

“WE FORGOT ABOUT THE DITCHES”: RUSSIAN CONSTITUTIONAL IMPATIENCE AND THE CHALLENGE OF TERRORISM

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Gladko bylo na bumage, da zabyli pro ovragi. A po nim khodit'.

(It was so smooth on paper, but we forgot about the ditches we still
have to traverse.)

—Russian proverb by way of Leo Tolstoy (1853-1856).¹

*Ya sidel doma i, po obyknovenio, ne znal, sto s soboi delat'. Chego-to
hotelos': ne to konstitutsii, ne to sevruzhiny s hrenom, ne to kogo-
nibuld' obodrat'. Obodrat' by snachala mel'knulo i menya v golove;
obodrat', da i v storonu. . . . A potom, zarekomendovav sebya*

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1. While this is now a widely quoted proverb in general circulation in Russia, it had its source in lyrics written by Leo Tolstoy to a song popular during the Crimean War, 1853-1856. The war was lost and the song blames the defeat on the plans of the generals, who failed to anticipate messy realities on the ground. The proverb and its source are given in A. K. BYRIKH ET AL., *SLOVAR' RUSSKOI FRAZEologii: ISTORIKO-ETIMOLOGICHECHKII SPRAVOCHNIK* (DICTIONARY OF RUSSIAN PHRASEOLOGY: A HISTORICAL-ETYMOLOGICAL MANUAL) 62 (1998).

blagonamerennym, možhno i o konstitutsiyah na dosuge pomechtat'.

(I was sitting at home and, as I generally do, I had no idea what to do with myself. I wanted something. Either a constitution—or sturgeon with horseradish—or to plunder. Yes, for starters, it crossed my mind to plunder. To plunder, and then flee. . . . And after that, when I already proved myself to be a respected person, I could dream up a constitution in my spare time.)

—MIKHAIL SALTYKOV-SHCEDRIN, KULTURNYE LUDI
(EDUCATED PEOPLE) (1876).²

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I. INTRODUCTION

Russian constitutionalism is often portrayed as a sad story of

2. MIKHAIL SALTYKOV-SHCEDRIN, 12 SOBRANIE SOCHINENII V DVADTSATI TOMAKH 295 (COLLECTED WORKS IN TWENTY VOLUMES) (1971). This remark from one of Saltykov-Shchedrin's characters has long been a widely quoted saying in Russia. In fact, Lenin often referred to this passage and once elaborated on it by saying to the democrats of his day:

Instead of teaching people how to understand the constitution properly, you [the democrats] reduce the constitution to a sturgeon with horseradish. There is no doubt that for a counter-revolutionary landowner, a constitution is exactly like a sturgeon with horseradish because it is the most sophisticated means of plundering and subjugating a simple man and the masses.

See Krylatye Slova I Vyrazhenia (Words and Sentences with Wings), at <http://slova.ndo.ru> (last visited July 3, 2005) (reproducing the Lenin quote in Russian).

incomplete development, autocratic sabotage, and bad luck. Pre-Soviet constitutions failed to make reforms that were thoroughgoing enough to prevent the Revolution.³ Soviet constitutions used high-minded rhetoric and failed to guide the state in any meaningful way.⁴ Post-Soviet constitutions have been unstable, altered more by evasive practice than by transparent and legal amendment, and generally not the subject of much public veneration.⁵ After a bit more than a decade, during which the state

3. Max Weber, an astute observer of Russia's early twentieth century constitutional reform, famously argued that Russia's first written constitution in 1905 produced only "pseudoconstitutionalism":

The machinery grinds on as if nothing has happened. And yet things have been done which cannot be undone. The insincerity by which liberties are officially granted, and at the moment when one is about to avail oneself of them, are taken away again with the other hand, *must* become the source of constantly repeated conflicts and fierce hatred, and be far more provocative than the old blatantly crushing system of repression. You cannot play a game of tag with a nation's political liberties, by holding them out to it as one holds out a ball to a child and, when it reaches for them, making them disappear behind your back. It is the same with the "*constitution*" which the Manifesto of 17 October promised

MAX WEBER, *THE RUSSIAN REVOLUTIONS 173-74* (Gordon C. Wells & Peter Baehr trans., 1995).

4. As Aryeh Unger has shown, Soviet constitutionalism did not perform the functions typically attributed to liberal and democratic constitutions:

Soviet constitutions are not designed to perform the crucial normative function of restraining the rulers and protecting the ruled, and such constitutional provisions as appear to place some limits upon the exercise of political power are either meaningless or inoperative. The basic reason for this is, of course, that the Soviet Union is a dictatorship.

ARYEH L. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR* 3 (1981).

5. For example, in discussing the difficult birth of Russia's Constitutional Court, Herman Schwartz noted that some of the problem with establishing the Court's authority could be traced to the chaotic trajectory of post-Soviet constitutional development:

[A]ll of these challenges [that the Constitutional Court of the Russian Federation faced] have had to be met without clear constitutional guidelines in a society with a weak central government, powerful centrifugal forces, no supportive tradition or precedent, a culture permeated for centuries by "legal nihilism," and under two constitutions. The first of these was a continually changing patchwork of Communist legal principles and over 320 modifications and transformations; the second, the hastily cobbled product of a violent coup, designed to enhance the power of one man, and probably adopted without the requisite majority.

attempted to honor the new 1993 Constitution with a special Constitution Day, the holiday was quietly dropped in late 2004 without any public protest.⁶ And there are lively rumors now that Russia will soon have a wholly new constitution, currently being written in secret.⁷

Why have constitutions generally failed to take root and grow in Russia in a robust way? Why is Russia always starting over again with a yet another new constitution? As with many things Russian, well-known proverbs often provide more insight into the way things work than do general theories. And, as an old Russian proverb says, "It looked so smooth on paper, but we forgot about the ditches we still have to traverse."⁸ The reference was to the plans the Russian generals used during the Crimean War, a war they badly lost. Obviously, the lovely plan on paper failed to capture the reality on the ground, something that became glaringly obvious as soon as the battle was joined. But the proverb

HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 109 (2000).

6. See Claire Bigg, *Russian Lawmakers Scrap Public Holiday Marking Bolshevik Revolution*, THE GUARDIAN (Manchester, England), Dec. 31, 2004, at 15 (noting that Parliament adopted a new holiday schedule for Russia, including the elimination of Constitution Day); *Russians Bid Farewell to Constitution Day*, RIA NOVOSTI (Russian News and Information Agency), Dec. 11, 2004 (proposing to end the holiday), available at <http://en.rian.ru/onlinenews/20041211/39775463.html> (last visited July 3, 2005).

7. As one commentator has noted:

Three years remain until the next presidential election. According to the Constitution of the Russian Federation, Vladimir Putin, having completed his second term in office, will be ineligible to run for a third term. Putin himself is said to have no wish to do so. Yet some others in the Kremlin, after observing the latest elections in Georgia and Ukraine, are prepared to take any and all measures to maintain the status quo. For that purpose, the Constitution can be sacrificed yet again.

Sergei Shakhrai, one of the main authors of the current Constitution, is working on constitutional matters once more. Shakhrai is now chief-of-staff at the Auditing Chamber; his people are working on plans to create a parliamentary [republic] and abolish direct popular presidential elections. Last week, Shakhrai said: "A transition to a parliamentary model is being prepared, and that will require amending the Constitution—either by referendum or by convening a Constitutional Assembly."

Igor Dmitriev, *The Kremlin's Traffic Lights*, VERSIYA (Kiev), Feb. 15, 2005, at 9, translated in WHAT THE PAPERS SAY (Reading, England), Feb. 21, 2005, available at LEXIS, Nexis Library, Wps File.

8. BYRIKH ET AL., *supra* note 1, at 62.

could just as well refer to constitutions, where there is also always an issue of how one uses the abstract plan to guide conduct in concrete cases “on the ground.”

In Russian constitutional history, the strained relation between paper and reality has been particularly acute. Constitutional reforms in Russia have generally been launched from above with insufficient attention to the messy realities of a vast, socially uneven, ethnically complicated, politically inexperienced, and potentially unruly country.⁹ As a result, it should not be surprising that constitutional reforms often attempt to bring into being a reality that could not exist, or at least could not exist very soon.

At the first sign of constitutional trouble, however, Russian leaders have typically wanted to change the paper constitution immediately rather than wait to see if the constitutional plan, once fully established, would itself provide a solution to the long-term problems that provided the rationale for the new constitution in the first place. Russian constitutionalism has therefore been an *impatient constitutionalism*, with radical changes forthcoming at the first hint of real adversity. As a result, we will never know whether Russia’s constitutions would have ever solved great political problems because they were never given a chance to do so.

Terrorism, my particular focus in this Article, has been one of those problems—a recurring set of particularly deep “ditches,” to use the metaphor of the proverb. Twice in Russia’s history, terrorism has produced constitutional retrenchment rather than effective responses that stayed within the boundaries of the constitution. Constitutional impatience

9. For example, in the late eighteenth century, Catherine the Great launched major reforms with the idea of bringing her country into the European mainstream:

If Peter [the Great] had opened a window to Europe . . . Catherine threw open the doors and began to rebuild the house itself. She looked beyond the technological accomplishments of the North European Protestant nations to the cultural glories of France and Italy and the political traditions of England . . .

. . . Few other rulers of her time had such sweeping plans for reform and attracted so much attention from the *philosophes*, yet few others were so poor in practical accomplishment.

JAMES H. BILLINGTON, *THE ICON AND THE AXE* 217 (1966).

As Adam Ulam was to remark perceptively about the reforms of the nineteenth century, “the cumulative weight of Russia’s backwardness, of her oppressive social and political system, was too great to be lifted by a few new laws.” ADAM B. ULAM, *IN THE NAME OF THE PEOPLE* 19 (1977).

has extended to cases beyond terrorism, but serious terrorism has caused Russia's leaders to blame the constitutional reforms rather than to suppose that the problems that generated terrorism have a different, older, and deeper cause. Confronted with "ditches we still have to traverse," Russian leaders believe that they simply have the wrong paper before them. As a result, the two waves of terrorism in Russia's history have undermined the two most liberal constitutional reforms the country has ever known.

I focus on terrorism here for two reasons. First, fighting terrorism is the main public rationale for constitutional changes occurring in Russia as I write, so it has immediate importance; and second, terrorism tends to make most countries come unglued—at least in part—from their prior constitutional commitments, so Russia is not alone in this.¹⁰ Lessons from Russia can then be taken as a kind of cautionary tale for other places.

Even with Russia's bumpy constitutional history, however, I do not think it is fair to say that Russia has never had constitutionalism at work in her politics. And here, too, there may be some features of Russian constitutional history that provide useful tools to think with in analyzing other constitutional systems as well. While there are many ways to conceptualize crucial distinctions among types of constitutionalism, I want to focus in this Article on one primary dimension, which I will identify with a distinction between *ex ante constitutionalism* and *post hoc constitutionalism*. *Ex ante constitutionalism* exists when a constitution acts as a prior restraint on government, when the presence of a legal barrier to government action actually stops—or significantly modifies—official action *before it occurs*. The constitution's power, then, can be meaningfully said to preexist and shape a government's horizon of possible activity. This might be contrasted with *post hoc constitutionalism* in which a constitution is used primarily to reflect the principles to which a government aspires to be held under the best of circumstances (or, at least, where conditions permit). In *post hoc* constitutionalism, the constitution provides a framework to assess whether government action *that has already occurred* has lived up to its ideals, rather than providing a constraint in advance. *Post hoc* constitutionalism is not empty; it is not merely window dressing to make the façade of government appear better than its internal state would warrant. It really does have some normative power because the constitution can be used as the basis for a public critique of state action.

10. I address the special force of terrorism in generating states of emergency as a derogation from normal constitutionalism in my forthcoming book, KIM LANE SCHEPPELE, *THE INTERNATIONAL STATE OF EMERGENCY: CHALLENGES TO CONSTITUTIONALISM AFTER 9/11* (manuscript on file with author).

Ex ante constitutionalism provides more, of course; it provides actual binding constraint in advance that shapes what state action shall be. But, particularly when a constitution has been abandoned, *post hoc* constitutionalism reveals that there may be some residue of the constitution remaining in the form of a potential critique.

In general, the typical model of the constitution as a constraint on power assumes that *ex ante* constitutionalism is the only sort of constitutionalism that exists, but I think this assumption misses this other important dimension of constitutional possibility. Offering normative resources for a future constraint on state power by providing an especially authoritative critique of government conduct after the fact, *post hoc* constitutionalism provides a crucial focus for oppositional discontent and a way of diagnosing with some public legitimacy what went wrong after the constitution's principles were abandoned. The constitution, after all, usually provides a public rhetoric that regimes in power are often seen adopting in the moments just before they cross the line into unconstitutionality. As a result, the opposition can make a particularly sharp critique in the name of the constitution, quoting state officials who have since abandoned the constitutional path from a time when these very same state officials themselves quoted the constitution's principled and binding rhetoric. There is no critique like appealing to the country's own valid law (or a politician's own prior statements) at a time when the law is being flouted. At moments when a government suspends, ignores, or self-consciously violates the constitution, the constitution itself goes into opposition, to be used against the regime. This can be a powerful and important use of a constitution. As I will argue, Russia's present state of constitutional development is suspended somewhere between *ex ante* constitutionalism and *post hoc* constitutionalism. In fact, as I also hope to show, this is how Russian constitutionalism has worked in the past as well.

In this Article, it will not be possible to trace all of Russia's impatient constitutional history in light of these ideas about *ex ante* and *post hoc* constitutionalism. Instead, I will focus on two episodes of Russian history, separated by more than a century, in which crucial constitutional reforms stumbled into the ditches of domestic terrorism.¹¹ One is the present

11. Astute readers will notice that Russia's most famous episode of terrorism—Stalin's "terror" of the 1930s—is not included here. I take the production of terror by the state against its own population to be a different sort of political problem than challenges to state authority by non-state actors engaged in violence. As a result, I have focused only on the latter sort of terrorism—"bottom-up" terrorism, if you will—rather than on "the terror," as it came to be known in Soviet history, which is instead a sort of "top-down" terrorism.

period, in which a growing number of increasingly shocking incidents of domestic terrorism are perpetrated by Chechen separatists.¹² The Chechen radicals—along with their oft-advertised foreign allies¹³—have used attacks outside of Chechnya in order to gain attention, and possibly revenge, for the brutal civil war being conducted largely out of press scrutiny in their breakaway republic. The other recalls Russian terrorism in the 1870s through 1890s, starting with the organization of violent oppositional groups in the mid-1870s, reaching their peak with the assassination of tsar Alexander II in 1881, and continuing through the mid-1890s when thousands of military trials and politically inspired prosecutions resulted in the suspected terrorists being sent off to execution, exile, hard labor, or prison.¹⁴ Both bouts of terrorism—the nineteenth century one and the

12. While there is some ambiguity about whether all of the recent terrorist incidents were really carried out by Chechens, many of the worst incidents clearly were, which seems to have been enough to sweep official blame for all of the incidents onto Chechens. For a chronology of the attacks from 1995 to late 2004, see CNN, *TIMELINE: RUSSIA TERROR ATTACKS* (Sept. 2, 2004), at <http://edition.cnn.com/2004/WORLD/europe/09/01/russia.timeline> [hereinafter *CNN TIMELINE*].

13. There has long been a suspected connection between the broader networks of Islamic militancy and the Chechen independence movement. The Report of the 9/11 Commission, for example, notes that Mohammad Atta, the ringleader of the 9/11 plot, originally went to Afghanistan in order to train to fight against the Russians in Chechnya, but was later diverted to the attack against the United States once he got to Afghanistan. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 165-66 (2004). In addition, Russian President Vladimir Putin has repeatedly said since 9/11 that Russia and the United States are fighting a common enemy. In a speech delivered immediately after the terrorist attacks on the United States on September 11, 2001, Putin explicitly linked terrorism against America to terrorism against Russia:

The event that occurred in the US today goes beyond national borders. It is a brazen challenge to the whole humanity, at least to civilized humanity. And what happened today is added proof of the relevance of the Russian proposal to pool the efforts of the international community in the struggle against terrorism, that plague of the 21st century. Russia knows at first hand what terrorism is. So, we understand as well as anyone the feelings of the American people. Addressing the people of the United States on behalf of Russia I would like to say that we are with you, we entirely and fully share and experience your pain. We support you.

Statement by President Putin of Russia on the Terrorist Acts in the US (Official Kremlin International News radio broadcast, Sept. 12, 2001).

14. For an overview of this period, see generally NORMAN NAIMARK, *TERRORISTS AND SOCIAL DEMOCRATS* (1983).

post-Soviet one—were immediately preceded by substantial constitutional change,¹⁵ and the constitutional reforms that took place just prior to these challenges were themselves blamed for and then became the leading casualties of the campaigns against terrorism.¹⁶ Even so, the normative

15. Russia did not get its first written constitution until 1905, so one might wonder how a discussion of Russia's response to terrorism in the 1880s could have much to say about constitutionalism. I would like to make a controversial, or at least somewhat novel, argument in response. In the 1860s, the Russian tsar Alexander II promulgated a series of reforms that in their radicalness and their comprehensiveness amounted to what I think constitutes a constitutional change. The reforms of the 1860s did not come in the form of a single written text, but the discussion of constitutionalism has never been limited only to that form of constitution. Instead, the Great Reforms, as they have come to be called, performed constitutional work by (a) freeing the serfs and giving them claims to land, (b) introducing separation of powers for the first time in Russian history by creating an impressively independent judiciary, and (c) creating participatory local governments in the rural areas (*zemstva*) and then later in the cities (local *dumy*). There were other root-and-branch reforms of the military and tax systems as well. These sweeping reforms carried over to the increasing separation of other institutions from heavy-handed state control. Universities were given meaningful academic freedom by the University Statute of 1863 and civil society organizations sprang up in comparatively great numbers during this time, though more because of the absence of repression than through affirmative legal measures. These changes, creating limited self-government, separation of powers, and a general institutional differentiation of the society as a whole, amount—in my view—to an ambitious set of constitutional changes. All too often, a constitution is equated in an autocratic system with the creation of a parliament, but that is too limited a view of what constitutions can do. While Alexander II steadfastly resisted calls for a new constitution (which meant—in the traditional view—having to govern in conjunction with others), his reforms were fundamental enough to amount to a constitutional change already, in my view. A quite comprehensive review of the Great Reforms can be found in *RUSSIA'S GREAT REFORMS, 1855-1881* (Ben Eklof, John Bushnell & Larissa Zakharova eds., 1994) [hereinafter *RUSSIA'S GREAT REFORMS*], and I will review these reforms in more depth in the next section of this Article. Ironically, the tsar did finally approve a formal constitution drafted by one of his ministers on March 1, 1881, but the tsar was assassinated later that same day by one of the new breed of terrorists. For evidence that Alexander II actually agreed to a constitution on the day of his assassination, see Larissa Zakharova, *Autocracy and the Reforms of 1861-1874 in Russia: Choosing Paths of Development*, in *RUSSIA'S GREAT REFORMS*, *supra*, at 19, 36. James Billington also confirms that the tsar had just approved a new constitutional plan on the day of his assassination. BILLINGTON, *supra* note 9, at 401.

