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INDIVIDUAL RIGHTS, DEMOCRACY, AND CONSTITUTIONAL ORDER: ON THE FOUNDATIONS OF LEGITIMACY

Roger Pilon

Introduction

After more than 70 years of Communist rule, the people of the Soviet Union today face an enormous challenge—to make the transition to freedom. Never in history have so numerous and diverse a people as those who live in today's Soviet Union undertaken so fundamental and difficult a transition as is envisioned by the move from a planned to a free society. Were the transition going in the other direction, it would be relatively easy, of course; for as theory and history demonstrate, socialism is brought about simply by taking what is privately held, from land to labor, and putting it under public control. Getting out of socialism, however, is much more difficult, not least because, over time, many of the conditions that characterized the pre-socialized order—such as a distribution of private holdings—and enabled that order to function and evolve—such as a system of private law and the culture that sustains it—have been all but destroyed. It will not be easy to revive those conditions or to create them anew. Yet for all the difficulties, the transition must be undertaken; the chaos and suffering that are the inevitable products of the planned society must be brought to an end.

Important as it may be to focus on the difficulties, however, it will be even more important to keep in view the prospects that lie ahead

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for the peoples of the Soviet Union. And here we need to recognize that in many ways these are exciting times. For the first time in generations, after all, Soviet citizens can speak openly about their future. Things are possible today that were undreamed of only a few years ago. Recall that Germany and Japan lay in ruins and under occupation at the end of World War II, yet within a generation they were prosperous nations. That potential is here today in the Soviet Union. It will take work and dedication, of course. But above all, it will take a vision on the part of the people and their leaders of where they are going, how they are going to get there, and, most important, why they are undertaking so arduous a journey.

Underlying all the practical questions that surround the transition, then, are these deeper questions, questions of first principle. And none of these is quite so pressing as the question of legitimacy. For the events of the past year throughout the socialist world signify nothing so much as a crisis of legitimacy. As the Berlin Wall, the starkest symbol of that crisis, came crashing down upon the illegitimate regimes of the East, the thirst for freedom and a greater measure of legitimacy grew all but palpable. To have seen the crisis unfolding, however, is not to have witnessed its resolution. Rather, we have seen simply, and again, that man is a moral creature: In his political no less than his personal life, he yearns for legitimacy. Yet the gap between that yearning and its realization is yawning still, not only in the East but, to one degree or another, throughout the world, including the West.

This question of legitimacy, then, will be my principal concern here, for upon it turns everything from prosperity to peace. Indeed, without a better understanding and appreciation of its foundations, we are doomed to a constant struggle in its name—either the intense struggle we are witnessing now in the East, or the less-intense but no less-enduring struggle that has come to be the political life of the West. Toward minimizing that struggle we must recognize, properly relate, and then institutionally secure the three elements that constitute the foundations of legitimacy—individual rights, democracy, and constitutional order. And we must ensure that the order that is thus secured, if it is to endure, is broadly understood and appreciated.

Because my thesis is in several parts, each of which I want to develop to some extent, and because in places it is more abstract and abstruse than I wish the subject required, it may be useful to summarize it here, at least in conclusory form. In brief, the move from rule by the party to rule by the people, the beginnings of which we are seeing throughout the Soviet Union, is absolutely essential if legitimacy is to come about. But that move in the direction

of democratization gets us only part of the way toward legitimacy, for rule by the majority, which is the practical manifestation of rule by the people, can be every bit as despotic and illegitimate as rule by the minority. To complete the process of legitimating power, therefore, the next step must be taken, toward rule by the individual, or self-rule, which in truth is a move toward privatization. The move toward privatization or self-rule, however, can never be fully completed, for reasons both practical and theoretical that I will discuss shortly; taken to its limit, in fact, such a move would amount to the elimination of government. Nevertheless, that limit can be approached through the creation of constitutional mechanisms that recognize, first, that legitimacy is grounded from the start in the individual; second, that only those powers that belong legitimately to individuals can be legitimately transferred to government; and third, that the procedures for making such transfers are fraught with difficulty, all of which leads to the conclusion that only limited government—government that leaves as much as possible to the private sector—can claim plausibly to be legitimate. Whether such limited governments will be seen to be legitimate by those living under them is a different and a difficult question, which I will take up next, then return to later.

