended the effect of statutes imposing legal disabilities on Catholics and Protestant dissenters. It is significant that the Bishops had not objected to the Declaration on the basis of religious doctrine or even their view of the limits of the king's power.

90 See Nenner, supra note 13, at 95-119.
91 Quoted in Nenner, supra note 8, at 142-43, 157.
to govern the Church. Rather, they protested that the Declaration was "founded upon such a dispensing power as hath been often declared illegal in Parliament."\(^93\) It was this constitutional opinion that the King denounced as a "standard of rebellion" and made the basis of the subsequent prosecution.\(^94\) Whether the verdict of acquittal was, in any way, a legal judgment on the dispensing power is more than doubtful but there were significant signals from some of the judges questioning its validity and the outcome was regarded as a triumph over arbitrary government.\(^95\)

The issues for which the revolution was made were, therefore, indelibly labeled as issues of law and the opponents of the old regime saw themselves as men of law. For them it was James II who was the law's enemy. In the Declaration of Rights they accused him of "endeavour[ing] to subvert . . . the laws and liberties of this kingdom."\(^96\) It would have been most unusual if, having staked their positions on their legal correctness, the revolutionaries could have been comfortable with the role of law breakers. Having vindicated the law, as they saw it, in making the revolution, they were unlikely to abandon it in justifying it.

Because they were successful in capturing a political and legal system, the revolutionaries of 1688-89 were able to erect a facade of legal continuity. They could regard their kingdom, constitution and laws as the same ones that were in place before they acted. That was a characterization unavailable to the secessionists of 1860-61. They were unmistakably erecting a new state. It would exist (they hoped)
alongside the United States which would continue in the North under the Constitution of 1787. There was, therefore, no way in which the actions of the seceding states could be understood as anything other than a break with the pre-existing law. Nevertheless, given these realities, the secessionists, as has been discussed, went to great lengths to associate their actions with the values of the American constitutional-legal system.

Like the English statesmen of 1688-89, the leaders of the Southern states lived in a culture in which legality was a critical political value. In this respect the South merely shared in more widespread American attitudes. In the first half of the nineteenth century, law and the legal profession reached a position of preeminence. The American Revolution was largely the work of lawyers (and itself sometimes justified by citation to English law). “In America,” Thomas Paine had written, “the law is king.”97 De Tocqueville’s description of the early American assimilation of legal values is well known:

The language of the law becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and the courts of justice, gradually penetrates beyond their walls in the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and taste of the judicial magistrate.98

By mid-century lawyers had come to occupy a dominant position not only in politics but in commerce, education, even literature. They were, as De Tocqueville wrote, “the most cultivated portion of

More directly relevant to the crisis of 1861, Americans had come to believe that there were legal solutions to almost any social or political problems. It was exactly in moments of uncertainty or crisis that the law became most important. In his first inaugural address Thomas Jefferson located the strength of the American government in the fact that it was "the only one where every man, at the call of the laws, would fly to the standard of the law."\textsuperscript{100}

The American South shared fully in the formation of this viewpoint. One commentator has, in fact, observed that, while the importance of the lawyer in American culture had been reduced in most of the country by the middle of the century, in the South the central role of the profession in defining the political-legal culture remained undiminished.\textsuperscript{101} The "southern" attitude to the law is, of course, a complicated matter but the evidence is clear that, with respect to the law of the Constitution, the loyalty of Southerners was especially intense. Their understanding of the Constitution, moreover, was a distinctly rigid and formal one.\textsuperscript{102} "To the South, the constitution was a fixed scheme of things, forever to be interpreted in the light in which it was written."\textsuperscript{103}

That devotion suggests another factor making the use of legal rhetoric more or less inevitable in the secession. Like the

\textsuperscript{99} id. At 278.

\textsuperscript{100} \textit{Quoted in R. Ferguson, supra note 97, at 53-54. See also P. Miller, The Life of the Mind in America: From the Revolution to the Civil War 206 (1965).}

\textsuperscript{101} R. Ferguson, supra note 97, at 290-94.

\textsuperscript{102} Historian Charles Sydnor writes "[i]n the South, the Constitution was the supreme law of the land and its words had not changed their meaning. Through repeated insistence upon the Constitution's supremacy in its original, literal meaning the South came to regard itself as the special custodian and defender of this great legal document; its attitude toward the Constitution was one of great respect." C. Sydnor, \textit{The Southerner and the Laws}, 6 J. So. Hist. 3, 5 (1940). The somewhat different relation of southern "unwritten law" to subconstitutional positive law is surveyed in id.

revolutionaries of 1688-89, the position of the South in the great sectional political controversy leading to the crisis had been defined almost exclusively in legal-constitutional terms. As already shown, the southern complaints focused on breach of the fugitive slave clause of the Constitution by the northern states and on the use of power not delegated to the federal government to restrain the spread of slavery. The degree to which these positions were identified with the Constitution cannot be better illustrated than by some passages from a speech delivered by Jefferson Davis in the United States Senate in May, 1860 as the crisis deepened. In it he explicated at length the arguments of the South. It must be remembered that this was only nine months before he would be inaugurated as President of a new revolutionary government. The positions he was defending, he said were

little more than the announcement of what I hold to be the clearly-expressed declarations of the Constitution itself. To that fixed standard it is sought, at this time, when we are drifting far from the initial point, and when clouds and darkness hover over us, to bring back the Government, and to test our condition to-day by the rules which our fathers laid down for us in the beginning.

