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Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order

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LEGAL REVOLUTIONS: SIX MISTAKES ABOUT DISCONTINUITY IN THE LEGAL ORDER

MICHAEL STEVEN GREEN*

A legal revolution *occurs when chains of legal dependence rupture —causing one legal system to be replaced by a different and incommensurable legal system. For example, before the French Revolution chains of legal dependence ultimately led to Louis XVI, but after this legal revolution they led to the National Assembly (or the people of France it represented).*

The very possibility of legal revolutions depends upon laws being structured into legal systems in this fashion. And yet, despite substantial academic interest in legal revolutions, there has been a reluctance to examine the structure that makes them possible. The goal of this Article is to begin to fill this gap by examining six mistakes in reasoning about legal revolutions that occur when the structure of legal systems is ignored. My discussion focuses on concrete examples of these mistakes, drawn from a wide variety of sources, including the writings of Akhil Amar, the Supreme Court of Pakistan's 1958 decision in State v. Dosso, *the jurisprudence of John Austin, and recent criticisms of* Bush v. Gore.

INTRODUCTION 332
I. FIRST MISTAKE: LEGALLY JUSTIFYING LEGAL AXIOMS 336
A. Legal Axioms 336
B. Legal Axioms Cannot Be Legally Justified 339
C. Amar on the American Axiom 343
D. Amar on the Articles of Confederation 348
II. SECOND MISTAKE: CONFUSING EXTRA-LEGAL EXPLANATIONS WITH LEGAL JUSTIFICATIONS 352

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A. Extra-legal Explanations of Legal Axioms 352
B. Greenawalt on the American Axiom 358
C. State v. Dosso 360
III. THIRD MISTAKE: INCORPORATING THE EXTRA-LEGAL INTO LEGAL AXIOMS 364
A. Austin's Command Theory of Law 365
B. Austin on Limited Sovereignty 368
C. Austin (and Amar) on Divided Sovereignty 372
IV. FOURTH MISTAKE: INCORPORATING POLITICAL SELF-IMAGE INTO LEGAL AXIOMS 374
A. In the United States, the People Are Not Sovereign 375
B. Amar Forces Us To Be Free 380
V. FIFTH MISTAKE: SELF-AUTHORIZATION AND SELF-LIMITATION OF AUTHORITY 382
A. Self-limitation as Revolution 384
B. Self-limitation Within Authority 386
C. Amar on the Inalienability of Authority 389
D. Amar's Exception to the Principle that Authority is Inalienable 390
VI. SIXTH MISTAKE: MISIDENTIFYING THE SCOPE OF JUDICIAL LAWMAKING 393
A. Judicial Lawmaking 393
B. Is the Law What a Court Says It Is? 399
C. Bush v. Gore 403
CONCLUSION 406

INTRODUCTION

In 1788, a financial crisis forced Louis XVI to summon the Estates-General, a representative body with no tradition of vested powers.[1] On June 17, 1789, the Third Estate, which consisted of commoners, withdrew from the Estates-General and renamed itself the National Assembly.[2] Three days later, in the Tennis Court Oath, it announced its intention to promulgate a constitution for France.[3] Popular support for the Assembly increased, and on June 27 the King recognized it.[4]

Was this a *legal revolution*—a break in the continuity of the legal

1. 1 GEORGES LEFEBVRE, THE FRENCH REVOLUTION: FROM ITS ORIGINS TO 1793, at 97–102 (Elizabeth Moss Evanson trans., 1962).
2. *Id.* at 112.
3. *See id.* at 112–13.
4. *Id.* at 114.

order? Was one legal system replaced by another through extra-legal means? Before June, 1789, Louis XVI's authority was absolute: all valid laws could be traced back to his command. But it is unclear that the events in June changed that fact. It was commonly thought, by members of the National Assembly as well as others, that the new constitution would be valid only if given royal approval.[5] The National Assembly, like the Estates-General that preceded it, apparently had power only because the King said it did.

But by the time the National Assembly announced its Declaration of the Rights of Man on August 4—after the storming of the Bastille on July 14—a legal revolution *had* occurred. The authority of the National Assembly no longer depended upon the royal will.[6] Although the King accepted the Declaration as legally valid, its legal validity did not *depend* upon his recognition.[7] His recognition merely acknowledged an established legal fact.

This Article is about legal revolutions. I use the term "legal revolutions" to distinguish them from what can be called "political revolutions," that is, revolutions that are primarily about dramatic political, social and economic changes. Although both a legal and a political revolution occurred in 1789, the two need not always coincide. If Article V procedures were used to pass an amendment to the United States Constitution that prohibited private property, only a political, not a legal, revolution would have occurred. Conversely, although the United States Constitution was probably illegal from the perspective of the Articles of Confederation (because the procedures for amending the Articles were ignored when the Constitution was ratified),[8] its ratification was probably only a legal, not a political, revolution. The political, social and economic changes in 1787 were minor.[9]

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5. *Id.* at 112.

6. *Id.* at 130–31.

7. *Id.* at 133.

8. *E.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 168 (1991) (noting that "patriots" at the Constitutional Convention claimed authority, in the name of the people, to ignore the rules that the Articles of Confederation specified to govern their own revision); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476–77 (1995) (noting that the reformers to the Constitution did not play by the established rules for amendment but tried to compensate for their legal deficiencies through a remarkable bootstrapping process).

9. For example, there was no political resistance to the new "illegal" Constitution. Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 214 n. 45 (1995). For a description of the political continuity between the two legal systems, see Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMM. 463, 475–77 (2004).

Legal revolutions are a favored theme in the legal academy.[10] A recent example is the charge that *Bush v. Gore*[11] was a "judicial coup."[12] At the very least, this means that the Supreme Court's

10. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (explaining the constitutional revolution of the "New Deal" Court under the Roosevelt administration); Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985 (1991) (arguing that revolutionary movements are an important type of social setting for the construction and articulation of political values); J.M. Eekelaar, *Principles of Revolutionary Legality*, *in* OXFORD ESSAYS IN JURISPRUDENCE 22 (A.W.B. Simpson ed., 1973) (exploring the role of the judiciary in preserving pre-existing legal norms leading up to and following a revolution); J.M. Finnis, *Revolutions and Continuity of Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE 44 (A.W.B. Simpson ed., 1973) (criticizing Hans Kelsen's theory of legal discontinuity, which defines a revolution as any illegal change in a nation's constitution, as arbitrary and ambiguous); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995) (analyzing the opinions of the 1994 Term of the Supreme Court in light of the ideas of revolution, constitutional change, and legal continuity); J.W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103 (1971) (discussing the legal revolutions of Pakistan, Uganda and Southern Rhodesia); A.M. Honore, *Reflections on Revolutions*, 2 IRISH JURIST 268 (1967) (discussing how laws and legal systems evolve out of revolutions); T.C. Hopton, *Grundnorm and Constitution: The Legitimacy of Politics*, 24 MCGILL L.J. 72 (1978) (discussing the flaws in the logic of the Rhodesian judiciary's decisions impacting the Rhodesian legal revolution); Stanley N. Katz, *Constitutionalism and Revolution*, 14 CARDOZO L. REV. 635 (1993) (providing a critique of conference papers on the constitutional relevance of eighteenth-century revolutions to the modern European revolutions of 1989–91, and concluding that constitutional theory can help clarify the arguments but cannot effectively inform the practical solutions to modern constitutional options); Ali Khan, *A Legal Theory of Revolutions*, 5 B.U. INT'L L.J. 1 (1987) (suggesting a theoretical framework for judicial analysis of revolution and arguing that revolutions gain legitimacy and legal authority only through social acceptance of succession rules and of the revolution itself); Robert Justin Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645 (1988) (discussing the importance of recognizing constitutional revolutions and criticizing the failure of Ronald Dworkin's theory of "law as integrity" to consider the pragmatic side of such revolutions); Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701 (1989) (presenting the theory of constitutional revolutions as two distinct movements—revolutionary adjudication and normal adjudication—and arguing that the theory of constitutional revolutions better explains and resolves the current law than a coherence or unitaristic theory); David A.J. Richards, *Revolution and Constitutionalism in America*, 14 CARDOZO L. REV. 577 (1993) (analyzing America's constitutionalism in terms of its historical revolutions—first from the principles that led to the American Revolution and then the battle over those constitutional principles in the Civil War, leading to the Reconstruction Amendments); Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31 (1999) (stating that it "seems useful to think about U.S. constitutional history as constituting of a succession of regimes").

11. 531 U.S. 98 (2000).

12. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1108 (2001); *see also* BRUCE ACKERMAN, *Off Balance*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 192, 199 (Bruce Ackerman ed., 2002) (describing the "revolutionary jurisprudence" behind the decision); Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86

decision was illegal.[13] But the word "coup" suggests more than that. A coup is an act that, although illegal from the perspective of the legal system within which it occurred, becomes legal through a revolutionary change of legal systems. To be a coup, popular acceptance of the Supreme Court's decision in *Bush v. Gore* must have lifted us out of one legal realm and placed us into another, the way events in 1789 lifted France out of absolute monarchy and into democracy.[14]

Despite the hold that revolutions have on the legal imagination,[15] there has been a reluctance to consider the *structure* of legal systems that makes discontinuity between them possible. A legal revolution occurs when chains of legal justification are broken. Although these chains *had* led to one ultimate lawmaker (e.g., Louis XVI), they now lead to another (e.g., the National Assembly or the people of France). Legal revolutions are possible only assuming laws are structured into legal systems in this fashion. And yet there is little discussion of just what this structure is like.

The goal of this Article is to begin to fill this gap by examining six mistakes concerning legal revolutions that arise when the structure of legal systems is ignored. My discussion will focus on concrete examples of these mistakes, drawn from a wide variety of sources, including the writings of Akhil Amar (who will provide a particularly rich source), the Supreme Court of Pakistan's validation of a coup in 1958, the nineteenth-century legal theory of John Austin and criticisms of *Bush v. Gore*.

In the end, I hope to show that a formalist approach has a place within legal theory. The anti-formalist bias in the United States has made legal scholars deeply suspicious of viewing the law as a structured system.[16] This suspicion, I will argue, has allowed

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MINN. L. REV. 227, 228 (2001) (arguing that the decision in *Bush v. Gore* was "lawless" and the use of an "extralegal judicial power.").

13. *See* Farnsworth, *supra* note 12, at 228–35.

14. *See infra* Section VI.C.

15. Another example of academic interest in legal revolutions is Bruce Ackerman's and Akhil Amar's long-standing dispute about the legality of the ratification of the Constitution. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41–42, 167–99 (1991); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 463–86 (1994) [hereinafter Amar, *Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–50 (1988) [hereinafter Amar, *Philadelphia*].

16. In showing the benefits of a structural approach to legal systems, I hope to vindicate the form of legal analysis first employed in the early twentieth century by the Vienna School of legal theory, and especially by Hans Kelsen. I will borrow liberally,

fundamental errors of legal reasoning to exist undetected.

I. FIRST MISTAKE: LEGALLY JUSTIFYING LEGAL AXIOMS

A. *Legal Axioms*

A law can exist only as part of a *system* of laws.[17] Consider section 205.3(b)(1) of Volume 17 of the Code of Federal Regulations, which requires attorneys practicing before the Securities Exchange Commission to report evidence of material securities violations.[18] This law is a *command*, in the sense that it establishes a standard of conduct for behavior.[19] We can determine the system to which this command belongs by identifying the *authorization* that gives it validity. Authorizations are laws that confer upon the authorized party the power to create new law, whether that new law is a command or a further authorization.[20] Authorizations and commands are fundamental elements out of which legal systems are built—the laws in a legal system can be categorized as authorizations or commands.[21]

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albeit selectively, from the Vienna School in many of my arguments. *See generally* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934) [hereinafter INTRODUCTION] (discussing a theory of law purified of political ideology and empirical elements); HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ. of Cal. Press 1967) (1960) [hereinafter PURE THEORY] (attempting to solve the fundamental problems of a "pure" theory of law). Other important members of the Vienna School were Adolf Merkl and Fritz Sander, see generally ADOLF MERKL, ALLGEMEINES VERWALTUNGSRECHT (1927); ADOLF MERKL, PROLEGOMENA EINER THEORIE DES RECHTLICHEN STUFENBAUES IN GESELLSCHAFT, STAAT UND RECHT: UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE 252 (Alfred Verdross, ed. 1931); FRITZ SANDER, DAS FAKTUM DER REVOLUTION UND DIE KONTINUITÄT DER RECHTSORDNUNG, 1 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 132 (1919–20).

17. *See* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEMS 1–4 (2d ed. 1980); INTRODUCTION, *supra* note 16, at 55–75.

18. 17 C.F.R. § 205.3(b)(1) (2004).

19. Kelsen understands commands as directed to officials only. PURE THEORY, *supra* note 16, at 114–17. They obligate officials to sanction non-compliance with the identified standard of conduct. *Id.* For a discussion of Kelsen's approach, see RONALD MOORE, LEGAL NORMS AND LEGAL SCIENCE: A CRITICAL STUDY OF KELSEN'S PURE THEORY OF LAW 137–40 (1978). Nothing about my analysis here presupposes Kelsen's definition of a command.

20. PURE THEORY, *supra* note 16, at 118; *see also* MOORE *supra* note 19, at 77.

21. INTRODUCTION, *supra* note 16, at 23–25; PURE THEORY, *supra* note 16, at 76–81. Kelsen understands authorization and command as *relationships* (of "imputation" or "*Zurechnung*") between the elemental legal meanings of events. *See* Stanley L. Paulson, *Hans Kelsen's Doctrine of Imputation*, 14 RATIO JURIS 47 (2001). These relationships build up complex legal meanings by a "functional connection[s] of elements," similar to

In the case of section 205.3(b)(1), its immediate authorization is section 307 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"),[22] which gave the Securities Exchange Commission the power to establish minimum standards of professional conduct for attorneys practicing before the Commission.[23] Sarbanes-Oxley, in turn, is valid law because Congress was authorized under Article I, section 8 of the Constitution to "regulate Commerce . . . among the several States."[24] Furthermore, the Commerce Clause has *remained* valid law because the conventions or legislatures of three-fourths of the states, who are authorized by Article V to enact amendments to the Constitution,[25] refrained from exercising their power to remove the Clause. Finally, the Commerce Clause and Article V are valid law because Article VII authorized the conventions of the original thirteen states to enact the Constitution.[26]

This chain cannot go on forever; legal systems must terminate in a final authorizing law.[27] This final law will, of course, have a source of some sort. In the case of Article VII, the responsible party was the Constitutional Convention. But whatever this source is, it was *not legally authorized* to create the law. There is no law authorizing the Constitutional Convention to create Article VII, the way there is a law authorizing the SEC to create section 205.3(b)(1) or Congress to create Sarbanes-Oxley. We are, of course, free to argue that there is a law authorizing the Convention, but if we succeed that simply

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the way that logical rules build the complex meaning of sentences out of the meaning of words. *See* Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365, 388–89 (2003). These details in Kelsen's theory can be ignored for the purposes of this article.

Kelsen also speaks of positive permissions as another relationship of imputation. PURE THEORY, *supra* note 16, at 118. But this appears to be nothing more than the granting of an exception or license to what is generally prohibited behavior. *Id.* at 138. It therefore seems reducible to command and authorization.

22. 15 U.S.C.A. § 7245 (West Supp. 2004).

23. *Id.*

24. U.S. CONST. art. I, § 8. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185, [2002–2003 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,823 at 87,069-110 (Jan. 29, 2003).

25. U.S. CONST. art. V. That is, if the amendment is proposed by a two-thirds vote of both houses of Congress or the legislative will of two-thirds of the states. *Id.*

26. U.S. CONST. art. VII. All thirteen states ratified the Constitution, although it took North Carolina until November 21, 1789 and Rhode Island (who failed to send any delegates to the Constitutional Convention) until May 29, 1790. HANNIS TAYLOR, THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION 218–19 (1911). For the pressures to ratify exerted by the new United States upon these two foreign nations in its midst, see David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 835–38 (1994).

27. For a contrary view, see RAZ, *supra* note 17, at 32.

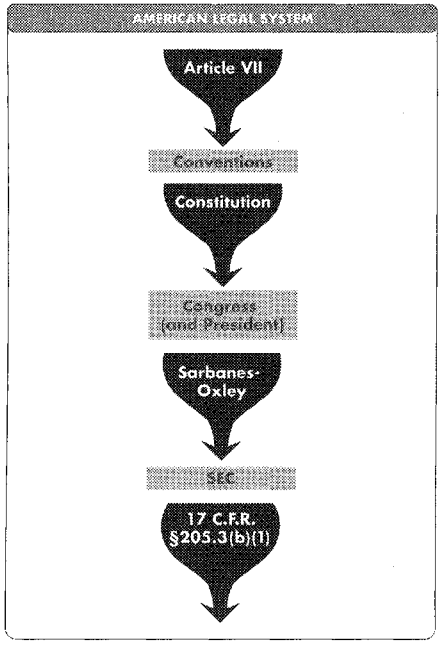
means that Article VII is not the final authorizing law. Furthermore, whoever was responsible for what actually is the final authorizing law was not legally authorized to create *it*.[28]

If Article VII is the final authorizing law, it is the *axiom* of the American legal system. Furthermore, the lawmaker identified by this axiom—the conventions of the original 13 states—is the supreme lawmaker in that legal system, the American *sovereign*. See Figure A.

28. The structure I am employing here follows from the *Stufenbau* (or hierarchical) theory of legal norms introduced by Adolf Merkl. *See, e.g.*, Adolf Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaues* in GESELLSCHAFT, STAAT UND RECHT: UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE 252 (Alfred Verdross, ed., 1931). Merkl strongly influenced Kelsen, who made the *Stufenbau* approach an essential element of his legal theory. *See* INTRODUCTION, *supra* note 16, at 55–75; PURE THEORY, *supra* note 16, at 221–78; WILLIAM EBENSTEIN, THE PURE THEORY OF LAW 131–206 (1945) (photo. reprint 1969); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 95–100 (2d ed. 1980); William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CAL. L. REV. 617, 642–44 (1971).

Notably absent from my account, however, is Kelsen's theory of the *basic norm*. The basic norm authorizes the creators of the *axiom*. *See* INTRODUCTION, *supra* note 16, at 58; PURE THEORY, *supra* note 16, at 199, 226; Green, *supra* note 21, at 388–89. It is not itself positive law—that is, a law actually issued by a person—the way Article VII is. Green, *supra* note 21, at 388–89. The basic norm is instead *presupposed* by anyone who knows the laws of the legal system. *Id.* For example, anyone who knows American law must be presupposing a norm that authorized the Constitutional Congress to make Article VII. *Id.* Kelsen's theory of the basic norm is motivated in large respect by the Kantian dimensions of his legal theory, which need not concern us here. *See id.* at 389–405; Norbert Leser, *Die Reine Rechtslehre im Widerstreit der philosophischen Ideen*, in DIE REINE RECHTSLEHRE IN WISSENSCHAFTLICHER DISKUSSION 97, 101–02 (1982); CARSTEN HEIDEMANN, DIE NORM ALS TATSACHE: ZUR NORMENTHEORIE HANS KELSENS 348–50 (1997). On Kelsen's Kantianism generally, see Green, *supra* note 21; Stanley L. Paulson, *Introduction*, in INTRODUCTION, *supra* note 7, at *v*; Alida Wilson, *Is Kelsen Really a Kantian?*, *in* ESSAYS ON KELSEN 37 (Richard Tur & William Twining eds., 1986).

Figure A



The inability to trace a law that is *now* considered valid back to what *was* the sovereign in a legal system means that a legal revolution has occurred. For example, a revolution occurred in France in 1789, because valid laws were no longer traceable back to Louis XVI. The American Revolution occurred because, at some point between 1776 and 1783, valid laws could no longer be traced back to the sovereign within the British legal system—the King-in-Parliament.[29]

B. Legal Axioms Cannot Be Legally Justified

Unlike the other laws within a legal system, a legal axiom does not have a legal justification, in the sense that it cannot be shown to be valid in light of a higher authorization.[30] This can make the axiom

29. *See* VERNON BOGDANOR, POLITICS AND THE CONSTITUTION: ESSAYS ON BRITISH GOVERNMENT 5 (1996) ("[T]here is a sense in which the British Constitution can be summed up in eight words: What the Queen in Parliament enacts is law."); *see also* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 9–10 (1999) (arguing that the essence of the seventeenth century King-in-Parliament's sovereignty was that "no other human agency possess[ed] legal authority to override or hold invalid any statute that Parliament enact[ed]").