16. For example, in the case of the reaction after the assassination of Alexander II:

Instead of a constitution, Russia got first a manifesto on the “irreplaceability of autocracy” and then the Statute on Measures to Preserve the Security of the State and Domestic Tranquility of August 14, 1881. . . . As issued, the statute was “temporary,” for three years. As its three-year term expired, it was renewed; it remained in effect right up to the February Revolution of 1917,

frameworks of the prior constitutional reforms provided important rallying points of opposition for pushing back against state overreaction to terror. When *ex ante* constitutionalism failed to stop the potentially unconstitutional actions taken by the state to fight terrorism in both periods, *post hoc* constitutionalism remained to provide a coherent critique of what the state had just done.

In order to trace the effects of terrorism on Russian constitutions, we will look first at the nineteenth century events. Then we will move to the current situation, which is, as I write, still in flux. Finally, we will consider what it means for a country to be suspended between *ex ante* and *post hoc* constitutionalism.

II. CONSTITUTIONALISM AND TERRORISM IN NINETEENTH CENTURY RUSSIA

By all accounts, the country that Alexander II inherited when he became tsar in 1855 was a mess. Russia's defeat in the Crimean War showed Russia's military weaknesses,¹⁷ and the persistence of serfdom revealed Russia to be a "backwards" place that was an embarrassment in the eyes of Europe because it so obviously signaled that Russia trailed it in development.¹⁸ Administratively, the state was barely functioning. Russian finances were in ruin.¹⁹ The backlog of cases in Russia's courts had become a scandal.²⁰ Autocracy, challenged under Alexander II's

becoming "Russia's real constitution."

Zakharova, *supra* note 15, at 36.

17. Carl Peter Watts, *Alexander II's Reforms*, HIST. REV., Dec. 1998, at 6, 9.

18. James Billington attributes the freeing of the serfs to the ideas that flowed into Russia from Europe after Russia's loss in the Crimean War. "[T]he beginnings of a massive, irreversible process of modernization" could be seen in Alexander's reforms. BILLINGTON, *supra* note 9, at 361. By emancipating the serfs, "Alexander II cut Russia off forever from its static, agrarian past." *Id.*

19. Ben Eklof, *Introduction to RUSSIA'S GREAT REFORMS*, *supra* note 15, at vii, vii.

20. A report to the Russian tsar in 1842 indicated that there were 3,300,000 cases pending in the courts without resolution. SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS 3 (1953). These backlog numbers, staggering as they are, resulted in part because cases took decades to resolve, given the unwieldy and inefficient system of evidence that left ten to thirteen percent of the criminal cases without any formal resolution—ever. RICHARD S. WORTMAN, THE DEVELOPMENT OF A RUSSIAN LEGAL CONSCIOUSNESS 239, 316 n.12 (1976). The backlogs are also evidence of the balkiness of the system that occurred because the number of judges remained unchanged from 1775, when the population was half the size it was in the mid-1800s. *Id.* at 238.

immediate predecessor Nicholas I, had survived the uprisings of the Decembrists who had called for constitutional change—but autocracy’s weaknesses were made more visible by its inability either to govern effectively or to win wars. Though Alexander II did not seem to have come to the throne with any particular hankering for change, he was persuaded by the situation he confronted and by the coterie of liberals around him to take up reform.²¹

Whole libraries have been devoted to the causes and consequences of the Great Reforms;²² for our purposes, it suffices to say that the breadth and depth of the reforms was truly extraordinary and not fully predictable from Russia’s autocratic history to that point. With the edicts²³ of February 19, 1861, serfdom was abolished.²⁴ Huge numbers of people—people who had previously been tied to the land, unable to move, possessed of no important freedoms, and governed by the landowner whose holdings were the source of both their meager livelihood and their oppression—were suddenly uprooted and cast loose onto the terrain of Russian society and politics.²⁵ But they were not completely cast free of obligation, because they had to buy the land that they had been promised.²⁶ As a result, many newly freed peasants wound up in deep debt to the state when they bought their holdings.²⁷ Some two to three million peasants found themselves with

21. See generally WORTMAN, *supra* note 20, at 244-48 (accounting the liberal reformers behind the great wave of judicial changes in the 1860s); ZAKHAROVA, *supra* note 15, at 20 (recounting how liberal reformers had to persuade Alexander II, who did not come to power as a reformer even though he “was a man of liberal beliefs”).

22. For a review of the historiography of the period, see ABBOTT GLEASON, *The Great Reforms and the Historians Since Stalin*, in RUSSIA’S GREAT REFORMS, *supra* note 15, at 1, 1 (reviewing the work of historians on the Great Reforms).

23. The translation I have seen in most English language sources for the Russian term *ukaz* in this context is “statute.” That word, however, tends to connote a system for the passage of laws that is something other than an unconstrained directive of the tsar. Though there was some informal consultation with the generally toothless Council of State over major reform issues, it would be quite a distortion of history to think of Russian statutes as approximating their parliamentary-democratic equivalent in a modern constitutional democracy. I will therefore use the term “edict” instead.

24. DANIEL FIELD, *THE END OF SERFDOM* 357, 359 (1976).

25. At the time of their emancipation, there were about forty-three million “souls” (as they were routinely called) in serfdom. ULAM, *supra* note 9, at 78. While twenty-two million were owned by individual landowners, fully nineteen million were owned by the state itself. *Id.* Two million belonged to the imperial family on its private estates! *Id.*

26. *Id.* at 80.

27. *Id.*

no land at all in the deal, despite the promises.²⁸ Many of the political reforms that followed have been chalked up to the need to find forms of governance and dispute resolution for this sea of unmoored people.²⁹ Political reforms came along at least in part to contain the failure of economic reform.

The new political institutions were startling in their modernity and novelty for Russia. Perhaps most important for our purposes were the extraordinary efforts at democratization and separation of powers that resulted from Alexander II's reforms. As for democratization, the edict of January 1, 1864³⁰ created the *zemstva*,³¹ organizations in rural areas that provided, on paper at least, self-government for peasants and landholders alike.³² The *zemstva* comprised—at least, in theory—elected representatives from all social classes; in practice, not surprisingly, landholders dominated.³³ The *zemstvo*'s urban political counterpart, the city *duma* or parliament, was created by edict in 1870 and also envisioned “all-estate institutions of local government.”³⁴ These city parliaments were based on general elections held every four years. Property qualifications, however, limited those voting to only the most elite of the lower strata and turnout seems to have been only 5.5 percent of all of the citizens, at best.³⁵ Though neither the rural nor the urban variant of local democratic institutions lived up to the aspirations liberal reformers had for them, they nonetheless represented a striking inroad on autocracy. Local

28. Watts, *supra* note 17, at 7.

29. See WORTMAN, *supra* note 20, at 2 (expressing skepticism of the proposition that “the emancipation, ending the landlords’ judicial authority over the peasants, created conditions necessitating an independent judiciary”).

30. Fedor A. Petrov, *Crowning the Edifice: The Zemstvo, Local Self-Government and the Constitutional Movement, 1864-1881*, in RUSSIA’S GREAT REFORMS, *supra* note 15, at 197, 198.

31. A note on plurals here. The Russian terms for institutions of local self-government is *zemstvo* for the rural organizations and *duma* for the urban ones. The plurals in Russian would be *zemstva* and *dumy*, which I have used here in preference to the more awkward-sounding *zemstvos* and *dumas*. There is no standard usage here; other authors may use the Anglicized plurals.

32. Some critics say that the *zemstvo* was not quite as novel as it looked, having evolved from a prior system of local self-administration run only by the nobility. For a contemporary critique, see *id.* at 198 (describing the *zemstvo*'s introduction into the Russian political arena). Expanding representation to include the peasants had to change the institution in its fundamental character.

33. Watts, *supra* note 17, at 8.

34. Valeriia A. Nardova, *Municipal Self-Government After the 1870 Reform* (Lori A. Citti, trans.), in RUSSIA’S GREAT REFORMS, *supra* note 15, at 181, 183.

35. *Id.* at 187-88.

governments, at least on paper, were to be democratic, representative, and responsive to broad swaths of the population. There were, however, “ditches” from the start. The institutions never worked quite the way they were designed to function.

Separation of powers was an even more novel concept in Russian political history, but it was pressed in the reforms with even more vigor than the democratizing changes of local self-government. In the history of Russian autocracy, there had never been any substantial differentiation of political institutions that provided either any constraint on what the tsar could do or any source of authority independent of the tsar.³⁶ The edict of November 20, 1864 changed all that. It proclaimed a wholly new set of functions for a wholly reformed judicial branch of government with a preamble to the judicial reform edict that spoke (in the royal “We”) of:

Our desire to establish in Russia fast, just and merciful courts, equal for all Our subjects; to increase judicial power, to give it the necessary independence and, in general, to strengthen in Our people the respect for law without which public prosperity is impossible, and which must serve as a permanent guide for the actions of all and everybody, from the person of the highest to that of the lowest rank . . .³⁷

The edict on the judiciary laid out an ambitious agenda of reform. Exclusive judicial power was given to the courts, and no other institutions were permitted to exercise judicial functions.³⁸ No person could be punished for a felony or misdemeanor without judgment of a competent court.³⁹ A new code of civil procedure rationalized rules of evidence and required that court hearings be public.⁴⁰ Court structure was simplified and the hierarchy among courts was made clearer.⁴¹ An independent and professionally trained legal profession—both bench and bar—was called into existence virtually overnight.⁴² Judges were given life tenure.⁴³

But perhaps the most striking change was the introduction of the

36. See KUCHEROV, *supra* note 20, at 27 (“The doctrine of separation of powers was introduced in Russia for the first time by the Reform of November 20, 1864, and dropped again by the Soviet Government.”).

37. *Id.* at 26 (citation and internal quotation marks omitted).

38. *Id.* at 33.

39. *Id.* at 34.

40. *Id.* at 37-40.

41. See *id.* at 43-50.

42. See WORTMAN, *supra* note 20, at 261, 263-65.

43. See *id.* at 261.

twelve-person free-standing independent jury.⁴⁴ Here, too, there was a striking aspiration for bringing ordinary people into state decisionmaking in the paper plan for the jury and a substantial difference between plan and practice once the institution was up and running (that is, more ditches). While the jury was to be drawn from among all those citizens between the ages of twenty-five and seventy who had lived for at least two years in the district where the trial was to be held, a property qualification enforced in practice meant “the great majority of the Russian population” (in particular, the former serfs) could not participate.⁴⁵ Eventually, however, the strong desire of the elites to avoid jury duty seems to have led to greater representation of peasants on the juries.⁴⁶ But then, specific limits on the numbers of particular populations who could and did serve on juries (particularly limits on the numbers of Jews who were allowed to serve on juries in nine western provinces⁴⁷) further limited their representative quality.

That said, Russian courts in their first decades after the reform performed surprisingly well. They were, in fact, remarkably independent, particularly when functioning with juries.⁴⁸ And, as one might expect, courts started to threaten autocracy almost immediately. Just one year after the reforms were announced, Alexander II wanted to sanction a senator who, at a meeting of a *zemstvo*, made a very liberal speech. The tsar ordered the minister of justice to remove the senator from office. While the minister was preparing the paperwork, the minister’s

44. As Kuchеров notes, the institution of the jury may appear to have been borrowed from England, where such juries were in operation, but the more likely source of foreign influence was France with substantial, distinctly Russian, adaptation. See KUCHEROV, *supra* note 20, at 51-71.

45. Alexander K. Afanas’ev, *Jurors and Jury Trials in Imperial Russia, 1866-1885* (Williard Sunderland, trans.), in RUSSIA’S GREAT REFORMS, *supra* note 15, at 214, 215.

46. *Id.* at 224.

47. *Id.* at 223.

48. Perhaps they were even too independent:

Even in ordinary cases, lawyers on both sides allowed themselves liberties unimaginable in England or France. Civic spirit being undeveloped, juries tended to base their verdicts on the general impression the defendant produced rather than on the weight of the evidence. It was notoriously difficult to obtain a conviction, even of a common murderer, if he or she touched the heartstrings of the jurors: life in Russia was so hard—how could a good Christian justify to his conscience, or an *intelligent* square with his beliefs, that a fellow human being should spend years at hard labor in Siberia?

ULAM, *supra* note 9, at 271.

subordinates called his attention to the fact that a senator could no longer be removed under the new laws because the senator was also a judge who had protection under the Judicial Reform Act. Reporting his failure to remove the senator, the minister was apparently then asked by the tsar: "Did I sign such nonsense?"⁴⁹ This was just one example, of which there came to be many, in which the presence of independent courts created unaccustomed constraints in the exercise of absolute power.

Not surprisingly, the tsar soon began to resort to end-runs around the judiciary to accomplish his purposes.⁵⁰ Local officials in the newly created self-governments were also aggrieved by the presence of independent courts that got in the way of their exercise of absolute power within their spheres.⁵¹ Little did they realize that the same reforming spirit that made possible the independent judiciary was also the same spirit that enabled their own institutions to flourish. Threats to one of these reform institutions would, as a result, surely mean trouble for all. But at first, the *zemstva* and the *dumy* were jealous of the courts.

Russian constitutionalism for a bit looked like the sort of *ex ante* constitutionalism that was emerging all over Europe during this period. New institutions, created first on paper, constrained in advance the discretion of kings; laws on the books created institutions in practice that

49. KUCHEROV, *supra* note 20, at 34-35.

50. As Wortman details:

The new judiciary introduced an element of disruption into Russian institutions that would split the Russian polity into mutually antagonistic and uncomprehending parts. The clashes took place at a high level—where the officials responsible for the defense of the interests of administration and judiciary confronted each other, and often proved incapable of comprehending each other's mentalities or goals. On the one side were the administrators, beholden to the power of the executive as the instrument of the autocratic will; on the other, the legal officials who regarded the judiciary as the only guarantor of justice. The administrators feared legal expertise, which seemed to introduce doubts and the snares of legal reasoning when forceful action was called for. The legal officials feared the government, which seemed, as always, to regard the judiciary as a nuisance thwarting its political designs.

WORTMAN, *supra* note 20, at 270. Zakharova adds: "As the reforms came into effect, a clash between illusions and reality was inevitable. Consequently, liberalism lost its leading position right after the abolition of serfdom, and in the 1860s, still more in the 1870s and 1880s, it yielded its place to extreme tendencies." Zakharova, *supra* note 15, at 37.

51. See WORTMAN, *supra* note 20, at 275 ("Independent courts placed a limit on administrative authority that neither governors nor police officials were accustomed to, and both complained loudly.").

attempted to accomplish the purposes for which the laws were written. But the period of *ex ante* constitutionalism did not last long. While far from perfect, these new institutions—the *zemstvo*, the urban *duma*, and the new judiciary—set Russia on a different path, a far less autocratic one than had been thought possible before the 1860s. But opening up before all the new institutions was another giant ditch that came along with political liberalization: terrorism.

Scattered through Russian society of this reform period were many discontents who had been uprooted by the changes, partially accommodated by the reforms, but never fully integrated into the project of building the Russian state in its new but semi-autocratic form. The discontents themselves were mostly intellectuals who benefited from the academic freedom that came with the reform of Russian universities in the 1860s.⁵² The populations to which they hoped to appeal were the economically dislocated, newly freed peasants, whose participation in the institutions of local self-government and the new juries never lived up to advance promises. The failures of the reforms to truly include all of those to whom they had been apparently directed provided rich opportunities for the radicals to claim that the reforms were a sham.

Having been given public space by the withdrawal of censorship, many in the new class of intellectuals found much to criticize in the reforms. The liberals among them thought that the reforms were good in theory, but flawed in practice because they were not thoroughgoing enough. They wrote critiques and campaigned for further reform. The radicals among them believed that the reforms merely tried to patch up a system that was fatally flawed because it was highly unequal and because the tsar, in the end, was truly unwilling to share power with the newly empowered classes. They threw bombs.

Who were these terrorists? They emerged from a shadowy set of disparate groups—some overlapping, others isolated from the rest—and embarked on a program to radicalize the reforms and/or to bring down the Russian tsar.⁵³ Many of the most important radicals were populists of

52. NAIMARK, *supra* note 14, at 9-10; *see also* BILLINGTON, *supra* note 9, at 388-92 (discussing the rise of the intelligentsia during the 1860s and their attraction to revolutionary populism).

53. *See* NAIMARK, *supra* note 14, at 130-31 (recounting the rise of the Terrorist Faction, which expressed the prevailing ideology of radical university students, and attempted to carry out that group's wish by attempting to assassinate the tsar); ULAM, *supra* note 9, at 274 (describing an uprising led by the intelligentsia in Odessa, Ukraine).

different stripes. Organized primarily in small bands, with shifting membership and goals that were not always clear, the radicals' views ranged from nihilism to anarchism to socialism. They agreed on the inadequacy of autocracy, however much it had been softened around the edges. They did not agree on any ideal future or particular path for getting there.

Ironically enough, the moment when Russian reforms seemed to work at their liberal best was also the moment at which the flames of terror were most boldly fanned.⁵⁴ In 1878 a revolutionary named Vera Zasulich was tried in the independent courts with a jury. Zasulich, a well-known radical who had been involved with the revolutionary populist movement, was charged with attempting to assassinate General Fyodor Trepov, the governor of the city of St. Petersburg. Trepov had ordered the brutal whipping of a prisoner in the yard of the city prison when the prisoner failed to doff his hat to the general on command. Zasulich had read about the incident in the newspaper and, identifying with the unfortunate prisoner who had been beaten, determined to take revenge against the perpetrator.⁵⁵ When she shot Trepov, wounding him slightly, she was “[h]ailed by *obshchestvo* (educated society) as a martyr for justice.”⁵⁶

Her trial, in open court with an independent jury on March 31, 1878, was a public spectacle.⁵⁷ The defendant, for substantial parts of the trial, seemed to be not Vera Zasulich, but instead General Trepov himself. In the absence of any strict rules of evidence that would have kept the focus on Zasulich and not on her victim, the defense called several political prisoners who had witnessed the original beating to testify to the brutality with which the prisoner had been whipped.⁵⁸ As one trial spectator wrote afterwards, the defense counsel then “mercilessly disclosed the whole despotism of government.”⁵⁹ In his analysis of what the government was doing in this case by charging Zasulich with a political crime, Zasulich’s defense counsel argued to the jury:

Attention should be paid to the typical moral features of crimes against the state. The nature of such crimes changes very often. What

54. “For it is difficult to imagine the now decisive turn of Populism to terror without the Zasulich case.” ULAM, *supra* note 9, at 274.