Legitimacy as Subjective Acceptance

As these introductory remarks should already have suggested, we may talk about legitimacy on two quite different levels or from two quite different perspectives. On one hand, the philosopher may analyze the idea and its elements from the perspective of reason or moral rationality, attempting to justify his conclusions with reference ultimately to the theory of moral or natural rights. That will be my principal concern here. But on the other hand, the social scientist or the political leader may look at legitimacy empirically or operationally.¹ In so doing, the closely related idea of "acceptance" looms large as an empirical or operational criterion for legitimacy. On this approach, the fact that a regime is or is not accepted by the people living under it will tend to distinguish legitimate from illegitimate regimes. I emphasize "tend," however, for "acceptance" can serve this function only in a very crude way. That many in this century have fled from socialist regimes while many more have sought out democratic capitalist regimes doubtless says much about the legitimacy of those regimes, at least as perceived by the people in motion;

¹This approach is also found among philosophers of law working in the tradition of legal positivism. See, e.g., Hart (1961).

for when people vote with their feet, they speak volumes. At the same time, many more have not fled their homelands, however oppressive the political conditions there. Thus, any extrapolations from such gross evidence of acceptance to assessments about legitimacy can be only suggestive, yielding crude and sometimes even misleading measures of legitimacy.

Nevertheless, this subjective criterion of legitimacy, as we might also think of it, does tend to restrain the actions that political leaders might take, which is why it cannot be dismissed. Even if they discern a more legitimate order, that is, an order reflecting rational or objective criteria of legitimacy, it does not follow that political leaders can bring such an order about. If a substantial or otherwise important enough portion of the population thinks the proposed order illegitimate, education, persuasion, and leadership may be required before those subjective perceptions of legitimacy can be brought into harmony with a more objectively grounded sense of the idea. This tension between two quite different senses of "legitimacy," grounded on different criteria, constitutes a very old problem, of course, but a very real one as well, both in the East and the West. And it is a problem that cuts both ways: Sometimes the leaders are right and the people wrong; sometimes it is the other way. But none of this can be determined with any confidence short of a more rigorous and systematic approach to "legitimacy," to which we now turn, after which we will again take up this inherent tension in the idea.

Objective Legitimacy: Clarifying the Idea

To come to a better understanding of the rational foundations of legitimacy, we need at the outset to notice a pair of ambiguities that surround the use of the term. First, we may speak of legitimate governments or of legitimate governmental powers: They are not the same, for a legitimate government may exercise illegitimate powers, and an illegitimate government may exercise legitimate powers. And second, we may speak of legal and of moral legitimacy, which again are not the same. Let me develop those two points in order.

Legitimate Government and Legitimate Power

To the extent that they give reasons for what they do, all governments, or government spokesmen, can be said to seek legitimacy. To give reasons is to attempt to explain, at least, and that slides easily into an attempt to justify, which is an attempt to argue the legitimacy of what might otherwise be thought illegitimate (Pennock and Chapman 1986). But legitimacy can be said to attach to governments as

such as well as to the policies, rules, and actions of governments. At the international level, for example, it is the government itself, as an institution, that seeks legitimacy through recognition by other governments. Because the legitimacy that arises from such recognition is not my principal concern here, I will concentrate instead upon the legitimacy that may arise from the relationship between government and its subjects. In so doing, however, I will focus not so much on the legitimacy that attaches to governments as such, which is rooted in their origins (Wolff 1970), as on the legitimacy that may attach to the various actions of a government. If governments, like people, are known by their actions, and if actions, in the end, are what count for those subject to them, then this is the proper focus for our attention.