30. As Kelsen put it: "[T]o attempt juristically to determine the choice of juristic starting point would be like trying to climb on one's own shoulders; it would be like the

and the sovereign it authorizes look illegitimate. But to the extent that an attempt to justify the axiom is not circular, it will distort the very legal system it is supposed to support.

To illustrate, imagine that someone in 1788 used a decision by a French court that said Louis XVI was an absolute monarch to legally justify his absolute monarchy. If Louis was an absolute monarch, this justification would be circular. The court's authority to make determinations of the law would exist only because of Louis XVI's power. And if the person justifying Louis's authority attempted to remove this circularity by insisting that Louis XVI had his authority only *because* the courts of France said so, this would make *the courts*, not Louis, sovereign.

When a justification of a legal axiom appeals to laws issued by a subordinate lawmaker within that legal system, it distorts the structure of the system by making this subordinate supreme. When it appeals to laws issued by a lawmaker in *another* legal system, it merges two systems into one. For example, imagine someone in 1787 attempted to justify the axiom of the American legal system by reference to British law. One possibility would be the Treaty of Paris of 1783, in which Great Britain recognized the United States.[31] Another would be the recognition of American law by British courts, that is, the willingness of these courts to apply American law to events occurring within territory claimed by the United States.[32]

Although these justifications may make sense of the role of American law within the British legal system, they distort the American legal system itself. First of all, there is no reason that British law should recognize American laws as valid for the same reason that they are valid within the American legal system itself. From the perspective of British law, the axiom of the American system, which we are assuming is Article VII, may be irrelevant. The British might consider American laws to be valid because they have their source in a government that is *efficacious*—in the sense that its commands tend to be obeyed by the population.

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attempt of Münchhausen to pull himself out of the swamp by his own hair." HANS KELSEN, DAS PROBLEM DER SOUVERANITÄT UND DIE THEORIE DES VÖLKERRECHTS 97 (1920).

31. Or, more correctly, the thirteen states. *See* Definitive Treaty of Peace, Sept. 3, 1783, art. I, U.S.-Gr. Brit., 8 Stat. 80, 81, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776–1818, 151 (Hunter Miller ed., 1931).

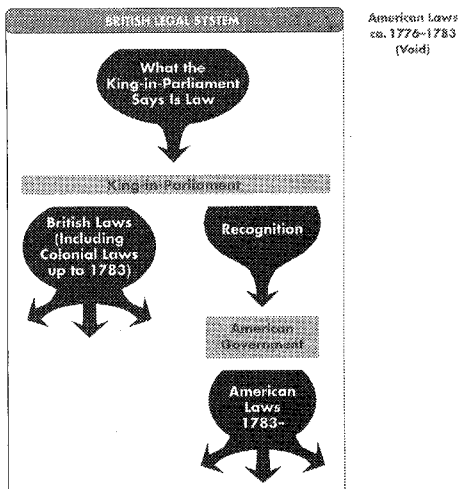
32. By the time of the Treaty of Paris, foreign law was employed by English common law courts in cases having a foreign element. Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, *in* 3 LAW: A CENTURY OF PROGRESS 342, 398 (1937).

Because Britons and Americans may use different criteria for determining the validity of American law, a revolutionary change of the American legal system may not be seen as such under British law. Assume, for example, that Congress decides to repeal the Fourteenth Amendment by a simple majority vote and the President signs the repeal. Assume further that the American public, after considerable grumbling, acquiesces and the repeal is treated as law. From the perspective of the American legal system, this would be a legal revolution because the repeal, although now accepted as legally valid, could not be traced back to the authority identified in Article VII. But from the perspective of the British legal system, the American legal system might exist unchanged because the same cast of characters in the American government, namely Congress and the President, is obeyed by the population.

The most significant distortion of justifying American laws by reference to British law, however, is that it makes the validity of American laws ultimately depend upon the sovereign within the British system. The American system and its laws will have their ultimate validity in the King-in-Parliament. There would be no *independent* American legal system.

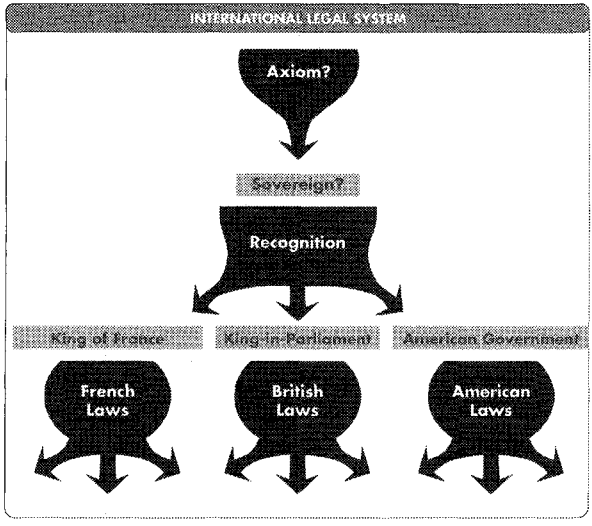
As a consequence, the American Revolution would not really have occurred. If American laws were valid only because of their recognition by the British system, then valid laws in English-speaking North America would have remained uniformly traceable back to the King-in-Parliament. *Before* the recognition, all valid laws would be traceable back to that source, for the simple reason that the only valid laws were British ones. *After* the recognition, there would be valid American laws, but they, too, would be traceable back to the King-in-Parliament, through the act of recognition. See Figure B.

Figure B



The American legal system is no less distorted when its axiom is justified by reference to *international* law. Once again, Article VII may not be relevant under international law. Efficacy, or some other principle, may matter instead. Furthermore, such a justification ultimately makes the validity of American laws depend upon the axiom of the international system.[33] Such justification leaves no place for an *independent* American legal system. All that would exist is an international system, within which the American system played a subordinate role. The same would hold true for those other domestic legal systems that owed their existence only to recognition under international law. See Figure C.

Figure C



From the perspective of the international legal system, revolution would be impossible. To be sure, changes in domestic legal systems would occur *from within the international system*, in the

33. For the purposes of this Article, we shall have to leave the questions of the axiom and sovereign of the international system vague. For a discussion of these issues, see INTRODUCTION, *supra* note 16, at 107–08; PURE THEORY, *supra* note 16, at 318–20. The international legal system could be primary even though, having no organs of enforcement, it had to rely upon the actions of subordinate domestic legal systems to enforce its laws. *See* INTRODUCTION, *supra* note 16, at 108–11; PURE THEORY, *supra* note 16, at 320–22. This would be analogous to a domestic legal system that engaged only in lawmaking and adjudication, leaving enforcement to private individuals. *See* INTRODUCTION, *supra* note 16, at 108–11; PURE THEORY, *supra* note 16, at 320–22.

sense that the changes followed from the international system's principle for recognizing domestic systems (which, we can assume, is efficacy). For example, the American Revolution would have occurred within the international system, because some time between 1776 and 1783 the American government (or the state governments) supplanted the King-in-Parliament as the efficacious lawmakers among most English-speakers in North America. At that point American (or state) and not British law became valid under international law. This change would not be a legal revolution, however, for the axiom on the basis of which the old and the new laws are justified would remain the same. Both British law and the American law that supplanted it would be valid only *because* of the principle of efficacy, which owes its validity to the axiom of the international legal system. The ultimate principle of legal validity would not change.

C. *Amar on the American Axiom*

In short, legal systems and revolutionary changes of these systems can be understood only if legal axioms are left legally unjustified. Our *first* mistake concerning legal revolutions occurs when this lesson is forgotten. An example of this mistake can be found in the writings of Akhil Amar.[34] I will begin, however, with Amar's novel account of the American legal system.

I have suggested that the axiom of the American legal system is Article VII and that the lawmaker identified in that axiom—the conventions of the thirteen original states—is the American sovereign. Amar also takes the ratification of the Constitution to be important in identifying the American sovereign. But he believes the true axiom of our legal system is not Article VII.[35] It is instead the more comprehensive "legal right of the polity to alter or abolish their government at any time and for any reason, by a peaceful and simple majoritarian process."[36]

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34. *See infra* notes 44–53 and accompanying text.

35. Amar, *Consent*, *supra* note 15, at 470–75.

36. *Id.* at 458. *See also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 750 (1994) [hereinafter Amar, *Denominator*] ("At the Founding, the very act of constitution itself—of ordainment and establishment—embodied the first principles of Republican Government: the right of the sovereign people, via a special convention, to alter their existing constitution by simple majority vote."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435–36 (1987) [hereinafter Amar, *Sovereignty*] (describing the essence of popular sovereignty in America as "the right of the People to alter or abolish their government . . . ."); Amar, *Philadelphia*, *supra*

In fact, Amar argues that this right of popular sovereignty is the axiom of *fourteen* different legal systems. It is the axiom of each of the thirteen state systems that existed prior to ratification, and it is the axiom of the American legal system that was the result of the ratification.[37] In each of the fourteen systems a different people are sovereign. In each state system, the people of that state are sovereign, and, in the American legal system, the people of the United States as a whole are sovereign. Within each state system, a constitution for that state can be created, without revolution, by a simple process in which the majority of the people of that state vote for the constitution.[38] Likewise, within the American legal system, a constitution for the United States can be created, without revolution, by a simple process in which the majority of the people of the United States as a whole vote for the constitution.[39]

Amar believes that Article VII played a crucial role in bridging the gap between the sovereignty of the state peoples and the sovereignty of the people of the United States. Indeed, its most important function was not establishing the Constitution, but enabling this delegation of sovereignty. After the delegation, the method by which future constitutions could be legally created was radically altered. Prior to the delegation, each state people, being sovereign, could not be bound by law that did not have its source in that people's will. Article VII respected this sovereignty of the state peoples, Amar argues, because each people had to agree individually to delegate its sovereignty.[40] Although the Article VII process was effective with the ratification of nine of the thirteen states, the effect was only "between the States so ratifying the [Constitution]."[41] After the delegation was complete, however, sovereignty rested in a new people, the people of the United States. That new sovereign could create constitutions in the future by its simple majority vote. If the people of the United States voted for a new constitution, it would be binding, even if the people of an individual state objected.

Because the American people are now sovereign, the American

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note 15, at 1044 (stating that "the first, most undeniable inalienable and important, if unenumerated right of the People is the right of a majority of voters to amend the Constitution . . . .").

37. Amar, *Consent*, *supra* note 15, at 488 n. 15; Amar, *Denominator*, *supra* note 36, at 767; Amar, *Philadelphia*, *supra* note 15, at 1062–63.

38. Amar, *Denominator*, *supra* note 36, at 773; Amar, *Philadelphia*, *supra* note 15, at 1051–52.

39. Amar, *Consent*, *supra* note 15, at 458–59, 501.

40. Amar, *Sovereignty*, *supra* note 36, at 1459–60.

41. U.S. CONST. art. VII.

legal system can endure even if there is dramatic constitutional change, for example, the wholesale scrapping of the Constitution and its replacement by a parliamentary government of the British variety. Valid laws will still be traceable back to the same sovereign, as long as the constitutional change is ratified democratically by the majority of the American people as a whole. For this reason, Amar argues that Article V is not the sole method of constitutional change within our legal system. It is merely a means of constitutional change from within our *current* Constitution. The people can make Article V irrelevant, however, by enacting a new constitution through a simple majoritarian process.

I will argue in Part V that the alienation of sovereignty that Amar attributes to the Article VII process is impossible, which forces him into the position that the ratification was as much of a revolution as the independence of the thirteen state legal systems from the British system. Indeed, the belief that a sovereign can alienate or limit its authority (as well as the belief that it can authorize its own authority) is the *fifth* mistake concerning legal revolutions. My current goal, however, is to show that even if Amar is right about Article VII, he succumbs to the *first* mistake concerning legal revolutions, because he offers *legal* justifications for why the people are sovereign within the state systems.

To his credit, Amar does not argue that popular sovereignty is the axiom of these systems simply because a popular vote is the *morally valid* means of creating a constitution for a people.[42] If this were his argument, he would have to accept that popular sovereignty is the axiom of every legal system—for if the American peoples have a moral right to control the constitution under which they live, so do all other peoples.

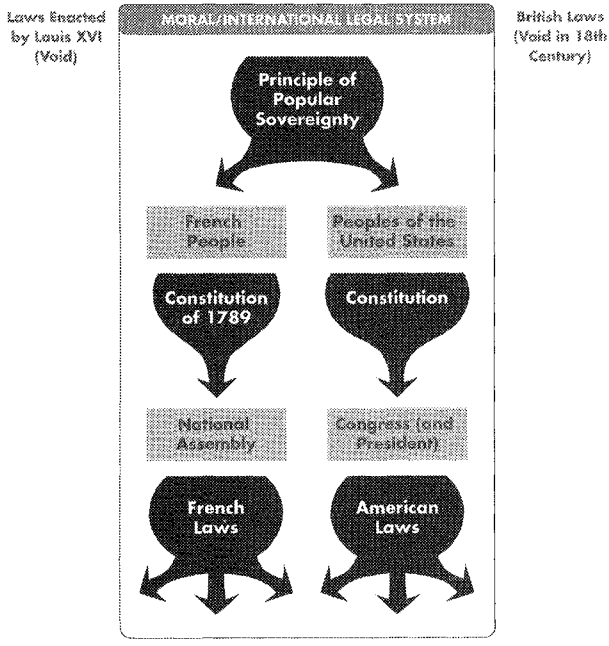
If all laws depended upon such moral validation, the American Revolution would not have occurred. After all, the (unwritten) British constitution, which gave lawmaking authority to the King-in-Parliament, was not ratified by any of the American peoples—and not by the British people either, at least in the eighteenth century. From the perspective of the axiom of popular sovereignty, British laws that applied to the Colonies before the American Revolution, indeed British laws as a whole, were void. Instead of a revolutionary change in valid law, abiding sovereigns—namely the peoples of the states—would have finally spoken.

42. Amar, *Consent*, *supra* note 15, at 499.

In fact, if the moral axiom of popular sovereignty were the axiom of every legal system, no revolutions would have *ever* occurred. The peoples of the world would always be the ultimate source of valid law, and any putative law from another source would simply be void. Louis XVI decrees before 1789 would not be valid laws, since they could not be traced to the true sovereign, the people of France. There would be no revolutions—that is, shifts of sovereignty—only cases of abiding sovereigns choosing to speak or falling into silence.

Furthermore, because the valid laws of each domestic system would be traceable back to the same moral axiom, these laws would inhabit the same moral/international legal system. The difference between the valid laws of France and valid laws of the United States would be no more significant than the difference between laws enacted by subsidiary lawmakers within the American legal system (such as Congress and the state legislatures). See Figure D.

Figure D



Instead of offering such a moral argument, Amar claims that particular social events in English-speaking North America established popular sovereignty as the legal axiom of the American systems by the time of the Founding. These events gave the pre-

existing moral right to choose one's government a "legal form that it lacked before 1776."[43]

This means that popular sovereignty is not the ultimate legal basis for constitutional validity in *all* legal systems. It did not apply in the French legal system before 1789 (and maybe not even after). And because it also did not apply to the eighteenth century British legal system, there was an American Revolution. Sovereigns *changed*—ultimate lawmaking authority shifted from the King-in-Parliament to the American peoples.

But Amar's argument that popular sovereignty became the axiom of the state legal systems by the late eighteenth century succumbs to the first mistake. Trained to give legal arguments, he cannot help but give further *legal* justifications for why popular sovereignty was the law. But this is precisely what Amar should *not* do. If these justifications are non-circular, which they must to be justifications at all, the principle of popular sovereignty must legally depend upon the authority standing behind the law to which he appeals. The sovereignty of the people will be extinguished because the ultimate source of valid law will be this new authority.

Of course, the most serious problem for Amar—to which I have already alluded and which I discuss in greater detail in Part V—is his argument that popular sovereignty is the axiom of the *American* legal system because it had that role in the state legal systems. Unless the delegation of sovereignty is possible, such a justification threatens to make the validity of American law dependent upon the sovereigns of the state legal systems. American law would be binding upon a state only to the extent that the people of the state say so. These peoples could extinguish their legal obligations under American law at will, as the people of South Carolina attempted to do in 1861.

But Amar's arguments put even the sovereignty of the people of each state at risk. For example, he offers the statement in Virginia's Declaration of Rights that "all power is vested in, and consequently derived from, the people" as having "established popular sovereignty as [Virginia's] legal cornerstone."[44] And yet the Virginia Declaration was a product of the Virginia state legislature. The people of Virginia did not grant the legislature the authority to enact it, nor did they subsequently ratify it.[45] If the Declaration really *established* the

43. Amar, *Consent*, *supra* note 15, at 464; *see also id.* at 462–87 (describing gradual entrenchment of popular sovereignty as the ultimate justification of legality in the states).

44. Amar, *Consent*, *supra* note 15, at 477.

45. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L.

Virginian people's lawmaking power, they have lawmaking authority only because the Virginia state legislature gave it to them. The legislature, not the people, would be sovereign. Of course, Amar can insist that the state legislature itself has lawmaking authority only because the people gave it this power. But the Declaration cannot legally justify this fact.

Amar must be understood, not as *legally justifying* the axiom of popular sovereignty, but as extra-legally *explaining* why the peoples of the states were in legal systems in which popular sovereignty was the axiom.[46] If he is successful, he will have shown why legal justification stopped at popular sovereignty *without* the need for further legal justification—precisely what Amar himself is so reluctant to do. The statement in the Declaration, rather than being an act of lawmaking, would simply be the exemplification of popular sovereignty's axiomatic role among those legally reasoning within the system.

D. Amar on the Articles of Confederation

The first mistake can also be found in Amar's argument that there was no revolutionary break between the Articles of the Confederation and the ratification of the Constitution. Actually, there are three possible revolutions at issue here, each of which Amar denies occurred: (1) a revolutionary creation of one American legal system out of the state legal systems at the time of the Articles of Confederation; (2) a revolutionary recreation of the state legal systems through the dissolution of the Articles; and (3) a revolutionary creation (or recreation) of the American legal system out of the state systems with the ratification of the Constitution.

The Articles and the Constitution look legally discontinuous because the Constitution was not ratified in accordance with the amendment procedures of the Articles.[47] Under Article VII of the Constitution, the "Ratification of the Conventions of nine States" was sufficient for the establishment of the Constitution "between the States so ratifying the Same."[48] If nine state conventions agreed, they could legally obligate their states to abide by the new Constitution. In contrast, under Article XIII of the Articles of Confederation, valid amendment required the approval of Congress and the confirmation

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REV. 475, 486 n.30 (1995).

46. *See infra* Section II.A.

47. *See* Ackerman & Katyal, *supra* note 8, at 478–80.

48. U.S. CONST. art. VII.

of the legislatures of every State.[49] The agreement of nine state conventions would therefore be a legal nullity.

Amar escapes this problem by arguing that the Articles themselves were no longer binding in 1787:

> Of course, Article VII is *inconsistent* with the best reading of Article XIII, but to declare Article VII therefore *illegal* is to beg the question of the *legal* status of Article XIII, and the rest of the Articles of Confederation, in 1787. I believe, as did many Federalists in 1787, that the Articles of Confederation were a mere treaty among thirteen otherwise free and independent nations. That treaty had been notoriously, repeatedly, and flagrantly violated on every side by 1787. Under standard principles of international law, these material breaches of a treaty freed each party—that is, each of the thirteen states—to disregard the pact, if it so chose. Thus, if in 1787 nine (or more) states wanted, in effect, to secede from the Articles of Confederation and form a new system, that was their *legal* right, Article XIII notwithstanding.[50]

If Amar is correct that the state legal systems possessed full independence at the time of the ratification of the Constitution, his sole problem is the third revolution—the transfer of sovereignty from the peoples of the states to the people of the United States through the ratification of the Constitution. I have set aside this problem until Part V.