55. KUCHEROV, *supra* note 20, at 214-15.

56. NAIMARK, *supra* note 14, at 11.

57. KUCHEROV, *supra* note 20, at 217.

58. *Id.* at 217-21.

59. *Id.* (quoting Elisabeth Naryshikin-Kurakin) (internal quotation marks omitted).

was considered a crime yesterday, becomes a glorious deed of civil valor today or tomorrow. A crime against the state is often the expression of a doctrine aiming at premature reforms, at propagation of something not yet grown to full maturity and for which the time is not yet ripe⁶⁰

The clear invitation to the jury was to think of Zasulich's "crime" as another sort of reform, one that the state was not yet ready to join. Zasulich's case, therefore, squarely put before the jury the radicals' question of the insufficiency of Alexander II's political course. Moreover, Zasulich's defense counsel argued that she did not really want to kill General Trepov.⁶¹ Instead, she wanted to wound him just a little in order to have a chance to bring his horrible conduct before the public.⁶² Since it appeared to be Trepov, not Zasulich, who was really on trial, it was therefore the government, and not the radicals, whose conduct was to be judged.

The jury found Zasulich not guilty, despite the overwhelming evidence presented at trial that she had in fact shot Trepov.⁶³ A roar of approval went up from those in the courtroom and the defense counsel was carried out on the shoulders of the crowd.⁶⁴ Zasulich was set free. When the police came to arrest her the next day on the pretext of another offense, they found that she had already fled abroad.⁶⁵

In reaction, Alexander II fired the justice minister who had brought the prosecution to trial.⁶⁶ Showing that he had pulled back from reform, the tsar did not seem willing to live happily with the results of the independent jury. Instead, the acquittal of Zasulich hastened the end of the reforming tsar's liberal tendencies. As Adam Ulam explained, "[t]he government, dumbfounded by Vera Zasulich's act and infuriated by the verdict in her favor, replied in the way that the revolutionaries hoped it

60. *Id.* at 219.

61. *Id.* at 220.

62. *Id.*

63. *Id.* at 221.

64. *Id.* at 222.

65. *Id.* n.68. It should be noted that virtually everyone in Russia knows the story of Vera Zasulich. She went on from this incident to be one of Karl Marx's foremost Russian translators, and her correspondence with him has been widely published. She lived in exile and remained a revolutionary until she returned for the October Revolution in 1917 where, by siding with the Mensheviks, she joined what came to be the losing side of the revolutionary movement.

66. *Id.* at 225 (citation omitted).

would: by escalating its repression.”⁶⁷ The tsar tightened the grip of censorship, set the secret police to ferret out the revolutionaries, and made it increasingly clear that he had no intention of honoring the promises that the reform had made to power-sharing, however minor those promises had been. But the acquittal of Vera Zasulich signaled to the radicals that the public was with them. They turned to more violence in an effort to speed the revolution, with assassination of members of the political elite as their favored activity.

The group *Narodnaya Volya* (People’s Will) was the most effective at the use of violence for political ends.⁶⁸ While only one of the many groups that populated the critical fringe of Russian society at that point, *Narodnaya Volya* “was to shake the foundations of the vast empire and affect decisively the course of Russian history.”⁶⁹ Though numbering perhaps only several dozen members at its height,⁷⁰ *Narodnaya Volya* showed a sort of revolutionary discipline unmatched by other groups at the time,⁷¹ and it was willing to use terrorist tactics, particularly assassination. The chief target of *Narodnaya Volya*, which had quickly become the most feared group of radicals, was the tsar himself. Various members of the group tried repeatedly to assassinate him but failed.⁷² The secret police had rounded up many members of the group, but the group members who remained free kept trying to kill the tsar.

On March 1, 1881, a member of *Narodnaya Volya* tossed a bomb at the royal carriage, which exploded, but which did not succeed in even

67. ULAM, *supra* note 9, at 275.

68. *Narodnaya Volya* was an offshoot from a group called *Zemlya I Volya* (Land and Freedom). While *Zemlya I Volya* limited “the terror . . . to self-defense—the elimination of traitors, police informers, and officials notorious for cruelty,” some within the group began to see regicide as the only solution to the problem of autocracy. *Id.* at 250, 308-09. When one of the *Zemlya I Volya* members attempted to assassinate the tsar on April 2, 1879, the group split irreconcilably over the justifiable limits of terrorist attacks. *Id.* at 325. The more violent offspring *Narodnaya Volya* recognized no limits on the targets of terrorist attacks and aimed at producing general terror in the political elite in order to force radical political change. By early 1880, the platform of the group was aimed explicitly at “terrorist activity designed to annihilate the most harmful officials.” *Id.* at 220 (quoting the public program of the Executive Committee of *Narodnaya Volya*).

69. *Id.* at 251.

70. *Id.* at 327.

71. *Id.* at 251-52.

72. The group’s favorite material for these attacks was dynamite, and *Narodnaya Volya* tried seven times without success to blow up the tsar. *Id.* at 336.

injuring the tsar.⁷³ When Alexander got out of his carriage to view his potential assassin, another member of the group threw another bomb, this time fatally wounding the him.⁷⁴ As Norman Naimark wrote about the reaction of *Narodnaya Volya* to their unaccustomed success:

Members of [*Narodnaya Volya*] had tried so often to assassinate Alexander II and suffered so many arrests as a result of their failures that the actual killing sent a shudder of relief through the remaining ranks of the party. The nightmare of autocracy was over, they believed. The combined social and political revolution, which they had advocated but had begun to doubt, could start now that the dragon was slain. The people would rise to seize their freedom and establish their own forms of socialism. The more astute narodovol'tsy [party members], less prone to the illusions of their populist past, argued that at the very least there would be genuine liberal reforms, which would begin the process of revolution.⁷⁵

But instead of starting more radical reforms, all hell broke loose after the assassination. First, against the expectations of the radicals, most of the population turned out to be more sympathetic to the dead tsar than to *Narodnaya Volya*.⁷⁶ Second, the assassination of Alexander II brought into power tsar Alexander III, who was not only no reformer, but an autocrat of the first order.⁷⁷

Constitutional change was still in the air. But at that point, had the constitution Alexander II agreed to on the morning of his assassination been promulgated, “any reform would now appear to many as a partial capitulation to the terrorists.”⁷⁸ At a meeting shortly after the assassination of Alexander II to decide what to do about the proposal for a new constitution, the procurator general analyzed the situation Russia faced: “Some want to impose a constitution on the country, if not now, then as the next step. What is a constitution? Western Europe gives us an answer—there, constitutions have served to promote falsehood and intrigue.”⁷⁹

The new tsar considered constitutional innovation in light of the pleas

73. NAIMARK, *supra* note 14, at 8.

74. *Id.*

75. *Id.*

76. *See id.* at 13 (“Rather than seizing the opportunity to rebel, educated society and the people mourned the death of the tsar.”).

77. *Id.* at 9.

78. ULAM, *supra* note 9, at 366.

79. *Id.* at 368.

of some of his reform-minded ministers and in the end, opted for a return to firm autocracy. In an imperial manifesto setting the tone of the reign of the new tsar, he attested to his “faith in the strength and justice of autocratic power which [w]e have been called upon to preserve and reinforce for the weal of the nation.”⁸⁰

The terror felt by political officials in the wake of the assassination of the tsar was apparently quite intense. A series of trenches was dug around the Winter Palace to protect it from attack.⁸¹ Even so, the tsar moved to a more remote location outside of St. Petersburg.⁸² Count Dmitrii Tolstoi, named the new head of the Ministry of Interior Affairs, “became obsessed by fear of nihilists” and was afraid to venture from his house because he was sure he would be assassinated himself.⁸³ Others in the circle around the new tsar thought that “Russian statesmen were ‘fated and doomed.’”⁸⁴ They came to see terrorists everywhere. Universities were a special locale for suspicion. *Zemstvo* organizations were also under surveillance. Poles and Jews were especially likely to be terrorists, or so the authorities thought.⁸⁵ And what was to blame for the terror?

The Great Reforms of the 1860s were seen as the seedbeds of liberalism, and liberalism, in [newspaper editor Mikhail] Katkov’s words, was merely “nihilism in its legal form.” Thus, government leaders conceived their attempt to reverse the old reforms as one aspect of the sacred struggle against the revolutionary movement. The substantial opposition in government and society to the counterreforms was attacked for sedition and radical leanings by the conservatives, with Alexander III and [Interior Minister] Tolstoi in the lead.⁸⁶

Whatever hope there may have been on the part of the oppositionist groups for either a socialist revolution or for liberal reform was quickly dashed by the early actions of the new tsar. Even holding the existing constitutional reforms in place, as *ex ante* constitutionalism would require, became impossible under the force of the tsar’s reaction. He resorted to

80. *Id.*

81. *Id.* at 366. At this point, there were literal ditches to protect autocracy from incursion!

82. *Id.*

83. NAIMARK, *supra* note 14, at 17 (citation omitted).

84. *Id.* at 20 (citations omitted).

85. *Id.* at 22. The association of Jews with the terrorists was one of the motivating forces behind the pogroms in 1881 and 1882. ULAM, *supra* note 9, at 369.

86. NAIMARK, *supra* note 14, at 21 (footnote omitted).

emergency powers.

On August 14, 1881, the new tsar issued a new edict, "Measures for the Preservation of State Order and Public Tranquility."⁸⁷ The edict struck directly at the reforms that had been promulgated by Alexander II, particularly those that had constituted the independent judiciary. The emergency law transferred the trial of crimes away from ordinary courts to courts-martial.⁸⁸ It also allowed these transferred criminal trials to be conducted in secret.⁸⁹ Both of these provisions put an end to trying suspects like Vera Zasulich in open court before a jury. Persons could be arrested on mere suspicion and dwellings could be searched without definite suspicion.⁹⁰ Those deemed to be threats could be banished to remote parts of the Empire under police supervision for up to five years.⁹¹ While the law originally contained a sunset clause that would cause it to expire in three years, it was repeatedly renewed—up to, in fact, the period just after the Revolution of 1905, when it was toughened up and reenacted as a counterweight to the new written constitution.⁹² Though the law originally limited to only a few provinces and cities, it was continually expanded in range over the years so that by 1905 it covered nearly the entire empire.⁹³ This emergency decree and its harsher successor proved to be more permanent and lasting than any of Alexander II's reforms. The constitutional reforms of mid-century failed to stop the new tsar from returning again to autocracy.

In place of trial by jury in open court, the political trials of the counter-reform period were conducted by courts-martial.⁹⁴ Between 1875 and 1908, 2,678 persons (of whom 2,410 were civilians) were executed under sentence from these courts.⁹⁵ While the vast majority of these executions took place between 1905 and 1908 (instead of right after the first emergency decree was promulgated in 1881), the track record of courts-martial was clearly different from that of the regular courts all the

87. KUCHEROV, *supra* note 20, at 202.

88. *Id.* at 203 (citation omitted).

89. *Id.* (citation omitted).

90. *Id.* (citation omitted).

91. *See id.* at 202-03 (summarizing the law in English).

92. *Id.* at 203; *see also id.* at 205-10 (discussing the 1906 emergency law). In fact, the 1906 law was enacted *under* the new constitution—promulgated by the government without consent of the new parliament, which the government was allowed to do when the parliament was not in session. *Id.* at 206.

93. *Id.* at 203.

94. *Id.* (citation omitted).

95. *Id.* at 211.

way through.⁹⁶ From the start of the emergency government, the tsar's administration chose where political cases would be tried, which more or less determined the sentence.⁹⁷ Defendants were not permitted to consult with counsel.⁹⁸ In addition, a governor-general had the right to refuse the possibility of appeal from a court-martial in any specific case.⁹⁹ The result was the abolition of the separation of powers that the judicial reforms of 1864 had created.¹⁰⁰ The result was also the increase in extremely long sentences, as well as frequent use of the death penalty for political offenses.¹⁰¹ The independent judiciary, accountable only under the law and not under the tsar, was effectively killed off after the assassination of the tsar who had called them into being.

The local self-governments, a significant—though imperfect—sign of a commitment to democratic participation, were also greatly cut back in jurisdiction after the assassination of Alexander II. By the first half of the 1880s, the tsar's administration showed signs of interfering in the choices of city mayors, something that before then had been largely left to elections with approval of the governors of the regions.¹⁰² But though the city governments often went their own way, “[t]he state considered any incident of noncompliance with demands by the [tsar's] local bureaucracy oppositional, and thereby illegal activity.”¹⁰³ By the mid-1880s, Interior Minister Tolstoi developed an extensive program of counterreforms that enabled the tsar's administration to bring the cities under state control.¹⁰⁴ One feature of this counterreform was limiting elections and directly appointing local officials.¹⁰⁵ Finally adopted on June 11, 1892, the counterreform of city self-government returned autocracy to even this corner of political life.¹⁰⁶ The democratic reforms were dead. The *zemstva*, caught in the same dynamic, were limited in their autonomy as well. Autocracy was back, almost as if the mid-century reforms had never

96. See *id.* (describing the number of executions imposed by court-martial proceedings as “monstrous”) (citation and quotation marks omitted).

97. *Id.* at 211-12.

98. *Id.* at 212.

99. *Id.*

100. *Id.* at 211.

101. *Id.* at 205.

102. Nardova, *supra* note 34, at 195.

103. *Id.* at 194.

104. See *id.* at 195 (“Tolstoi’s ‘counterreforms’ attempted to maximize the city government’s subordination to the bureaucratic apparatus of the autocracy.”).

105. *Id.*

106. *Id.* at 195-96.

occurred.¹⁰⁷

As we have seen, reform—while apparently sweeping and idealistic in its initial conception—was almost immediately thought to be a bad idea by the very tsar who put the reforms into place.¹⁰⁸ Alexander II never showed the patience required to see the constitutional changes that he launched actually take hold. Instead, he himself attempted to go around the newly independent institutions, and was surely publicly piqued by them. Others in the political sphere—newly empowered *zemstvo* leaders and *duma* members—were also jealous of the power of the courts, not realizing that their own independence was also a function of the same liberalizing moment in Russian autocracy. Even before bands of terrorists started making assassination attempts—and having assassination successes—with the tsarist elite as their primary targets, significant portions of that elite were already not quite sure they wanted to live with the new reforms. Instead of blaming terrorism on the dreadful condition of the society (the preferred explanation of the radicals) or on the incompleteness of the reforms (the preferred explanation of the liberals), the tsar and his immediate circle blamed the reforms themselves for opening up the society to give the oppositionists a chance to rebel. Russia's constitutionalism emerged as both impatient and self-blaming.

The reforms looked so good on paper, but then there were these ditches. Rather than believe that the reforms should then be pushed farther or allowed to fully take hold, tsars blamed the unrest on the reforms themselves and cancelled them:

By the end of 1884 all ministers even faintly interested in constitutional or federal rights had been dismissed, all publications of the [*Narodnaya Volya*] curtailed, and the leading journal of legal populism . . . outlawed forever. This determined dash of cold water produced a stunned silence among those who had shared in the great expectations of the populist period.¹⁰⁹

What was left of the constitutional changes of the 1860s? Not much, unless one listens to the voices of the opposition that eventually returned

107. See *id.* (“[T]he counterreform marked the end of a definite stage in state policy toward municipal self-government.”).

108. See *id.* at 195 (even during the first decade after the reforms, “the ruling elite doggedly avoided any legal change in the Municipal Statute that might enhance self-government,” illustrating “the state’s original intent to accommodate municipal self-government *within* the structure of the autocratic regime”) (emphasis added).

109. BILLINGTON, *supra* note 9, at 435.

by the time the fist of autocracy unclenched a bit in the 1890s. For while the terrorist groups of the 1870s and 1880s were quite violently suppressed, along with all other substantial political opposition, the crackdown did not last forever. The moments of reform lived on in the imaginations of those who would rise up again in opposition to autocracy. The rallying cry of this new opposition? “*Zemstvo* constitutionalism!”¹¹⁰ Russian constitutionalism may not have worked as an *ex ante* constraint on what the tsar would actually do, but it appeared (with a suitable pause) as *post hoc* critique. The *zemstva* had never been completely wiped out, and they emerged both as a site and as a substantive program of constitutional ideas.¹¹¹ The mid-century constitution lived on in the central organizing ideas of the opposition.

The *zemstvo* movement was extremely decentralized, given that it grew up in the hollowed-out shells of the rural local self-governments of mid-century constitutional reforms.¹¹² During the period of terrorist attacks and reaction of the 1870s and 1880s, the leaders of the *zemstva* agreed to participate in the crackdown against terrorism, satisfying the tsar’s demands to be protected from “terrorism from below.”¹¹³ But these leaders also demanded protection from “terrorism from above,” as they pushed for constitutionalism and the rule of law.¹¹⁴ For example, the leader of the *zemstva* movement, Ivan Petrunkevich, started in the late 1870s to advocate for a constitutional assembly to radicalize the constitutional reforms.¹¹⁵ But after the crackdown of the early 1880s, the *zemstva* lost their political voice and became instead merely administrative centers taking orders from above. They continued to increase their potential power, however, by taking on more and more employees to carry out local government. By the late 1890s, there were 70,000 people employed by *zemstvo*¹¹⁶ capable of being politically mobilized to demand more autonomy for self-government.¹¹⁷ Their early cries for reform centered

110. *Id.* at 447.

111. *Id.* at 449.