Legal and Moral Legitimacy

Let us turn now to the second ambiguity that surrounds the idea of legitimacy, to the distinction between the legal and moral senses of the idea. In its narrower, legal sense, "legitimate" is simply a synonym for "legal." Used in its legal sense, that is, a government's action is said to be legitimate if it is legal, if it conforms to the system's criteria for legality, whatever those criteria may be.² In this sense, legitimate actions are distinguished from *ultra vires* actions. This narrower sense of "legitimacy," however, even as it entails an occasional venture into normative terrain, as in systems that permit judge-made law, is not the sense we ordinarily intend when we say that a government is legitimate or that some government action is illegitimate. What we mean, rather, is to make a *moral* claim. We mean not simply that the government satisfies or its action fails to satisfy some narrow criterion of *legal* legitimacy but that it satisfies or its action fails to satisfy *moral* criteria. Moreover, when *governments* make claims about the legitimacy of their actions, they especially cannot be thought to be making a mere legal claim. To suppose otherwise would be to suppose that in thus characterizing their actions, governments are saying that those actions are merely legal, but not necessarily moral. That interpretation simply strains credulity. To so intend would defeat the whole point of a government's claiming legitimacy for itself.

Ordinarily understood, then, the claim of legitimacy points precisely to the nexus between law and morality, which is why it plays

²Here, again, this is the proper province of the legal positivist, who discerns what those criteria may be—the criteria that distinguish law from law-like phenomena, such as mere rules of ethics or etiquette—then whether various indicia of law or legal power do in fact conform to the criteria.

so central a role in political discourse. When governments wrap themselves and their actions in the cloak of legitimacy, they are claiming, by implication, that their actions are not simply legal but moral as well. They are invoking moral criteria to justify actions otherwise thought at least to be legal. Moreover, and more precisely, they are saying that in being legitimate, in being moral, those actions are performed *by right*, whereas an illegitimate action is one that the government has no right to perform. At bottom, then, questions about political legitimacy reduce to questions about moral rights. Legitimate government actions are performed not simply by legal authority but by moral right. That, at least, will be my concern here, to determine when those claims about the legitimacy of various government acts can be justified not simply by legal but, more deeply, by moral criteria.

Early Substantive Approaches to Legitimacy

Natural Law: Deontological and Teleological

How, then, have governments sought to argue these claims about the legitimacy of their actions? Here, a very brief historical review will be useful. In the pre-modern era the approach to political legitimacy was generally substantive, not procedural. Two main lines, in the natural law tradition, can be discerned. The first was deontological and was rooted specifically in theological considerations. The "higher law," to which positive law was said to conform, was the command of God. Under this version of higher law, the duties of those subject to the law were correlated not to the rights of other subjects but to the commands of the sovereign, which in turn were the temporal manifestations of divine commands. Legitimacy was thus a straightforward function of the correspondence of positive law to divine law.

The second line of argument in the natural law tradition was teleological, rooted in a conception of man as a purposive agent with certain natural ends, the realization of which it was the function of positive law to enhance, while prohibiting the pursuit of certain unnatural ends. Stemming at least from Aristotle, this view found its greatest exponent in St. Thomas Aquinas, who argued that man is a social animal who desires to live in common with other men in order to satisfy his needs and wants, which implies that he ought to cooperate with those others for his own, their, and hence the common good. Legitimacy, on this view, was a function of whether the ends sought to be secured by positive law were indeed consistent with

our natural ends and whether the means entailed by that law did in fact serve to secure those ends.

Epistemological Uncertainty and the Rise of the Individual

The problems that surrounded those two substantive approaches to legitimacy were several, but they all related, in one way or another, to epistemological uncertainty. Theocratic deontologists had difficulty explaining to nonbelievers, for example, why divine law should serve as a model for positive law. And even among believers, the foundations of belief proved inadequate to resolve differences over the content of divine law; disagreements at the theological level thus devolved into disagreements at the secular level. Those problems, arising from inadequate epistemological foundations, had their counterparts among the teleologists as well. For the idea that man has a certain nature and certain natural ends, while ostensibly more "scientific" than the theological approach, was simply too general, too subject to disconfirmation when made more specific, and too circular to command universal acceptance. Moreover, the strategy of the argument, as David Hume later observed, involved a straightforward inference from factual assertions about the nature of man to normative conclusions, a move the canons of logic could not support (Hume [1739, 1740] 1978, pp. 469–70).