But Amar's argument that the states were released from their obligations under the Articles suffers from the first mistake. Assume he is right that the Articles were a treaty between independent states.[51] If so, the legal obligations created by the Articles must be traceable back to the ultimate authority within each state system, namely the people of that state. The powers of the United States government under the Articles would exist for a state only as long as

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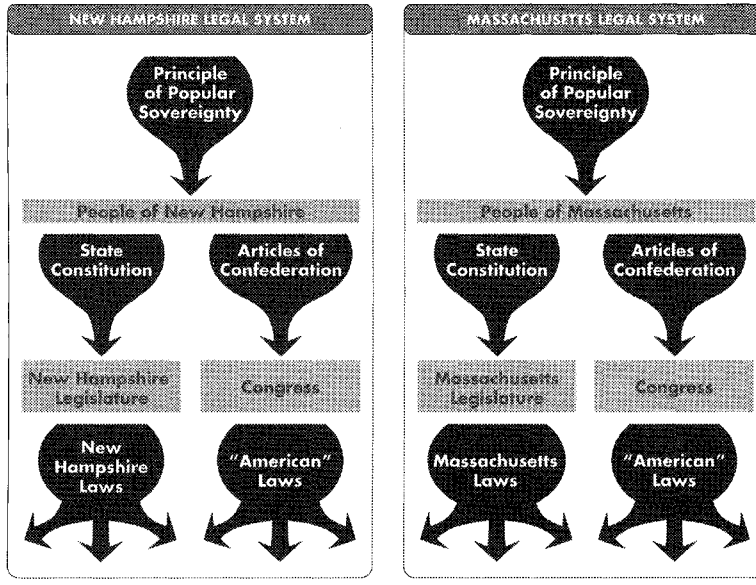
49. ARTICLES OF CONFEDERATION art. XIII (1777).

50. Amar, *Philadelphia*, *supra* note 15, at 1048. *See also* Amar, *Consent*, *supra* note 15, at 465–66 (1994) ("By 1787, the Articles had been routinely and flagrantly violated on all sides. And under well-established legal principles in 1787, these material breaches freed each compacting party—each state—to disregard the pact, if it so chose.").

51. *See supra* note 50 and accompanying text; *see also* Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 21 (1995) ("Under the Articles, residual political authority remained in the thirteen states"). *See* ARTICLES OF CONFEDERATION art. II (1777) ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

these powers were recognized by its people. Indeed, there would be no such thing as an *American* legal system or *American* law. Instead there would be thirteen separate state legal systems, containing incommensurable sets of state laws called "American law."[52] See Figure E.

Figure E



But if the people of each state are sovereign within their legal system, why is Amar concerned to show that the states were *released* from their legal obligations under the Articles? Whatever obligations New Hampshire had under the Articles were obligations only because the people of New Hampshire said so. And by deciding to ignore the Articles, including their amendment procedures, the people of New Hampshire made it clear that the Articles no longer had any legal force.

By appealing to principles of international law that apparently bind the people of New Hampshire independently of their consent,

52. The Articles put upon every state an obligation to "abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them." ARTICLES OF CONFEDERATION art. XIII (1777). It also declared the "Union" to be "perpetual." ARTICLES OF CONFEDERATION art. XIII (1777). But these can be understood as legal obligations that flowed from and were dependent upon the abiding consent of the people of each state.

Amar has once again threatened the very sovereignty he aims to defend. If the people of New Hampshire could escape their obligations under the Articles only by satisfying standards of international law, then their sovereignty would be lost even if they did succeed in escaping their obligations. The legal fact that the people of New Hampshire were released from their obligations could not be traced to the will of the people of New Hampshire. This binding international law would have to be explained in terms of some other sovereign, for example, the sovereign of the international legal system (whatever that is).

To make Amar's position consistent, we have to reinterpret his appeal to international law. For example, we could understand him as speaking of the *moral* concerns that motivated the people of New Hampshire to exercise their legal power to extinguish New Hampshire's obligations under the Articles. The people of New Hampshire were not legally bound to respect such moral concerns. They could have extinguished New Hampshire's obligations for no reason at all. But, as a matter of fact, the violation of the terms of the Articles by other states was the reason they chose to exercise this plenary power.[53]

53. There are, in fact, two other avenues for making Amar's appeal to international law consistent, although Amar himself would be unwilling to accept them. I have so far assumed that the sovereign has *unrestricted* lawmaking authority (except insofar as it may not make laws that alter its own authority). I have also assumed that the sovereign is indivisible. If these restrictions on sovereignty were set aside, as I believe they should, we could make sense of legal limits that would prevent the sovereign people of New Hampshire from simply negating the Articles at will. For example, one could argue that under the axiom of the New Hampshire legal system the people of New Hampshire have supreme lawmaking power only to the extent that they did not violate certain treaty obligations. These limitations would not be part of *international law*, since they would not be commanded by the sovereign of the international legal system (or indeed by any sovereign), but it would nevertheless be true that the people of New Hampshire were legally bound by them. *See infra* Section III.B.

Another possibility is to assume divided sovereignty. On international issues the sovereign responsible for international law (whatever that is) would have supreme lawmaking authority and on domestic issues the people of New Hampshire would. The people of New Hampshire would be a supreme lawmaker, but only within a domestic realm. They would be bound by the decisions of the international sovereign as far as their ability to withdraw from the Articles was concerned. *See infra* Section III.C.

But Amar would not accept either of these approaches, because he assumes (mistakenly, as we shall see) that sovereignty cannot be limited or divided. *See* Amar, *Consent*, *supra* note 15, at 507; Amar, *Philadelphia*, *supra* note 15, at 1062–63; Amar, *Sovereignty*, *supra* note 36, at 1435.

II. SECOND MISTAKE: CONFUSING EXTRA-LEGAL EXPLANATIONS WITH LEGAL JUSTIFICATIONS

As we have seen, legal systems will be misunderstood if axioms are legally justified. And yet it seems that some *explanation* must be given for why legal justification should stop at one axiom rather than another. Imagine that someone claimed that the Queen-in-Parliament is the current sovereign of all of English-speaking North America. When confronted with laws, like Sarbanes-Oxley, that appear to be valid and not traceable to the Queen-in-Parliament's commands, he dug in his heels, arguing that these laws only *seem* valid because we are assuming the wrong axiom. Once one recognizes that the Queen-in-Parliament is the sovereign, these "laws" reveal themselves to be nullities.

Because it is an axiom, we cannot, by definition, legally justify our choice over his. We can, however, explain why this person is an outlier—that is, why almost everyone in this country stops legal justification at Article VII (or something similar) rather than "what the Queen-in-Parliament says is law." This explanation cannot be a legal justification, of course, since the axiom is an axiom precisely because it has no such justification. The explanation must be extra-legal in nature. The confusion of this extra-legal explanation of a legal axiom with its legal justification is our *second mistake* concerning legal revolutions.

A. *Extra-legal Explanations of Legal Axioms*

I have chosen the deliberately vague term "explanation," because it does not commit us to the view that the axiom can be reduced to what explains it. An example of a legal theorist who believes that legal axioms can be extra-legally explained, but who resists extra-legal reductionism, is Hans Kelsen. Kelsen accepts that legal axioms can be explained in terms of social facts. An authorization, he argues, is treated as the axiom of a legal system if it is efficacious, that is, if the population by and large obeys the laws identified by the authorization.[54] But he insists that the axiom—and all other legal rules—cannot be reduced to such social facts.[55] Legal rules are irreducibly legal in nature.

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54. PURE THEORY, *supra* note 16, at 210 ("As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one.").

55. INTRODUCTION, *supra* note 16, at 13–14; PURE THEORY, *supra* note 16, at 2.

Kelsen's position is comparable to the position in the philosophy of logic called "logicism." Consider an axiom of logic—that is, a logical rule, such as the law of non-contradiction, that is foundational and so cannot be logically justified. The logicist admits that why we accept the law of non-contradiction without justification can be explained physiologically, psychologically and sociologically, for example, in terms of the constitution of our brains, certain innate habits or instincts, and socialization by parents and teachers. He does not think, however, that the law, or any logical rules, can be reduced to the empirical facts that explain them. Logical rules are about logical states of affairs, which are not contingent upon anything empirical.[56]

In contrast, some philosophers of logic consider logical rules to be nothing over and above the physiological, psychological and sociological facts that explain our acceptance of them. According to this position, which is sometimes called "psychologism," the law of non-contradiction is constituted by facts about human brains, desires, or societies.[57] For the psychologist, although the law of non-contradiction cannot be logically justified, it can be empirically justified, since it is, in the end, reducible to empirical facts.

A possible analogue to psychologism in legal theory is American legal realism. The realists sought to reduce legal rules to social facts—especially facts about judicial behavior.[58] For the realists, legal reasoning is ultimately a type of empirical—especially sociological—

56. Green, *supra* note 21, at 375–81. For the classic expression of logicism, the view that logical laws concern abstract objects rather than psychological states, see GOTTLOB FREGE, THE FOUNDATIONS OF ARITHMETIC v-viii, 33–38 (J.L. Austin trans., Basil Blackwell 2d ed. 1959) (1884); 1 EDMUND HUSSERL, LOGICAL INVESTIGATIONS 99–100 (J.N. Findlay trans., Routledge and Kegan Paul 1970) (1900). On both Husserl's and Frege's anti-psychologism, see MARTIN KUSCH, PSYCHOLOGISM: A CASE STUDY IN THE SOCIOLOGY OF PHILOSOPHICAL KNOWLEDGE 30–62 (1995).

57. *See* Richard R. Brockhaus, *Realism and Psychologism in 19th Century Logic*, 51 PHIL. & PHENOMENOLOGICAL RES. 493, 495–96, 500–06 (1991). A classic expression of psychologism is 1 JOHN STEWART MILL, A SYSTEM OF LOGIC 2 (Longman, Green & Co. 1936) (1851).

58. *See* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICTS OF LAWS 8 (1942); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 828–29 (1935); Walter Wheeler Cook, Essay, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 49, 57–58 (Julius Rosenthal Found., Northwestern Univ. ed. 1987) (1941); Underhill Moore, Essay, *in id.* at 203; LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 3–44 (1986). The legal realists often pointed to Holmes' famous statement in Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), as anticipating this approach: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

inquiry.

Although Kelsen and the legal realists are relatively clear about where they stand, other legal theorists are more difficult to categorize. Consider H.L.A. Hart. On the one hand, Hart appears to reduce the rule of recognition, which, as we shall see, he considers to be the foundation of a legal system, to social facts.[59] On the other hand, Hart argues that attending to the internal perspective of the participants in the legal system is needed to avoid the purely external sociological approach of the legal realists.[60] Hart's commitment to the internal point of view looks like a rejection of sociological reductionism and, for that reason, could put him in the same camp as Kelsen.[61] From within the internal perspective of the participants, the existence of the rule of recognition is completely irrelevant to legal justification.

If this reading of Hart is correct, then he is much like Kelsen in insisting that sociological explanation of legal axioms should not infect legal justification. Sociology can at most explain why legal justification stops at the axiom; it cannot actually justify the axiom. I shall adopt the Kelsen-Hart approach in this Article—and attempt a justification of this choice in the Conclusion. The second mistake concerning legal revolutions arises when the distinction between extra-legally explaining and legally justifying a legal axiom is forgotten.

Let me begin by outlining in greater detail Hart's explanation of legal axioms.[62] Hart explains legal axioms, and the legal systems generated from them, through rules of recognition, that is, practices among officials of enforcing norms only if they satisfy certain criteria. (He also argues that the bulk of the population must generally comply with what the rule of recognition determines to be valid laws.) For example, the rule of recognition of the British legal system is,

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59. *See* H.L.A. HART, THE CONCEPT OF LAW 110 (Penelope Bulloch & Joseph Raz eds., Clarendon Press 2d ed. 1994) ("[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.").

60. *Id.* at 104–05.

61. *See* Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 OXFORD J. LEGAL STUD. 449, 450–51 (1990). For more discussion of the internal point of view in Hart, see Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 172–76 (1999); Richard Holton, *Positivism and the Internal Point of View*, 17 LAW & PHIL. 597, 600–06 (1998); Dennis Patterson, *Explicating the Internal Point of View*, 52 SMU L. REV. 67, 69–72 (1999).

62. I use Hart's explanation of legal axioms because it is more developed than Kelsen's. I do so even though the lesson of distinguishing explanation from justification is clearer in Kelsen's work than Hart's. *See* Green, *supra* note 21, at 398–405.

roughly, the practice among British officials of enforcing only those norms that have their ultimate source in the Queen-in-Parliament.[63] A revolution, in turn, occurs when one rule of recognition is replaced by another.[64]

According to Hart, when someone describes the conditions for legal validity, the person is either participating within a rule of recognition or describing the internal perspective of participants.[65] The rule of recognition can therefore extra-legally explain the axiom of a system, insofar as it shows what participants take to be the ultimate criterion for determining whether a norm should be enforced. For example, Article VII is the axiom of the American legal system if participants in the American rule of recognition stop legal justification at Article VII without any felt need for further justification.

Hart's explanation of the axiom of a legal system is not the same as a legal principle that is used to determine when a subsidiary system is recognized by a primary legal system. The two are easy to confuse, because Hart's explanation looks very much like a commonly accepted legal principle of recognition, namely the principle of efficacy. The existence of a rule of recognition requires efficacy, in the sense that the population must generally abide by the laws identified by the rule. But the recognition of a subsidiary legal system according to the principle of efficacy, unlike a rule of recognition,

63. Technically, the rule of recognition is not itself a practice. It is instead an abstract object—perhaps a proposition—that is practiced by a population. Because there is an infinite number of rules of recognition in this sense, Hart cannot possibly be claiming that a rule of recognition is the ultimate source of legal validity. There is, after all, a rule of recognition in which I am emperor of the United States. According to that rule of recognition, my commands are valid law and Sarbanes-Oxley is not. Hart must instead be arguing that the ultimate source of legal validity is the social fact that a certain rule of recognition is *practiced* by a population. On the distinction between a rule of recognition and the practice of that rule, see JULES COLEMAN, THE PRACTICE OF PRINCIPLE 77–78 (2001). For ease of expression, however, I will ignore this distinction.

64. Hart himself offers the example of the peaceful liberation of a colony from the United Kingdom. Initially colonial laws are part of the British legal system, because colonial officials, with the officials of Britain, have a practice of enforcing only those norms that have their source in the Queen-in-Parliament. *See* HART, *supra* note 59, at 120 ("[T]he legal system of the colony is plainly a subordinate part of a wider system characterized by the ultimate rule of recognition that what the Queen in Parliament enacts is law for (*inter alia*) the colony."). Eventually, however, "the ultimate rule of recognition changes, for the legal competence of Westminster Parliament to legislate for the former colony is no longer recognized by [the colony's] courts." *Id.* Where there was once *one* rule of recognition, and so one legal system, there are now two. The axiom for the new colonial legal system is no longer "what the Queen-in-Parliament commands is law"; it is something like "what the colonial legislature commands is law." *Id.*

65. HART, *supra* note 59, at 90–91, 242.

does not explain the *independent* existence of the recognized legal system. The laws of the recognized system instead depend upon the axiom of the recognizing system. For this reason, a change of recognized legal systems, unlike a change of rules of recognition, is not a legal revolution.

Although a primary legal system's principle for legally recognizing subsidiary legal systems is usually very similar to Hart's explanation of the axiom of a legal system, they can diverge. Consider Hart's example (written in 1961):

> We are, in fact, quite clear that the legal system in existence in the territory of the Soviet Union is not in fact that of the Tsarist regime. But if a statute of the British Parliament declared that the law of Tsarist Russia was still the law of Russian territory this would indeed have meaning and legal effect as part of English law referring to the USSR, but it would leave unaffected the truth of the statement of fact contained in our last sentence. The force and meaning of the statute would be merely to determine the law to be applied in English courts, and so in England, to cases with a Russian element.[66]

Although the Soviet rule of recognition and so the Soviet legal system exist, the Soviet system does not satisfy the English principle for recognizing subsidiary legal systems.

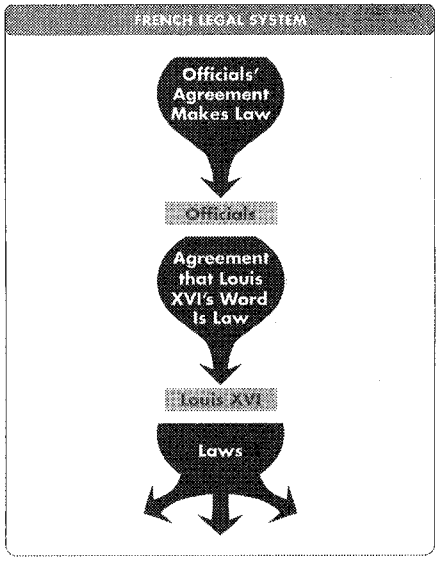
Because Hart offers an explanation of the axiom of a system, not a legal justification of the axiom, the explanation will not be appealed to when reasoning within the system. To the extent that one treats the existence of the rule of recognition itself as a legal justification for the axiom, one is not being true to the internal perspective of the participants in the rule and not accurately describing legal validity.[67]

For example, assume that there is a rule of recognition according to which Louis XVI's word is taken as the final criterion for enforcing a norm. From the perspective of the participants, the existence of the rule of recognition is legally irrelevant. If it were relevant, there would be a *different* rule in place, in which "what Louis commands is law" is *not* simply accepted without justification. Instead a further reason would be demanded by the officials, namely the existence of a practice among them of accepting "what Louis XVI commands is law" as law. This would mean the *officials* are sovereign, not Louis XVI. France would be transformed from an absolute monarchy into

66. *Id.* at 119–20.
67. *Id.* at 108–09.

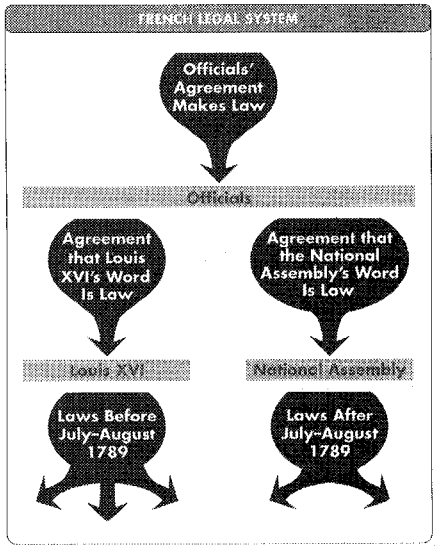
an oligarchy. See Figure F.

Figure F



Indeed, if such a rule existed, there would have been no French Revolution. Instead the abiding sovereign, the officials of France, would have simply changed the subordinate lawmaker to which they delegated their power from Louis XVI to the National Assembly (or the people of France it represented). See Figure G.

Figure G



The point is that the officials either demand a further legal reason for the axiom or they do not. If they do not, then it is indeed the axiom. If they do, then whatever they give as a reason for the axiom is the true axiom (provided that they stop at that). But they cannot appeal to their very practice of treating the axiom *as* an axiom as the legal reason it *is* an axiom.

B. Greenawalt on the American Axiom

This does not mean that official acceptance can never legitimately be an ultimate criterion for valid law. As an example, consider Kent Greenawalt's attempt to articulate the rule of recognition of the American legal system.[68] Greenawalt questions whether the legal reason that the United States Constitution[69] is valid law is that it was ratified in accordance with Article VII.[70] He concludes that the "more accurate modern characterization" is that the Constitution is valid law because of its "continued acceptance."[71] On the one hand, Greenawalt could be understood as arguing that the Constitution is simply part of the axiom of the American legal system—that it is accepted as law without any justification at all. See Figure H.

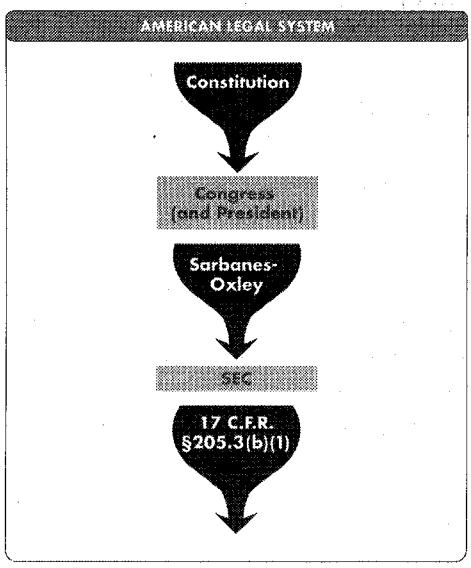
68. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 630–660 (1987).

69. Or, more correctly, those original provisions in the Constitution that were not introduced through Article V amendment procedures.

