

PROCESS, SUBSTANCE, AND LEGITIMACY: ON THE NEXUS  
BETWEEN LAW AND MORALITY

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I. INTRODUCTION

If we may judge from the writings of antiquity, the distinction between law and morality is as old as civilization itself. Yet just as old is the desire that law be moral, that the positive, declared law reflect the higher, moral law. For when law and morality conflict--when law permits or requires what morality prohibits, or prohibits what morality permits or requires--oppression and disobedience result, save where force compels obedience.

Nowhere is the desire that positive and higher law be in harmony more evident today, perhaps, than in those nations around the world that are ruled under the Marxist doctrine. From Moscow to Managua, from Budapest to Belgrade to Beijing the ferment for freedom is all but palpable. Increasingly under these regimes the cry is heard that the law in place is not only inefficient but immoral as well. To say that these systems lack legitimacy is to the state the obvious. To say precisely why they lack legitimacy, and why the democracies of the West are thought to be legitimate, is not as easy.

Toward answering these questions, a first approximation would point to the idea of "acceptance." That idea carries weight in the end as well, for at the level of ordinary discourse, the fact that a regime is "accepted" by the people

ruled under it will tend to sort out legitimate from illegitimate regimes. The operative word here is "tend," however, for "acceptance" can serve this function only in a very crude way. That many people throughout this century have fled the Soviet Union while many more have sought to come to the United States doubtless says something about the perceived legitimacy of the governments in these two countries. When people "vote with their feet" they speak volumes about the legitimacy of the regimes they flee or seek. For the decision to leave one's nation--one's family, friends, language, customs, history, and memories--perhaps never to return, must be difficult under any circumstances. It must constitute a complex and highly personal assessment, weighing the known past against the unknown and uncertain future. At the same time, many more do not flee their homelands, however oppressive; and most in the West stay where they are. Any extrapolation, therefore, from gross data on such decisions to assessments of relative legitimacy must be suggestive at most--albeit perhaps dispositive in the end, at least as the ordinary debate presently stands.

To explore these issues more systematically--with the aim, ideally, of refocusing the ordinary debate--I want first to try to clarify the idea of political legitimacy by looking at a pair of ambiguities that surround its use. Fastening upon the moral aspect of legitimacy, as it applies to the exercise of political power, I will then examine substantive,

procedural, and, again, substantive approaches to achieving political legitimacy. I will conclude that insofar as it is possible to be achieved, legitimacy, at bottom, is a function primarily of substantive, not procedural considerations. To illustrate this conclusion I will look finally at two fundamental powers found in the American system of government, the police power and the power of eminent domain, both of which have counterparts in other political systems. The general conclusions that flow from this analysis are that from a consideration of political legitimacy there is a strong presumption against pursuing ends through public or state institutions and a heavy burden upon those who would do so to show why their ends should be thus pursued. From a moral perspective, that is, there is a bias against public and in favor of private action, a bias against expansive and in favor of limited government.

## II. LEGITIMACY: CLARIFYING THE IDEA

### A. Legitimate Government and Legitimate Power

To the extent that they give reasons for what they do, all governments can be said to seek legitimacy. Reasons are explanations, at least, which slide easily into justifications, which are attempts to make legitimate what might be thought illegitimate. 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 from 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 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. Nevertheless, there is a subtle interplay between the legitimacy that may characterize a government and the legitimacy that may characterize its actions: legitimate governments, after all, may perform illegitimate acts, just as illegitimate governments may perform legitimate acts. This interplay will be developed more fully below.

B. Legal and Moral Legitimacy

A second ambiguity that surrounds the idea of legitimacy relates not to the subject that may be said to be legitimate--government or its actions--but to the character of and hence to the criteria for the legitimacy that is said to attach. At a general level, two broad characterizations of and criteria for legitimacy suggest themselves: legal and moral.

"Legitimacy," that is, is a systematically ambiguous idea. Laws and the official actions taken thereunder can be said to be both legally and morally legitimate, neither legally nor morally legitimate, legally but not morally legitimate, or morally but not legally legitimate. Because the term admits of this systematic ambiguity, care must be taken in its use if confusion is to be avoided.

In its narrower, legal sense, "legitimacy" is simply a synonym for "legal." A government's action is legitimate, that is, if it is legal, if it conforms to the system's criteria for legality, whatever those criteria may be. In this sense, legitimate actions are distinguished from ultra vires actions. It is the task of legal positivism, strictly speaking, to discern the criteria of a system by which such distinctions are drawn. These criteria should also enable the positivist to distinguish laws from other law-like rules, such as customary, prudential, or moral rules. In drawing such distinctions, however, the legal positivist may reach a point where normative judgments are required, especially in systems where customary, prudential, or moral rules become legal rules through the adjudicatory process. Nevertheless, as a declaratory undertaking, legal positivism, strictly speaking, is a branch of the social sciences.