With both those approaches, however, a sense of unease arose from their authoritarian character, for they had about them more than a trace of order and legitimacy imposed from above. By implication, of course, that unease would arise whenever there was dissension from the universal or dominant view, for then the correctness—and the legitimacy—of the overarching view would come into question. That unease could only grow, however, with the rise of the individual through the late-medieval and early-modern era. As the place and importance of the individual grew in our consciousness, the difficulties of deriving legitimacy from overarching, seemingly authoritarian theories grew as well. Nor was it the moral quality of the overarching rule that was the real problem: Good rule as well as bad, beneficence as well as maleficence proved inadequate to the challenge. For if the individual was truly the beginning—the fundamental building block—and the end of society, only *self*-rule would do. There, precisely, was the locus of political legitimacy: not in *good* rule from above but in *self*-rule from below. For only so would the wish—indeed, the right—of every individual to rule himself be respected. Legitimacy and self-rule forevermore would be entwined.

The Soviet Regression

Well, not quite. This brief history of the demise of pre-modern attempts to derive and impose legitimacy from above does not end, of course, with the emergence of the individual in the West and with the grounding of legitimacy in that individual. Perhaps no one needs to be less reminded of that than the Soviet citizen, who for 70 years and more has had a conception of legitimacy imposed upon him from above, by the party, the vanguard of the proletariat, the leading and guiding force of Soviet society, armed with Marxism-Leninism, which imparts a planned, systematic, and theoretically substantiated (read, "legitimate") character to the struggle for the victory of communism. Soviet citizens will recognize there the language of Article 6 of their constitution (Ramundo 1978). But I could have drawn from Marx or Lenin or a thousand and one other theoreticians to show that, far from a continuation of the liberal tradition that emerged in the West in the 17th and 18th centuries, the model of government that was imposed on the peoples of the East from 1917 onward was a throwback to the *ancien regime*. It was a top-down, not a bottom-up, model of legitimacy, with the party standing in the place of the king. As such, it suffered all the problems that the earlier models had suffered—and many more besides. Most important, for our purposes, it needed only one person, one individual, asking "why?" to bring the entire edifice into question. As with the *ancien regime*, there has been no shortage of such dissidents. And as before, because their question threatened to bring the whole edifice crashing down, they could not be tolerated. But neither could they be silenced, until today they are everywhere, and everywhere the edifice is in ruins. It is time to build a new structure, this time from the bottom up.

**Modern Substantive and Procedural
Approaches to Legitimacy**

The question the dissidents asked—the question that every dissident has asked from the beginning of time—can be stated generally and simply. Indeed, it is the fundamental question of political philosophy: By what right does one person have power over another? Calling for a warrant, for a justification for the exercise of power over another, it is a question about authority, or power that purports to be legitimate. At bottom, it is a question about moral equality, for it asks for the justification for unequal authority. Let me state here and now that no one has ever answered the question satisfactorily—in a way, that is, that gives confidence that political power has been deeply justified. Nevertheless, democratic theorists have come closer than

any others. Let us see how they have done that, and where they have failed. For in their failure they have charted a path toward legitimacy, which we would all do well to follow.

The Substantive Starting Point: The Private Realm of Individuals and Individual Rights

Democratic theory begins, as it must, by recognizing the right of the individual to rule himself and himself alone (Locke [1689] 1965, para. 13). The importance and power of that starting point cannot be overstated. For if the locus of legitimacy is in the individual and in his right to rule himself, then rights, far from being grants from the state, are already inherent in the individual, quite independent of any recognition by the state or even any existence of the state. Indeed, whatever rights or powers the state has are given to it by the individuals who create it in the first place; for individuals and their rights are both temporally and logically first, states second, with their characteristics, including their rights or powers, derivative (Nozick 1974, p. 6). That, precisely, is what the American Founders meant when they wrote, in the Declaration of Independence, that to secure these rights—namely, the rights that pre-exist the state—governments are instituted among men, deriving their *just* powers from the consent of the governed.