70. Greenawalt, *supra* note 68, at 639–40.

71. *Id.* at 640. He also makes similar claims about some amendments to the Constitution, such as the Fourteenth Amendment.

Figure H



This, of course, would not be the justification of an axiom by appeal to a rule of recognition.

On the other hand, Greenawalt might be understood as arguing that official acceptance is what would be used to *legally justify* the Constitution's validity. For example, if a good argument could be found for why the ratification of the Constitution actually failed to satisfy Article VII, officials would insist that the Constitution was still valid law and would give as their reason the fact that it has been accepted by them as law for a long time.

Assuming that officials did offer such a justification for the Constitution's validity, rather than simply accepting it as law without demanding a legal justification at all, Greenawalt still would not have justified the axiom of our system by reference to the rule of recognition. Official acceptance would instead be an ultimate criterion of law under the rule of recognition. "What officials accept is law" would be the (or part of the) axiom of our legal system. Officials would be sovereign. To have justified the axiom of our system by reference to the rule of recognition, Greenawalt would have had to try to justify legally why official acceptance *itself* is an appropriate criterion and to use the fact that the officials accept their acceptance without justification *as* the justification.

There may still be reasons to object to Greenawalt's characterization of the American axiom of course. If Greenawalt is

right, a (gradual) legal revolution occurred after 1787. In 1787 Article VII would have been given as the legal justification for the Constitution's validity, but now official acceptance is.[72] But if there is a problem with his approach, it is inaccuracy, not incoherence.

C. State v. Dosso

Although Greenawalt does not make the mistake of using an extra-legal explanation of an axiom as its legal justification, an example of this mistake is not hard to find. Consider the case of *State v. Dosso*.[73] In 1958, the President of Pakistan, Iskandar Mirza—in an attempt to circumvent a general election—abrogated the constitution (which had been promulgated by the Constituent Assembly two years earlier), dissolved the legislature, and declared martial law.[74] A mere twenty days later, the Supreme Court of Pakistan, in the context of four consolidated criminal appeals, undertook to determine the legal validity of the coup.[75]

In an opinion by Chief Justice Muhammed Munir, the court concluded that the coup had generated a new legal system in which the President's word was law.[76] Granted, the President issued an order that the country was to be governed "as nearly as may be in accordance with the late Constitution."[77] But the "Constitution" to which the President referred now existed only because the President commanded it.[78] See Figure I.

72. Greenawalt himself recognizes this fact. *Id.* at 640.

73. State v. Dosso, 1958 P.L.D. S. Ct. 533 (Pakistan). For a discussion of *Dosso* and its international reception, see Tayyab Mahmud, *Jurisprudence of Successful Treason: Coups d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49 (1994).

74. Mahmud, *supra* note 73, at 54–57.

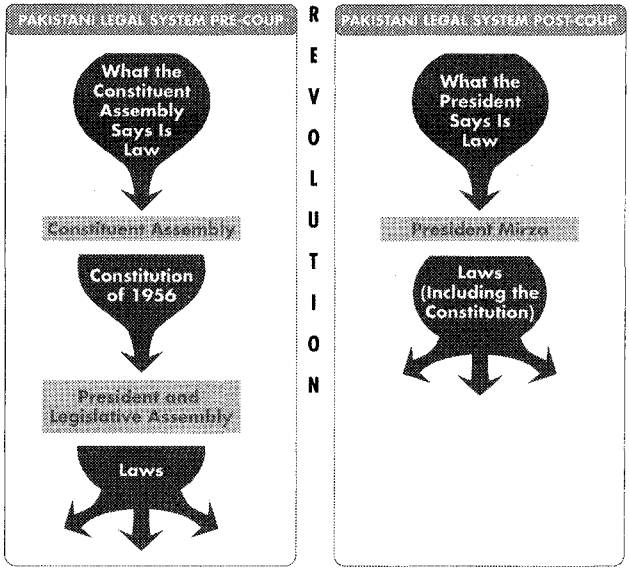
75. *Dosso*, 1958 P.L.D. S. Ct. at 537–43.

76. *Id.* at 541 ("Under the new legal order any law may at any time be changed by the President, and therefore there is no such thing as a fundamental right, there being no restriction on the President's law-making power.").

77. *Id.* at 538.

78. *Id.* at 541.

Figure I



Furthermore, Munir argued that this new constitutional order was valid. The reason was the efficacy of the coup, that is, the conformity of the population and officials to the President's new decrees:

> [I]f the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.[79]

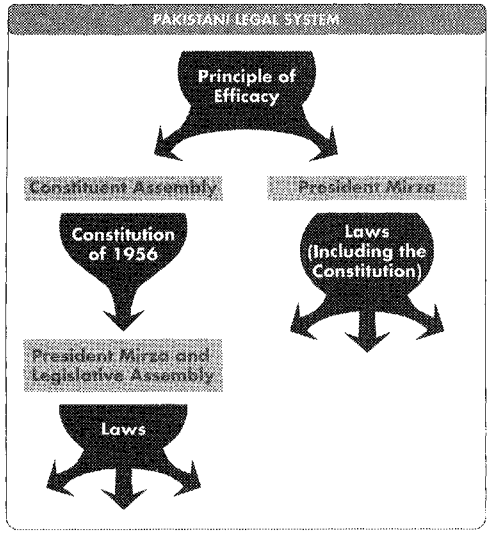
There are two ways of understanding this principle of efficacy. On the one hand, it could be an extra-legal explanation of why a new legal system exists in which the President's word is law. Let us set this reading aside for a moment. Another possibility is that it is itself a

79. *Id.* at 539.

legal justification of the President's lawmaking power.

One way that the principle could legally justify the President's lawmaking power is if it was the axiom of the Pakistani legal system. This would mean that the coup was not a revolution. The situation would be similar to Amar's account of the American legal system, in the sense that radical constitutional change would be compatible with legal continuity. The only difference would be that, in Amar's United States, constitutional change occurs through popular ratification, whereas in Munir's Pakistan it occurs through a ruler achieving efficacy. The establishment of an efficacious system of command (including through repression) would be for Munir what majority votes are for Amar: the fundamental means by which valid constitutions are created within the legal system. Furthermore, contrary to Munir's own suggestion, it would not be the case that the axiom of the new legal system is "the President's word is law." The President would have lawmaking power only because he satisfied the axiom of efficacy. See Figure J.

Figure J

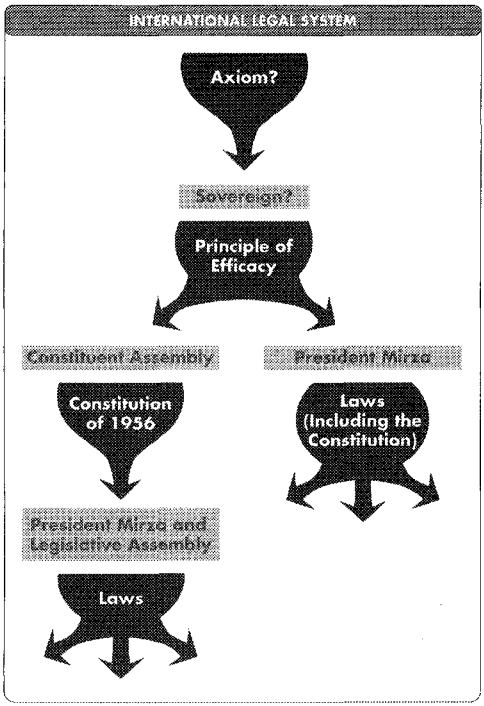


Another interpretation, which is suggested by Munir himself, is that the principle of efficacy is not the axiom of the Pakistani legal system, but instead has its source in international law.[80] If so, not only would

80. *Id.* He argued that "a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution."

the coup not be a revolution, the President would not even be sovereign. Instead he would be authorized by the sovereign of the international legal system. See Figure K.

Figure K



Finally, the principle could be a part of "international law" in the sense that it is used by a domestic (e.g., American) legal system when determining whether it should recognize other legal systems. This too would mean that the coup was not revolutionary and that the President was a subsidiary lawmaker, now within the other domestic legal system.

Because Munir appears to believe that the President was sovereign[81] and that his sovereignty was not legally continuous with the pre-coup regime,[82] we cannot understand the principle of efficacy as a legal justification. It must instead be an extra-legal explanation (analogous to Hart's)[83] of why a new legal system exists. Munir is

81. *Id.* at 541.
82. *Id.* at 538–39.
83. *See supra* Section II.A.

arguing that, as a result of this efficacy, he is now in a legal system in which legal justifications stop with the axiom "the President's word is law."

But if that is the case, then Munir cannot perform the task that he has assigned himself—namely *legally justifying* the sovereignty of the President. If Munir really were within a legal system in which "the President's word is law" is the axiom, no justification of the President's authority would be possible or needed. He would show that the President's word is law precisely by *not* justifying the coup. Indeed Munir himself admits that a jurist must "presuppose," not justify, the ultimate constitution in his legal system.[84] The very fact that Munir feels a need for justification means that this new legal system is *not* established. Munir, by trying to *argue* that the President's authority needs no justification, shows that it in fact does.[85]

III. THIRD MISTAKE: INCORPORATING THE EXTRA-LEGAL INTO LEGAL AXIOMS

Our first two mistakes involved the failure to recognize that axioms cannot be legally justified. The first mistake occurs when legal justifications are given for axioms (Amar) and the second occurs when the extra-legal explanations of these axioms are treated as if they were legal justifications (*State v. Dosso*). But the confusion of the legal and the extra-legal can take more subtle forms. It is common for legal theorists to incorporate within the axiom of a legal

84. *Dosso*, 1958 P.L.D. S. Ct. at 538.

85. Munir's argument relied to a great extent on Kelsen. *Id.* at 539. Kelsen, it will be remembered, argued that the basic norm, which legally validates the first constitution of the system (that is, the axiom of the system), must be assumed by anyone who has knowledge of the laws of that system. *See supra* note 28. Furthermore, he admits that the basic norm will not be assumed unless the constitution is efficacious, in the sense that people abide by the laws that the constitution validates. PURE THEORY, *supra* note 16, at 210 ("As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one."). But this does not mean that Kelsen understood efficacy as a legal *justification* of the validity of the constitution. It is an explanation of why the constitution is *assumed* to be valid, not a condition of its validity. *See supra* notes 54–58 and accompanying text; Green, *supra* note 21, at 401–02; Mahmud, *supra* note 73, at 110–13. Munir's misunderstanding of Kelsen is very common, for example, JULIUS STONE, LEGAL SYSTEM AND LAWYER'S REASONING 103–04 (1964), and has often been the source of inappropriate criticisms of Kelsen himself. R.W.M. DIAS, JURISPRUDENCE 413 (3d ed. 1970); W. FRIEDMANN, LEGAL THEORY 285 (5th ed. 1967); Dhananjai Shivakumar, Note, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383, 1393 (1996).

system characteristics of its extra-legal explanation. This is the reason many come to the conclusion that sovereignty must be undivided and unlimited. John Austin, the nineteenth-century philosopher of law, will be my primary example of this *third mistake* concerning legal revolutions.

A. Austin's Command Theory of Law

In some respects Austin's philosophy of law looks very much like Hart's. Austin identifies a legal system extra-legally through a *sovereign*, understood as the person (or group of people) whose commands are habitually obeyed by the bulk of the population and who habitually obeys no one else.[86] Where Hart looks for official practices, Austin looks for popular habits of obedience. The two also share a similar understanding of legal discontinuity. For Hart, discontinuity occurs when the rule of recognition changes.[87] For Austin, it occurs when the bulk of a society changes its habits of obedience.[88]

There is an important difference between Hart's approach and Austin's however. Although for Austin the sovereign plays an extra-legal role in explaining the existence of a legal system, it is also the supreme lawmaker *within* the legal system it explains.[89] Once there is a habit of obedience, the person to whom that obedience is given has supreme authority to make all law.

For Hart, in contrast, the extra-legal explanation of a legal system is not required to play any particular legal role within the system. The participants in the rule of recognition are like Austinian

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86. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 193–94 (1954) (1832).

87. *See supra* note 64.

88. The following is Austin's account of Mexico's independence from Spain, formally recognized on September 27, 1821 in the Treaty of Córdoba:

> When did the revolted colony, which is now the Mexican nation, ascend from the condition of an insurgent province to that of an independent community? When did the body of colonists, who affected sovereignty in Mexico, change the character of rebel leaders for that of a supreme government? ... Now the questions suggested above are equivalent to this: When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the *bulk* of the inhabitants of Mexico were *habitually* disobedient to Spain, and probably would not resume their discarded habit of submission?

AUSTIN, *supra* note 86, at 206.

89. *Id.* ("Every positive law ... is set, directly or circuitously, by a sovereign person or body.").

sovereigns in an extra-legal sense, because they are responsible for bringing legal systems into being.[90] But they are not Austinian sovereigns in the sense of having supreme legal authority to make all laws. Instead, the lawmaking role any person plays in the system is determined *by* the axiom the officials bring into being. If they create a direct democracy, they and the rest of the people in the society will jointly have supreme lawmaking authority. If they create an absolute monarchy, one person—who may or may not be one of them—will have supreme lawmaking authority.

Because Austin's theory of sovereignty straddles the legal and the extra-legal, extra-legal concerns motivated him to put inappropriate legal restrictions upon the sovereign. For example, because the extra-legal explanation of a legal system is responsible for *all laws* within the system, including its axiom, Austin treats the sovereign as if it must command all laws within the system. This makes it impossible to explain an axiom that transcends and authorizes a succession of supreme lawmakers. Assume that Rex I's reign is followed by the reign of Rex II. If all valid laws must be traced to an individual sovereign, the change of monarchs must be understood as a revolution.[91] See Figure L.

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90. *See supra* Section II.A.

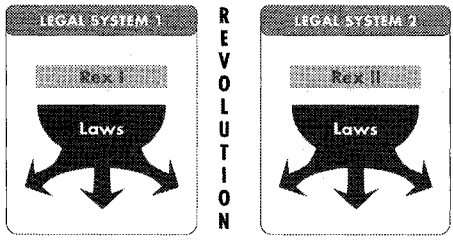
91. As Hart explains:

> Let us now suppose that, after a successful reign, Rex dies leaving a son Rex II who then starts to issue general orders. The mere fact that there was a general habit of obedience to Rex I in his lifetime does not by itself even render probable that Rex II will be habitually obeyed. Hence if we have nothing more to go on than the fact of obedience to Rex I and the likelihood that *he* would continue to be obeyed, we shall not be able to say of Rex II's first order, as we could have said of Rex I's last order, that it was given by one who was a sovereign and therefore law.... Only after we know that his orders have been obeyed for some time shall we be able to say that a habit of obedience has been established.... Till this stage is reached there will be an interregnum in which no law can be made.

HART, *supra* note 59, at 53.

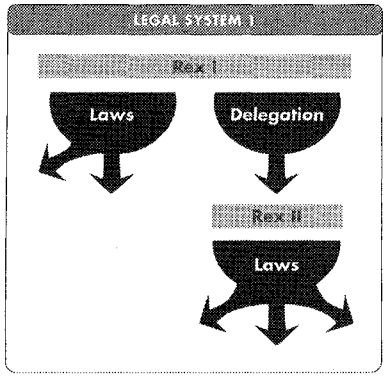
Hart makes its sound as if the problem is the empirical one of determining whether there will be obedience to Rex II simply because there was obedience to Rex I—as if Hart's argument would be undermined by a showing that people are in fact quite likely to obey a son if they had obeyed the father. But let us say that there is such a showing. It would still follow that there was a revolution when we moved from the reign of Rex I to Rex II. Rex I's laws are valid by virtue of being Rex I's commands, and Rex II's laws are valid by virtue of being Rex II's commands. The two systems of laws are discontinuous. *See* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 34 (2d ed. 1980).

Figure L



One might argue that legal continuity can be preserved if Rex I *commanded* obedience to Rex II upon his death. There would be legal continuity because only one sovereign in the Austinian sense (namely Rex I) exists. See Figure M.

Figure M



One problem with such an approach is explaining how the authority of a current sovereign could fundamentally depend upon a habit of obedience to a dead one.[92] But the real problem is far more fundamental. It is not just that Austin cannot exclude the possibility of a revolution between the reigns of Rex I and Rex II; he cannot exclude the possibility of a revolution between each of Rex I's commands. Because all law has its source in the command of the sovereign, there is no place for the axiom of the legal system that

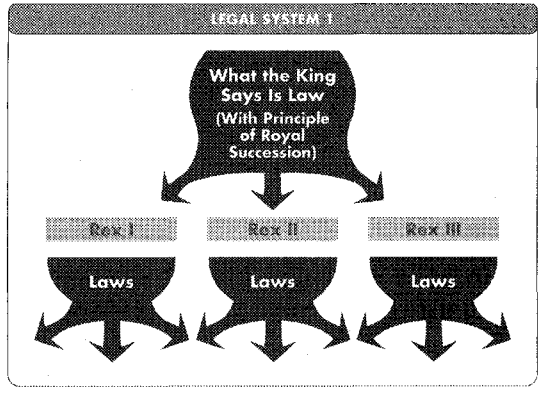
92. HART, *supra* note 59, at 62. A habit of obedience is confirmed by sensitivity to changes of command. Since the commands of a dead sovereign may not change, it is hard to see how we can know that there is a habit of obedience at all. Furthermore, in some cases the identity of the Austinian sovereign would be forgotten. It is odd to be in a habit of obeying someone unknown.

authorizes Rex I himself to make law. There is no sense in which "Rex I's word is law" is itself law. When asked why what Rex I says is law, the participants in the legal system would apparently have no answer. If there is no legal rule authorizing Rex I to make law, there is no reason not to consider each command issued by Rex I as independent—its own momentary legal system—such that revolution happens constantly.

To unify all the commands of Rex I into the same legal system, an authorization of Rex I to make law—an axiom to the legal system—is needed. This axiom cannot be commanded by a lawmaker within the system—even the supreme lawmaker. To say that the axiom cannot emanate from the supreme lawmaker is simply another way of saying that it cannot be legally justified—it can only be extra-legally explained.

Furthermore once it is conceded that Rex I's authority to make law has an extra-legal explanation in something outside of his own commands, the possibility opens up of an even more comprehensive axiom that allows the reigns of Rex I and Rex II to be contained within the same legal system. See Figure N.

Figure N



B. *Austin on Limited Sovereignty*

The confusion of the legal and the extra-legal also stands behind Austin's arguments that the sovereign must have unlimited authority.[93] Austin admitted that the sovereign could defer to the

93. AUSTIN, *supra* note 86, at 254 ("[T]he power of a sovereign number in its

opinions of other sovereigns or its own population.[94] Nevertheless, it was *legally* unlimited in the sense that it was subject to no law.[95]

Austin is correct that the *extra-legal explanation* of a legal system is legally unlimited. All law, even the axiom of the system, is whatever this extra-legal explanation "says" it is. For example, assume that three federal district court judges decide that the U.S. Constitution was a mistake. They draft a new constitution in which legislative authority rests in a new collective body and executive authority in the majority leader of that body. They then fill the body with their friends. From that moment forward, these three judges follow the new constitution, adjudicating cases in accordance with the laws generated by the new body.

The judges in this example are clearly acting illegally. Assume, however, that the new constitution catches on. Eventually all judges, as well as the other participants in the American rule of recognition, start following it. No one asks for, or feels the need to give, a legal justification for the new constitution. It is now the axiom of a new legal system. At this point the three judges, with all the other participants in the American rule of recognition, are no longer acting illegally, because they have generated a new rule under which their actions are legal. The law is, in a sense, whatever they "say" it is. They appear to have precisely that limitless lawmaking power that Austin attributes to the sovereign.

But these participants are not the supreme lawmakers *within* the system they create. The new body is. Furthermore, precisely because they have the unlimited ability to generate any legal system at all, there is no reason they cannot generate one in which the supreme lawmaker has limited authorization to create law. If the law is whatever they "say" it is, what reason is there to believe that they cannot say that the body can make laws only concerning peanuts and that all non-peanut laws are void? The body would be the supreme lawmaker in the sense that all valid laws can be traced back to its commands. But it would be extremely limited in the types of laws it may enact.