... I do not propose to argue questions of natural rights and inherent powers; I plant my reliance upon the Constitution; that Constitution which you have all sworn to support; that Constitution which you have solemnly pledged yourself to maintain while you hold the seat you now occupy in the Senate; to which you are bound in its spirit and in its letter, not grudgingly, but willingly, to render your obedience and support.

The Constitution is the law supreme to every American. It is the plighted faith of our fathers; it is the hope of our posterity. I say, then, I come not to argue questions outside of or above the Constitution, but to plead the cause of right of law and order under the Constitution, and to plead it to those who have sworn
Having described their grievance in such terms it would have been extraordinary if the Southern secessionists had been able to make a revolution without reference to some form of legal justification. The theme of constitutional fidelity was further embodied in the decision of the Confederate founders to adopt, more or less wholesale, the Constitution of the United States as their own Constitution. Indeed, they regarded this action as a restoration of the genuine Constitution purged of the illegitimate misinterpretations that had subverted its true meaning.\(^{105}\)

As noted, however, the very nature of the secession and establishment of a new government precluded a thorough legal defense. It would also be inaccurate to describe those events without reference to the important strain of explicitly revolutionary rhetoric that accompanied them. If there was a deeply rooted American-Southern tradition of legality which had to be accommodated, there was also another important historic legacy- that of the inherent popular right of revolution. It was natural for the secessionists to identify their actions with those of the revolutionaries of 1776, among whom Southerners were especially prominent.\(^{106}\) The Declaration of Independence and its assertion of the right of a people to alter and abolish their government were frequently cited. In the debates preceding the secession of Georgia in November, 1860, Henry Benning insisted “that we are in all respects as sovereign as our fathers were, and therefore, . . . if they could make a constitution for

\(^{104}\) CONG. GLOBE, 36th Cong., 1st Sess. 1937-38 (1860).

\(^{105}\) See generally DEROSA, supra note 23.

themselves, we can make another for ourselves."\(^{107}\)

The tension between these two traditions was relieved in part by the compact interpretation of the Constitution in which the right of the people of the state to modify their government was implicit. Alternatively, the right of revolution could be understood only as a collective one vested in the people of a state acting under accepted procedures. In this way there still existed a paramount legality -- the law which defined how that collective will could be expressed. Rebellion against the properly repudiated agency of the federal government was consistent with loyalty to that law. At the moment that he was joining the rebellion by leaving the bench of the United States District Court in Charleston, South Carolina, in November, 1861, Andrew Magrath admonished his listeners "not [to] forget that what the laws of our State require become our duties."\(^{108}\)

The social and philosophical background of the Russian Revolution of 1917 could scarcely have been more different. The idea of an impersonal, systematic and effective law came to Russia much later than to Western Europe.\(^{109}\) This was especially true with respect to public law which had to coexist with the political commitment to an unfettered authority in the monarch. Volume I, Article I of the imperial Legal Code began: "The All-Russian Emperor is an autocratic and unlimited monarch. Obedience to his supreme power not only from fear but also from conscience is ordained by God Himself."\(^{110}\) While significant substantive and procedural legal reforms were instituted in the second part of the nineteenth century,

\(^{107}\) SECESSION DEBATED supra note 37, at 144. See also 4 PROCEEDINGS OF THE VIRGINIA STATE CONVENTION OF 1861, supra note 41, at 708 (Mr. Conrad).

\(^{108}\) W. ROBINSON, supra note 108, at 5.

\(^{109}\) See generally H. BERMAN, JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW 122-59 (1950).