112. *See id.* (stating that the *zemstvos* were provincial “organs of local administration” that had been created by Alexander II in 1864).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. As one historian notes:

By the mid-1890s, the *zemstvos* began to turn their attention . . . to express opposition to the [national] bureaucracy and, to a lesser extent, the autocracy. . . [T]he Minister of Internal Affairs regularly prohibited gatherings of

precisely on the points that the constitutional reforms of the 1860s had made—that local self-government and reform of an outmoded legal system were the most important places to start.¹¹⁸ In short, the new constitutionalist movement was built largely out of the vocabulary and institutions of mid-century constitutionalism, with local self-government and the independence of legal institutions at the center of the movement. The constitution lived on as opposition, after autocracy had reclaimed the ground it had ceded to constitutionalism. The mid-century constitution had a longer life in opposition than it had as government policy. *Ex post* constitutionalism brought the residue of earlier reforms forward into another historical moment.

But the distinctly Russian ideas from the mid-century constitutional reforms were blended with new, foreign ideas to produce a more deeply set of liberal proposals. By the start of the new century, the leaders of the Russian constitutionalist movement were in deep conversation with the constitutionalist movement of the rest of the European continent.¹¹⁹ A key figure in the liberal movement that had been given new life by *zemstvo* constitutionalism, Paul Miliukov, traveled widely in Western Europe and took what he learned there as a basis for developing his own brand of liberal constitutionalism.¹²⁰ He had also lectured around the United States and borrowed the ideas of Woodrow Wilson on the rule of law in his distinctly Russian reformulation.¹²¹ Eventually, he formed the Cadet (Constitutional Democratic) political party, the party that went on to dominate the first real parliament that was created as a result of the 1905 constitutional reforms.¹²² Another of the intellectual leaders of the *zemstvo* constitutional movement, Paul Vinogradoff, left Russia after being appointed as the Corpus Chair of Jurisprudence at Oxford, not as an expert on Russian constitutionalism, but as an expert on the English constitution.¹²³

zemstvo activists. The zemtsy therefore organized “private meetings,” often in conjunction with an official affair, such as the unveiling of a monument to Alexander II in Moscow in 1898.

ABRAHAM ASCHER, *THE REVOLUTION OF 1905*, 32-33 (1988).

118. BILLINGTON, *supra* note 9, at 449-50.

119. *Id.* at 450-51 (noting that liberals like Granovsky and later Chicherin and Miliukov were well-acquainted with liberal ideas in circulation in Western Europe and drew heavily on them in their elaborations of Russian liberal constitutional reform).

120. *Id.* at 451.

121. *Id.*

122. *Id.* at 451-52.

123. *Id.* at 451.

Their brand of Russian liberalism met with the forces of reaction at home, as Alexander III's immediate successor Nicholas II famously refused reform. Reaction fed revolution as the opposition's moderate proposals—foiled again by the hand of autocracy—were overtaken by more violent methods. But the constitutional reforms of the 1860s survived, first underground and then in revival, as an ongoing critique of autocracy. The language of the political reformers at century's end was the language of the now-dead constitution of mid-century. While the "constitution" of the Great Reforms did not succeed in constraining the tsars, who retreated from any constraint set out by these reforms at the first opportunity, it did succeed in motivating the later reformers, who took up the concepts and categories of mid-century constitutionalism at their first opportunity. Russia may have held out the possibility of *ex ante* constitutionalism in mid-century, but in the end, *post hoc* constitutionalism was a more enduring legacy of the reforms.

III. CONSTITUTIONALISM AND TERRORISM IN REAL TIME: RUSSIA NOW

The nineteenth century history of the relationship between constitutional reform and terrorism might be of interest only to Russia specialists if it were not for the fact that we are seeing some similar dynamics playing out in contemporary Russia, with implications far beyond Russia itself. A new wave of terrorism in Russia is causing the Russian authorities to have second thoughts about whether their new constitution is working. In fact, changes are occurring so rapidly in Russia that between the time I finish this Article (early May 2005) and the time it is published, new developments will no doubt have occurred. Given that I am writing in "real time," then, analysis can only be preliminary and subject to being overtaken by events. But let us start with what we know about "the history of the present" in Russian constitutionalism.

Since 1991, when the Soviet Union broke apart, leaving an independent Russia as the largest of the separate pieces to emerge from that former federation, Russia has had a turbulent constitutional trajectory. During the Soviet period, Russia had had its own sub-national constitution.¹²⁴ At first after 1991, this same constitution was carried

124. Given the Russian cultural context, the reference to nested *matrioshka* dolls is irresistible. The USSR consisted of a variety of republics. Inside the USSR, Russia was one of those republics. Inside Russia were other sub-national units. Given the complicated shape of Russian federalism, these sub-national units within Russia were sometimes based on ethnic distinctiveness (in which case they were called *republics* or *okrugs*) and other times were merely administrative units (called *oblasts* or

forward to serve as the basis for the legal establishment of the new national Russian Federation.¹²⁵ Of course, the Soviet-era constitution had to be amended to remove one-party control, add competitive elections, put the parliament and the presidency on a more democratic footing, establish real federalism, create a constitutional court, and add real rights. But in many ways, it was still the same constitution. There were, however, more than 300 amendments in two years.¹²⁶ With such constant constitutional change, the constantly reformed institutions could only lurch on in constitutional ambiguity as the constitution swirled around them in a constant state of movement. It was hard to promote *ex ante* constitutionalism when the constitution itself was such an uncertain and changing object.

Under this patched-up constitution inherited from the Soviet time, Russian President Boris Yeltsin's position was precarious because the paper constitution set up a moderately parliamentarist (weak presidentialist) system, and the lower house of the Parliament refused to approve his initiatives at every turn. The lower house of the Parliament, still called the Supreme Soviet at that point, was able to oppose Yeltsin so effectively because it had a clear majority bloc consisting of the only strong and national party at that time—the Russian Communist Party. Yeltsin had attempted repeatedly to destroy the Communist Party,¹²⁷ and the Communist Party returned the compliment by attempting to block nearly

krais). Occasionally an *okrug* or an *oblast* would be nested inside another sub-national unit. Like *matrioshka* nesting dolls, then, there were always two different, nested governmental units at any given location in the Soviet Union and always three, four, or five within the part of the USSR that was the Russian Soviet Federation of Socialist Republics. Soviet constitutionalism was nothing if not intricate.

125. See SCHWARTZ, *supra* note 5, at 115.

126. *Id.* at 109.

127. The Constitutional Court blocked Yeltsin from permanently disbanding the Russian Communist Party, though it allowed him to close the Communist Party of the Soviet Union, given that the Soviet Union no longer existed. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti Ukazov Prezidenta Rossiiskoi Federatsii ot 23 avgusta 1991 goda "O priostanovlenii deiatel'nosti Kommunisticheskoi Partii RSFSR," ot 25 avgusta 1991 goda "Ob imushchestve KPSS i Kommunisticheskoi Partii RSFSR," ot 6 noiabria 1991 goda "O deiatel'nosti KPSS i KP RSFSR," a takzhe o proverke konstitutsionnosti KPSS i KP RSFSR [Decision of the Constitutional of the Russian Federation in the Matter of Constitutional Review of the Decrees of the President of the Russian Federation of 23 August 1991 on "On the Termination of the Activity of the Communist Party of the RSFSR," of 25 August 1991 "On Property of the Communist Party of the USSR and the RSFSR," of 6 November 1991 "On the Activity of the Communist Party of the RSFSR," as Well as About the Constitutional Review of the Communist Party of the USSR and of the RSFSR], Ross. Gazeta, 16 Dec., 1992.

everything Yeltsin tried by way of reform. Yeltsin's response to having to govern with a parliament that did not share his sense of the country's future was not to govern by statute, which would have required that he find a way to compromise with the parliament, but instead to govern by *ukaz*, or executive decree.¹²⁸ In this way, the autocratic history of Russia was echoed in its usual legal form. (The *ukaz* was the traditional legal instrument of the tsars.) Having new laws on the books made relatively little difference in any event. As Robert Ahdieh notes: "Though many laws were adopted, the most essential ones were ignored."¹²⁹ *Ex ante* legality, let alone *ex ante* constitutionalism, did not put down immediate roots.

In this legal chaos, when it was often not clear what the constitution was, it became clear that Russia needed constitutional clarity—and probably a new constitution. At least, Russia needed a constitution that organized the state more comprehensively and workably than the incoherent bricolage of the ever-shifting Soviet constitutional pieces. Yeltsin and his advisors had tried to bring a new constitution into effect from the time they took office, but this effort, too, was constantly blocked by the parliament, which had its own ideas about the shape that the new constitution should take. Finally, in the summer of 1993, Yeltsin unilaterally called a constitutional conference—something like a constituent assembly—to draft a new basic law.¹³⁰ The representatives were not elected; instead, they were all *invited* by Yeltsin.¹³¹ Sessions were conducted in secret, which limited the opportunity for public education that might have come with an open discussion about Russia's constitutional future.¹³² During this conference, however, the 762 "representatives," standing for a wide variety of reform groups and coming from all of Russia's regions (except unruly Chechnya), debated Yeltsin's preliminary draft constitution and agreed on a proposal.¹³³ The draft produced by the constitutional conference seemed to promise a way around the presidential-parliamentary deadlock over constitutional reform by reconstituting the parliament and requiring a new election for president.

128. See ROBERT B. AHDIEH, *RUSSIA'S CONSTITUTIONAL REVOLUTION* 56 (1997) (adding that on March 20, 1993, "Yeltsin announced the introduction of 'special rule' by the president").

129. *Id.* at 50.

130. *Id.* at 56.

131. *Id.* at 58 (citation omitted).

132. *Id.* at 60 (citations omitted). The proceedings of the summer assembly were eventually published, but not during the session.

133. *Id.* at 57, 62.

But not surprisingly, the office of the president strongly dominated in Yeltsin's draft constitution.

Yeltsin's constitutional draft did not, in any event, settle the constitutional crisis. Instead, the battle of wills between Yeltsin and parliament intensified as they headed into the fall of 1993. The Supreme Soviet took on Yeltsin by passing a new series of constitutional amendments to the former Soviet constitution, amendments that would have reduced the office of the president to a mere figurehead.¹³⁴ In short, parliament countered Yeltsin's presidentialist draft constitution with a constitution of its own in which (not surprisingly) *the parliament* was the leading power. To get around parliament yet again, Yeltsin proposed taking his constitution to a series of regional ratifications, instead of using the procedure in the then-valid constitution of submitting the constitution first to the parliament for a vote and then to a national popular referendum.¹³⁵ But the parliament blocked Yeltsin's turn to the regions for approval, too, claiming that this novel procedure was not authorized under the then-valid constitution.¹³⁶ As both sides dug in further and further, Yeltsin's patience snapped.

In a televised public speech on September 21, 1993, Yeltsin announced that the state was experiencing a profound constitutional crisis.¹³⁷ He issued Decree No. 1400, called (without the slightest trace of irony) *On the Step-by-Step Constitutional Reform of the Russian Federation*,¹³⁸ which, first and foremost, suspended the existing constitution. He disbanded parliament and halted the operation of the Constitutional Court.¹³⁹ But some of the parliamentarians defied his order and refused to disband.¹⁴⁰ A faction of the Constitutional Court—with some of the judges refusing to participate—met despite the ban to hastily vote that Yeltsin's Decree No. 1400 was unconstitutional.¹⁴¹

Yeltsin's declaration of emergency and seizure of power were met with substantial resistance. The resistance was carried out in the name of the now-suspended constitution, with the rebel parliamentarians holed up in their offices claiming authority under the existing constitution while the

134. *Id.* at 65.

135. *Id.*

136. *Id.* at 65-66.

137. *Id.* at 66.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

rump Constitutional Court, declaring that the suspension of the constitution was itself unconstitutional, clung publicly to the old constitution as the justification for its decision.¹⁴² As a result, the normative force of the constitution moved from the hands of state authority—which Yeltsin claimed for himself—into the hands of the political opposition—which the Parliament claimed as its status. This shift of the constitution as a resource from the government to the opposition is a classic sign of *post hoc* constitutionalism. The oft-amended Soviet-era constitution ceased its constraint on the president, but it lived on as the basis for critique of his actions. Once again in Russian history, *ex ante* constitutionalism gave way to *post hoc* constitutionalism.

When Yeltsin learned that the parliamentarians who were refusing to leave the White House (the parliamentary office building) were heavily armed, Yeltsin cut off all utilities to the building.¹⁴³ A crowd supporting the rump parliamentarians surrounded the White House to defend it, took over the city's television broadcasting tower, and occupied the Moscow mayor's office.¹⁴⁴ In response, Yeltsin called out the tanks and ordered a huge artillery attack against the White House and those barricaded inside.¹⁴⁵ After over 100 members of the opposition were killed, they surrendered.¹⁴⁶ A curfew was imposed in Moscow and more than 6,000 people were arrested by the army.¹⁴⁷ Censorship was pressed against those media still critical of Yeltsin.¹⁴⁸ In Russia's regions, local leaders who had supported those who opposed Yeltsin were fired, and all local parliaments were dissolved by presidential decree.¹⁴⁹

Still proclaiming constitutional reform but still ruling by decree, Yeltsin once again convened a constitutional conference in October 1993, and this new, smaller, and more loyal assembly changed the summer draft of the constitution.¹⁵⁰ The biggest alteration was the stunning increase in presidential power, which was now even more sharply superior to all parliamentary capacities.¹⁵¹ "In its final form," Ahdieh writes, "the

142. *Id.* at 66-67.

143. *Id.* at 67.

144. *Id.* at 68.

145. *Id.*

146. *Id.*

147. *Id.* at 71.

148. *Id.* at 71-72.

149. *Id.* at 72.

150. *Id.*

151. *Id.* at 72-73.

constitution was thus premised not on the separation of powers, but on presidential supremacy.”¹⁵² In addition, Yeltsin had dropped all pretense of loyalty to the Federation Treaty,¹⁵³ an agreement between the center and the regions in which Yeltsin had negotiated with Russia’s “subjects of the federation” just one year before to gain their buy-in to constitutional reforms.¹⁵⁴ Under the 1993 Constitution, federalism was sharply limited and more powers were concentrated at the center.¹⁵⁵ In major structural features, then, the constitutional draft of the fall of 1993 was quite different from the draft that had emerged from the more representative—if still Yeltsin-dominated—drafting process of the summer. Among other things, the president had to share far less power with parliament or the regions under the new version.¹⁵⁶

So sure was Yeltsin that this draft would be adopted as Russia’s new constitution that he put it to a referendum and held elections for the newly constituted parliament on the same ballot.¹⁵⁷ The constitutional draft squeaked through, but many have long suspected that the fifty percent turnout required to make the constitutional referendum valid was not actually reached except in the official results reported after the fact.¹⁵⁸ In any event, there had been virtually no public debate over the constitution,

152. *Id.*

153. *Id.*

154. “Subjects of the federation” is the literal translation of the term used to identify Russia’s sub-national governments, the Russian equivalent of states for the United States or Länder for the Federal Republic of Germany. As we will see soon, however, one of Russia’s persistent constitutional crises since the breakup of the Soviet Union had to do with federalism. As Yeltsin was trying to gain hold over the center between 1991 and 1993, he was also trying to use the uppity regions as leverage against the national government. His deals with the regions were given general legal form in the Federation Treaty of 1992, which gave more self-governance rights to the ethnically based republics within Russia than to the non-ethnically based regions. Dating from the Soviet time, ethnically based republics were regions in which a non-Russian ethnic minority dominated and in which there were nominal rights of self-government that gave more power of self-governance to non-Russian areas than to the Russian-majority regions. The Federation Treaty was actually three separate agreements, one with ethnic republics, another with ethnic *okrugs* (smaller ethnically based divisions within the complex system of Russian federalism), and a third with non-ethnic divisions. It created a form of asymmetrical federalism in which not all regions had the same powers of self-government.

155. AHDIEH, *supra* note 128, at 73.

156. *Id.*

157. *Id.* This created a situation in which people might have voted for representatives to a body that they could have vetoed altogether elsewhere on the same ballot.

158. *Id.* at 73-74.

and it would appear likely that no more than a tiny fraction of Russia's population knew what was in it at the time it passed.¹⁵⁹

The 1993 Constitution created a presidentialist state which, even by the standards of presidentialist states, grants the president extraordinary powers. For example, in addition to being the head of state, the president is also the "guarantor of the Constitution" and the constitutional officer who "ensure[s] concerted functioning and interaction of all bodies of state power."¹⁶⁰ He "defines the basic domestic and foreign policy guidelines of the state."¹⁶¹ While his appointment of the prime minister is subject to approval of the *Duma* (the newly constituted lower house of parliament)¹⁶² and his nominations of judges are subject to approval by the Federation Council (the newly constituted upper house of parliament),¹⁶³ he nonetheless originates all of these appointments and can dissolve the *Duma* if it twice expresses no confidence in the government in a three-month period.¹⁶⁴ With respect to the regions, he can unilaterally suspend laws duly passed by the regions if, in his view, they contradict the federal constitution.¹⁶⁵ There is virtually no part of the Russian government, regional or national, over which the Russian president does not have substantial influence or veto power in the 1993 Constitution.

Even under the new constitution and after new elections, however, it was not always easy for Yeltsin to work with the parliament for the rest of his term in office. The lack of a stable party system meant that the *Duma* was often composed of tiny party fractions of fractious deputies without a workable majority.¹⁶⁶ The Communist Party, which never disappeared despite Yeltsin's best efforts to kill it off, still comprised the third-largest single bloc because it was the only nationally organized party.¹⁶⁷ Moreover, having been given substantial leeway while Yeltsin was consolidating his power at the national level, the Russian regions had, by the time Yeltsin

159. *Id.* at 74 ("[I]t is unlikely that more than a small percentage of the citizenry perused the lengthy document, with its two parts, nine chapters, and 137 articles," particularly "given the precipitous decline in the readership of nearly every newspaper in the country.").

160. KONST. RF, art. 80(2) (1993), available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005).

161. *Id.* art. 80(3).

162. *Id.* art. 83(a).

163. *Id.* art. 83(f).

164. *Id.* arts. 109(1), 111(3), 117(3).

165. *Id.* art. 85(2).

166. See AHDIEH, *supra* note 128, at 77-78.

167. *Id.* at 77.

turned back to them, gotten used to near independence and were resisting control from the center. The Federation Council, modeled on the United States Senate, in which each region has two representatives, acted as a blocking force for the regions and not as a part of the government at the center. Yeltsin had clearly won the battle for presidential supremacy at the national level, at least in theory.¹⁶⁸ But even then, the newly constituted Parliament could veto, or at least slow down, virtually everything he wanted to do. The primary way to avoid any such constraint was to continue to govern by presidential decree, which Yeltsin did on many matters up until the end of his presidency.