Austin argues that the sovereign's lawmaking power must be unlimited because any limits would have to be understood as the

collegiate and sovereign capacity, is incapable of *legal* limitation."). This tradition goes back at least as far as Thomas Hobbes. THOMAS HOBBES, LEVIATHAN 213–15 (M. Oakeshott ed., 1946) (1651).

94. AUSTIN, *supra* note 86, at 214.

95. *Id.* at 254.

commands of a higher sovereign.[96] To make *every* sovereign limited, one would need an infinite chain of sovereigns, each limiting the one below it, which Austin rightly calls "impossible and absurd."[97] He ignores, however, the fact that the source of these limits could be extra-legal. After all, even if the legal system has an *unlimited* sovereign, there will eventually have to be an extra-legal explanation of who that person is—why one person rather than another is the one with that power. That a particular person is the unlimited sovereign could never be justified in terms of the command of a higher sovereign, on pain of generating an infinite regress. If we must rely upon the extra-legal to explain unlimited sovereignty, why not rely upon it to explain the limited variety?

But what happens if the limited sovereign acts in a manner that *it* believes is within these limits but others disagree?[98] Is not a lawmaker needed to resolve the disagreement? And must not this sovereign be unlimited, since it would have the final say about what any limitation is? Its limits would be whatever it said they were, which is to say it has no limits at all.

Although such arguments are common,[99] they make unlimited sovereignty just as impossible as limited sovereignty. Let us assume that Rex claims to be the unlimited sovereign but other people disagree, claiming that Roi is. If we need an unlimited sovereign to resolve the disagreement, unlimited sovereignty is impossible. For the disagreement is precisely about who this unlimited sovereign is.

Those who appeal to an unlimited sovereign to resolve disagreement about limitations on sovereignty simply assume that significant disagreement does not arise concerning that unlimited sovereign's status. But the same assumption should be available to the advocate of limited sovereignty. If the acceptance of the limits on Rex's sovereignty is as strong as the acceptance that he is the sovereign, then his sovereignty will be limited. Although there will be no authority to answer disagreements about his limits, the level of agreement that makes this unproblematic is precisely *why* his

96. W.J. Rees, *The Theory of Sovereignty Restated*, 59 MIND 495, 518 (1950) ("All political theorists have found it logically necessary, therefore, either to deny the existence of legal duties on the part of the government so as to be able to maintain its legal sovereignty . . . or else to deny its legal sovereignty in order to assert its legal duties . . . ."). *See* AUSTIN, *supra* note 86, at 254.

97. AUSTIN, *supra* note 86, at 254.

98. *See* Amar, *Sovereignty*, *supra* note 36, at 1430, 1435 (1987).

99. *See* RAZ, *supra* note 17, at 30–33.

sovereignty is limited.[100]

In short, for the axiom of the legal system to be "whatever Rex says is law, provided it concerns peanuts," it must be the case that officials will simply accept the axiom without further legal justification. This acceptance will manifest itself in their treating Rex's non-peanut "laws" as legal nullities, without referring the question to Rex or to another lawmaker. These "laws" will be treated with the same indifference as the "laws" issued by a madman who claims to be King or by any other illegitimate pretender to the throne.

The possibility of genuinely limited sovereignty is crucial to making sense of entrenched (that is, unamendable) provisions within constitutions. An example of such a provision is Article 79(3) of the German constitution (or *Grundgesetz*).[101] Article 79(3) prohibits amendments changing the basic principles laid down in Articles 1 and 20.[102] On the one hand, the limitations in Article 79(3) can be understood as not limiting the sovereign at all. Instead, they could be the creation of the *unlimited* sovereign who commanded the constitution as a whole, including Article 79(3). This sovereign would apparently be the representative assemblies of two-thirds of the German *Länder*, which ratified the *Grundgesetz*.[103] If this sovereign were to choose a new constitution that rejected the principles in Articles 1 and 20, there would be no revolutionary change of legal system.

But the extra-legal evidence might show that these limitations were actually part of the axiom empowering the representative assemblies of the *Länder* to create the constitution in the first place. Article 79(3), rather than being an act of lawmaking by the sovereign, would instead be the exemplification of the axiomatic status of the limitation for those reasoning within the legal system. This would be true if any constitution enacted by the representative assemblies that violated the principles laid down in Articles 1 and 20 would have been treated by officials as void. If the assemblies later enacted a

100. *See* Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 59–61 (1992).

101. *See* ACKERMAN, *supra* note 8, at 6–16, 32–33, 35–36.

102. GRUNDGESETZ [GG] [Constitution], art. 79(3) (F.R.G.). Article 1 protects human dignity, and Article 20 protects the state order, including democracy and the separation of powers, as well as the right to resist any person seeking to abolish the constitutional order. *Cf.* U.S. CONST. art. V (forbidding amendments that prohibit the importation of slaves until 1808 or that deprive a state of equal suffrage in the Senate without its consent).

103. GRUNDGESETZ [GG] [Constitution], art. 144 (F.R.G.).

constitution violating the principles and the constitution was accepted as law, a revolution would have occurred.

C. *Austin (and Amar) on Divided Sovereignty*

Austin's confusion of the legal and the extra-legal also stands behind his demand that the sovereign be undivided. Although he admitted that some sovereigns, such as the King-in-Parliament, are composite,[104] he insisted that even a composite sovereign was nevertheless unitary—the composite, *acting together*, was sole determiner of the law.[105] Chains of legal validity, Austin argued, must always lead to a *single* lawmaker.[106] It cannot be the case that one lawmaker has final say about one area of the law and another has final say about another area.[107]

Once again, the primary argument against divided sovereignty is that disagreements about the division of lawmaking powers could arise.[108] These disagreements, it is assumed, would have to be answered by a unitary sovereign. But that unitary sovereign could have this status only on the assumption that there are no serious disagreements about *its* lawmaking power. By the same token, divided sovereignty should be able to exist, provided that there are no serious disagreements about the *divisions* of lawmaking power.[109]

Indeed, one must believe in the possibility of divided sovereignty to the extent that one believes that a *succession* of lawmakers is possible within the same legal system. This is sovereignty *divided over time*. Rex II is able to become King after Rex I (without revolution) only because there is no serious disagreement about the temporal division of authority within the system. While Rex I is King, officials do not accept Rex II's commands as law. When Rex II becomes King, officials do not accept Rex I's old commands as law (for example when they conflict with Rex II's commands).

The same thing should be possible concerning division of supreme lawmaking authority at the same moment in time. Assume

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104. He even went so far as to argue that the sovereign of the United States was an aggregate body consisting of the joint action of the bodies of each of the states' citizens. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 209 (Wilfried E. Rumble ed., Cambridge University Press 1995).

105. *Id.* at 205.

106. *Id.*

107. *Id.* ("[U]nless the sovereign be *one* individual, or *one* body of individuals, the given independent society is either in a state of nature, or is split into two or more independent political societies.").

108. *See* RAZ, *supra* note 17, at 35–38.

109. *See* Pogge, *supra* note 100, at 59–61.

that Blue Rex is the supreme lawmaker about issues having only a domestic element, and Red Rex is the supreme lawmaker about issues having an international element. Neither Blue Rex nor Red Rex may overrule the decision of the other. Provided that disagreements about the division of authority between Blue Rex and Red Rex concerning subject matter are as rare as disagreements about the temporal division of authority between Rex I and Rex II, then the former division of sovereignty is as real as the latter.

Disagreement may be *more likely* concerning sovereignty divided by subject matter than it is concerning sovereignty divided over time. But saying that divided (or limited) sovereignty is difficult to sustain is a far cry from saying it is impossible. Furthermore, we can only determine the extent to which this form of sovereignty exists by examining legal systems in an unbiased fashion. That someone has yet to find examples of divided or limited sovereignty means nothing if she has examined legal systems with the *a priori* belief that they are impossible.

The belief that divided and limited sovereignty are impossible is the result of the confusion of the legal and the extra-legal. In any legal system, an unlimited and undivided source of law remains in the background—namely the extra-legal explanation of the legal system itself. The officials who practice the rule of recognition that brings the system into being will be unlimited, in the sense that they can generate any axiom they want. They will also be undivided, in the sense that only they, acting together in a practice, can create the system. If their practice is divided, there will be two legal systems. This does not mean, however, that some unlimited and undivided sovereign must exist within the system they create.

Amar shares Austin's view that sovereignty must be undivided.[110] Ratification of the Constitution, he argues, could not generate a legal system in which sovereignty was shared between the states and the federal government.[111] Either the peoples of the states retained their pre-ratification sovereignty and each state people can unilaterally secede simply by choosing to make the Constitution void in their legal system *or* the people of the United States became sovereign and all

110. Amar, *Consent*, *supra* note 15, at 457, 506 (endorsing Founder James Wilson's view that sovereignty is absolute and indivisible). Amar also argues that the Founders—Madison excepted—rejected divided sovereignty. Amar, *Philadelphia*, *supra* note 15, at 1063 (citing Amar, *Sovereignty*, *supra* note 36, at 1435 n.40, 1452 n.113) (discussing Founders' almost universal rejection of dual sovereignty).

111. *See* Amar, *Consent*, *supra* note 15, at 457, 506; Amar, *Philadelphia*, *supra* note 15, at 1062–63; Amar, *Sovereignty*, *supra* note 36, at 1465–66.

power that the states possess is delegated from this unitary people.[112]

But there is no reason to believe that in the United States sovereignty is not shared with the states, in the sense that state governments (or their peoples) are the supreme sources of law in some areas. All that is needed is extra-legal evidence of an accepted division of lawmaking authority that is not itself justified by reference to a higher authority. If state authority to make law is granted by federal law, then Amar would be right that there is only one federal sovereign. But these two bodies of law can have independent and coexisting sources.[113]

If sovereignty is divided, the states would have no legal power to unilaterally secede from the Union simply by declaring the Constitution void. If they could secede at all, it would be only with the consent of the federal sovereign. But because the states are also sovereign with respect to state law, the federal sovereign would not be the only final determiner of valid law.

IV. FOURTH MISTAKE: INCORPORATING POLITICAL SELF-IMAGE INTO LEGAL AXIOMS

In this Article, I have assumed that Article VII is the axiom of the American legal system. In fact, since sovereignty may be divided, Article VII would probably be only *part* of that axiom. State laws within our legal system would have their source in different sovereigns, which would have to be mentioned in any complete articulation of the axiom of our legal system. But for the rest of this Article, we can ignore this wrinkle.

If Article VII is the axiom of our legal system, the sovereign within our system is the conventions of the thirteen original states (or, perhaps, their peoples). This entity had the ultimate lawmaking

112. *See* Amar, *Consent*, *supra* note 15, at 457, 506; Amar, *Sovereignty*, *supra* note 36, at 1465–66; Amar, *Philadelphia*, *supra* note 15, at 1062–63.

113. *Cf.* U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty.... The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."); New York v. United States, 505 U.S. 144, 188 (1992) (" 'The Constitution ... leaves to the several States a residuary and inviolable sovereignty ... reserved explicitly to the States by the Tenth Amendment.' ") (quoting THE FEDERALIST NO. 39, 245 (C. Rossiter ed. 1961)). Of course, if there is indeed divided sovereignty in the United States, it cannot be *legally* justified, either by reference to the Constitution (for example, the Tenth Amendment) or Supreme Court decisions, without undermining that division of sovereignty itself. The previous citations must be understood as extra-legal evidence only.

power, through ratification by at least nine of its constituents, to enact the Constitution as valid law for the ratifying states.[114] All valid law can be traced back to this decision by the sovereign. Had it decided not to ratify, everything we currently take to be the law of the United States would be invalid.

But, as we shall see, this conception of our sovereign fits poorly with popular view that in the United States *the people* are sovereign. This is true even if we assume that the conventions of the original thirteen states expressed the majority wills of the peoples of those states. The tension between the structure of our legal system and our political self-image can lead to our *fourth mistake* concerning legal revolutions, in which the axiom of a legal system is distorted to accommodate this self-image. My example of this mistake is, once again, the writings of Akhil Amar. In Amar's case, the fourth mistake causes him to see legal continuity where there is actually revolution.

A. In the United States, the People Are Not Sovereign

The Article VII sovereign diverges from our political self-image in at least four respects. First of all, even if it is admitted that sovereignty may be limited, a popular sovereign is usually understood as having at least significant discretion concerning the content of laws that it may enact. In contrast, the Article VII sovereign has *no choice* about the content of the law it may enact, since its content is fully specified in the axiom of the legal system. The sovereign's only lawmaking power is enacting or refusing to enact a *particular constitution*.[115]

Second, a popular sovereign is usually understood as having the power to rescind any laws that it has enacted.[116] In contrast, the Article VII sovereign's decision is eternal and irrevocable. If the constitution is enacted, it will be the Constitution forever. No *new* constitution can be created to replace it, because Article VII makes no provisions for such a replacement, even by the Article VII sovereign itself.[117] The only legal means of constitutional change is through the Article V *amendment* procedures identified *within* the eternal constitution. If a truly *new* constitution came into being, it

114. U.S. CONST. art. VII.

115. *See* Greenawalt, *supra* note 68, at 639–40 (arguing that the fact that Article VII is tied to a particular constitution makes it unlikely as an identification of the sovereign).

116. *See id.* (arguing that the "one time only" character of Article VII makes it unlikely as the identification of the sovereign).

117. U.S. CONST. art. VII.

could only be the result of a revolution.

One might think that there can be no eternal constitution if everything that the Article VII sovereign enacted can be amended away through Article V procedures. Indeed, for just this reason, it seems that the true sovereign within our legal system is the lawmaker identified in Article V, since it is *that* lawmaker that has the final say about what is or is not in the Constitution.[118]

But the Article V amendment process does not mean that there is no eternal constitution. This is easiest to see if one assumes that Article V cannot amend itself, that is, that Article V procedures cannot be used to change the procedures for amending the Constitution.[119] If so, the eternal constitution must include at least Article V itself. The decision of the Article VII lawmaker to enact Article V put an eternal limit on subsequent participants in the American legal system. No constitutional change is possible except through Article V procedures, no matter what the Article V lawmaker itself says. Furthermore, Article V cannot be changed even by the Article VII sovereign. If the conventions of the thirteen original states (or indeed all fifty states) subsequently voted to amend Article V, this could be considered valid only on the assumption that a revolution had occurred. The amendment could not be validated by reference to Article V since Article V may not amend itself. And it could not be validated by reference to Article VII, for that allows the state conventions to enact only the Constitution (in which Article V occurs).

But even if one assumes that self-amendment of Article V is possible, an eternal core would still remain. Granted, Article V would not be that eternal core. If Article V procedures were used to amend Article V, any subsequent amendment of the Constitution would proceed through the *amended*, not the original, Article V procedures. And the amended Article V would not be eternal either. If this amended Article V were itself amended, then any subsequent amendment of the Constitution would have to proceed through the twice-amended Article V procedures. But the fact remains that however many amendments of the amendment procedures occur, any amendment of the Constitution, including of the amendment procedures themselves, is valid only if the procedures by which the

118. *See* AUSTIN, *supra* note 86, at 204–05. *Cf.* Alf Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1, 3–7 (1969) (arguing that the highest authority in a legal system is the body with the power to amend the constitution).

119. *See infra* Sections V.A–B.

amendment was effectuated can be traced back through a series of path-dependently valid amendments that ultimately begins with the *original* Article V procedures. This is a requirement in the legal system that no lawmaker can change, including the Article VII sovereign. It is the eternal constitution that can be altered only through revolution.

In contrast to Article VII, the American axiom as Amar understands it gives the sovereign of our system the discretion to create any constitution it wishes, and to rescind a constitution at will.[120] For Amar, the people of the United States, through a simple vote, can create a constitution that is utterly different from our current one.[121] There is no *eternal* constitution within our system. To be sure, the *axiom* of the system is eternal. As long as we remain in the American legal system as Amar understands it, the people will be sovereign.[122] This is something over which, as we shall see in Part V, even the people have no legal control. But the Article VII sovereign was not merely unable to change the axiom of its legal system. In addition, the axiom gave it no choice about the *constitution* that it could create. And Amar's sovereign is *not* restricted in this fashion.[123]

A third divergence from our political self-image is that a popular sovereign is usually understood as being alive, whereas the Article VII sovereign is dead. The conventions of the states referred to in Article VII are the conventions at the time of the ratification, not any conventions that might subsequently be created. Of course, this is not surprising, since the sole lawmaking decision entrusted to that sovereign has already been made and is irrevocable.

Once again, Amar's approach is more in keeping with our political self-image. The *living* people of the United States are the ultimate source of valid law.[124] It is precisely for this reason that Amar insists that Article V cannot be the sole method of constitutional change.[125] This would be incompatible with the sovereignty of the living, since Article V's restrictions can keep an amendment from being enacted even if the majority of those living in the United States—or, indeed, the majority of those living in a

120. Amar, *Philadelphia*, *supra* note 15, at 1044–45.

121. *Id.*

122. *See infra* Section V.C.

123. Amar, *Sovereignty*, *supra* note 36, at 1434–35 (arguing that American sovereign is unlimited).

124. *Id.* at 1072.

125. *Id.* at 1054–57, 1063.

particular state—wanted it.[126] No living people would have ultimate control over the law that binds them.

Furthermore, popular sovereignty is commonly understood as encompassing *all* the people. But if Article VII is the axiom of our legal system, the conventions (or peoples) of the thirty-seven *non*-ratifying states are not constituents of this sovereign. Although American laws are valid within New Hampshire in a way that can be traced back ultimately to a decision of the people of New Hampshire (albeit the *dead* people of that state), American laws are valid in, say, Hawaii in a way that *cannot* be traced back to a decision of the people of Hawaii, living or dead. Although Hawaii voted to become a state in 1959, as a condition for statehood under the Hawaii Admission Act,[127] all that is required for the admission of a state under Article IV, section 3 is congressional consent—not the consent of the new state itself.[128] And since the requirements of Article IV, section 3 derive ultimately from the conventions of the original thirteen states, the constitutional rights and obligations of Hawaiians derive from the choices made by foreigners.

In any event, refusing statehood would not have removed Hawaii from the American legal system as long as it remained a territory.[129] And Hawaii was made a territory of the United States without the consent of the people of Hawaii. American annexation in 1898 was negotiated with the consent of the Republic of Hawaii,[130] an oligarchy of pro-annexationist Americans that had overthrown the Hawaiian

126. *Id.* at 1062–63.

127. *See* An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. 86-3, § 7, 73 Stat. 4, 7 (1959). In addition, the Territorial Legislature petitioned Congress for statehood in 1903 and Hawaii voted to join the union by plebiscite in 1940. RICH BUDNICK, STOLEN KINGDOM: AN AMERICAN CONSPIRACY 188–90 (Aloha Press 1992). Hawaii's admission, like the admission of other states, was in accordance with the congressional practice, which may also be constitutionally required, of admitting states on an "equal footing" with the original thirteen colonies. *See* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370, 373 (1977) (quoting Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867)); Coyle v. Smith, 221 U.S. 559, 563–69, 576–77, 579 (1911); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224 (1845). The equal footing doctrine is a misnomer, however. The admitted states are not given the option, which was given to the original states, of refusing obligations under American law entirely. *See infra* notes 128–39 and accompanying text.

128. U.S. CONST. art. IV, § 3.

129. *See* Am. Ins. Co. v. 356 Bales of Cotton, David Canter, 26 U.S. (1 Pet.) 511, 542–43 (1828).

130. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750, 55 Pub. Res. 55 (July 7, 1898). Consent was through the Senate of Hawaii.

Kingdom under Queen Lili'uokalani, by force, in 1893.[131]

Since Hawaii was an independent nation with diplomatic relations, including relations with the United States, prior to annexation, it is a particularly vivid example.[132] But it is not at all exceptional. The same could be said of the people of any of the other thirty-six non-ratifying states. The Louisiana Purchase, for example, did not involve the consent of those people, even those white people, who became subject to American laws as a result of the purchase.[133] As John Quincy Adams rightly put it, the Louisiana Treaty created "despotic powers over the territories purchased."[134]

It is true that Article V procedures give the people of Hawaii or Missouri the ability to participate in constitutional change. But it cannot put them on an equal footing with people of the thirteen original states, since Article V does not give the people of Hawaii or Missouri a unilateral right to block amendments to the Constitution. Under Article VII, the dead people of New Hampshire had the option of avoiding obligations under the Constitution (such as their obligations under the Commerce Clause) by refusing to ratify the Constitution. In contrast, the people of Hawaii or Missouri can avoid their obligations under the Commerce Clause only if they can first convince the legislatures or conventions of thirty-seven other states to repeal it.