We will take up that creation and derivation in a moment. For present purposes, however, it is crucial that we notice certain features of the pre-government world, or the theoretical state of nature as it is commonly called. In particular, we need to recognize that it is not a lawless world (Locke, para. 6). On the contrary, a world in which individuals enjoy the equal right to rule themselves, and themselves alone, is a world ruled by the natural law—not the theological or the teleological natural laws of old, which were rooted in the epistemologically indeterminate realms of aspiration and value, but the modern natural law of reason (Locke, para. 6; cf. Gewirth 1978), the theory of natural rights, rooted in the intersubjectively verifiable idea of *property*, broadly understood, as John Locke put it, as denoting “lives, liberties, and estates” (Locke, para. 123). So important is this idea of property—the property we possess in our lives, our liberties or actions, and the things we acquire either by original acquisition or through contract—that property can be said to constitute the very foundation of the private realm (Pilon 1983). It is not for nothing that Marx took property as his principal target. Destroy the foundation of the private realm and you destroy that realm.

Yet it is in that private realm that individuals can be said to be truly free, free to plan and live their own lives, by their own values, however wise or foolish those values may turn out to be. In the private realm individuals are free to enjoy their general rights to life, liberty, and property, and all the countless manifestations of those rights. And they are free to join with others, with the consent of those others, to create all the special rights and obligations that contract and association enable, from marriages to businesses to everything else we have come to call civilization.³ Finally, they acquire legitimate power over others only if those others have consented or if their general or special rights are violated by those others, as by torts, crimes, or contractual breaches, and only, in the case of violations, to the extent necessary to be made whole again. This, in a nutshell and at its best, is the private common law of England and America as that law evolved over the centuries. It is a law derived ultimately from principles of reason; a law rooted in the idea of individual autonomy, as defined by property and contract; a law reflecting the rights of individuals, rights we create government to secure (Pilon 1979).

Before taking up that creation, one final issue needs to be raised, namely, that although life in this theoretical state of nature may be free, it may also, as Thomas Hobbes observed, be solitary, poor, nasty, brutish, and short. The reasons have been well catalogued in the literature. They all have to do, in one way or another, with uncertainty (Nozick 1974, pt. I). For although each of us enjoys the executive authority in the state of nature—the second-order right to secure our first-order rights and, if they consent, the first-order rights of others as well—there can be uncertainty, among other things, about what our first-order, substantive rights are; about what our second-order, procedural rights are; and about whether our conceptions of those rights conform to the conceptions of others. Life without social institutions to settle such uncertainties might prove difficult, at best.

Accordingly, theorists of the classical liberal tradition proposed procedures through which the familiar institutions of government might be established, institutions that might in turn resolve such uncertainties by declaring the law, resolve complaints about violations of law by adjudicating disputes, and pursue whatever else of common interest might usefully and legitimately be pursued through such public institutions. The question we need to ask,

³This distinction between general and special rights and obligations can be found in Hart (1955).

however, is whether, through such procedures, the legitimacy that characterizes self-rule can be preserved. Can we move from the private to the public realm, from individual self-rule to group or collective rule and respect the individual right of self-rule, the locus of legitimacy, in the process?

*The Procedural Path to Political Legitimacy:
Does It Take Us There?*

The modern path to political legitimacy has wound through the procedures of the social contract, of course, which is grounded in the idea of consent. For just as the individual in the private realm could authorize others to exercise power over him by consenting to that exercise, so it was thought he could authorize public officials to exercise power over him by giving his consent. More generally, the legitimacy of government itself was thought to be grounded in consent, as manifest by the ratification of a constitution that in turn authorized the government. If things were that simple, there would be no problems; but, of course, they are not that simple. In fact, they are much more complicated and problematic.