\(^{110}\) Quoted in id. at 145.
the impact of law as a social organizing device was, at best, superficial.\textsuperscript{111} "[D]own to 1917 there were whole spheres of activity, both in public and private life, for which no legal definition of rights and duties existed."\textsuperscript{112}

Furthermore, unlike the other revolutions discussed, the Russian Revolution of November, 1917 was not directed at a state that had, over an extended period of time, established itself as legitimate according to accepted law. Notwithstanding the possible legal links between them, any perceived legal claims to allegiance held by the Tsarist regime were unlikely to have been transferred to the Provisional Government. The record of that government, moreover, had not fostered a sense of political obligation to it as a legitimate lawmaker in its own right. It operated under no established set of principles, written or unwritten, and it exhibited an apparently uncontrollable volatility. In nine months there were four changes of government. Throughout its existence it was never recognized as the sole legitimate order. It called and participated in a succession of councils and conferences with equally ill-defined authority.\textsuperscript{113} Almost from its inception it contended with the Petrograd Soviet for the right to govern in the period of "dual power." Indeed, the Government suggested its own lack of authority by planning and promoting the Constituent Assembly, widely understood as the only forum where the foundations of an authentic new system of law and state could be laid. Since the target of the revolution was itself without the advantages of legal legitimacy there was little pressure for the Bolsheviks to articulate a competing theory of legal justification.

\textsuperscript{112} \textit{Berman, supra} note 109, at 151.
\textsuperscript{113} \textit{See Bunyan \\& Fisher, supra} note 46, at 9-22.
Legal Rhetoric and Revolutionary Change

They succeeded, as E. H. Carr pointed out, "to a vacant throne."\textsuperscript{114} More critical still was the nature of the underlying political complaints that supported the revolution. In the other two cases studied the revolutionaries' grievances were often phrased as legal wrongs according to pre-existing law. In 1688-89 the common law and ancient constitution were believed to have had an independent existence prior to that of the state. While the Constitution of 1787-89 was posited, historical law, its superior status in the legal order permitted a conceptual separation of at least constitutional law and state. In either case it was coherent to express the view that the governing authority was acting in violation of law. But the emergence of positivist conceptions of law made this distinction increasingly difficult to maintain. On this view,

the state became only a name for the legal order. . . The integral identification of public order with legal order constituted a first step in the direction of the total separation of law from the transcendental values which constitute the legitimacy of the legal rule. . . Right and might are not opposites. . . Identification of power with law is complete; power functions through law.\textsuperscript{115}

This perception of law developed by mid-twentieth century legal positivist theorists also describes the theory of law and state that informed the Revolution of 1917. According to the Bolshevik version of Marxist theory the state was "the chief spoil of the victor" in the class struggle. It was the device employed by the dominant class "to crush and exploit the oppressed class," a "special kind of cudgel,

\textsuperscript{114} CARR, supra note 46, at 25.
\textsuperscript{115} K. GRZYBOWSKI, SOVIET LEGAL INSTITUTIONS: DOCTRINES AND SOCIAL FUNCTIONS 29-32 (1962).
nothing else." Law and legal institutions were the forms through which the bourgeois state protected the ruling class's control of the means of production. If law is the instrument of the state and the state is the instrument of the oppressor class, a class revolution on behalf of, or even consistent with, the law is a self-contradiction. The Marxist-Leninist description of state and law leaves little room for acknowledging either as a source of legitimate power:

What is the machinery of the bourgeois state but an apparatus to exploit, oppress, and crush the toilers? Alien to the people and to their interests, it is a frightful instrument--a dreadful octopus, entwining and exhausting with its multiple tentacles the living body of the people.

The end of the class struggle, the object of the proletarian revolution, was not the capture or modification of the state but its abolition as a social institution. The victory of the proletariat was the prelude to the end of class exploitation, the elimination of classes. In such a society the state no longer had any use. The "government of persons is replaced by the administration of things" and "the whole state machine" will be consigned to the "museum of antiquities." Such a movement was not about to justify itself by reference to the law it proposed to make obsolete.

This hostility to the continuation of the state distinguished Lenin and the Bolsheviks from the more moderate socialist forces in the revolution. The latter insisted on the need for Russia to go through

\[\text{References:} \]

\text{Vyshinsky, supra note 74, at 10; Carr, supra note 46, at 141 (quoting Lenin).}

\text{117 See H. Collins, Marxism and Law 26-30 (1982).}

\text{118 Vyshinsky, supra note 74, at 63.}

a period of bourgeois domination before the preconditions for a revolution by the proletariat would appear. These parties therefore supported the Provisional Government as the necessary correlate of the indispensable bourgeois revolution. That revolution might well be accomplished by the mere conscription and democratization of the old imperial state. Lenin, on the other hand, thought the bourgeois revolution had been exhausted and the next revolutionary step could be taken immediately.\textsuperscript{120}

The Marxist-Leninist theory of revolution did not, to be sure, foresee an immediate transition to the stateless society. It would be necessary for the proletariat to establish a new state apparatus for the specific purpose of extirpating the last vestiges of bourgeois power. But this transitional state, the dictatorship of the proletariat, would be an altogether different kind of state than that of the bourgeois exploiters, the state Lenin's socialist rivals proposed to support. Unlike every previous state this transitional state would be a dictatorship of the great majority over the formerly oppressing minority. It signifies, Lenin wrote on the eve of the revolution, "a gigantic replacement of certain institutions by other institutions of an essentially different kind." In the process democracy is transformed "from a bourgeois democracy into a proletarian democracy; from a state (a special force for the suppression of a particular class) into something which is no longer a state in the proper sense."\textsuperscript{121}