Post-Soviet Russia has been, as a result, not particularly stable in constitutional terms in the form of government developed at the national level. By far the biggest threat to post-Soviet stability, however, has been in the relationship between the regions and the center. This instability has its origins in constitutional promises made that were never kept in tsarist and Soviet times, and have come back to haunt Russia in the form of *post hoc* constitutional critique. To see why, we need more history.

The Russian Empire of the pre-Revolutionary period included much more territory than does present-day Russia. After pieces of the Empire were cut loose in various ways during the October Revolution of 1917 and in its immediate aftermath,¹⁶⁹ the new, smaller Russia was born with the 1918 Constitution as a federal, constitutional, socialist state.¹⁷⁰ But as this new Russian state was consolidated after the end of the Russian Civil War, some of the pieces of the country that had gained independence during the Revolution were brought back into the Soviet political orbit, enlarging the size and scope of the state yet again.¹⁷¹ The 1924 Constitution created the Union of Soviet Socialist Republics (Russia was now only one among

168. See *supra* notes 150-54 and accompanying text.

169. During the upheavals surrounding the October Revolution of 1917, some pieces of the Russian Empire slipped loose from Russian control. Lenin gave formal independence to Finland and German-occupied Poland in 1917. ROBERT SERVICE, A HISTORY OF TWENTIETH-CENTURY RUSSIA 69 (1997). The Brest-Litovsk Treaty of 1918, which took Russia out of World War I, made the Baltic States, Ukraine, and Belorussia (which would now be sections of Moldova and Romania) independent of the Russia that remained. *Id.* at 78.

170. This birth was marked by the Constitution of the Russian Socialist Federated Soviet Republic in 1918. UNGER, *supra* note 4, at 9.

171. Stalin was able to consolidate these regions because all were then ruled by communist parties. In 1922, the treaty forming the Soviet Union was signed by Russia, Ukraine, Belarus, and Transcaucasia (which itself was created out of Georgia, Armenia, and Azerbaijan). RONALD GRIGOR SUNY, THE SOVIET EXPERIMENT 142-43 (1998).

six).¹⁷² As a constitutional entity, the USSR was a multinational¹⁷³ state that comprised six (later more) constituent republics, each with the constitutional right to secede (in theory, if not in practice).¹⁷⁴ Holding out the promise of national independence, the right of secession was never something that a political division within the Soviet Union could have invoked without unimaginable penalties, but it lingered on in the national imaginations of those who were not ethnically Russian throughout the Soviet Union. Russia, as the largest component part of the USSR, was itself a multinational federation with its own constitution during the Soviet time. Given this history, it was almost inevitable that any relaxation of control by the Soviet Union would result in various pieces of the Soviet Union generally, and of Russia specifically, claiming the right of self-governance.¹⁷⁵

During the *perestroika* reform movement of the 1980s, the USSR loosened its grip on the various “satellite” states in Central and Eastern Europe—states that had never been part of the USSR proper.¹⁷⁶ As

172. The constitution creating the Soviet Union as a legal entity based on this treaty was promulgated in 1924. UNGER, *supra* note 4, at 45. The other constituent parts of the Soviet Union—Russia, Ukraine, Belarus, Georgia, Armenia, and Azerbaijan—got their own sub-national constitutions in 1925.

173. “Multinational” here means that there were many different geographically concentrated ethnic groups (nationalities) within Russia, many of which aspired to have their own nation-state one day.

174. CONST. OF THE UNION OF SOVIET SOCIALIST REPUBLICS OF 1977, art. 71, *reprinted in* UNGER, *supra* note 4, at 246. Article 72 of the USSR Constitution of 1977 maintained, “Every union republic shall retain the right of free secession from the USSR.” CONST. OF THE UNION OF SOVIET SOCIALIST REPUBLICS OF 1977, art. 72, *reprinted in* UNGER, *supra* note 4, at 246.

175. Given the broader argument of this Article, it is worth noting that successive USSR Constitutions (1924, 1936, and 1977) continued throughout the Soviet time to give its component republics the right of secession, even though everyone knew in this period that it would have been impossible. *See* CONST. OF THE UNION OF SOVIET SOCIALIST REPUBLICS OF 1924, art. 4, *reprinted in* UNGER, *supra* note 4, at 62; CONST. OF THE UNION OF SOVIET SOCIALIST REPUBLICS OF 1936, art. 17, *reprinted in* UNGER, *supra* note 4, at 143; CONST. OF THE UNION OF SOVIET SOCIALIST REPUBLICS OF 1977, art. 72, *reprinted in* UNGER, *supra* note 4, at 246. But with the changes of the late 1980s and early 1990s, it became possible for the first time to assert (in opposition to the dominant authorities of the time) that the constitution was real and that free secession should be allowed. The constitution became real, in consequence, in the hands of the opposition rather than in the hands of the state authorities. *Post hoc* constitutionalism again proved more enduring and powerful than *ex ante* constitutionalism.

176. The satellite states of East Germany, Poland, Czechoslovakia, Hungary, Romania, and Bulgaria were taken under Soviet control when Soviet troops that had

countries from East Germany to Bulgaria declared their independence in the heady days of 1989, the republics *within* the USSR that once had, or had long aspired to independence also became restive.¹⁷⁷ They began to claim the right of secession guaranteed under the Soviet Constitution, a constitution that had had no connection with reality except to provide a potential critique of it. As Serguei Oushakine's work¹⁷⁸ has pointed out, "follow your own constitution" appeared more as a form of critique than an ideal of governance in the Soviet period. The critique worked because it was very difficult for the authorities to criminalize.¹⁷⁹ But, as it turns out, Soviet constitutions had no powers of *ex ante* constraints; their sole real existence consisted in their ability to be mobilized as critique, as *post hoc* constitutionalism. In the immediate post-Soviet period, too, the constitution was more powerful in the hands of the opposition than in the hands of the political authorities. *Post hoc* constitutionalism remained the dominant form of constitutional discourse in transition.

The eventual breakup of the Soviet Union in 1991 was essentially unplanned, having more the shape of a coup launched by Russian President Boris Yeltsin to take advantage of USSR President Mikhail Gorbachev's momentary weaknesses than the form of an amicable divorce among the component parts of the USSR.¹⁸⁰ Because the breakup occurred suddenly and without any prior negotiation among the constituent republics, conflicts arose over which pieces could declare independence. With the republics that had been part of the Soviet Union but not part of

been advancing on the Eastern front during the Second World War simply stopped in place at war's end and compliant governments were installed shortly thereafter in territories that had been so occupied.

177. For more on the relationship of the various ethnically distinct regions of the Russian Empire to the center and later to the Soviet Union, see SUNY, *supra* note 171, at 96-120.

178. Serguei Oushakine demonstrates that the political *samizdat* (self-published) publications during the Soviet time often invoked the Russian constitution and Russian law as a way of providing an official critique of the Communist Party's failures. Echoing back to the very language of the regime as a form of critique, dissidents found a way to express themselves in ways that were hard to suppress. After all, if the political opposition says "follow your own constitution" as a sort of critique, how can they be arrested for saying this? Would that mean that publicly supporting the official constitution is an illegal act? See generally Serguei Alex. Oushakine, *The Terrifying Mimicry of Samizdat*, 13 PUB. CULTURE 191 (2001). I owe to Oushakine's article the inspiration for this argument about *post hoc* constitutionalism in Russian history.

179. *Id.* at 198.

180. For a particularly vivid account, see AHDIEH, *supra* note 128, at 37-46.

the Soviet Russian federation, independence became the norm.¹⁸¹ But among republics¹⁸² that had been part of the Soviet Russian federation, the answer to the independence question was typically *nyet*.

Both the pre-Revolutionary Russian Empire and the Soviet Union had laid claim to territories occupied for centuries by peoples who did not share a common language, a common ethnicity, often a common religion or alphabet, or a common aspiration to nationality with Russia and ethnic Russians. The creation of a non-national “Soviet” identity had papered over ethnic and religious differences, both within the Soviet Union generally and within the Soviet Russian federation specifically, at least at the official level. But even going back to the tsarist time, self-governance would not have been possible for any of these regions. Given the entrenchment of autocracy and the geographical reach of the Russian Empire, many of these diverse territories that had once been part of the Russian Empire had not had any extended period of self-government for quite some time—in many cases never at all—before 1991.¹⁸³

The key questions after 1991, then, were: When the Soviet Union fell to pieces, did the Russia that emerged from the rubble lay claim to *all* the

181. Within the federalism of the USSR, all of the constituent pieces held the formal title of “republic.”

182. Within the Russian Soviet Federation of Socialist Republics (RSFSR), “republic” was a term of art designating only those sub-national regions whose boundaries were drawn around a non-Russian ethnic concentration of residents. Thus, Tartarstan, Komi, Tuva, Baskortostan, and North Ossetia, for example, were republics possessing greater (paper) rights of self-governance in the Soviet time because they had a dominant non-Russian ethnic group at their core, but regions like Novosibirsk, Rostov, Nizhny Novgorod, and Samara, for example, were merely administrative territories with a lesser set of (paper) powers. To make matters even more complicated, an administrative region like Krasnoyarskii Krai has had within its boundaries two ethnic oblasts that were given the status of republics during Yeltsin’s reign. (Think of another level of *matrioshka* dolls.) In April 2005, all three regions voted to merge their governments, which will reduce the number of sub-national governments in Russia from eighty-nine to eighty-seven in 2006. Around the country, however, the territorial divisions did not always fully track ethnic populations. Complications could quickly arise if, for example, the region of North Ossetia within Russia wanted to unite with the region of South Ossetia, which—after the Soviet break-up—was located within the independent state of Georgia. Those problems were multiplied throughout the former Soviet space.

183. Some pieces, like the Baltic States, had only had a brief period of independence in the twentieth century between the two world wars. Their incorporation into the Soviet Union after World War II was something that was never recognized as legal by the United States, even though their period of independence had been quite short.

territories of the former Russian Empire (some of which had been separate republics within the Soviet Union but not republics of the Soviet Russian federation)? Or did the newly emerging Russian Federation renounce claims to *some* pieces of this past empire by satisfying itself with the territory it had been allocated in the Soviet time? Was it going to allow all other pieces of the Soviet Union to declare themselves newly independent states? Was it going to give the same deference to non-Russian parts of the Soviet-era Russian federal state? Expediency and sometimes dirty tricks, rather than law or agreement, provided the answers.¹⁸⁴

Given the enormous potential for conflict lurking in the answers to these questions, it is actually quite surprising that there was not more shooting as the political geography was dramatically rearranged.¹⁸⁵ In fact,

184. Georgi Derluguian argues that “in remoter areas like the Caucasus, Tadjikistan, and Moldova, Moscow opted for covert subversion by making itself a backstage participant in the unfolding conflicts. Moscow’s new goal was to inhibit separatism by any means, including pretty dirty ones, for which reason it preferred to use various proxies.” GEORGI DERLUGUIAN, *BOURDIEU’S SECRET ADMIRER IN THE CAUCASUS* 228 (2004).

185. Not that there wasn’t shooting:

Six wars already have occurred on the territory of the former Soviet Union: in Nagorno-Karabakh, Abkhazia, Trans-Dniester, South Ossetia, Tajikistan, and Chechnya. Close to 20 short-term armed clashes have taken place; the conflicts in Fergana (Uzbekistan) and Osh (Kyrgyzstan), the pogroms in Baku and Sumgait in Azerbaijan, and the Ossetian-Ingush conflicts are among the better known. In addition, there have been more than 100 nonviolent interstate, interethnic, interreligious, or interclan confrontations, most occurring in Central Asia, the Transcaucasus, and the North Caucasus.

Currently [in 1994], war is being fought or unstable cease-fires are in place in Tajikistan, Abkhazia, Nagorno-Karabakh, and the adjoining territories of western Azerbaijan which were captured by Karabakh troops. Sharp ethno-political strife continues in areas where military appeasement was achieved yet the initial causes of conflict were not resolved, as for example in Trans-Dniester, South Ossetia, the Prigorod region of North Ossetia, and Ingushetia. Strained ethnic relations which may yet turn violent exist in Kazakstan, Ukraine, South Siberia, and the Baltic states. In Russia, the most conflict-prone area is the North Caucasus, where more than three dozen ethnic groups reside. Military action has been under way in Chechnya since 1994, and tension remains in Dagestan, Kabardino-Balkaria, Karachaevo-Cherkessia, Ingushetia, and North Ossetia (the first region in Russia to burst into warfare, in 1992). Indeed, the possibility of ethnic conflict exists in all the Soviet successor states as they struggle over the redistribution of power in this new political space. Conflicts over power sharing have broken out throughout Russia, though only Chechnya has demanded outright secession.

the fate of the different parts of the Soviet Union depended more on happenstance than logic or history. Georgia, for example, declared itself to be a whole and unified state and broke free first in 1991.¹⁸⁶ Some long-standing parts of the former Russian Empire, Ukraine and Belarus in particular, became separate states as soon as they could, driven by nationalism and acquiesced by Yeltsin's forces, even though their brief period of national independence at the time of the October Revolution was dwarfed by centuries of cultural, religious, and linguistic cohabitation with Russia. But other parts of the former Russian Empire which had long claimed some independent status within the federation of Russia even during the Soviet time—for example, Tartarstan or Chechnya, where the populations were ethnically distinct, Muslim, and linguistically different from Russians—started to believe that they could use this moment to claim their own statehood as well. After all, who was to say that they could not break free, given that some ancient parts of the Russian Empire had gained their independence relatively easily with the breakup of the Soviet Union and given that the Soviet-era constitutions had promised it? Constitutions of the past, with their promises of the right of secession, emerged again as a critique of the present. In the hands of the independence-minded republics, the right of secession in the Soviet constitutions could be used in *post hoc* fashion to justify their new vision of constitutionalism, and why they were constitutionally entitled to their autonomous statehood.

In this heady deconstruction of the Soviet Union, virtually all of the ethnically distinct regions within the Soviet version of the Russian federal state itself declared their independence in 1991 and 1992 in what came to be known as a parade of sovereignties.¹⁸⁷ To consolidate his hold over the Russian regions, or—at a minimum—to keep the new post-communist Russia from falling to pieces, Russian President Boris Yeltsin negotiated a Federation Treaty in 1992, giving the regions substantial new and independent powers in order to keep them within Russia. Even that did not quell all of the independence movements. Tartarstan and Chechnya,

Leokadia Drobizheva, *Power Sharing in the Russian Federation: The View from the Center and from the Republics*, in PREVENTING DEADLY CONFLICT 80, 81 (Gail W. Lapidus & Svetlana Tsalik eds., 1994) (footnote omitted).

186. For an account of the dynamics of Georgian independence, see DERLUGUIAN, *supra* note 184, at 229-39. As Derluguian notes, the territorial integrity of Georgia itself was (and remains) far from a foregone conclusion, given that there are several break-away regions that were populated by ethnic Azeris, Armenians, or Ossetians. *Id.* at 229, 236-39.

187. Steven L. Solnick, *Is Russia Really a Federation? The Political Economy of Russian Federalism*, 43(6) PROBS. OF POST-COMMUNISM, Nov.-Dec. 1996, at 13, 13.

two of the most restive regions, refused to sign. Tartarstan, for example, was satisfied only when Boris Yeltsin allowed the republic to have its own unique constitutional status within the Russian Federation.¹⁸⁸ Other regions, too, tried to strike out on their own and were brought into line with special deals.

But the Chechen independence movement was not so easily placated. Chechens are a predominantly Muslim ethnic group with their own language and culture, based in the Caucasus region of southern Russia. Chechens suffered a horrible fate at the hands of Stalin—having been deported en masse to Siberia during World War II only to be returned after Stalin's death in greatly diminished numbers to their original territory, territory that had been occupied in the meantime by others, and in which all of the mosques had been destroyed.¹⁸⁹ Why had Chechens been treated this way? The Soviet state insisted that some Chechens and Ingush (a neighboring people—also Muslim, but with their own distinctive language and culture—who were also deported) had collaborated with the Nazis in World War II.¹⁹⁰ To that, Chechens could respond with justification that they had been subjected to forced collectivization, urbanization, and industrialization before the war and that there had been an assault on their culture and language.¹⁹¹ Given their treatment at the hands of Stalin, they might well have found comfort with Soviet enemies.¹⁹²

188. Yeltsin's promises to the regions appeared in legal form in the Federation Treaty of 1992. Different regions had different powers, so they were not all treated the same. The problem was that the status of this treaty became almost immediately unclear with the adoption of the Constitution in 1993, which declared the formal equality of all sub-national units. KONST. RF, art. 5(1) (1993), *available at* http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005). After adoption of the Federation Treaty and the new constitution, however, some nervous republics still held out for special treatment. Tartarstan, for example, had initially refused to sign the Federation Treaty, continuously threatening to secede and denying that the 1993 Constitution applied to them. Tartarstan was satisfied only with a separately negotiated treaty that gave them substantial autonomy in early 1994. After Tartarstan got this deal, other republics lined up to make special agreements with Yeltsin. For example, Yeltsin signed a special treaty with Kabardino-Balkaria in June 1994 and with Bashkortostan in August 1994. For the various stages of this process, see Vladimir N. Lysenko, *Distribution of Power: The Experience of the Russian Federation*, in PREVENTING DEADLY CONFLICT 97, 98-108, 113-15.

189. DERLUGUIAN, *supra* note 184, at 243.

190. Serguei Alex Oushakine, *Subjected to War 17* (2005) (unpublished manuscript, on file with author).

191. *Id.*

192. *See id.* at 17-18 (detailing of Stalin's treatment of Chechens and the Ingush).

With bad blood all around and with the chaos that accompanied the disintegration of the Soviet Union, Chechnya declared independence in 1990, and again in 1991.¹⁹³ Russia saw that allowing Chechnya to secede might provide a basis for other regions to want to secede as well. Moreover, crucial oil pipelines ran through Chechnya,¹⁹⁴ and secession would have allowed control over them to fall into the hands of what would be a foreign government. That was unacceptable to Moscow, too. Chechnya could not be allowed to break free.

With enough trouble on its hands consolidating its hold over the center, however, the Yeltsin government did not have a lot of resources to throw into keeping Chechnya in line. Rather than fight the separatist movement directly, then, Russia instead pulled its army out of Chechnya in 1992 and tried to ignore the threat that Chechnya posed to Russia territorial unity. Russia, however, did not withdraw its arsenal of weapons, which were quickly seized by the Chechen independence forces. Thus, bands of Chechen fighters were immediately and impressively armed.¹⁹⁵ Yeltsin neither recognized Chechen independence claims nor definitively dealt with them in these early years. Their claims became nothing but stronger.