The tension between our political self-image and the sovereignty of the Article VII lawmaker makes it tempting to argue that the axiom of our legal system *must* be something other than Article VII, that legal justifications *must* end with a higher legal principle that gives the ultimate choice of legal validity to the people who *currently*

131. Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 465–66 (1995); Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 70–74 (1995).

132. *See* Chock, *supra* note 131, at 463–64; Oshiro, *supra* note 131, at 66–70.

133. *See* Treaty for the Cession of Louisiana, 8 Stat. 200, TS 86 (Apr. 30, 1803) (not conditioning the agreement on the consent of any of the citizens of the territory).

134. 5 MEMOIRS OF JOHN QUINCY ADAMS 401 (Charles Francis Adams ed., AMS Press 1970) (1874–1877). The primary worry about the constitutionality of the Louisiana Purchase, however, did not have to do with the absence of consent of the inhabitants of the territories themselves, but the fact that national government could affect the interests of the current states, especially by generating new states, without the current states' consent. Jefferson and Adams both worried that a constitutional amendment might be necessary to make the purchase legitimate. *See* Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 346 (2003).

live in the *entire* United States. But this temptation should be resisted. By giving in to it, we will lose sight of the legal system we currently inhabit. This is the fourth mistake concerning legal revolutions.

B. *Amar Forces Us To Be Free*

Amar's account of the American sovereign is an example of this mistake.[135] The sovereignty of the dead, he argues, is contrary to our democratic traditions.[136] The living must rule. This motivates him to look behind the lawmakers identified in Article VII for an enduring sovereign—the people of the United States.[137] Because this sovereign, unlike that identified in Article VII, is alive, it can bypass Article V procedures for amendment, without a revolutionary break in legal continuity, simply by creating a new constitution.[138]

But Amar is not uncovering the structure of *our* legal system. We do not currently inhabit a system in which the ultimate source of legal validity is the people of the United States. The evidence for this is the fact that Amar's argument that the Constitution can be amended through a simple majority vote was greeted, and is still greeted, with an extreme skepticism that Amar himself acknowledges.[139]

Amar's response to the skeptics is that they "suffer from remarkable amnesia concerning the Constitution's words and deeds."[140] The forgotten history of the Founding shows that the people are sovereign. But how can the views of people two centuries ago determine what legal system we currently inhabit? Even if Amar had succeeded in showing that the people were accepted as sovereign during the Founding, that does not mean that we currently inhabit such a legal system. All Amar would have done is show is that we

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135. *Cf.* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 30–35 (1990) (arguing that Amar's popular vote theory is not based on the constitution but is rather an esoteric notion and is irrelevant to constitutional interpretation); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 165–76 (1996) (arguing that constitutional amendment by a simple majority was not what the Framers intended and that it would be a "bad" development).

136. Amar, *Philadelphia*, *supra* note 15, at 1072–75.

137. *See* Amar, *Sovereignty*, *supra* note 36, at 1427.

138. *See* Amar, *Philadelphia*, *supra* note 15, at 1044.

139. See DAVID R. DOW, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 117, 123–24, 136–42 (Sanford Levinson ed., 1995); Dow, *supra* note 135; Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 29–33 (1995); Monaghan, *supra* note 135.

140. Amar, *Consent*, *supra* note 15, at 497.

have undergone a revolution since that time. The ultimate standard of legal validity *used* to be the people of the United States. In the past, circumvention of Article V by a popular vote *would* have been viewed as non-revolutionary. Now, due to the very amnesia that Amar identifies, the ultimate standard of legal validity is the dead peoples of the thirteen original states.

Indeed, there is an irony to Amar's appeal to history. On the one hand, by making the enduring people sovereign, Amar seeks to "cast[ ] off the dead hand of the past."[141] If decisions made by the dead could legally bind us—we would lose our democratic credentials. But by freeing us from the sovereignty of the past as a *legal* matter, Amar has bound us to the past *extra-legally*. Why are we in a legal system in which we are free of the sovereignty of the past? Because of views that people had over two centuries ago. It does not matter, Amar argues, that we refuse to recognize ourselves as sovereign.[142] The dead hand of the past *makes* us so.

Amar's appeal to the past is also selective. If he is allowed to ignore *our* current beliefs when determining what legal system we inhabit, why is he so willing to look to the beliefs the Founders had when determining what legal system *they* inhabited? Why not worry about whether they suffered from "remarkable amnesia" concerning the ultimate sovereignty of the King-in-Parliament?

Amar is an example of why the distortion of our legal system to fit our political self-image should be resisted. If we succumb to the temptation to view our legal system in the light of our political ideals, all that will happen is that our view of our own legal system will be obscured. We will begin treating *as law* positions that are not in fact valid within our legal system. We will see legal continuity where there is actually revolution.

It is worth noting that there is another very different reason that Amar might believe that the people of the United States are sovereign. He might think that the existence of a rule of recognition depends, not upon officialdom (as Hart does[143]), but upon the population as a whole. If so, then, in a sense, the law would be whatever the people "say" it is, just as for Hart the law is whatever officialdom "says" it is.

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141. *See* Amar, *Philadelphia*, *supra* note 15, at 1072.

142. *See* Fried, *supra* note 139, at 31; Lawrence Lessig, *What Drives Derivability: Responses to* Responding to Imperfection, 74 TEX. L. REV. 839, 853–57 (1996).

143. *See supra* Section II.A.

But, as we have seen,[144] identifying the community at the basis of the rule of recognition is very different from identifying the sovereign within the legal system created by that rule of recognition. Assume that it was the French people—not French officials—who generated the rule of recognition in which Louis XVI's word was law. It would not follow that France before the Revolution was really a *democracy* or that the French Revolution, far from being revolutionary, merely involved the people of France changing the body to whom they delegated their power from Louis to the National Assembly.

If the people are the community standing behind the rule of recognition, then the sovereign is whatever the people accept, without justification, as the ultimate lawmaker. If they accept Louis, then they have generated an absolute monarchy. If they accept themselves, then they have generated a democracy. Accordingly one does not know who the sovereign in our system is simply by being told that the people are the community establishing our rule of recognition. And one does not know that there is legal continuity simply by being told that there is continuity to this community.

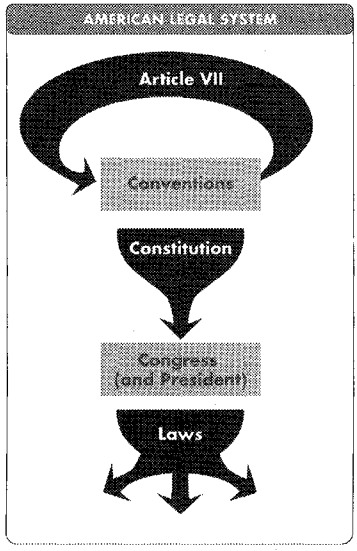
V. FIFTH MISTAKE: SELF-AUTHORIZATION AND SELF-LIMITATION OF AUTHORITY

I have argued that legal systems are identified by axioms that are not themselves legally justified. If the axiom of the American legal system is Article VII, then the Constitutional Convention was not an authorized lawmaking body when it created Article VII. But why not say that Article VII authorized itself, because it was ratified according to its own procedures? After all, Article VII is, at least formally, part of the Constitution, and the Constitution was ratified by the conventions of at least nine states.[145] See Figure O.

144. *See supra* Section II.A–B.

145. Joseph Raz argues that laws may, through a loop, *indirectly* authorize their own creation, but he admits that the validity of the laws within the loop "can be proved only if, in the last resort, the validity of one of the laws is assumed and not proved." RAZ, *supra* note 17, at 139.

Figure O



A good deal rides on this question, because if a sovereign could authorize the very axiom that gives it authority, then it should also be able to refuse to authorize it or refuse to authorize it fully, thereby terminating or limiting its authority. And if *that* is possible, then revolutions may be far less common than has been supposed.

Consider Louis XVI's relationship to the National Assembly in August of 1789. At that time the King was a limited monarch, in the sense that he could not revoke the National Assembly's lawmaking power. We treated this as a reason to conclude that a revolution had occurred. The sovereignty of the King was replaced, through extra-legal means, by the sovereignty of the National Assembly. But if the King could have used his absolute authority to irrevocably delegate his authority to the National Assembly, then a revolution may not have occurred after all.

Indeed, there may be no reason to conclude that the American Revolution really occurred. It is true that, at one point, valid laws were traceable back to the King-in-Parliament[146] and, at another point, the colonies were "Free and Independent States" with the "full

146. The sovereignty of the King-in-Parliament was challenged from the American perspective before the Revolution. *See, e.g.*, JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788, at 66–68 (1986) (describing Benjamin Franklin's questioning of the authority of Parliament over the colonies).

Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do."[147] But in the Treaty of Paris of 1783, Great Britain recognized the thirteen colonies as "free, sovereign and independent States."[148] Of course, Americans are disinclined to understand their laws as valid only because of the Treaty of Paris. But maybe this is because of the worry that if American laws had such a source, they could be revoked by the King-in-Parliament. And once we realize that the King-in-Parliament could have *irrevocably* delegated its absolute authority, we might be less inclined to think that the American Revolution happened after all.

A. Self-limitation as Revolution

In order to determine the possibility of a sovereign legally changing the very axiom that gives it authority, it is crucial to distinguish such an event from revolution. Although Louis XVI's recognition of the Declaration of the Rights of Man might be understood as legally validating the Declaration, it can also be understood as the simple acknowledgement that a revolution had occurred. Indeed, even if one assumed that the Declaration was not valid until after the King's recognition, it does not yet follow that Louis XVI was legally responsible for the Declaration's validity. The King's utterance of the words "I recognize the Declaration" could have motivated officials, who formerly looked to the King as the ultimate source of law, to look to the National Assembly. This utterance would have been no different from any of the other ways that the King could cause a change in rules of recognition, for example, by vigorously picking his nose in public. Observing his nose-picking, officials might lose so much respect for Louis that they begin looking to the National Assembly as the ultimate lawmaker. But that would not mean that the King legally self-limited his authority by picking his nose.

For Louis to have limited his authority in a non-revolutionary fashion, the pre- and post-recognition legal systems must have been the same. But that makes it hard to see how the King's recognition could possibly have bound him. If officials *retained* the practice of looking to the King as the ultimate source of law, they would have followed his command if he revoked the Declaration and with it the

147. THE DECLARATION OF INDEPENDENCE para. 35 (U.S. 1776).

148. Definitive Treaty of Peace, Sept. 3, 1783, art. I, U.S.-Gr. Brit., 8 Stat. 80, 81 (known as the "Treaty of Paris.").

National Assembly's power. France would have remained an absolute monarchy.[149]

We appear to be driven to the position that Louis's recognition, and all other acts of self-limitation of authority, must be either revocable or revolutionary. There is a problem with this conclusion however. Consider amendment provisions within constitutions, such as Article V. Since these provisions create lawmaking authorities, their self-amendment (for example, the use of Article V procedures to amend Article V itself) would appear to be the self-limitation of authority. And if the amended rather than the original amendment procedures must be used to rescind the self-amendment, this self-limitation would be binding—something we have concluded is revolutionary.[150] The revolution would be no less real because the self-limitation was accomplished by a subsidiary authority within the legal system.

That binding self-amendment of amendment clauses must be understood as revolutionary would not be a problem in itself if it were rare. But amendment provisions (although not Article V itself[151]) are *commonly* amended by their own procedures in a way that is taken to be binding and non-revolutionary.[152]

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149. Ross, *supra* note 118, at 6.

150. *Id.* Ross used as his example the Article 88 of the Danish Constitution.

151. But even with Article V, there have been attempts. *See* PETER SUBER, THE PARADOX OF SELF AMENDMENT, Appendix I (1990). In only one case was the self-amendment actually passed by two-thirds of each house of Congress, qualifying it to be submitted to the states. This was the Corwin Amendment, which, in a last-minute attempt to avert the Civil War, would have forbad amendments to the Constitution that would authorize or empower Congress to interfere with slavery. *See* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 512–540 (2003). The Corwin amendment was not, however, passed by the requisite three-fourths of the states. It is unclear whether the Corwin Amendment would have been genuinely irrevocable, in the sense that it could never be repealed. *Id.* at 534–40. But it certainly looked like it would have bindingly amended Article V, in the sense that post-Corwin procedures for amendment would have had to be used to get rid of it. For example, an act of Congress proposing an amendment repealing the Corwin Amendment would probably be considered interference with slavery and so forbidden. Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 730 (1981). The Corwin amendment could have been repealed only by calling a convention upon the application of the legislatures of two-thirds of the states, since that is the only method under Article V that would not involve congressional action.

152. *See* SUBER, *supra* note 151, Appendix II. The amendment clauses of 35 state constitutions have been amended by their own procedures: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia.

B. *Self-limitation Within Authority*

Is there is a way of avoiding the conclusion that revolutions are ubiquitous, while still rejecting the possibility of an authorized lawmaker using his lawmaking power to change the content of his own authorization? Let us begin by considering a *non-legal* case concerning a *subsidiary* authority. Imagine that I authorize you to make rules for my child in my absence. While I am gone, you attempt to delegate your rulemaking power to someone else, in a way that cannot be rescinded, because you feel that this is in the best interest of my child. (Perhaps you feel a bout of temporary dementia coming on.) Do we have to conclude that your delegation was unsuccessful, because it remained rescindable, or that a revolution occurred, because you acted outside of my authorization?

Is it not possible that your delegation was *within* my authorization? Perhaps I did not merely authorized *you*, but also anyone to whom you delegated your power, in a way that could not be rescinded by you. If I did, your delegation would be binding and non-revolutionary. But such delegation would not be an example of self-limitation of authority. To have self-limited your authority, you must have used the authority I gave you to change the authority that I gave you. For example, although I gave you the authority to only revocably delegate, you somehow used this authority to make it such that you could irrevocably delegate. When self-limitation of authority is understood in *this* fashion however, it is not surprising that it would have to be either unsuccessful or revolutionary.

There are many ways that one can be authorized to self-limit one's rulemaking powers. For this reason, it is virtually impossible to specify in the language of an authorization all the forms of self-limitation that are authorized or forbidden. Assume that I say: "I authorize you to make rules for my child in my absence." Taken literally, this language suggests that you are forbidden to delegate your rulemaking power in any way, even revocably. You *alone*, not anyone else, have the power to make rules for my child. To the extent that you *can* delegate, my authorization must have really been something like the following: "I authorize you to make rules for my child in my absence with the following exception: if you should delegate your powers to another rulemaker, the rules for my child will henceforth be whatever the delegated rulemaker says they are and not whatever you say they are."

In short, we must look *behind* the language of an authorization to answer the question of whether self-limitation of rulemaking power is

authorized. Sometimes, of course, the question will not be answerable. But even in these unclear cases the fact that successful self-limitation takes place is not evidence that the authorized party used her authority to limit her authority. They are merely cases where we are unclear whether a revolution or *authorized* self-limitation has occurred.[153]

We can now apply this lesson to the self-limitation of power by subsidiary *law*makers. This should be distinguished from the lawmaker's power changing because of a change in the authorization he received from a higher-order lawmaker. For example, if Amar is right that the people are sovereign and that the lawmaker identified in Article V possesses authority only because the people say so, Article V can change (or be set aside entirely) as a result of a national vote. This is not a case of the lawmaker identified in Article V *self*-limiting its power however. For that to occur, the procedures in Article V *themselves* must be used to amend Article V.

The question of whether self-amendment of Article V is possible amounts to the question of whether the lawmaker responsible for Article V (which we are assuming is specified in Article VII) authorized the lawmaker identified in Article V to self-limit its power. This question cannot be answered by looking to the language of Article V itself. Taken literally, Article V forbids self-limitation, since it says only that the conventions or legislatures of three-quarters of the states can amend, *not* that some other body can amend if the conventions or legislatures of three-quarters of the states delegate their lawmaking power to that body. But powers of irrevocable delegation are tacit in many authorizations. It is for precisely this reason that amendment provisions in state constitutions are commonly amended, without the feeling that a revolution has

153. My argument here relies in large part upon Alf Ross's solution to the puzzle of self-amendment. Ross, *supra* note 118, at 24. For arguments that there is no puzzle at all, see H.L.A. Hart, *Self-Referring Laws*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 170 (1983); Norbert Hoerster, *On Alf Ross's Alleged Puzzle in Constitutional Law*, 81 MIND 422 (1962); Joseph Raz, *Professor A. Ross and Some Legal Puzzles*, 81 MIND 415 (1962). For an argument that the puzzle can resist these criticisms, see SUBER, *supra* note 151, §§ 5–10. Suber argues the puzzle is unsolvable, but he seriously misunderstands Ross's solution, describing the axiom that allows self-limitation of power as a "transcendent, immutable rule, universal across all systems." *Id.* § 6.B. The rule is not transcendent, in the sense of being beyond empirical confirmation, for, like any axiom, it can be extra-legally explained. It is an extra-legal question whether such an axiom exists or not. It is also not immutable, for it can be changed by revolution. Finally, it is not universal across legal systems, for some legal systems may allow self-limitation of power, while others may not.

occurred.[154] There is no reason to think that Article V is any different. Nevertheless, the fact remains that if Article V can be amended, that will mean only that the body identified in Article V was authorized to self-limit its power, not that it changed its very authorization.

Finally, we can consider the question of whether the supreme lawmaker within a legal system may self-limit its lawmaking power.[155] Here too the question should be answered by reference to the scope of the relevant authorization, that is, the axiom of the legal system. And however one answers this question, the supreme lawmaker will be powerless to use his authority to change the axiom itself. If it is authorized to self-limit its power, it may do so, without revolution. But it may never legally change the scope of its authority. A change in the scope of its authority is possible only through revolution.

Some binding self-limitation of power is generally within the authorization of all supreme lawmakers. For this reason the axiom of even the simplest legal system must be fairly complex. If "the law is whatever Louis XVI says it is" were the axiom of the French legal system in 1788, Louis would not merely have been unable to irrevocably delegate his lawmaking power—he would have had no ability to *revocably* delegate it. Indeed, he would have had no ability to name a successor, to abdicate, or to transfer his lawmaking authority upon his death. He, and, only he, would be the lawmaker of France. When he died, he would remain the sole lawmaker. There would be a sovereign but no laws. New laws would be able to come into being only through a revolutionary change of legal systems.

Since Louis XVI must have had some authority to self-limit his lawmaking powers, it is not inconceivable that he could have had the ability to irrevocably recognize the Declaration of the Rights of Man and the power of the National Assembly in 1789. This bare possibility does not mean, of course, that the French Revolution never occurred. First of all, the axiom of the French legal system probably did not allow Louis to irrevocably delegate his lawmaking powers to someone other than a royal successor. But even if it did,

154. SUBER, *supra* note 151, Appendix II.

155. Ross in fact, confines himself to self-limitation of supreme authority. Ross, *supra* note 118, at 21–24. In other words, he rejects the possibility that the lawmaker identified in the *axiom* of the legal system can change its own authority. *Id.* But the examples he gives of these axioms are amendment provisions, such as Article 88 of the Danish Constitution and Article V of the United States Constitution. *Id. passim.* It is questionable that these are in fact the axioms, or part of the axioms, of the relevant legal systems. Article V, for example, was passed in accordance with Article VII.

the fact that the valid laws of the National Assembly *could* be justified by reference to the 1788 axiom does not mean that they *were*. The post-recognition axiom surely pointed solely to the National Assembly or the people of France. The justification of valid laws stopped at these bodies. It did not appeal further to Louis's act of irrevocable recognition.[156]

Although a sovereign can be authorized to limit its lawmaking power, it cannot legally change its authority, because its authority depends upon an extra-legal source over which it has no *legal* control. And because self-limitation of authority is impossible, *self-authorization* must be impossible as well. The very act of authorization presupposes that the extra-legal explanation is in place, which makes self-authorization both unnecessary and ineffective. Either Article VII gave the states authority to create the Constitution or it did not. If the extra-legal evidence shows that it did, then Article VII does not need to be authorized by the states. If the evidence shows that it did not, then Article VII cannot be authorized by the states because they have no lawmaking power.