This narrower sense of "legitimacy," however, even as it entails an occasional venture into normative terrain, 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 action fails to satisfy some narrow criterion of legal legitimacy but that it 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. 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 of political legitimacy reduce to questions about moral rights. Legitimate government actions are performed not simply by legal authority but by moral right.

### III. EARLY SUBSTANTIVE APPROACHES TO LEGITIMACY

#### A. Natural Law: Deontological and Teleological

We may ask, then, just how this connection between the legal and the moral, through the claim of legitimacy, is completed or satisfied. 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. Duties were correlated not to the rights of others 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 these 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.

B. Epistemological Uncertainty and the Rise of the Individual

The problems that surrounded these two substantive approaches to legitimacy were several, but they all related, in one way or another, to epistemological uncertainty. 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 sacred level thus devolved into disagreements at the secular level. These 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 cannons of logic could not support.

Underlying both these approaches, however, was the unease that arose from their character as a theoretical overlay. These substantive approaches had about them, that is, a sense of order and legitimacy imposed from above. By implication, of course, this unease would arise whenever there was dissent 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 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 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.

#### IV. MODERN PROCEDURAL APPROACHES TO LEGITIMACY

##### A. Self-Rule, Democratic-Rule, and Consent

Although self-rule and democratic-rule are historically intertwined, they are not identical. The former connotes an individual ruling himself, and himself alone. It is rule by people, of themselves, as individuals, not rule by "the people." This last--rule by "the people," as opposed to rule by some fraction of the people--is ordinarily what is understood by democracy. The gap between self-rule and democratic-rule is less than that between self-rule and any other form of political organization, but it is yawning all the same, as we shall soon see. Nevertheless, that gap is bridged by the moral warrant for democracy, which can be found only in the idea of self-rule. For if the origins of democracy are to be found in the rejection of rule from above, in the embrace of rule from below, and in the foundations of rule from below--the individual, his right to rule himself, and the absence of a right to rule him in anyone else--then whatever legitimacy democracy enjoys must be found in its respect for that individual right. To be legitimate, democracy must truly be self-rule writ large.

1. Starting Points. The aim, then, will be to move from self-rule to democratic-rule while preserving or respecting the individual right of self-rule. Before attempting that crucial move, however, several preliminary points need to be raised. First, as has often been noted, such

a move is necessary largely for practical reasons. A world in which individuals enjoy the right of self-rule is, at least on first impression, a world without government, a state of nature, whether Hobbesian, Lockean, or some other version. It is thus a world of uncertainty: about what our first-order, substantive rights are; about what our second-order, procedural rights, needed to secure our substantive rights, are; about whether our conceptions of those rights conform to the conceptions of others; and so on. Life without social institutions to settle such uncertainties might prove difficult, at best.

2. From Substance to Process. Accordingly, second, toward clarifying these uncertainties, among other things, theorists of the classical liberal era proposed procedures through which the familiar institutions of government might be established. These institutions might in turn resolve such uncertainties--declare the law--resolve uncertainties over matters of fact--adjudicate disputes--and pursue whatever else of common interest might usefully be pursued through such public institutions. It should be noted, however, that self-rule, strictly speaking, is a substantive approach to legitimacy: indeed, as such--i.e., apart from particular actions that may be taken under its name--it is legitimacy in its simplest, most straightforward form. When self-rule functions through procedural mechanisms, however, we move to a procedural approach to legitimacy. The question

then becomes whether, through such procedures, the legitimacy that characterizes self-rule can be preserved.

3. Consent. A third point to be noted, in addition to why the move from self-rule to democratic-rule might be sought and how it might be accomplished, is that underlying self-rule, giving it its moral character, is the idea of consent. Because an individual consents, by definition, to what he does by way of ruling himself, which means that in virtue of that consent he cannot be heard to complain about that rule (to whom would he bring such a complaint?), the sine qua non of legitimacy is consent. Social-contract theorists, in one way or another, have all recognized this role for consent. It was recognized explicitly in the 18th century document that electrified the world, the American Declaration of Independence, which states that men have rights by nature, not as a grant from government, that they create government to secure those rights, and that government derives its just powers from the consent of the governed. By implication, those powers not so derived are not just.