For present purposes, we will assume that the polity, or group in question, and the territorial issues are unproblematic—large assumptions, to which I will return shortly. So assuming, there is one version of the move from individual self-rule to group rule that is not a problem—the version in which all group decisions are made unanimously. By definition, unanimity preserves consent, but in a world of widely varying tastes, it is rarely if ever achieved. Accordingly, resort to majoritarian rule ordinarily follows, or to rule by some other fraction of the whole. But by itself, majoritarian rule cannot be legitimate, nor was it ever thought to be by the modern theorists; for whether the majority is 50 percent + 1 or 100 percent - 1, the minority, by definition, has not consented. We have the *ancien regime* all over, with the majority standing in the place of the king, the minority in that of the subjects. No, what justified majority rule, on the modern theory, was prior *unanimous* consent to be bound *thereafter* by the majority or by some other fraction of the whole. That arrangement would legitimate political power—provided the prior unanimous consent could be shown.

There, of course, is the rub, for even in America, where we came closer to the ideal model than anywhere else, the debate continues over just who was supposed to have given that prior unanimous consent—the people or the states—and just how that consent could possibly have bound succeeding generations. The truth, of course, is that nowhere can we point with confidence to any deeply satisfying

consent, not even in America. It simply did not happen in the way the theory requires, nor is it likely, for practical reasons, that it ever could have.

The last resort of the democratic theorist, therefore, is to point to so-called tacit consent: You stayed, therefore you have tacitly consented to be bound by the majority. Nothing in that argument limits it, however, to cases in which the majority rules; the argument could as easily apply to kings or to tyrants, purporting to make their rule legitimate too. Moreover, and more generally, the argument is patently circular: It amounts to putting the individual to a choice between two of his entitlements, his right to stay where he is and his right not to be ruled by another—this last being precisely the point that has to be justified, not assumed away.

We are left, then, with the unsettling conclusion that although democratic theory starts at the right place—with the individual—and points in the right direction—preserving legitimacy through consent—it is unable to carry out the latter burden; it is unable to preserve legitimacy as it moves from individual rule to group rule. Thus the state that emerges from such procedures has an ineluctable air of illegitimacy about it, as does everything that is done through the state—all of which suggests that out of a concern for legitimacy, for minimizing the forced association that the state necessarily is, as little as possible be done through the state, as much as possible be done in the private realm, where it can be done through free, voluntary association. On balance, it is perhaps better that we select officials and policies by majoritarian rather than by other possible procedures. But those procedures do not yield results that deeply satisfy our yearning for legitimacy, especially on those occasions when we find ourselves in the minority, under the burden of some particularly onerous majoritarian preference. On such occasions, which in the West are all too common, and increasingly so as majorities ask governments to do more and more, we yearn for a more secure foundation for legitimacy than is afforded by democratic process. And we yearn in particular for some institutional brake upon the illegitimacy that too often follows from the majoritarian process. That, among other things, is what a constitution should be—a brake upon democratic tyranny.

Constitutional Order: Securing the Private Realm

A constitution is a social compact through which the founding generation of a people who will thereafter live under the compact constitutes itself politically and legally. It is an instrument through which those people authorize and institute a plan of government.

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But in instituting a rule of law, the founders *ipso facto* put a brake upon the government they authorize—otherwise they could go straight to a rule of man and dispense with any instrument that locks some plan in place.

Ideally, then, a constitution authorizes the institution and institutions of government, establishes the rules of governance, and, most important, sets forth a vision to be secured through those institutions and rules. If any of those elements is inadequately crafted, the door is open for illegitimacy. Institutions or rules that enable power to be concentrated in public hands, for example, are anathema to individual liberty, as *The Federalist Papers* make clear. But above all, an inadequate or otherwise mistaken vision of the order to be secured—of the rights and obligations we have in the state of nature—will all but ensure illegitimacy.