C. *Amar on the Inalienability of Authority*

Amar appears to agree that the axiom of a legal system cannot be changed by the sovereign within that system. For example, he describes the legal right of the American people to choose their constitutions as "inalienable."[157] This might be understood as the stronger claim that Americans could not do anything to lose this ultimate legal right. If they failed to exercise it (and so lapsed into a dictatorship of acquiescence), they would remain in a legal system in which they had ultimate lawmaking authority. There would be a lawmaker—the American people—but no laws.

But it is hard to see how Amar could justify this stronger position. After all, he admits that extra-legal events were able to move us from a legal system in which the American people did not have ultimate lawmaking authority (the British one) to a legal system in which they did, so why could the same process not work in reverse? If Amar thought that laws always had to be ultimately justified legally by reference to the moral principle of popular sovereignty—that is, if he were a type of natural law theorist—then he could insist that nothing that Americans could do would lead them to lose their

156. *See* LEFEBVRE, *supra* note 1, at 133–35 (arguing that by August of 1789 the validity of the Declaration of the Rights of Man did not depend upon royal approval).

157. *Id.* at 464; Amar, *Philadelphia*, *supra* note 15, at 1050.

sovereignty, since Americans do not have the power to invalidate that moral principle. But, as we have seen, Amar believes that the moral principle of popular sovereignty became the legal axiom of the American system only because of certain social facts.

I must conclude that Amar is merely speaking of *legal* alienation—an inalienability *from within the American legal system.* Indeed, my guess is that he is relying upon precisely the more comprehensive principle about the structure of legal systems that we uncovered above: the sovereign in any legal system may not enact a law that changes the axiom that gives it authority.[158] This applies across the board. Just as the American people may not use their supreme lawmaking power to legalize absolute monarchy, Louis XVI may not use his supreme lawmaking power to legalize democracy.

But events changed France from an absolute monarchy to a democracy, and they could change the United States from a democracy to a monarchy. Furthermore, these events can include the decisions of the American people themselves. Even if the American people cannot legally revoke their right to choose their constitutions, they could nevertheless make it such that they entered a legal system in which they no longer possessed this right.

D. Amar's Exception to the Principle that Authority is Inalienable

But the inalienability of authority makes it difficult for Amar to explain the ratification of the Constitution. He insists that before ratification the peoples of the states were unlimited sovereigns.[159] But after it, unlimited sovereignty rested in the people of the United States as a whole.[160] The simple explanation is that a revolution occurred—the ratification was no more legally effective in *creating* the American legal system out of the state legal systems than Louis XVI's recognition of the National Assembly could be in bringing about democracy.[161] The act of ratification bound the states only from the perspective of the American legal system. From the perspective of the state systems, the Constitution was no different from the Articles of Confederation—it had legal effect only to the extent that it was recognized within these systems.

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158. *See* Amar, *Consent*, *supra* note 15, at 496 n.154; Amar, *Philadelphia*, *supra* note 15, at 1068.

159. *See* Amar, *Consent*, *supra* note 15, at 507; Amar, *Philadelphia*, *supra* note 15, at 1062–63; Amar, *Sovereignty*, *supra* note 36, at 1435.

160. *See* Amar, *Philadelphia*, *supra* note 15, at 1062–63.

161. Monaghan, *supra* note 135, at 135.

Because Amar is unwilling to accept a revolutionary explanation of the Founding, he carves out an exception to the inalienability of authority when one sovereign people are generated from a collection of multiple sovereign peoples:

> It was by these very acts [of ratification] that previously separate state Peoples agreed to 'consolidate' themselves into a single continental People. Before ratification, the People of each state were indeed sovereign—and for that very reason could not be bound by the new Constitution if they chose not to ratify, no matter what any of the other sovereign Peoples chose to do. Thus, although Article VII required only nine states to ratify, it *confirmed* the *pre-existing* sovereignty of the People of each state by proclaiming that the Constitution would go into effect only between the nine or more states ratifying. The ratifications themselves thus formed the basic social compact by which formerly distinct sovereign Peoples, each acting in convention, agreed to reconstitute themselves into one common sovereignty.[162]

In arguing that alienation of unlimited sovereignty is possible, Amar has succumbed to the fifth mistake concerning legal revolutions.

For Amar the Article VII process legally bridged legal systems. Although the result of the ratification process was a unified American sovereign, "the pre-existing sovereignty of the People of each state" was integral to the process, because no state's people were required to relinquish their authority without their consent. But the fact that the state's people could not lose their authority without their consent hardly confirms their sovereignty. If the state peoples truly were *unlimited* sovereigns, as Amar insists, their act of consent could not bind them at all. As the ultimate determiners of law, they could make their consent a legal nullity at will. The very idea that they could bind themselves by their consent must mean that *even before they consented* they were participating in a legal system whose valid laws could not be traced back to their individual will. Although this legal system gave them a choice about whether they would be obligated under the Constitution, it did *not* give them a choice about legal consequences of their choice.

In short, Article VII could make unilateral secession impossible after ratification only on the assumption that the state peoples had *already* lost their unlimited sovereignty before ratification. Only then

162. Amar, *Sovereignty*, *supra* note 36, at 1460 (emphasis in original).

could the legal consequences of their ratification be beyond their control. That means that the ratification, far from bridging state and federal legal systems, had legal effect only from the perspective of the new federal legal system. For the ratification to occur a revolution must have already taken place.

Even if Amar understands the state peoples' sovereignty as unlimited, however, we do not have to ourselves. Their sovereignty could have been limited in the sense that the irrevocable delegation of their lawmaking power was allowed under the axioms of their legal systems. If the officials of the Massachusetts legal system did not look to the people of Massachusetts as the ultimate standard of legal validity, but looked to this people *until* they delegated their power to another lawmaker (such as the people of the United States), it seems that the ratification could create an *American* legal system without revolution. Amar succumbs to the fifth mistake because of his commitment to the *unlimited* nature of sovereignty. This forced him to conclude that the state peoples were somehow able to legally alter the very axiom that gave them authority.

Nevertheless, even if Amar *had* conceded that the state peoples' authority was already limited under the axioms of the state legal systems, in the sense that they could irrevocably delegate their lawmaking power to another more comprehensive people, there is still a problem with a non-revolutionary explanation of the ratification. Simply because legal systems share the same sovereign does *not* mean that they are the same legal system. They will be unified only if, as an extra-legal matter, the practices that are the sources of the systems unite. For example, imagine that soon after 1776, Massachusetts and New Hampshire—feeling expansionist, but also democratic—each claimed to *be* the United States. In other words, the officials in each system looked to the people of the United States as the sovereign of *their* system. This situation would not be sustainable for long, since the absence of any Massachusetts or New Hampshire officials and institutions in the other states would mean that there would be no procedures for the sovereign to speak within the Massachusetts or New Hampshire systems. Nevertheless, while it lasted, there would be two independent legal systems, each of which was, as an internal legal matter, the *United States*, in the sense that the people of the United States was the sovereign for each system.

Things might not have been much different after the ratification of the Constitution. Even though from the perspective of the thirteen state systems the people of the United States would be sovereign—that would be true only from within each of the state systems. It

would not yet follow that there was a United States, understood as a unified legal system. There could still have been thirteen (unstable) legal systems each sharing the same sovereign.

It is true that legal practices are very likely to merge if they claim the same sovereign. If the participants in thirteen legal practices each believe they have unified, then they are likely to make that belief concrete. But the extra-legal fact of unification is the reason for the unity of the legal systems. Because Amar fails to appreciate this extra-legal dimension of the ratification, he treats the creation of the American legal system out of the state systems as if it were a purely legal matter of the ratification. An extra-legal event, which was not assured by the ratification, was necessary—the revolutionary unification of legal systems that gave birth to the United States.

VI. SIXTH MISTAKE: MISIDENTIFYING THE SCOPE OF JUDICIAL LAWMAKING

A. Judicial Lawmaking

Up to this point, we have not much considered the role of courts as lawmaking bodies. It is clear that the axiom of a legal system, or an authority within that system, may give courts the power to create *common law*.[163] But what about lawmaking through judicial *interpretation* of law? Courts would have such lawmaking power if their interpretations of law were taken by officials within the system as authoritative, in the sense that officials looked to the opinions and not the law itself when determining what norms should be enforced.

There are two ways that this can occur. On the one hand, the *judgment* that the judge issues can be valid—in the sense that other legal actors must respect the judgment even if the law was misinterpreted. On the other hand, the interpretation of the law in the court's written opinion can be valid, in the sense that other legal actors are bound to respect that interpretation—not their own views about the uninterpreted law—in future situations.

Few have seriously doubted that interpretations are—and should be—binding in the first sense.[164] A concrete judgment (for example providing damages to a plaintiff or acquitting a criminal defendant) must be respected and enforced by other legal actors, even if they

163. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 279 (1992).

164. The sole example I am aware of is Michael Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 276–84 (1994).

believe (correctly) that it is based upon a misinterpretation of the law.[165] On the other hand, whether judicial interpretations of the law should be binding beyond the particular case adjudicated has been a matter of more debate. Some have questioned whether federal courts' interpretation of federal law—and particularly the United States Constitution—should be binding upon the other branches of the federal government, or even upon the states.[166]

Nevertheless, it certainly seems safe to say that some interpretations are in fact treated as binding in our legal system, whether or not they should be. For example, consider the interpretation of the Eleventh Amendment provided by the Supreme Court in *Hans v. Louisiana*.[167] The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[168] This language appears drafted to end a source of diversity jurisdiction otherwise available in Article III, namely jurisdiction for "controversies ... between a State and Citizens of another State."[169] So understood, the Eleventh Amendment would not preclude a federal question action brought against a state in federal court, particularly one brought by a citizen of that *same* state.[170] This is the prevailing view of the Eleventh

165. *See* Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 8 (2001); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 988–89 (1987); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993); Michael S. Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 82 (1993).

166. *See, e.g.*, Meese, *supra* note 165; Paulsen, *supra* note 165. The Supreme Court declared that its constitutional rulings are binding in this stronger sense in *Cooper v. Aaron*, 358 U.S. 1 (1958).

167. Hans v. Louisiana, 134 U.S. 1, 18–19 (1890).

168. U.S. CONST. amend. XI.

169. U.S. CONST. art. III, § 2, cl. 1.

170. The history of the Amendment supports this reading. The Eleventh Amendment was enacted to abrogate the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 71 (1972). *Chisholm* was a state law action in the United States Supreme Court brought by the South Carolina executor of the estate of a South Carolina merchant, Robert Farquhar, to collect revolutionary war debt owed by the State of Georgia. Chisholm argued, and the Supreme Court agreed, that the Court had federal subject matter jurisdiction under diversity. *Id.* at 425. The language of the Eleventh Amendment was crafted to end this source of jurisdiction. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 45–46 (1988); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1696 (1997).

Amendment among legal scholars.[171] And yet the *Hans* Court read the Eleventh Amendment as recognizing a more comprehensive principle of state sovereign immunity in federal courts that applies to federal question actions, including those between a state and a citizen of that same state.

It would be a mischaracterization of our legal system, however, to say that our Eleventh Amendment—the Amendment as it exists in our current legal system—solely concerns diversity jurisdiction. The interpretation in *Hans* "has been folded into the Eleventh Amendment itself."[172] Deference to the Supreme Court's reading is so complete that only legal scholars have views about the original uninterpreted Eleventh Amendment. What practitioners know is the Amendment as interpreted by *Hans*.

Assume that *all* judicial interpretations of the law are binding in this sense. This would mean that, rather than understanding the Commerce Clause as authorizing Congress to make law, we would have to understand it as authorizing the courts to authorize Congress to make law through their interpretations of the Commerce Clause. And Sarbanes-Oxley, in turn, would authorize the courts to authorize the SEC to make law. Indeed, section 205.3(b)(1) would be understood, not as a command to attorneys practicing before the SEC, but as an authorization to the courts to create commands applying to such attorneys.[173]

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171. *See, e.g.*, JACOBS, *supra* note 170, at 83–97 (noting that Article III extends federal jurisdiction to all federal question controversies without regard for the character of the parties); Amar, *Sovereignty*, *supra* note 36, at 1476 (opining that *Hans* was "clear error"); David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 32 (1972) ("[T]he Court in *Hans* veered far from the course . . . ."); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515–16 (1978) (noting that recent scholarship suggests that the Eleventh Amendment was not meant to completely preclude suits in federal court against the states by private individuals); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1262–64 (1989) (defending the diversity theory, which interprets the Eleventh Amendment as not closing off other sources of federal jurisdiction); Lawrence Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 *passim* (1989) (noting that the text of the Eleventh Amendment clearly does not preclude all suits against a state); David L. Shapiro, Comment, *The Supreme Court, 1983 Term—Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 70 (1984) (suggesting that *Hans* was "an unforced error.").

172. Shapiro, *supra* note 171, at 71.

173. The legal role that "erroneous" judicial decisions or other governmental acts (including the passage of statutes) can play within a legal system is meticulously explored in the Fehlerkalkül (calculus of error) of Adolf Merkl. ADOLF MERKL, DIE LEHRE VON DER RECHTSKRAFT ENTWICKELT AUS DEM RECHTSBEGRIFF 293 (1923). Kelsen followed Merkl in this regard. *See* INTRODUCTION, *supra* note 16, at 70–89; PURE

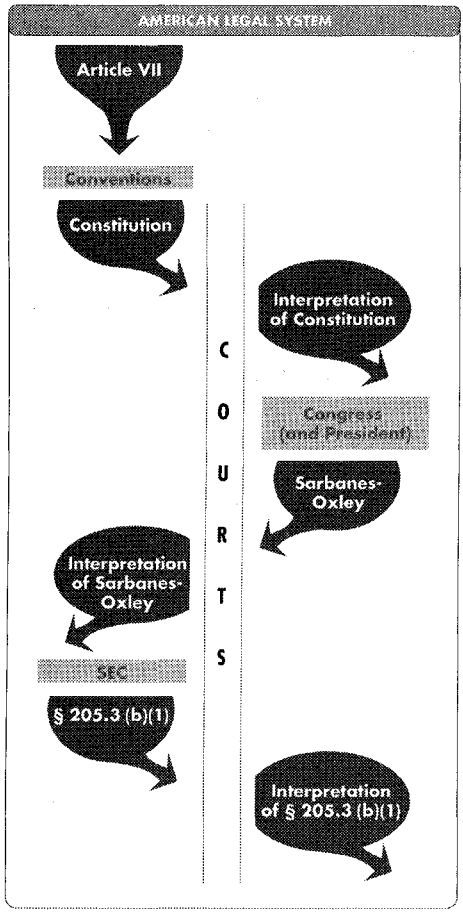
Conversely courts would be forbidden to make law by interpreting law if anything but a single interpretation of a law was ignored by officials within the system as void. This is probably true, for example, of Article VII. Article VII does not authorize the courts to authorize (retroactively) the conventions of the original thirteen states to enact the Constitution. The reason is that, if a court were to declare the Constitution invalid because of its interpretation of Article VII, its decision would simply be ignored by the community of officials even if the court's decision were not invalidated through legal channels. The court would not be accepted as having lawmaking power in that area.

This official resistance to deviant judicial interpretations does not have to mean that the legal justification of the Constitution is official acceptance, rather than Article VII, or that the Constitution has no legal justification as law at all—that is, that it is simply part of the axiom of our legal system.[174] For it may still be true that officials, when asked why the Constitution is valid, would appeal to Article VII—not claim that its status as law is in need of no justification or that official acceptance is the justification. All their resistance might mean is that they do not defer to *courts'* interpretation of Article VII. Article VII would authorize the conventions of the original thirteen states *directly*, rather than authorizing the courts to authorize these conventions. See Figure P.

THEORY, *supra* note 16, at 236–56, 267–78. For a discussion of Kelsen's views, see generally EBENSTEIN, *supra* note 28, at 127–32; RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 250–91 (2003); Stanley L. Paulson, *Kelsen on Legal Interpretation*, 10 LEGAL STUD.: J. SOC'Y PUB. TCHRS. L. 136 (1990); Stanley L. Paulson, *Material and Formal Authorization in Kelsen's Pure Theory*, 39 CAMBRIDGE L.J. 172 (1980); Stanley L. Paulson, *Subsumption, Derogation, and Noncontradiction in "Legal Science,"* 48 U. CHI. L. REV. 802 (1981).

174. *See supra* Section II.B.

Figure P



Of course, judicial lawmaking of some sort is inevitable in any system with courts. Courts exist because there is disagreement about the application of the law. If there were no disagreement—if what counted as a correct application was as clear as what counts as a correct move in chess—adjudicators would be no more necessary in a legal system than they are in games of chess. And without some deference to courts' decisions, they could not function to resolve disagreement about the application of the law.

But it does not follow that judicial lawmaking occurs *whenever* courts use their own judgment to apply the law. After all, whenever a court decides a case, it must rely upon its own judgment about whether the Constitution is valid law. But it has no lawmaking power in applying, say, Article VII, for it cannot diverge from the common

understanding of Article VII without its decision being treated as a legal nullity.

With this in mind, consider a recent argument by Matthew Adler and Michael Dorf that judicial review concerning whether a law has satisfied constitutional "existence conditions"—that is, conditions for something to be a law, rather than a nullity—is inevitable in any legal system in which courts can issue binding judgments applying the law.[175] Adler and Dorf's argument appeals to the fact that a court must exercise its own judgment about whether these existence conditions are satisfied:

> Imagine, for example, a law enacted in conformity with Section 7 of Article I that purports to require a three-fifths majority in each house for all subsequent measures raising taxes and that further declares itself amendable only by a three-fifths majority in each house. Even in the counter-*Marbury* world, it seems clear that a federal court would have to engage in nondeferential constitutional reasoning in order to determine whether to treat this law as binding in the face of a subsequent measure—enacted by simple majorities of both houses of Congress, signed by the President, and thus appearing to be an authoritative utterance of Congress—purporting to repeal it.[176]

According to Adler and Dorf, "judges cannot avoid enforcing those provisions of the Constitution that identify the procedure for legislation and perhaps those that demarcate Congress's powers."[177]

But it is also true that *Congress* cannot defer to a judicial opinion without determining—*without* deference—whether it actually satisfies the existence conditions for a judicial opinion. If Congress were obligated to defer to anything that *claimed* to be a judicial opinion concerning the issue of whether it actually *is* a judicial opinion, our legal system would collapse. Any lunatic could announce something as a judicial opinion and Congress would be obligated to accept it as such. So it seems that there must be congressional review of judicial opinions just as much as there must be judicial review of statutes.

Why do people not talk about such congressional review? The reason is that officials tend to agree to such a high degree about whether the existence conditions for a judicial opinion have been

175. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1111–16, 1122–28 (2003).

176. *Id.* at 1111–12.

177. *Id.* at 1114.

satisfied that any deviation by Congress, any attempt to treat a Supreme Court opinion as not "really" an opinion, would be immediately perceived as legally void. The fact that Congress must exercise its own judgment to determine whether something is a judicial opinion gives it no *legal* power.

Congress's situation is similar to that of a player in a game of chess. Each player must exercise her own non-deferential judgment about whether her opponent has made a correct move in a game. If she had a duty to accept whatever her opponent claimed was a correct move, the game would collapse—for her opponent could move his pieces any way he wanted. But this does not mean that she has power, within the game, of reviewing her opponent's moves. For the minute her judgment deviated from the common understanding of what a correct move is like, her opponent would balk and the game would come to a halt.

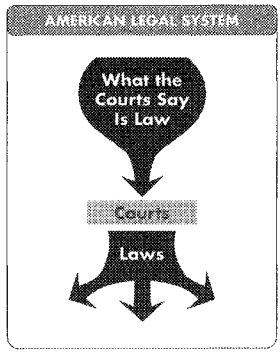
Adler and Dorf ignore the possibility that the same phenomenon could exist in connection with judicial review of whether a law satisfies constitutional existence conditions. Although federal courts would have to exercise their independent judgment about whether existence conditions are satisfied, this might not generate meaningful judicial review, because the court would be unable to issue a binding judgment that deviated from officialdom's common understanding concerning the existence conditions' scope.