As a result of this uncertainty about how far claims for sovereignty could go, the early years of the emerging Russian Federation were accompanied by a highly unstable federalism, a situation that Yeltsin used to his advantage by playing (where he could) the regions off the center in an attempt to outmaneuver the communist-dominated parliament, which was his primary adversary in the first few years after the fall of the Soviet Union. Yeltsin promised different deals to different regions in exchange

193. The region had declared its independence first during the Chechen National Congress that met from November 23 to 25, 1990—before the Soviet Union fell apart. *Id.* at 20. After the breakup of the Soviet Union, a regional election held in Chechnya on October 27, 1991 to elect a local president produced a landslide victory for Djohar Dudayev, who was a militant separatist. DERLUGUIAN, *supra* note 184, at 251. On November 2, 1991, Chechnya declared its formal independence from Russia again. *Id.* At this point, Chechnya and Ingushetia were combined in same sub-national region, but after the second declaration of independence, they separated into two different regions because the Ingush did not want to be a minority population in a new Chechen state.

194. For a map of the pipelines bringing Caspian Sea oil to Black Sea ports through Chechnya, see CAMBRIDGE ENERGY RESEARCH ASSOCS., OIL PIPELINES IN THE CASPIAN, *at* http://bcsia.ksg.harvard.edu/BCSIA_content/documents/color_pipelines_map.pdf (last visited July 3, 2005).

195. Oushakine, *supra* note 190, at 22 & n.42.

for political support, but the ever-increasing price of these deals threatened to wreck the possibility of a single constitutional order. Through the 1990s, the balance of power between the regions and the center was to be perhaps the most crucial unsettled and unsettling constitutional question. And all of this was going on while Yeltsin was having his battle of wills and struggles over the distribution of power with the parliament. Yeltsin handled both at the same time by conceding to the regions whatever it would take to keep them from seceding while concentrating his consolidating efforts on gaining control over the various pieces of the national government.

After Yeltsin established his hold over the national government by ramming through his new constitution in late 1993, he then turned to unfinished business—the crisis in Russia’s regions. By far the biggest challenge came from Chechnya, which by 1994 featured bands of heavily armed separatists and a duly elected local government insisting that Chechnya was no longer part of Russia. By December 1994, when Yeltsin had had enough of the chaos in and separatist declarations from Chechnya, he attempted to force Chechnya back into the Russian fold by launching the First Chechen War.¹⁹⁶ While the Russian military fought battles on the terrain of Chechnya itself, the Chechen separatists countered by launching terrorist attacks inside Russia, and outside Chechen territory. Having let the problem fester, Yeltsin’s heavy-handed “solution” to the Chechnya problem produced another wave of terrorism—more “ditches” for Russian constitutionalism. And here is where our story of terrorism and its impact on Russian constitutional reforms starts to sound like what happened in the nineteenth century. The appearance of terrorism—not immediately, but after a series of shocking, major “successes” for the terrorists—produced a backlash that threatened to undo the liberal constitutional reforms of the early- to mid-1990s.

As under Alexander II, the new wave of constitutional reforms under Yeltsin was substantial, but it was also new and fragile. Also, as under Alexander II, it was not clear whether anyone, including the president himself, really believed in the new constitutional framework. Centrifugal forces speeded by the loosening of the firm grip of central power—in the

196. To make the timeline clear here, it should be noted that 1994 was the year in which Yeltsin was negotiating separate treaties with regions that threatened to secede or were proposing to ignore federal orders. But Chechnya, so far as I have been able to tell, was never offered a special treaty. For the argument that the Chechen war was not begun as a last resort, but as a sort of demonstration for the other regions about how far Yeltsin’s resolve extended, see Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23(1) INT’L SECURITY, Summer 1998, at 5, 5.

time of Alexander II as in the 1990s—made possible new waves of terrorism that would not have been possible in the autocratic period that preceded it. The move from autocratic government to unruly partially democratic government opened up new political spaces both in the nineteenth century reforms and also in the post-Soviet reforms. Some of those new political spaces were occupied by terrorists. The argument that the constitutional changes started terrorism in both periods is not a crazy one. But it is probably a better explanation in both periods to argue that the correlation between constitutional change and terrorism is spurious: the constitutional changes themselves were a response to the same forces that produced unrest and then terrorism. Underlying grievances caused both the pressure for constitutional change *and also* the terrorism that followed. Constitutional change, while associated with a rise in terrorism, then was more likely caused by the same force that produced the terrorist attacks, rather than being an independent cause of terrorism.

Terrorism of the bottom-up, politically motivated kind started in earnest again in Russia in 1995 as a direct consequence of the First Chechen War.¹⁹⁷ Led by Shamil Basayev, Chechen fighters seized a hospital in Budennovsk, a town in the Stavropol Region in southern Russia, just north of Chechnya, in June 1995.¹⁹⁸ They took 1,500 patients and staff hostage, and forced negotiations with the Russian government.¹⁹⁹ The Russian prime minister's telephone negotiations with Basayev were broadcast live on television.²⁰⁰ In the end, 150 people died; a number of hostages were taken as human shields for the Chechen separatists as they escaped.²⁰¹ The government in Moscow looked powerless.

In January 1996, another hospital—this time in neighboring Dagestan—was seized by Chechen fighters. After holding 3,400 people hostage for a day, the Chechens agreed to release almost all “of their

197. In the quick survey that follows, I will only mention terrorist incidents that occurred outside the borders of Chechnya itself because attacks that occurred within Chechnya are harder to classify as pure terrorism when they may have been asymmetric responses to Russian military assaults launched primarily against military targets with civilians caught in the crossfire. Similarly, while many Russian military assaults killed civilians, it is harder to judge whether civilians were specifically targeted, or whether bad training, faulty equipment, limited intelligence and incompetence were the causes. As a result, I will only look at the Chechen attacks directly targeting civilians outside Chechnya in this account.

198. Oushakine, *supra* note 190, at 25.

199. *Id.*

200. *Id.*

201. *Id.*

captives in exchange for safe passage to Chechnya,” and, taking more than 150 of the hostages with them, they escaped.²⁰² Upon orders from President Yeltsin, the Russian military chased down the Chechen fighters and attacked their hideout in Pervomaiskoye, a tiny village (population 870) where the Chechen fighters were holed up with the remaining hostages.²⁰³ After a brutal battle, the government reported 161 Chechen fighters had been killed with 18 missing hostages presumed dead.²⁰⁴ The battle took four days and all but leveled the whole village.²⁰⁵

The First Chechen War was notable for its brutality, for the indiscriminately violent assaults of the Russian military and for the appalling tactics of the Chechen terrorists in targeting Russian civilians outside of Chechnya in response. Some said it was launched without a solid legal basis because President Yeltsin did not put the republic under a state of emergency before starting his military attack as the new constitution might have been interpreted to require.²⁰⁶ The constitution appeared to fail at constraining or guiding the decision of the Russian government to go to war against one of its constituent provinces, but the constitution did not disappear entirely. Instead, the war was accompanied by the legally vague slogan that the military action was necessary because it

202. Michael S. Serrill, *Blown Away*, TIME, Jan. 29, 1996, at 10, 10.

203. *Id.*

204. *Id.*

205. As Michael Serrill retells it:

The assault on Pervomaiskoye was so brutal and indiscriminate, and the performance of the Russian military so abysmal, that the daily *Izvestia* proclaimed in a front-page headline that the whole hostage drama was “TEN DAYS OF PAIN, IMPOTENCE AND SHAME.” Not only did the horrendous finale last four days before the overwhelmingly superior Russian forces could dislodge the band of rebels from Pervomaiskoye, but in a wild gun battle Thursday morning that was joined by a column of Chechen reinforcements, some 25 rebels escaped, reportedly including their fanatic leader, Salman Raduyev.

Id.

206. See, e.g., DMITRI V. TRENIN & ALEKSEI V. MALASHENKO, RUSSIA’S RESTLESS FRONTIER: THE CHECHNYA FACTOR IN POST-SOVIET RUSSIA 142 (2004). Article 88 of the Russian Constitution gives the president the power to declare a state of emergency but requires him to notify both houses of the parliament and to stay within the constraints of Article 56, which provides protection for basic rights. KONST. RF, arts. 56, 88 (1993), available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005). Trenin and Malashenko believed that Yeltsin was constitutionally required to do this. TRENIN & MALASHENKO, *supra*, at 142.

was “protecting constitutional order.”²⁰⁷ The Constitutional Court eventually upheld the constitutionality of the decrees that had launched the war.²⁰⁸ After a bloody conflict that carried on for two more years before it

207. TRENIN & MALASHENKO, *supra* note 206, at 142 (quotation marks omitted).

208. Postanovlenie Konstitutsionnogo Suda Rossiyskoy Federatsii po delu o proverke konstitutsionnosti Ukasa Prezidenta Rossiyskoy Federatsii ot 30 noiabria 1994 goda No. 2137: “O meropriiatiakh po vosstanovleniiu konstitutsionnoy zakonnosti i pravoporiadka na territorii Chechenskoy Respubliki,” Ukaza Prezidenta Rossiyskoy Federatsii ot 9 dekabria 1994 goda No. 2166: “O merakh po presecheniiu deiatel’nosti nezakonnykh vooruzhennykh formirovaniy na territorii Chechenskoy Respubliki i v zone osetino-ingushskogo konflikta,” postanovleniia Pravitel’sva Rossiyskoy Federatsii ot 9 dekabria 1994 goda No. 1360: “Ob obespechenii gosudarstvennoy bezopasnosti i territorial’noy tselostnosti Rossiyskoy Federatsii, zakonnosti, prav i svobod grazhdan, razoruzheniia nezakonnykh vooruzhennykh formirovaniy na territorii Chechenskoy Respubliki i prilegaiushchikh k ney regionov Severnogo Kavkaza,” Ukaza Prezidenta Rossiyskoy Federatsii ot 2 noiabria 1993 goda No. 1833: “Ob Osnovnykh polozheniiakh voennoy doktriny Rossiyskoy Federatsii” [Decision of the Constitutional Court of the Russian Federation in the Case of Determining the Constitutionality of the Decree of the President of the Russian Federation of November 30, 1994, No. 2137: “On Measures to Restore Constitutional Legality and Order in the Territory of the Chechen Republic,” the Decree of the President of the Russian Federation of December 9, 1994, No. 2166: “On Measures to Interdict the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Osetino-Ingush Conflict,” the Decision of the Government of the Russian Federation of December 9, 1994, No. 1360: “On Guaranteeing State Security and Territorial Integrity of the Russian Federation, Legality, and the Rights and Freedoms of Citizens, the Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjoining Regions of the North Caucasus,” Decree of the President of the Russian Federation of November 2, 1993, No. 1833: “On the Basic Principles of the Military Doctrine of the Russian Federation.”], in KONSTITUTIONNYY SUD ROSSIYSKOY FEDERATSII. POSTANOVLENIIA. OPREDELENIIA 1992-1996, at 609 (T. G. Morshchakova ed., Novyy Yurist 1997), available at http://ks.rfnet.ru/pos/p10_95.html (last visited July 3, 2005).

For an analysis of the decision by the Vice President of the Russian Constitutional Court, see Tamara G. Morshchakova, *The Chechen War Case and Other Recent Jurisprudence of the Russian Constitutional Court*, 42 ST. LOUIS U. L.J. 743, 744-45 (1998). It should be noted that the Chechen case happened to be the first major ruling of the Russian Constitutional Court after it was reopened in late 1994. See <http://ks.rfnet.ru/pos/postan.htm> (listing names of decisions in chronological order). The court had been closed down when Yeltsin suspended the previous constitution. See Steven Erlanger, *Yeltsin Is Seeking New Constitution to Scrap Congress*, N.Y. TIMES, Apr. 30, 1993, at A1 (discussing Yeltsin’s draft of a new constitution aimed at strengthening his position as president and eliminating those who had opposed him). The court was only reopened, with many new judges, after the new constitution went into effect in 1994. The judges might justly have thought at this point that Yeltsin was perfectly capable of closing them down again, so a decision finding for Yeltsin on cautious procedural grounds was just what one might expect of a court that reasonably

was fought through to a negotiation from weakness on all sides, a fragile—and as it turns out temporary—peace was declared in Chechnya in 1997.²⁰⁹

For two years after that Russia had no war, at least not in the obvious military sense. Economically, however, Russia had a meltdown.²¹⁰ In 1998, the ruble collapsed when the foreign loans that backed its unrealistic exchange rate ran out.²¹¹ In just two months, the value of the ruble fell by sixty percent against the dollar and prices rose by fifty percent.²¹² Poverty soared.²¹³ In Chechnya, the fragile peace degenerated into political nihilism and economic collapse.²¹⁴ Against this background, as Russia began to crawl back from economic catastrophe, another wave of terrorism hit, coming from the apparent direction of Chechnya.

In August 1999, Chechen separatists, this time with Islamist-inspired Arabs in the mix, conducted a military attack against another nearby Russian republic, Dagestan.²¹⁵ While the Russian military was able to repel the attack in short order, the Chechen problem became impossible for the Russian government to ignore when two high-rise apartment buildings in Moscow and residential buildings in two other cities were blown up over the course of twelve days in September 1999, killing more than 300 people.²¹⁶ While those who were behind the apartment bombings have never been publicly identified,²¹⁷ the Russian government rushed at the time to say that those responsible were clearly Chechen terrorists.²¹⁸

worried about what a decision against Yeltsin would mean for them.

209. Oushakine, *supra* note 190, at 26-27.

210. For an account of the run-up to and meltdown of the Russian ruble in the summer of 1998, see Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1949-59 (2004).

211. *Id.* at 1956.

212. *Id.* at 1958.

213. In 1998, 23.8% of the Russian population lived on less than two dollars per day and 40% lived on less than four dollars per day. *Id.* at 1928.

214. TRENIN & MALASHENKO, *supra* note 206, at 34.

215. DERLUGUIAN, *supra* note 184, at 258.

216. Michael McFaul, *State of Siege*, WASH. POST, Sept. 12, 2004, at B1.

217. Five years later, the bombings were eventually blamed on nine unnamed “Russian and foreign Islamic fighters.” Steven Lee Myers, *Russians Kept in Dark on Recent Terror Strikes*, INT’L HERALD TRIB., Aug. 31, 2004, at 3. None were ethnic Chechens even though those convicted are still said to have been operating on behalf of the Chechen independence movement. *Id.*

218. Mark Kramer, *Putin Is Only Part of the Russian Picture*, WASH. POST, Jan. 23, 2000, at B2. Some, including Russian oligarch Boris Berezovsky, have claimed from the start that the Russian FSB (the successor to the KGB) itself carried out the bombings to have a pretext for launching another war. *Bombers ‘Known’*, MOSCOW

The Dagestan invasion and the apartment bombings provided the reasons for launching the Second Chechen War in late 1999. At first, the Second Chechen War appeared to be fought in a more resolute and disciplined manner on the Russian side, and it was more immediately successful for the Russian government than the First Chechen War had been. Because of the immediate rationale that the war was a response to the apartment bombings, it was styled as a campaign against terrorism from the start.²¹⁹ With the new Russian Prime Minister Vladimir Putin in visible command in this new campaign, the Second Chechen War became clearly identified with him. He rode the war into the Russian presidency after Yeltsin abdicated in his favor at the end of 1999.²²⁰ While campaigning for his own eventual election victory in March 2000, Putin actually flew a fighter plane into Chechnya to show his mastery of the situation.²²¹

But Russian mastery of the Chechen situation, if in fact it ever existed, was only temporary at best. As I write, the brutal and depressing Chechen campaign grinds on. Apart from the politically messy and deeply violent stalemate in Chechnya itself, now dragging toward its sixth year, the Chechen separatists have been more routinely using terror against the Russian population outside of Chechnya—particularly in Moscow—as a way of keeping their claims to independence in the public eye. In August 2000, a bomb exploded at the Pushkin Square underpass in central Moscow, killing eight people.²²² In October 2002, about fifty Chechen terrorists stormed a Moscow theater where the popular Russian musical *Nord-Ost* (North-East) was in full swing.²²³ Heavily armed with guns and

TIMES, Feb. 12, 2002, available at 2002 WLNR 3286839; see also Alex Rodriguez, *Verdict Near on Sleuth Who Talked Too Much*, CHI. TRIB., May 18, 2004, at A4 (reporting that FSB agents were seen planting a bomb containing a powerful explosive called hexogen in another apartment building in Ryazan a few days after the other apartment bombings; when caught, the FSB said it was conducting a civil defense drill and that its testing revealed the substance in question was sugar).

219. See Rodriguez, *supra* note 218 (“The bombings helped rally Russians around then-Prime Minister Vladimir Putin, who vowed to crush the rebellion.”).

220. See TRENIN & MALASHENKO, *supra* note 206, at 36 (“Chechnya made Putin Russia’s president.”).

221. *Id.* at 59.

222. Patrick E. Tyler, *Rush-hour Bomb Attack Kills 8 in Central Moscow*, N.Y. TIMES, Aug. 9, 2000, at A6.

223. I was in Moscow when the *Nord-Ost* hostage siege occurred and so some of this account comes from my watching live television in Moscow during the siege. I later interviewed the lawyers for the victims and attended some of the court hearings in the victims’ suits against the government. I have written about this incident, and the lawsuits that followed, in more detail in Kim Lane Scheppele, *The Value of Mourning: Claiming Compensation After the Moscow Theater Siege* (Mar 12, 2004) (unpublished

large bombs, the terrorists held everyone in the theater hostage—probably about 800 people, though an exact count has never been given—for three days.²²⁴ The siege was broken when the Russian special forces pumped a sleeping gas into the theater, knocking out both hostages and terrorists before the bombs could be detonated.²²⁵ Storming the building, the special forces shot all of the unconscious terrorists at point blank range and waited an impossibly long time before evacuating the unconscious hostages. In the end, about 130 of the hostages died, virtually all from reactions to the sleeping gas and the botched rescue.²²⁶ (Only two had been killed by the terrorists.) As with the hospital siege in 1995, the whole event was broadcast live on television, including live audio of cell phone calls out of the theater from hostages and even a live television interview inside the theater during the stand-off with some of the terrorists. While many believed that this event would result in a drastic change in Russian policy in Chechnya, it did not.²²⁷

But there were more terrorist attacks in prospect. In July 2003, two Chechen female suicide bombers blew themselves up at a rock concert in Moscow, killing fifteen people besides themselves.²²⁸ In the days that followed, several more female suicide bombers—called black widows because they typically dressed in black hijab and because in many cases the husbands of these women had been killed by the Russian military in Chechnya—were intercepted in Central Moscow before they were able to blow up their intended targets.²²⁹ On August 1, 2003, a suicide bomber

manuscript, on file with author).