Let me expand briefly on this last point. As we have just seen, because of the difficulties of satisfying the consent requirement, *all* acts of government, as well as government itself, have an inescapable air of illegitimacy about them. As the more candid of the classical liberals recognized, government, owing to its character as a forced association, is an evil, but, owing to the practical difficulties of enforcement in the state of nature, a necessary evil. Recognizing that *procedural* source of illegitimacy, which stems from the problem of authorizing government as such, we can still ask whether a given act of government is legitimate *substantively*—that is, whether that act, however dubious its procedural pedigree, would be legitimate if performed by individuals in the state of nature, although performed here by government. In general, when individuals come together to constitute themselves politically, *insofar as they can be said to do so*, they can be said to have a right to authorize government to do for them what they *themselves* would have an *independent* right to do—such as secure their rights in a state of nature. When they, or a majority among them, ask government to do what they have *no independent right to do, however*, then the government acts they “authorize” are twice illegitimate—from procedural *and* from substantive considerations. For how can individuals yield up to the state, to be exercised on their behalf, powers they do not have? Asked the other way, how can the state legitimately exercise powers that no individual could legitimately exercise in the state of nature? Since all powers the state legitimately has, if there are such, must be derived from the individuals governed—in theory, through their consent—how could the state have derived powers that were not there in the first place to be derived?

Thus a substantive vision that authorizes forced transfers from one part of the population to another—the most common democratic wrong today—simply starts off on an illegitimate foot. For if it is wrong for A to take from B without B's consent, however worthy A's motive, how could it be right for A, as a government official, to do the same? It strains credulity, for reasons just discussed, to suppose that everyone standing in the position of B gave his consent to such a transfer in some original position, at the time of constitutional choice. In fact, because that original consent—the ratification that gets the constitution and the government off the ground and running in the first place—is so tenuous, so strained, yet legally binds not only everyone in the founding generation but all succeeding generations as well, it is absolutely essential that the vision thus secured be itself inherently legitimate. And the only vision that stands in that position is the vision that respects the right of every individual to plan and live his own life, free from the interference of others, including the government—a vision that has as its foundation the equal rights of every individual to life, liberty, and property. It is a vision that electrified the world when it was declared in 1776. It continues to inspire millions around the world today.

Bringing the Vision About

But none of this can be instituted or sustained without a substantial measure of popular support. We return, then, to our earlier discussion about the gulf that often exists between legitimacy as derived systematically from principles of reason and ethical analysis and legitimacy as perceived by a substantial or otherwise important part of a given population at a given time. Such a gulf is not inevitable, of course. In fact, the liberal vision just sketched, in which individuals are free to plan and live their own lives and government is limited to securing those rights, has a certain common-sense appeal about it, which should be understandable and even inspiring to people of ordinary interests and intelligence. Nevertheless, for reasons of history, experience, culture, and more, there will always be people who crave ever-expansive government, oblivious, indifferent, or worse to the perils inherent therein.

As noted earlier, to bring such people to a keener understanding and appreciation of the foundations of legitimacy, constant education and leadership are essential. But such efforts can go only so far: Human nature being as it is, there will always be divisions, as there were in America at the time of our founding. Eventually, a point will

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be reached where a decision has to be forced through. In America we were fortunate that the men who forced their vision upon us—for let us be candid, most of the rest did not have a vote at that time—had a vision that was largely correct. Other countries have not been so fortunate. Let us hope that when the time comes again for a portion of the Soviet people to force their vision upon the rest—for candor again requires us to recognize that the consent requirement can never be fully satisfied—those people will be substantial in number and, more important, will select their vision more carefully than heretofore has been done.

As these findings apply to today's Soviet Union, then, we may conclude that the move from party rule to democratization, which is already under way here, is essential if the conversion from top-down to bottom-up authority is to be effected. But that move, by itself, will not be enough to bring about a legitimate political order. More important is the move to privatization and self-rule—democracy's starting point—for only there, in that private realm, is legitimacy truly to be found. And that private realm must be secured to the greatest extent possible by a written constitution, a constitution that recognizes the rights of individuals to life, liberty, and property in all their manifestations—from religion to speech, press, assembly, commerce, due process of law, and all the other implications of those basic rights. Majority rule should be limited, in turn, to fleshing out the interstitial and gray areas of that otherwise rationally grounded common-law order, and to such other issues as are strictly essential to the public domain. Under no circumstances should institutions of government engage in commerce—not simply from considerations of efficiency but, more deeply, from considerations of morality, from a recognition of government's inherent character as a forced association. If the rights of individuals to plan and live their own lives are to be respected, commerce, and social life generally, must remain a matter of free, private association, with government serving only to protect those rights.