B. Is the Law What a Court Says It Is?

Nevertheless the fact remains that judicial lawmaking of some sort must exist in a system with courts. Courts cannot fulfill their role of resolving disagreement concerning the law unless their judgments legally bind those who disagree to *some* extent. And in our legal system the scope of judicial lawmaking appears so expansive that it is reasonable to inquire as whether the law that the courts interpret puts any legal restrictions upon a judge. Since judicial misinterpretations of the Commerce Clause or Sarbanes-Oxley or section 205.3(b)(1) are treated as valid, in what sense do the laws play any role within our legal system at all? Why not simply say that under the axiom of our legal system the law is whatever the courts say it is?[178] See Figure Q.

178. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 121 (2d ed. 1921) ("Thus far we have seen that the Law is made up of the rules for decision which the courts lay down; that all such rules are Law; that rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity 'The Law' apart from these rules; and that the judges are rather the creators than the discovers of the Law."). This position reaches back at least as

Figure Q



Despite courts' expansive authority to make law by interpreting law, we do *not* inhabit a legal system in which courts are sovereign. In arguing for this conclusion, let me begin with H.L.A. Hart's analogy of a game (assume it is baseball) in which umpires' misapplications of the rules are nevertheless binding on the players:

> [T]he scorer's determinations . . . are unchallengeable. In *this* sense it is true that for the purposes of the game "the score is what the scorer says it is." But it is important to see that the scoring *rule* remains . . . and it is the scorer's duty to apply it as best he can. "The score is what the scorer says it is" would be false if it meant that there was no rule for scoring save what the

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far as Bishop Hoadley, who argued in 1717 that "[w]hoever hath an *absolute Authority* to *interpret* any written or spoken Laws; it is *He*, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them." Bishop Benjamin Hoadly, Sermon Preached Before King George I, at 12 (Mar. 31, 1717) (emphasis in original).

Hoadly's argument is commonly attributed to the legal realists. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 20–21 (1988) (summarizing legal realism); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) (identifying Chief Justice Hughes' statement that "the Constitution is what the [Supreme Court] say[s] it is" as an element of legal realism); Sanford Levinson, *Why I Do Not Teach* Marbury *(Except To Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 569–70 (2003) ("Finally, I believe that emphasizing *Marbury* reinforces the single most pernicious aspect of American legal education, which is to instill in hapless students the most vulgar of all notions of Legal Realism, summarized in Charles Evans Hughes' identification of 'the Constitution' with what the 'judges say it is.' "(citations omitted)); Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law*, 18 J.L. & POL. 851, 855, 870 (2002) (associating legal realism with the view that "law is what judges say it is.").

For two classic statements of the realist position, see KARL LLEWELLYN, BRAMBLE BUSH 3 (1930) ("What officials do about disputes is, to my mind, the law itself."); Holmes, *supra* note 58, at 461 ("The prophecies of what the courts will do in fact, and nothing pretentious, are what I mean by the law.").

> [official] scorer in his discretion chose to apply. There might indeed be a game with such a rule, and some amusement might be found in playing it if the scorer's discretion were exercised with some regularity; but it would be a different game. We may call such a game the game of "scorer's discretion."[179]

The difference between baseball and scorer's discretion is that baseball players make independent judgments about how the game is proceeding. They often conclude that the umpire is mistaken and criticize him for violating the rules of the game (even though they accept his decisions as binding). If they were playing the game of scorer's discretion, such criticism would make no sense. The very point of scorer's discretion is to do whatever the scorer says—there is no ground, from within the rules of the game, for criticizing what the scorer says.

Hart's argument, as it stands, is not persuasive however. Granted, in baseball umpires are criticized for making "wrong" decisions. But this is not enough to conclude that the umpire has a *duty under the rules of baseball* to decide correctly. After all, an umpire would probably be criticized for imitating a monkey after every pitch, but we would not want to conclude that he therefore has a duty under the rules of baseball not to imitate monkeys. He would only be violating a duty within what we can call the "culture" of baseball. It is not a duty generated by the rules of the game. The reason is that imitating a monkey has no effect *within* the game. It does not, for example, invalidate the umpire's rulings or make sanctions against the umpire appropriate.

Hart has not explained why baseball is not a game of scorer's discretion, with duties *outside* the rules of the game that require the umpire to rule correctly. The only reason to conclude that an umpire's error is a violation of the rules of the game is that identifiable instructions for the game speak of what would be a correct ruling and there are no identifiable instructions that tell umpires not to imitate monkeys. For example, we are told that a "strike" includes a pitch "which . . . is not struck at, if any part of the ball passes through any part of the strike zone."[180] That is a reason to think that an umpire who calls a pitch a strike even when it is outside of the strike zone has violated the rules, not merely the culture of the

179. HART, *supra* note 59, at 142.

180. Official Rules of Major League Baseball 2.00 (2004), *at* http://www.mlb.com/NASApp/mlb/mlb/official_info/official_rules/definition_terms_2.jsp (last visited Dec. 13, 2004) (on file with the North Carolina Law Review).

game.

But that simply returns us to our problem. For there is *another* rule—giving the umpire's rulings finality[181]—according to which the earlier rules have *no effect within the game*. Even if a pitch that is not struck at is outside the strike zone, it is nevertheless treated as a strike in the game if the umpire rules it is a strike. The rules defining a strike have no more effect within the game than the prohibition of monkey imitations. That seems to push the rules defining a strike *out* of the game and *into* the mere culture of baseball.

I believe Hart's example of scorer's discretion is better understood as a challenge to the idea that the umpire's rulings are in fact always authoritative. Assume that an umpire rules a batter out even though no pitch has yet been thrown. Unlike a less egregious error, this ruling would very likely be treated as invalid within the game, in very much the same way that a deranged fan who ran on the field and started making rulings would find his rulings treated as invalid. Furthermore, when the players came to the conclusion the umpire's ruling was invalid, they would be relying upon the instructions defining a strike.

In short, we can find a role for the instructions defining a strike *within* the game of baseball, although it is not the role that they appear to have. These instructions set up a broad (albeit vague) standard of *reasonableness* beyond which the umpire's rulings will be void. For this reason, a pitch is *not always* a strike if the umpire says it is a strike. On the other hand, a reasonable but erroneous ruling is valid in the game (although it may be a violation of the culture of baseball).

This is an important difference between baseball and the game of scorer's discretion. In scorer's discretion, any ruling by the umpire is valid. Players who objected to the umpire's ruling could not be objecting on the ground that the umpire violated the rules of the game. They could only be appealing to duties that the umpire had outside the game.

The same points can be made with respect to legal systems. One can imagine circumstances where a judgment that radically misapplies the law would be treated as a nullity within the legal system. For example, if a judge ruled that the author of a materially misleading

181. *Id.* at 9.02(a) ("Any umpire's decision which involves judgment, such as, but not limited to, whether a batted ball is fair or foul, whether a pitch is a strike or a ball, or whether a runner is safe or out, is final. No player, manager, coach or substitute shall object to any such judgment decisions.") (on file with the North Carolina Law Review).

SEC filing should be summarily executed or should be liable to the judge herself for the sum of $10,000,000, she would find her decision treated as void, in much the same way that a delusional citizen who jumped into the judge's seat would find his decisions treated as void. It would not have to be nullified—for example, on appeal or through legislative action. It would instead be a nullity *ab initio*. Furthermore, in not following it, officials would not think that they were revolutionaries. To the contrary, they would think of themselves as maintaining the continuity of the legal order. What would have been revolutionary is if they had *followed* the court's decision.

C. Bush v. Gore

We have concluded that courts have genuine, but limited, authority to make law through their interpretations (and misinterpretations) of law. The belief that courts have no authority to make law in this fashion or that their authority does not go beyond choosing from a small set of highly plausible interpretations is our *sixth mistake* concerning legal revolutions. Because this confusion treats the courts' powers to make law as more restrictive than they really are, it makes perfectly legal events look like revolutions.

Assume that a court acted outside its authority every time its interpretation deviated from what is most plausible. If a deviant decision were nevertheless accepted as valid, there would have been a shift in the chains of legal validity. Valid law could no longer be traced back to the sovereign in the system. Although the court *was* a mere subsidiary lawmaker within the system, it would now be supreme.

This is the way *Bush v. Gore*[182] has been characterized by some of its critics. As Jack Balkin and Sanford Levinson put it, the decision was a "judicial coup"[183]—"[a] colossal act of illegality that subverts

182. 531 U.S. 98 (2000).

183. Balkin & Levinson, *supra* note 12, at 1108; *see also* ACKERMAN, *supra* note 8, at 200 (contesting "the five's revolutionary doctrines"); Farnsworth, *supra* note 12, at 235 (describing the Supreme Court's decision as "lawless"); Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS. 7, 28 (Summer 2002) ("One powerful consequence of *Bush v. Gore*, then, is that it further entrenches the monarch-like status of the United States Supreme Court as 'ultimate constitutional interpreter,' with a monarch-like royal prerogative to ignore ordinary legal restraints when necessary to protect the public good."). For a skeptical account of such claims with respect to other Supreme Court decisions, see Fried, *supra* note 139, at 33 (arguing that even in radical decisions, "the Court's exercise of power *claimed* to be interpretive, not revolutionary, and was accepted as such").

constitutional structures."[184] The Supreme Court acted outside its authority in *Bush v. Gore*. Due to acquiescence in the decision by officials and the American people, however, it is now being treated as legal. This means that there has been a shift in legal systems (albeit a subtle one). The members of the Supreme Court "appear to have gotten away with it,"[185] just as President Mirza got away with shifting supreme authority in Pakistan from the constitution (or its ratifiers) to himself. And like President Mirza's, the Supreme Court's coup was the "cumulative result of successful partisan entrenchment" within the institutions of the old system.[186]

So understood, Balkin and Levinson's criticisms distort the structure of the legal system they claim to defend. *Bush v. Gore* is not a legal nullity that gained its validity only through extra-legal changes in legal practice. For that would mean that had this extra-legal shift *not* occurred—had we remained in the *same* legal system—the decision would have been ignored by other legal actors as unworthy of a legal response. But we all know that the true revolution would have been if the Court's decision *had* been ignored, if everyone else had simply acted as if it had not really decided the case at all.

Balkin and Levinson characterize public and official acquiescence in the decision as the type of passivity that allows coups to succeed:

> [T]he message from many quarters these days is that we should forget about it: The Supreme Court has spoken, Bush won the election, he is in the White House, and one should get over it. Let's move on. We do not doubt the emotional conflict that many Americans now face. It is hard to admit that one lives in a country that has just suffered through a judicial coup. And many people will do almost anything to avoid recognizing that very unsettling fact.[187]

In fact, this acquiescence is precisely why the decision was legally valid. This was not a new form of acquiescence that shifted sovereignty. It was precisely the same (limited) acquiescence to judicial decisions that has always existed and that keeps us within the American legal system.[188]

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184. Balkin & Levinson, *supra* note 12, at 1050.

185. *Id.*

186. *Id.* at 1068.

187. *Id.* at 1107–08 (citations omitted).

188. My argument is, of course, the furthest thing from a justification of the Supreme Court's opinion, in the sense in which opinions are justified in law reviews. It is instead an

Although much of what Balkin and Levinson say—especially their use of the phrase "judicial coup"—suggests the interpretation I have offered above, Professor Balkin has privately argued that their position is "that the Court acted in violation of the law, but [not] that we have shifted [legal] regimes as a result."[189] The Court's decision is simply an illegality within an abiding legal system:

> We shouldn't confuse illegality in a particular case with revolution and the creation of a new legal regime. It is perfectly possible for a government official to break the law, even egregiously, have nobody complain about it or acquiesce in what they have done, and not create a revolution or a shift in legal regime. It happens all the time. Think about police brutality. Or torture. These actions don't change the legal regime. They are illegal within the existing legal regime. In particular courts can act illegally, and people can acquiesce in their decisions, and life goes on. But it isn't a revolution. It's like getting beaten up by a crooked cop.[190]

The analogy with police brutality is inapt however. Police brutality may remain unremedied, but it is not actually considered by the population (and particularly by the officials who participate in the rule of recognition) to be *legal.* In contrast, *Bush v. Gore* is treated as *the law.* Indeed, if officials were to view police brutality as legally permissible, it would be fair to say that a revolution *had* occurred.

What Balkin and Levinson need is an account of official acceptance of the decision as law that does not amount to a revolutionary change in the standards of legal legitimacy. Balkin has suggested this possibility:

> [I]t is very important to distinguish acceptance of an act as legal from acceptance of the legality of the consequences that flow from that act.... People often believe that consequences will be legal even if the original act was illegal.... Why? Because people like stability and the benefits of procedural regularity going forward into the future. In order to achieve these goods, ... some degree of illegality will be accepted in the system (sometimes grudgingly) if there is nothing one can do about it,

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observation about the remarkably broad scope of the Supreme Court's lawmaking powers within our legal system. For a justification of the opinion, see, for example, Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002).

189. E-mail from Jack Balkin (June 16, 2004, 04:14 EST) (on file with the North Carolina Law Review).

190. *Id.*

> and the consequences that flow from that original illegality will be accepted too . . . .[191]

But what is the difference between the acquiescence in illegality in the interest of stability that *fails* to change the legal system and the very same acquiescence that leads to a revolution? After all, it was undoubtedly true that officials in Pakistan acquiesced in President Mirza's coup because they liked "stability and the benefits of procedural regularity going forward into the future."[192] So why not say that there was no coup in Pakistan in 1958—and that Mirza's acts were simply illegalities whose consequences were accepted within the old legal system in which the Constituent Assembly was sovereign?

Balkin might argue that the difference is that *Bush v. Gore* was not as *radical* an illegality as Mirza's coup. Officials in our legal system have acquiesced in illegalities *similar* to *Bush v. Gore* in the past. But if this is true, then why not simply say that the Supreme Court is *authorized* under the rule of recognition to make law through its interpretations—and misinterpretations—of law? Why call *Bush v. Gore* "illegal" when its consequences and the consequences of similar decisions by the Supreme Court are habitually treated by officials as legal? What does this alleged illegality mean, when it makes no difference within our legal system?

CONCLUSION

In this Article, I have argued that attending to the structure of legal systems can reveal mistakes that arise when legal revolutions are discussed. Since these mistakes reveal themselves as mistakes only in the light of this structure, however, what reason do we have to believe that the law actually abides by this structure in the first place?

It would be one thing if I could point to the structure constraining, in some way, the extra-legal facts. But I admitted that the structure of legal systems is ultimately extra-legally explained. We only know what the axiom of a legal system is through extra-legal evidence. But if that is true, what could possibly be added by talking about the structure over and above the extra-legal through which it is explained? Why not simply talk about the law as seen from that extra-legal perspective, for example in terms of certain patterns of acceptance by officials?

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191. E-mail from Jack Balkin (June 18, 2004 12:37 EST) (on file with the North Carolina Law Review).

192. *Id.*

This is indeed a serious challenge to the approach of this Article—one that I believe was raised by the American legal realists.[193] The realist, as I understand him, bites the bullet and denies that there is any significance to talk of "valid" law. The only appropriate perspective on the law is extra-legal, and "law" exists only to the extent that it can be described in extra-legal terms—that is, in terms of conventions, attitudes and relationships of power and influence.

Something important is lost when the realist's approach is adopted, however. Consider the following analogy from the philosophy of logic. Even logicists admit that people accept the foundational axioms of logic—such as the law of non-contradiction—for extra-*logical* reasons.[194] The causes of our agreement about these axioms are physiological, psychological and sociological—for example, the constitution of our brains, certain innate habits or instincts, and socialization by parents and teachers.[195] If logical reasoning can be explained extra-logically, why not give up on logical structure entirely and simply speak in physiological, psychological and sociological terms?

The problem is that once we adopt the extra-logical perspective, logical continuity and discontinuity vanish. Assume that, starting with the premise "all whales are mammals," someone concludes "all whales are mammals and are not mammals." From the extra-logical perspective, this inference is contrary to the way that physiology, psychology and sociology tell us people normally behave. But it is not discontinuous. The extra-logical perspective cannot make sense of the *revolutionary* nature of the inference—the impossibility of getting to the conclusion from the premises *within* the structure of our logical system.

By analogy, the legal realist may be right, but if she is, legal revolutions are impossible. To the extent that the law is simply constituted by certain patterns of behavior, the movement from one set of patterns to another, whether it is gradual or sudden, has none of the discontinuity and incommensurability that we associate with revolutions. Granted, the realist has no reason to deny the occurrence of the *sociological* changes associated with revolutions. But seen from his purely extra-legal perspective, these changes are not discontinuous.

193. *See supra* Section II.A.
194. *See supra* Section II.A.
195. *See supra* Section II.A.

Consider the differing responses of a realist and someone committed to my approach as the events in late eighteenth century North America unfolded. For the latter, one set of valid laws—a set justified by the authority of the British King-in-Parliament—is replaced by an incommensurable set of valid laws justified by a different authority. She cannot legally reason from the first set to the second, because the revolution involves a shift in the axioms on the basis of which such reasoning is undertaken. For the realist, in contrast, there is no such shift in axioms, because he has abandoned the activity of reasoning about "the law" in favor of extra-legally determining how relationships of power and influence can be navigated. When these relationships change, the realist, of course, changes his behavior to accommodate them, but the principles by means of which he extra-legally reasons remains the same.

My argument, therefore, is not that the structure of legal systems *must apply*, but that it applies *to the extent that one believes in the possibility of revolutions*. One can look at the law as the realist does, but the price one pays is that legal discontinuity and continuity vanish. The fact that we believe revolutions are possible shows our commitment to the structure.

The same answer applies to a more limited criticism. One can admit that legal systems have a structure but argue that the structure is often indeterminate, in the sense that it will be unclear whether an act is inside or outside the authority of a lawmaker. But, once again, I am not arguing that the structure *must* be fully determinate—only that it is precisely as determinate as our belief in the possibility of revolution.

Consider the case of *Harris v. Minister of the Interior*.[196] The Appellate Division of the Supreme Court of South Africa struck down a statute passed by the South African Parliament that disenfranchised certain "non-European"—that is, mixed-race—voters.[197] The Appellate Division's reason was that, under a clause in the South Africa Act, a statute with subject matter of this sort had to be passed by a two-thirds vote of both houses sitting in joint session.[198] The statute had not satisfied these requirements, since it was passed by simple majorities of the separate houses of

196. 1952 (2) S.A. 428 (A). The case is discussed in HART, *supra* note 59, at 122. *See also* Erwin N. Griswold, *The "Coloured Vote Case" in South Africa*, 65 HARV. L. REV. 1361 (1952) (discussing *Harris*, soon after the decision was announced).

197. *See Harris*, 1952 (2) S.A. at 449–50, 472.

198. *Id.*

Parliament.[199] The Parliament's response was to enact, by simple majorities of the separate houses, the High Court of Parliament Act, which created an appellate body for review of decisions by the Appellate Division that struck down Parliamentary statutes.[200] The new High Court dutifully overturned the Appellate Division's decision.[201] The Appellate Division, in turn, struck down the High Court of Parliament Act.[202]

Eventually the Parliament changed tactics, deciding instead to pack the Appellate Division.[203] Once packed, the Court reversed itself.[204] But what if the Parliament had not changed tactics? Whose word would be law—the Parliament (through its High Court) or the Appellate Division?

The structure of legal systems does not demand an answer to this question. All it demands is that, if there is no answer, no revolutionary break in legal continuity will occur no matter whose word gets treated as law. Furthermore, this lacuna does not mean that structural concerns have no role in understanding the legal system in other respects. We can still say that a revolution would have occurred, for example, had a court of the General Division, which are trial courts in the South Africa legal system, defied the Appellate Division and this defiance came to be accepted as legal.

Our belief in the structure of legal systems is as strong (and as weak) as our belief in the possibility of discontinuity in the legal order. The law may be completely unstructured. But those interested in legal discontinuity must disagree, and so ignore this structure at their peril.

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199. *Id.* at 449.

200. *See* Erwin N. Griswold, *The Demise of the High Court of Parliament in South Africa*, 66 HARV. L. REV. 864, 865 (1953).

201. *Id.* at 866 n.9.

202. Minister of the Interior v. Harris, 1952 (4) S.A. 769 (A). *See also* Griswold, *supra* note 200, at 866 (discussing procedural history of the case).

203. Charles Villa-Vicencio, *Whither South Africa? Constitutionalism and Law-making*, 40 EMORY L.J. 141, 152 (1991).

204. Collins v. Minister of the Interior, 1957 (1) S.A. 552, 566 (A). *See also* Villa-Vicencio, *supra* note 203, at 152.