224. *The Aftermath in Moscow: Russia's Investigation*, N.Y. TIMES, Oct. 31, 2002, at A16.

225. Steven Lee Myers, *New Hostage Toll in Russia Siege Feeds Rumors*, N.Y. TIMES, Nov. 8, 2002, at A12.

226. Paul Quinn-Judge & Dyshne-Vedeno, *Russia's Most Wanted*, TIME INT'L, Oct. 25, 2004 at 30, 30.

227. Of course, there was an immediate reaction. Police of many different kinds blanketed the streets of Moscow during the siege and immediately thereafter when there were persistent rumors that some of the terrorists had escaped alive. There was also an immediate crackdown on anyone in Moscow who looked like they might have come from the Caucasus region because they had darker skin than ethnic Russians. Thousands of Chechen-looking people were detained in Moscow during and after the siege. The detentions were so indiscriminate that one of those arrested was a woman who had herself been held hostage in the theater. Douglas Birch, *For Hostage, Another Ordeal*, BALTIMORE SUN, Nov. 10, 2002, at A2.

228. Peter Baker, *Once a Sanctuary, Now a Battlefield*, WASH. POST, Aug. 3, 2003, at A20.

229. Susan B. Glasser & Peter Baker, *Chechnya War a Deepening Trap For Putin*, WASH. POST, Sept. 13, 2004, at A1. In defusing one of the bombs, a Russian

killed at least fifty people in a military hospital in the town of Mozdok in North Ossetia.²³⁰ On December 5, 2003, a bomb on a commuter train in the Stavropol region of southern Russia killed forty-two people,²³¹ and a few days later, a woman blew herself up outside the National Hotel in Moscow right across the street from the Kremlin, killing herself and at least five bystanders.²³² On February 6, 2004, a Moscow subway train was bombed, with a death toll of at least thirty people.²³³ In July 2004, two bus stops were bombed in Voronezh.²³⁴ Three were killed.²³⁵ In June 2004, Chechen separatists seized the interior ministry of neighboring Dagestan, and the resulting shootout left ninety-two dead.²³⁶ On August 24, 2004, a Moscow bus stop was blown up, causing four casualties. Just a few hours later, two airliners that had left the newly remodeled, state-of-the-art Domodedovo airport in Moscow crashed nearly simultaneously.²³⁷ Eighty-nine passengers and crew, plus the two female bomb carriers, were killed.²³⁸ On August 31, 2004, there was another subway bombing in Moscow—and ten more dead.²³⁹ By the end of summer 2004, many Russians, residents of Moscow in particular, were extremely anxious and the Chechen terrorists had gone a long way toward bringing their cause to public visibility.

Then there was Beslan. In this tiny village in the republic of North Ossetia, two republics over from Chechnya, more than 1,500 students, their

police officer was killed on July 10, 2003. David Holley, *Moscow Blast Kills Security Officer*, L.A. TIMES, July 11, 2003, at A1. I was living in Moscow at the time of these terrorists incidents as well, and heard that particular bomb go off in the middle of the night.

230. Steven Lee Myers, *Truck Bombing at Russian Military Hospital Kills 35*, N.Y. TIMES, Aug. 2, 2003, at A1.

231. David Filipov, *Suicide Bomber on Russian Train Kills 42*, BOSTON GLOBE, Dec. 6, 2003, at A1.

232. Steven Lee Myers, *Suicide Bomber Kills 5 in Moscow Near Red Square*, N.Y. TIMES, Dec. 10, 2003, at A1.

233. Steven Lee Myers, *39 Die in Moscow as Bomb Goes Off on Subway Train*, N.Y. TIMES, Feb. 7, 2004, at A1.

234. Sophia Kishkovsky, *Two Killed in Bus Stop Blast*, N.Y. TIMES, July 20, 2004, at A6.

235. J.F.O. McAllister & Paul Quinn-Judge, *Defenseless Targets*, TIME INT'L, Sept. 13, 2004, at 30, 30, available at <http://www.time.com/time/europe/magazine/printout/0,13155,692846,00.html> (last visited July 3, 2005).

236. CNN TIMELINE, *supra* note 12.

237. David Holley, *2 Russian Jets Crash*, L.A. TIMES, Aug. 25, 2004, at A1.

238. *Id.*

239. Erin E. Arvedlund & Sophia Kishkovsky, *After a Spate of Bombings, Moscow's Full of Foreboding*, N.Y. TIMES, Sept. 2, 2004, at A6.

parents, and their teachers were taken hostage by thirty-two armed terrorists on September 1, 2004, the first day of school, at the Middle School Number 1.²⁴⁰ The hostages were held without water or food in the stiflingly hot gymnasium of the school for three days before one of the terrorists' bombs exploded, and all hell broke loose.²⁴¹ In the ensuing chaos and shootout between the terrorists and the security forces (with anxious parents armed with guns joining in the fray), at least 330 were killed.²⁴² More than 150 of those hostages killed were children.²⁴³

Despite all of the terrorist attacks, despite the hundreds of Russian civilian bystanders targeted and killed outside of Chechnya in recent years, the Beslan siege was the only truly transformative event in the set of horrific terrorist attacks. The country was in shock in a way completely different from the other terrorist incidents. Targeting children had crossed a line.

Beslan was for post-Soviet Russia what the assassination of the tsar had been for the nineteenth century reform movement: the opportunity for major constitutional retrenchment. As we observed with the nineteenth century reforms, Russia's constitutionalism has traditionally been impatient and self-blaming. Rather than viewing constitutionalism as a possible resource in fighting terrorism because it might offer a legitimate way of settling the claims of the political opposition, the causes of terrorism were chalked up to the constitutional changes themselves. As with the constitutional retrenchment under Alexander III, Vladimir Putin proposed drastic changes in the country's political structure to better fight terrorism.

On September 13, 2004, while the country still reeled from the tragedy of Beslan, President Putin gave a speech to a quickly called assembly of federal ministers and regional governors.²⁴⁴ In it, he proposed

240. In Russia, the first day of school is a very festive occasion. Parents typically accompany their children to school and the children bring flowers for their teachers. Everyone dresses up and there is a public ceremony welcoming the children back after the summer. It was in the middle of this ceremony that the terrorists seized the children, the parents, the teachers, and the building. While estimates have varied, probably more than 1,500 people were held in the sweltering heat of the school gymnasium. Nick Paton Walsh, *Tracing a Tragedy*, THE GUARDIAN (London), Sept. 30, 2004, at 2.

241. McAllister & Quinn-Judge, *supra* note 235.

242. *Id.*

243. *Id.*

244. The speech was broadcast on Russian RTR television at 9:30 GMT and has been translated as *Sympathy for Victims Is Not Enough*. *Sympathy for the Victims Is Not Enough* (RTR television broadcast, Sept. 13, 2004), available at *Russia's Rulers*

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new methods for dealing with terrorism, methods that involved radical changes of the state structure:

It is impossible not only to speak but even to think of what happened in Beslan without tears.

However, compassion and tears and words of support from representatives of the authorities are by themselves entirely insufficient. We must act and increase the authorities' effectiveness in handling the entire spectrum of problems facing the country. . . . These issues are securing the unity of our country, strengthening state structures and confidence in the authorities and creating an effective system of internal security.²⁴⁵

And how could this be done? First and foremost by strengthening what Russians call the "vertical of power," the direct command structure of the government.²⁴⁶ And how to do this? By getting rid of the messy federalism that had developed during the Yeltsin period when the regions went their own way. According to Putin:

[T]he most important factor in strengthening the state, I consider, is a single system of executive power in the country, a single system stemming from the spirit and the letter of Article 77 of the Constitution of the Russian Federation. . . . The bodies of executive authority in the [center] and in the constituent parts of the Russian Federation will be formed by a single system of authority. And correspondingly, they must work as a single integrated organism with a clear structure of subordination.²⁴⁷

To accomplish this task, Putin proposed replacing the regional elections for local governors with a system in which Putin himself would appoint the governors.²⁴⁸ The local *dumy* (parliaments) would have to confirm the appointments, but the initiative and the nomination would come from Putin.²⁴⁹

and Public Must Unite Against Terrorism—Putin, BBC WORDWIDE MONITORING, Sept. 13, 2004, available at LEXIS, Nexis Library, Bbcmir File [hereinafter *Putin, Sympathy for the Victims Is Not Enough*].

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* Putin's speech also proposed that governors likewise exercise more control over local governments: "Furthermore, I think that the heads of the regions

Given the structure of messy, vocal federalism that developed in Russia during the 1990s, would this be constitutional? As it turns out, Article 77 of the Russian Constitution, explicitly mentioned by Putin, has two faces. In the part he was undoubtedly referring to, Article 77 section 2 says that in all matters of joint jurisdiction,²⁵⁰ “the federal bodies of executive power and bodies of executive power of the subjects of the Russian Federation form the single system of executive power in the Russian Federation.”²⁵¹ That might make it sound like the constitution envisaged that the Russian president and the regional governors were required to act together, as Putin’s proposal implies, but Article 77 section 2 specifies that this is true is only for matters of joint jurisdiction—where both national and regional governments have overlapping competencies.²⁵² Defense and security matters, the competencies at issue in the fight against terrorism, are listed among the uniquely federal competencies, however.²⁵³ That would seem to counsel that the president and regional governors could not be compelled to work together in a superordinate-subordinate way on these issues and that the president could not demand that they do so.

Even assuming that the “joint jurisdiction” controversy could be settled, however, a different part of Article 77 makes even more problematic the direct selection of governors. Article 77 section 1 provides that the governments of the regions “are established by the subjects of the Russian Federation *independently* in accordance with the basic principles of the constitutional system . . . [and of] federal law.”²⁵⁴ If the governor of the region is to be chosen by the president of the federation as Putin proposed,²⁵⁵ then it is hard to see how the local government is established “independently.” Perhaps this is why the potential veto in the local *duma* was added to the proposal, so that it would preserve some semblance of the

should today work more closely with municipal bodies and help them in their everyday work with the people. And also, in the framework envisaged by law, should exert more influence on the establishing of local government bodies.” *Id.*

250. The 1993 Constitution specifies a list of competencies that are to be carried out by the national government and a different list to be carried out “jointly” by the national government and the regions—for “joint jurisdiction.” KONST. RF, arts. 71, 77 (1993), available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005).

251. *Id.* art. 77(2). “Subject of the federation” is the Russian term of art for a sub-national region, rather like a state of the United States.

252. *Id.*

253. *Id.* art. 71(1).

254. *Id.* art 77(1) (emphasis added).

255. See *supra* note 249 and accompanying text.

local self-constitution of government.

Putin's September 13 proposal was raced into law. The bill that already passed the parliament and was signed by President Putin,²⁵⁶ however, adds a new detail not in Putin's original speech: if the local *duma* rejects the president's candidate for governor twice, then the president can dissolve the regional parliament, call new elections, and start again.²⁵⁷ While Article 77 section 2 of the Russian Constitution permits the executives of the regions and the national government to coordinate their efforts, it says nothing about the national president having any control over a regional legislature. The constitutionality of Putin's program for appointing regional governors is certainly not clear, and would seem to be directly contradicted by Article 77 section 1 which preserves the independence of regional governments. But despite questions about its constitutionality, the plan is already law.

Putin's September 13 speech also proposed making a modification to the way that the national *Duma* itself is elected in order to more effectively respond to terrorism. At the moment, half of the seats in the *Duma* are determined on the basis of proportional representation selection from party lists and half of the seats are determined in first-past-the-post single-member districts.²⁵⁸ In the last parliamentary election, held in fall 2003,

256. O vnesenii izmenenii v Federal'nyi zakon "Ob obshikh printsipakh organizatsii zakonodatel'nykh predstavitel'nykh i ispolnitel'nykh organov gosudarstvennoi vlasti subjektov Rossiiskoi Federatsii" i v Federal'nyi zakon "Ob osnovnykh garantiakh izbiratel'nykh prav i prava na uchastie v referendumakh grazhdan Rossiiskoi Federatsii" [Amendments to the Federal Law "On General Principles of Organization of Legislative (Representative) and Executive Organs of the State Power of the Subjects of Russian Federation" and "On General Guarantees of Election Rights and the Right of Participation in Referenda for Citizens of the Russian Federation"], 2004-12-11 FDZ-No. 159.

257. *Id.* ch. 1.4. The process is somewhat more complicated in the statute than this summary sounds, as it allows the president to appoint a temporary governor while a stand-off with the local *duma* is going on and it requires extensive local consultations before a local *duma* can be dissolved. Still, the bottom line is that the president could in theory keep dissolving local *dumy* until they approved his preferred candidate who could serve in that job, temporarily at least, in any event. The local *dumy* have only a suspensive veto at best.

258. This is a system of election common in parliamentary democracies, and is similar to the German model. Citizens who go to vote in national elections actually vote twice—once for a political party and again for a particular candidate to represent their district. The party votes are added up and distributed proportionally among the political parties, each of which has put together a list of party members who would take those seats if permitted by the election to do so. The candidate votes are added up and the candidate with the most votes in the particular district wins. Generally, given that

parties supporting President Putin swept the election²⁵⁹ and would have had an overwhelming majority in the *Duma* (instead of merely a substantial majority) if the single-member seat selections had not put into the *Duma* a number of independents, liberals, and others whose parties did not get enough votes to get them over the five percent threshold to win a party fraction.²⁶⁰ Putin proposed doing away with the single-member districts, creating a parliament where *all* of the seats are filled directly from party lists.²⁶¹ How would this fight terrorism? Putin's explanation:

[T]he fight against terrorism should in the full sense of the expression be the business of the whole nation. It is for this reason that it is so important that all institutions of the political system and the whole of Russian society play an active part in it. . . . Today we are obliged in our practical action to support the initiatives of citizens in their desire to fight terror. Together, we should find mechanisms to bind the state together.

One of these mechanisms, for providing a real dialogue and collaboration between society and the authorities in the fight against terror, should be national parties. In the interests of bolstering the country's political system, I think that it is vital to introduce a system of proportional representation for elections to the State *Duma*.²⁶²

Of course, one might well note that Russia already had a proportional representation system in the *Duma* elections; it is merely that the

there are more than two candidates, a runoff is held among the top two vote-getting candidates to determine who gets that seat. Half of the seats in the lower chamber of parliament are awarded based on party lists and the other half go to those who were elected personally in the districts.

259. "Everyone had expected a big victory for pro-Putin forces, but the scale of the landslide was unprecedented in post-Soviet Russian politics. United Russia, a party with no firm ideology other than total allegiance to the president, will have a working majority in parliament." *Morning Edition* (NPR radio broadcast, Dec. 8, 2003), available at LEXIS, Nexis Library, Npr File.

260. *Russia's Putin Gains Power to Appoint Regional Governors*, FACTS ON FILE WORLD NEWS DIGEST, Dec. 16, 2004, at 991, 991. In another piece of draft legislation, the threshold for gaining a party fraction would be increased from five percent (which the liberal parties almost made) to seven percent (which the liberal parties almost surely cannot meet). *Id.* at 992. In yet another proposal, the number of signatures required to establish a political party that could run in national elections would be raised from the present 10,000 to 50,000. *Id.* at 991-92.

261. *See id.* at 991.

262. Putin, *Sympathy for the Victims Is Not Enough*, *supra* note 244.

proportional representation system covered only half of the seats.²⁶³ Putin's speech did not explain why it was necessary to use proportional representation to fill *all* of the seats. Regular critics of Putin pounced on what they saw as his anti-democratic proposal.²⁶⁴

But is this proposal unconstitutional? Given the way that the 1993 Constitution was written, there is little direct text to contradict this proposal because the Constitution itself leaves the election law for the federal *Duma* to adopt through ordinary legislation.²⁶⁵ If an ordinary statute is passed changing the basis for elections, it is hard to see how this would violate the Constitution, which envisages precisely this way of establishing the electoral system.²⁶⁶ The only thing fixed in the constitution is the number of representatives, 450,²⁶⁷ and their four-year terms,²⁶⁸ not the method of their selection. Putin did not propose change in the constitutionally fixed aspects of the *Duma*'s structure. So it is hard to see where constitutional objections would come from.

Interestingly enough, however, the *Duma* initially stalled at passing these changes, perhaps because some of their own number saw their political fates as implicated in the change. Though the proposal was put before them in September, the *Duma* passed the bill on the third reading, which did not occur until April 2004, sending it to the Federation Council

263. *Russia's Putin Gains Power to Appoint Regional Governors*, *supra* note 260, at 991.

264. For one example, consider the following:

Faced with the most serious crisis of his presidency, Vladimir Putin has yielded to his darkest instincts. . . . On Monday, evoking Russia's long history of autocratic concentration of power, Putin called for legislation to end the popular election of regional governors and voting in parliamentary districts in favor of slates selected by national party leaders, who are more likely to bend to presidential whims.

These chilling proposals have no obvious relevance to the terrorist attacks. By exploiting Russia's grief, they merely advance Putin's antidemocratic agenda.

Editorial, *Russia's Lurch Backward*, INT'L HERALD TRIB., Sept. 15, 2004, at 8.

265. See KONST. RF, art. 96(2) (1993) ("The procedure for forming the Federation Council and the procedure for electing deputies to the House of Representatives [State *Duma*] is established by federal law."), *available at* http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005).

266. *See id.*

267. *Id.* art. 95(3).

268. *Id.* art. 96(1).

for their concurrence, which is virtually certain.²⁶⁹ In a recent interview, the chair of the National Elections Commission, Alexander Veshnyakov, underplayed the extent to which the changes would affect anything at all:

Well, the first thing I would like to say for all citizens, for all voters to hear is that the general rules of participation in voting are not changing. That is, we will have ballot papers, voting on a Sunday, and political parties nominating candidates. But there is one change of principle: while in the past we had nomination of candidates in single-mandate districts, and half the *Duma*—225 deputies—were those who were elected in single-mandate districts according to the majority system, today there will be no majority system in the elections to the *Duma*. We will only have the proportional system, that is, the single-mandate districts will be cancelled.²⁷⁰

But, then, why institute these changes? Because, according to the elections commission chair, no one can do anything single-handedly in the *Duma* and, therefore, no one should be elected without being attached to a party with a coherent platform.²⁷¹

269. Interview by Mayak Radio with Alexander Veshnyakov, Chair, Central Election Commission (Official Kremlin International News radio broadcast, Apr. 27, 2005). The Federation Council was scheduled to take up this proposal when they reconvened after the May holidays, on May 11, 2005. *Id.*

270. *Id.*

271. During the radio interview, Veshnyakov answered a question from a call-in listener:

Listener: Good afternoon. I'm Vyacheslav Pavlovich from Moscow. Could you tell me why people, including candidates, should be herded into parties?