Jurisdictional Considerations

Those procedural and substantive considerations, pertaining to democratization and privatization respectively, need to be supplemented, however, by what might be thought of as jurisdictional considerations. Here we broach one of the most vexing issues facing the Soviet Union today: Over which people or peoples and over what territory is any new constitutional order to range? This is not a question unique to the Soviet Union, of course; Yugoslavia, Romania,

Czechoslovakia, and even Canada are all among the nations of the world presently facing the issue. And it is an issue about which there is at once seemingly everything and nothing to say. The idea of "a people," with its language, culture, history, and identity stemming from and shrouded in the mists of antiquity, surely predates and prefigures the modern conception of constitutional if not legal order. At the same time, there is surely nothing written in stone about any present political configuration, no immutable principle that would be irretrievably lost if things should change—the more so if that arrangement is the minimalist one prescribed here. Where a more expansive and interdependent political order is under threat of disintegration, the inconvenience that would attend the demise properly belongs on those who have imposed or benefited from that order. Given the evolutionary and migratory characteristics that have ever marked the human race, however, the jurisdictional issues should probably be left to sort themselves out naturally, which in the end they will likely do largely from considerations of affection and efficiency. If ever there were an issue on which it should be left to the individual to decide what he should do and where he belongs, this is surely it.

But if legitimacy is ultimately substantive, as I have argued, and if it is grounded in the end in self-rule, then jurisdictional reflections should ordinarily lead to the recommendation that authority be kept as close to the individual as possible. That is not always the case, however, as is indicated by an example from the American experience, which may be relevant to the Soviet experiment. By the time the American Constitution was drafted in 1787, the 13 sovereign states that had declared themselves an independent people in 1776 had amassed, through their separate legislatures, a host of separate state statutes aimed at protecting local business and industry from competition from out-of-state firms, the net effect of which was to frustrate the free flow of interstate commerce by burdening interstate contracting. Here, if ever, was a case of local authority run amuck, not despite but because it rested closest to the people ruled, an influential portion of whom had used government for their narrow ends. In 1787, however, with the insertion of the Commerce Clause in the new Federal Constitution, which gave the *national* Congress the power to regulate commerce among the states, the logjam was broken, the local barriers came down, and the free flow of commerce resumed. With respect to jurisdiction, then, it may be necessary to go to a more remote level of authority to protect us from ourselves, as it were. Indeed, this is a particular example of a feature of constitutions generally: They are instruments in which we try to write in

stone, for all time, what we may be unable or unwilling to write in sand for the moment.

But there is a second lesson to be drawn from the example of the Commerce Clause that is perhaps of equal or even greater importance, for it returns us to the substantive order and to the connection between a constitution and the order that flows from it. There can be little doubt, as the history that surrounds the Commerce Clause makes clear, that those who drafted the clause intended that Congress and not the states should have the power to regulate—or make regular—commerce among the states. The furthest thing from their minds was that Congress might use that power, however broadly drawn, *affirmatively*, to regulate, in the minutest detail, all manner of inter- and intra-state commerce and industry, making a mockery of the original purpose of the clause. Yet over the years, and over the past 100 years in particular, that is precisely what Congress has done, frustrating and burdening the free flow of trade in ways the Framers would never have dreamed (Epstein 1987). In drafting a constitution, therefore, it is imperative to be as precise with language as language permits, and to be mindful always of Lord Acton's dictum, that power corrupts, absolute power corrupts absolutely.

In conclusion, as I observed at the outset, however real and distressing the hardships of the moment in the Soviet Union, in many ways these are exciting times to be a Soviet citizen. The potential for freedom and, eventually, prosperity is also very real. Indeed, history may yet look kindly upon the peoples of this land and make of this generation the founding generation, the generation that at last made the transition to freedom.

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