There could be no continuity between this new kind of state and the "frightful instrument" it replaced. The dictatorship of the proletariat "has nothing in common with power in a bourgeois state ...."\textsuperscript{122} Lenin pointed out that Engels' description of the "withering away of the state" referred only to the natural disappearance of the

\textsuperscript{120} See Carr, supra note 46, at 81-83.
\textsuperscript{121} Lenin, supra note 48, at 38.
\textsuperscript{122} Vyshinsky, supra note 74, at 40.
proletarian state not to some gradual transition from the bourgeois state.\textsuperscript{123} The job of the revolution was to destroy the bourgeois state root and branch. In the past, Marx had written, "all the revolutions perfected this [state] machine instead of smashing it."\textsuperscript{124} The violence of Marx's language was taken up by the Bolshevik revolutionaries and leaves little doubt that the revolution was understood as a complete departure from the regimes it replaced. Lenin emphasized the use of this kind of language by Marx and Engels in arguing against cooperation with the bourgeois government. He quoted their choice of the words "break," "smash," "amputation" and "destruction" in relation to the power of the state.\textsuperscript{125} The attitude of the new government toward the old system and rules of law reflected this philosophy. In the \textit{Guiding [sic] Principles of the Criminal Law of the RSFSR} promulgated by the new government in December, 1919, it was declared "self-evident that all the codes of the Bourgeois law, all Bourgeois law as a system of legal rules" existed only to adjust the "balance of interests" "to the advantage of the ruling classes." Such law could never be adapted to the requirements of the new state but ought to be placed "in historical archives."\textsuperscript{126}

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It is worth noting that the document just quoted that rejected the relevance of bourgeois law to the revolutionary regime also posited the inauguration of a new set of new positive law rules. It asserted that the "experience of the struggle has accustomed the proletariat to uniform measures, has led to systematization, has given birth to the

\textsuperscript{123} See LENIN, supra note 48, at 17.
\textsuperscript{124} Quoted in N. Harding, \textit{Authority, Power and the State}, \textit{in Authority, Power and Policy in the USSR: Essays Dedicated to Leonard Schapiro} 32, 39 (T. Rigby, A. Brown & P. Reddaway eds., 1980).
\textsuperscript{125} LENIN, supra note 48, at 26-27, 49.
\textsuperscript{126} Quoted in GRZYBOWSKI, supra note 115, at 43-44.
new law."\textsuperscript{127} This reference to the new law highlights the fact that no revolution can entirely ignore the law. Most obviously, any developed society will require rules to regulate and facilitate all manner of conduct and will need it from the moment of its inception. Almost invariably it will adopt for that purpose, however temporarily, the law already in place. All of the secession ordinances of the Southern states made provision for the continuation of the substance of federal law until displaced.\textsuperscript{128} Even the new Soviet government in 1917 ordered its new "People's Courts" to apply Tsarist law if not incompatible with the "revolutionary conscience and revolutionary concept of law."\textsuperscript{129}

But revolutions must attend to law in another way as well. As suggested in the \textit{Guiding Principles}, they must consider the law that will prevail in the new legal system coming into being. In this way the attitude of a revolution toward law is necessarily Janus-faced, looking back toward the law it is repudiating and forward to the law it is establishing. This aspect of a revolution may affect the extent to which legal justification is employed in its defense. A failure to cite pre-existing law on behalf of the revolution suggests that the binding quality of law is provisional, subject to reconsideration on political grounds. That attitude is potentially subversive of the efforts to entrench a sense of obligation to the forthcoming law of the revolutionary state. Whether the dangers of such a process outweigh the political attractions will depend on the kinds of circumstances I have canvassed in this essay.

The equivocality of a revolution's sympathy for existing law is illustrated by the choice of the founders of the Confederate States to

\begin{itemize}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} On the status of continued rules after a revolution see generally Finnis, \textit{supra} note 2.
\item \textsuperscript{129} \textit{Quoted in Grzybowski, supra} note 115, at 44.
\end{itemize}
place George Washington on the great seal of the new nation. (Jefferson Davis was inaugurated in 1862, under the "permanent" Constitution of the Confederacy, on Washington's birthday at the base of a statue of Washington.)

Washington of Virginia was the leader of a victorious revolutionary army. He was also a principal founder of a new constitutional order, the order which the secessionists were now both abandoning and attempting to replicate. This choice of symbol represents perfectly the fact that a revolution is, by definition, a transitional event between one legal system and another. In some circumstances that transition may be a bridge— in others a chasm.

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130 FAUST, supra note 106, at 14.