Veshnyakov: But no one herds people into parties. Simply, if you want to take an active stand in life, if you want to lay claim to authority, in particular, as a State *Duma* deputy, you have several ways of addressing that goal. First, you can find supporters and set up your own party; second, you can join some party and seek those goals together with them; and third, if you do not see yourself as a member of any party, you can be a sympathizer or supporter, and you can present yourself to such a party and ask them to include you in the federal list so that you, not being a member of that party, should promote the position and program of the party for the sake of a better life for voters, including yourself. . . .

....

And there is logic to this because everyone understands that when a

While it was not in Putin's September 13 speech, another major reform—this time to the judiciary—has emerged as part of Russia's campaign against terrorism.²⁷² Sergei Mironov, the speaker of Russia's upper house of parliament, the Federation Council, introduced a bill shortly after Putin's terrorism speech, a bill designed to alter the membership of the Supreme Judicial Qualification Collegium.²⁷³ This is the body that vets prospective judges and disciplines current ones, and before the new legislation, it consisted of twenty-nine members.²⁷⁴ One of those members was appointed by the president, ten were elected by the Federation Council and eighteen were elected by the All-Russia Congress of Judges, which is to say, by the judiciary itself.²⁷⁵ The body was, as a result, relatively independent of direct political influence because there was always a significant majority of members elected by judges. Under Mironov's proposal, however, the collegium would be reduced to twenty-one members, of which one would continue to be appointed by the president and ten would continue to be appointed by the Federation Council.²⁷⁶ But the remaining ten would not be elected by the judges themselves.²⁷⁷ Instead, that group would be nominated by Putin and

person runs for election on his own, without any support, then even if he wins, although this is very difficult, nearly impossible, and goes to the *Duma*, he will understand that [nothing] can be done there single-handed. Indeed, you can change any situation by passing a relevant law, and it takes at least 226 votes to pass a law. That is why deputies join one faction or another, which we have witnessed.

Id.

272. As a prominent Russian newspaper noted:

Federation Council Chairman Sergei Mironov was the first to respond to the president's address to the nation in the wake of the tragedy in Beslan. Vladimir Putin said, ". . . we permitted corruption to infest judicial and law enforcement spheres." Addressing the plenary meeting of the Federation Council yesterday, Mironov suggested a new procedure of appointment of judges into the Supreme Qualification Board.

Rustem Falyuakhov et al., *Will Judicial Power Be Made Answerable to Executive Power?*, ROSS. GAZETA (Moscow), Sept. 30, 2004, at 1, *translated in* WHAT THE PAPERS SAY (Reading, England), Nov. 3, 2004, *available at* LEXIS, Nexis Library, Wps File (omission in translation).

273. Peter Finn, *Putin Close to Winning New Power over Judiciary*, WASH. POST, Oct. 2, 2004, at A15.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

approved by the Federation Council.²⁷⁸ All direct and independent election by judges of the disciplining body for their own profession would be gone.²⁷⁹ The judicial congress would only have the power to recommend to the president and the Federation Council particular judges to sit on this body.²⁸⁰

Why change the composition of the Supreme Qualification Collegium? According to Mironov, the fight against terrorism was being impeded by the corruption of the judiciary, and the only way to better combat terrorism was to bring wayward judges under stricter control.²⁸¹ The increased control would be exerted not only because the Supreme Qualification Collegium would be able to discipline judges, and even authorize criminal charges to be brought against them, but because Putin himself would be given the power to fire a judge directly, provided that a majority of this body agreed.²⁸² While the proposal did not come from Putin directly, Mironov is known to be a very close Putin ally.

Is this change in the composition of the Supreme Qualification Collegium constitutional? Not surprisingly, a number of judges have argued in the press that the measure is not constitutional, not in accord with international standards, and not smart.²⁸³ The Russian Constitution

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. As one report noted:

“That’s plain stupidity of course, but this is just the sort of thing, unfortunately, we can expect these days,” Yuri Sidorenko, Chairman of the Council of Judges, said. “It is clear that the initiative aims to restrict independence of courts and judges”

. . . “They do not give a damn that it collides with international standards. There is the European Charter of Judges stating that judges must participate in formation of the judiciary through the bodies elected by themselves by 50%.”

Anastasia Kornya, Irina Romanicheva, *Judges Enraged by the Federation Council’s Initiative*, NEZAVISIMAYA (Russia), Oct. 1, 2004, at 2, *translated in* WHAT THE PAPERS SAY (Reading, England), Oct. 1, 2004, *available at* LEXIS, Nexis Library, Wps File. According to another report:

Supreme Qualification Board Chairman Valentin Kuznetsov did not know anything of the forthcoming reforms before a meeting with this correspondent. “Firstly, it collides with the Constitution which includes the list of officials the

says nothing about the Supreme Qualification Collegium at all, so a case for unconstitutionality would have to rest on the argument that the new composition of the Collegium would violate judicial independence, which is directly protected in the Constitution.²⁸⁴ But Putin, addressing the national Congress of Russian Judges, argued that “[j]udicial independence is not an honorary privilege,”²⁸⁵ appearing to stake his ground on the view that judicial independence did not prohibit measures to eliminate corruption.

So far, the *Duma* has resisted pushing this change in the Supreme Qualification Collegium through. The bill has languished in the *Duma* since it was passed by the Federation Council at the start of October.

Still, the Beslan tragedy has produced a huge wave of lawmaking designed to cope with terrorism. On one report, more than 200 draft laws were proposed to fight terrorism, with most of the proposals eventually consolidated into about forty more complex laws.²⁸⁶ The ones I have

president is supposed to nominate,” he said. “Members of the Supreme Qualification Board are not on the list. Shall we amend the Constitution? Besides, the whole idea collides with the European Charter adopted in Lisbon in 1998”

Rustem Falyukhov et al., *supra* note 272 (omission in translation).

284. See KONST. RF, art. 120(1) (1993) (“Judges are independent and obey only the Constitution and the federal law.”), available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005).

285. Putin continued:

“There exists today a problem of transparency of justice for the participants in court cases and for society as a whole.”

He also called on the congress to “strive for a situation when a judge and a person with an immaculate reputation become inseparable and identical concepts.”

Less than two months ago, speaking after the Beslan school attack, Putin said the country’s judicial and law enforcement systems were plagued by corruption.

Nabi Abdullaev, *Putin Tells Judiciary to Clean Up Its Act*, MOSCOW TIMES, Dec. 1, 2004, at 5.

286. In a press conference at the *Argumenty I Fakty* press center, Vladimir Vasilyev, chair of the State *Duma* Security Committee noted:

After the well-known events, the latest of which was the seizure of a school in Beslan, the State *Duma* formed a working group consisting not only of State *Duma* deputies and Federation Council members, but also representatives from 17 ministries and agencies, as well as the Security Council, [and] the Prosecutor General’s Office in order to work out and embrace the entire range

mentioned here are the most sweeping in their implications for the organization of the basic constitutional system of Russia, but these laws with constitutional implications have by and large avoided direct confrontation with clear constitutional language by taking advantage of weaknesses in the original constitution. Where crucial constitutional institutions like the framework for elections and the body for disciplining judges were not included in the text, it is not clear that there is any particular constitutional prohibition against changing the statutes that set them up. Where the constitution is vague, as it is with respect to the subject matter over which the president can commandeer the executives of the region to act as subordinates, new proposals can be tried without directly running up against constitutional plain language. Nonetheless, it would be hard to say that these proposals, sweeping as they are, have not affected the basic constitutional structure. But *ex ante* constitutionalism, to really bind, must be clear in advance about what is prohibited. In Russia's present constitution, enough was left out or left vague for major constitutional changes to look "constitutional enough" to pass. In short, *ex ante* constitutionalism does not seem to have been strong enough to prevent this clear centralization of power, bringing under the president's control those few elements that were left outside his grip in the original constitutional plan.

The excuse for all of this constitutional change has been Russia's current war on terrorism. Just as with the nineteenth century reactions against terror, one suspects that the sweeping nature of the constitutional retrenchment in recent months in Russia comes from a more general reaction against the liberalism of the earlier wave of constitutional reform than simply from a targeted attempt to solve what, after all, is a quite focused set of terrorist attacks with a very clear cause. The changes are just too vast to be about only one source of threat. Terrorism has, once again, provided a convenient opportunity for a centralizing leader to bring powers back to the center.

But, as with the nineteenth century case, has the constitution become

of proposals concerning the suppression of terrorism at early stages. It considered about 200 different draft laws. After initial examination during the two weeks, the working group combined them into 40-odd draft laws. The group then approved the 40-odd draft laws working documents. They were recently submitted to the government commission on legislation. Nineteen of them were considered yesterday in a joint meeting. So, this work is underway.

Vladimir Vasilyev, State *Duma* Committee for Security Chair, Press Conference at *Argumenty I Fakty* Press Centre (Official Kremlin International News radio broadcast, Oct. 22, 2004).

the basis of *post hoc* critique, as one might expect from Russian constitutional history? While the changes are still going on, it is clearly too early to tell how far the 1993 Constitution will be used as a basis for far-reaching reform in a later moment. But cries of unconstitutionality have already emerged regularly from the political opposition. Vladimir Ryzhkov, one of the leading independent members of the *Duma*, one whose single-mandate place would be abolished in the new reforms, was vocally opposed to the proposal about the appointment of governors:

In accordance with the Constitution, Russia is a multi-national state, where the rights of nations, including the right to self-determination, are guaranteed. This right is guaranteed by the federalism, which gave the state [system] to nations in Russia, including the right to election of their own authorities in their regions. . . . The introduction of the [institution] of the Kremlin's governors violates the principle of self-determination of nations. It can be compared with the forced russification of Russian remote areas, which took place under Alexander the Third and Nikolai the Second. . . .

Besides, the proposed measures contradict the Constitution. In accordance with article 1 of the Constitution, Russia is a democratic, federative and constitutional state. The abrogation of the governors' elections contradicts the principle of democracy. Building of the regional executive power into the federal "vertical" contradicts the principle of federalism. The violation of articles 1, 2, 3, 5, 10, 11, 32, 55, 71, 72, 73, 77, 83 of the Constitution as well as of the verdict of the Constitutional Court of January 18, 1996 contradicts the principle of the constitutional state. Besides, the violation of the Basic Law by the guarantor of the Constitution and federal legislators can allow regional authorities not to observe the federal laws. Moreover, they can cast doubt on the sovereignty of Russia over them.²⁸⁷

Like the dissidents in the Soviet time,²⁸⁸ Ryzhkov is telling the government to follow its own constitution. By calling the president the "guarantor of the Constitution," as indeed the Russian Constitution itself does,²⁸⁹ Ryzhkov uses the constitution as a particularly authoritative form

287. Vladimir Ryzhkov, *Abolishing Elections Means a Vote of No-Confidence in the People*, VEDOMOSTI (Moscow), Nov. 2, 2004, at A4, translated in WHAT THE PAPERS SAY (Reading, England), Nov. 3, 2004, available at LEXIS, Nexis Library, Wps File.

288. See *supra* note 177 and accompanying text.

289. KONST. RF, art. 80(2) (1993), available at http://www.oefre.unibe.ch/law/icl/rs00000_.html (last visited July 3, 2005).

of critique. The constitution, as a result, seems to have its real defenders in the opposition rather than in the holders of power.

Others in the opposition also have picked up the unconstitutionality refrain. Vladimir Solovyov, a member of Russia's Communist Party (which has also opposed Putin) called the post-Beslan measures unconstitutional.²⁹⁰ Journalist (and fiction writer) Ilya Milshtein, writing in the *Novoe Vremya* (New Time), composed a scenario reminiscent of some of the absurdist literature of the Soviet time:

Dramatis personae: Surkov^[291] and a group of *Duma* members from the United Russia faction. Date: July 2004. They are discussing the Kremlin's latest package of bills, which needs to be passed. The silence is broken by the voice of a certain unnamed *Duma* member with a background in law, who points out that the bills are flawed and unconstitutional. Surkov raises his voice to a shout, and raises the shouting to obscenities. He puts the *Duma* members in their place, telling them: "You're not *Duma* members, you're just . . ." (the rest seems to be straight out of Kharms^[292]), telling them they're all "bound," with specific individuals from the presidential administration taking personal responsibility for the actions of each *Duma* member, and they must vote as instructed, or by God he'll strip them naked and send them to Africa.²⁹³

Even in absurdist renditions of what Putin has been doing, unconstitutionality appears. In addition, demonstrations in the streets against Putin's counter-terrorism proposals have used the rhetoric of unconstitutionality: "[A]round 100 people opposed to the measures gathered in front of the *Duma* building, one of a dozen such demonstrations organized throughout the country. 'Deputies! There is still time to reconsider,' 'Do not violate the constitution,' read their

290. *Russia's Opposition Vows to Stick Together in Face of Putin's Reforms*, AGENCE FRANCE-PRESSE, Oct. 7, 2004.

291. Vladislav Surkov is the deputy head of the presidential administration under Putin.

292. Daniil Kharms (1905-42) was officially a writer of children's fiction, but he wrote "for the drawer," a collection of absurdist fiction that poked fun at Stalinist regime. He died of starvation in a Russian prison during the Second World War, having been convicted of spreading defeatist propaganda. For more on Kharms, including links to some of his stories in English translation, see *Daniil Kharms*, <http://www.sevaj.dk/kharms/kharmseng.htm> (last visited July 3, 2005).

293. *The Evolution of Vladimir Putin's Image: "President of Hope" or "Clumsy Dictator"?*, translated in WHAT THE PAPERS SAY (Reading, England), Nov. 17, 2004, available at LEXIS, Nexis Library, Wps File.

signs.”²⁹⁴

With the growing centralization of power in Russia, reversing the constitutional reforms of the 1990s, constitutionalism has become once again the rhetoric of the opposition.

IV. CONCLUSION: BETWEEN *EX ANTE* AND *POST HOC* CONSTITUTIONALISM

What have we learned from this exploration of two episodes in Russian history? The two great waves of liberal constitutional reform in Russia seemed to open up spaces into which political violence flowed. While I believe that the terrorism of both periods grew out of causes that predated the constitutional changes (excessive autocracy in the nineteenth century and impossible federalism in the twentieth), the leaders that had to cope with terrorism believed that the primary cause of the violence was the constitutional liberalization itself. And in both cases, they acted to repeal the constitutional reforms in order to battle terrorism. Alexander III scaled back local self-government and abandoned the independent judiciary. Vladimir Putin sharply restricted the independence of the regions and has attempted to bring both parliament and courts more within his control. When the two leaders abandoned the earlier constitutional changes, however, constitutionalism did not die. It moved from being the language of the state to being the language of the opposition. Russia may have had brief periods of *ex ante* constitutionalism, but it has had longer spells of *post hoc* constitutionalism.

While I have concentrated in some detail on Russian examples, there is something in them that might prove to be of more general use. First, we tend to think that constitutions only work when they constrain governments in advance. That is the promise of constitutionalism and it seems the main reason to have constitutions in the first place. But I have tried to identify something else that constitutions can usefully do if they fail at that: they can provide a particularly authoritative rhetoric of opposition.

Providing a focal point for the opposition is a valuable function. It makes a certain form of critique more grounded and compelling (and perhaps as a result more likely to attract adherents because it seems less radical). It provides a blueprint for what to do if the opposition ever comes to hold power—something affirmative on top of the critique. The constitution-in-opposition also puts those in power on the defensive.

294. Yana Dlugy, *Russians Spar over Putin Plans to Boost the Kremlin's Power*, AGENCE FRANCE-PRESSE, Oct. 28, 2004.

Whatever else they may be doing, blatantly violating the constitution in existence is never a good thing. Those in power may need to justify some of what they do in constitutional terms, if they do not simply repress the oppositional constitutionalists. When constitutions seemed to have ceased to constrain those in power, however, we have seen that they can shore up the opposition. It is very hard to put people in jail for asking the government to follow its own laws.

While most commentators on the history of Russian constitutionalism have found that constitutionalism has been very weak throughout Russian history, this is because they have typically only considered constitutionalism in its *ex ante* form. Adding *post hoc* constitutionalism to the mix gives a different impression. Throughout Russian history, opposition movements have typically embraced constitutionalism even more firmly than have actual governments. Autocratic tsars followed by communist dictators have not provided the best conditions for a robust constitutionalism. As we have seen, Russian leaders have tended to give up on constitutionalism at the first sign of trouble, creating a sort of impatient constitutionalism that is guaranteed to fail. But the political opposition has been more willing to create the right conditions for development of constitutional ideas, and it has typically been the political opposition in Russia that kept constitutionalism alive.

Perhaps it is quite fitting, then, that the saying about constitutions best known in Russia poses the question about what the alternatives to a constitution would look like to a member of the governing elite. It comes from Mikhail Saltykov-Shchedrin:

I was sitting at home and, as I generally do, I had no idea what to do with myself. I wanted something. Either a constitution—or sturgeon with horseradish—or to plunder. Yes, for starters, it crossed my mind to plunder. To plunder, and then flee. . . . And after that, when I already proved myself to be a respected person, I could dream up a constitution in my spare time.²⁹⁵

In the hands of Saltykov-Shchedrin's character, a bored member of the Russian elite, a constitution is a casual activity on a slow day. He might as well eat sturgeon with horseradish instead. But as we have seen from our study of Russian constitutionalism, we can now place this man exactly in his political and social context. He might well be typical in the ruling elite, where constitutions are taken as yet another luxury good to be

295. SALTYKOV-SHCHEDRIN, *supra* note 2, at 295.

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dreamed up in one's spare time and not to be much constraint on them if times are tough. But if Salykov-Shchedrin's character were in the opposition, he would fight to have a constitution. From Russia's political opposition, we now know we can expect more. Russia has had strong constitutions. It's just that Russia's strongest constitutions have been constitutions in opposition.