4. Characteristics of Consent. As it functions in the move from self-rule to democratic-rule, of course, consent has as its object not rule by oneself but rule of oneself by another. This leads to a fourth and an important point, that consent is an exceedingly complex phenomenon. Ideally, one supposes, the consent that serves to legitimate the rule of another should be explicit, informed, and free. Just as in

the ordinary contractual context, however, these characteristics of consent--relating, respectively, to its nature, objects, and conditions--must be treated carefully. Performative consent, for example, which, if explicit, is so only by inference, can serve to legitimate as much as explicit verbal or written consent. Similarly, the objects of consent may or may not be a matter of inference: consent to A, which a rational person should know entails B, is arguably consent to B; whether voting for C entails consent to all that C supports, or does, is another matter. Finally, for consent to be freely given it is necessary only that the consent not be forced by a threat to violate rights. Consent that is "forced" by a threat to withhold nonentitlements, however, is free all the same, for conditions of this kind are invariably present in one way or another in any consent context.

5. Avoiding Value Judgments. A final point that should be noted before determining whether the move from self-rule to democratic-rule preserves legitimacy is that consent is a deontological or nonconsequentialist criterion for legitimacy, rooted in the primacy of a rule that an individual has a right to rule himself, not a teleological or consequentialist criterion, which would ground legitimacy, and any attendant claims about such a right, on an assessment of the consequences that might result from following such a rule in any particular case (act-utilitarianism) or from

following it in general (rule-utilitarianism). Deontological criteria avoid such value-judgments: they look only to the inherent character of the substantive element--consent--and to the procedures under which the substantive element operates.

6. The Basic Question. Our question reduces, then, to a question not about whether the move from self-rule to democratic-rule would be good or valuable on some utility schedule but about whether the consent criterion is satisfied over the course of the move. Does the process preserve consent, that is, and thus yield legitimate results in the form of legitimate institutions that produce legitimate rules or laws that in turn confer legitimate power, or authority, upon those officials who act in accordance with them? If so, then those subject to obey such authorities cannot be heard to complain--provided the power in fact is exercised in accordance with the law--for the positive law will indeed reflect the higher law that is rooted in the individual autonomy of self-rule. But if democratic process does not preserve consent, then those subject to the law that flows from the process may be heard to complain; they may complain that it is not their law to which they are subject and hence, to that extent, the positive law is illegitimate. Efforts thereafter to show the law nevertheless to be legitimate must return to substantive considerations. Those efforts must be aimed at showing that the law is right per se, right not by

virtue of its flowing from the will-based but from the reason-based higher law of individual autonomy. The legal positivists, insofar as they have ventured beyond the confines of social science and taken on the mantle of normative theorists, have tended to place their eggs in the justificatory basket of democratic process. I shall now show that that basket is nearly empty, which means that the positivist, if he wishes to indulge his normative appetite, must look elsewhere. In particular, he must combine the empirical methods of a social scientist with the rational methods of a normative theorist.

**B. Does Democratic Process Preserve Consent?**

In the private domain the procedural approach, rooted in consent, does serve to legitimate the rules and relationships that result from its use, not only in the context of the small, two-party contract but in large and complex contexts as well, all the way to those involving giant corporations. For although the consent in these contexts is not always explicit, and often extends over terms that are little understood or attended to by those doing the consenting, it is usually free in the sense noted above. Having "bought in" to a corporation's articles of incorporation and by-laws, for example, a shareholder will ordinarily have no ground to complain about management's actions over "his" property, provided those actions conform to the articles and by-laws to



of the majority--precisely the hurdle the majoritarian argument needs to overcome if it is to avoid circularity. By implicitly putting the minority to such a choice, therefore, this argument is patently circular--assuming the very right the majority must demonstrate it has. Moreover, the "tacit consent" that is part of this assumption is of course no consent at all. At best it is "forced consent," as noted earlier, which yields no legitimacy whatsoever.

5. Majoritarianism as "Forced Consent". We are driven to conclude, then, that the move from self-rule to democratic-rule--from rule by people, of themselves, as individuals, to rule by "the people"--preserves consent, the bedrock of legitimacy, only under conditions of unanimity, which rarely if ever occur. Majority rule, by definition, entails no consent by the minority. Nor do the accompanying arguments from prior, implicit, or tacit consent succeed, not when pressed. Insofar as it is appropriate to speak of consent at all, each of these moves, save for unanimity, comes down in the end to "forced consent," to a proposition that takes the form: Either consent, by your behavior, to the will of the majority, or leave. Democratic-rule indeed is a far cry from self-rule.

6. Government as a Forced Association. It is instructive to reflect upon why these results are different than with the corporation, the country club, the church, or a marriage, to mention but four private institutions. They are

different because, other things being equal, one can stay where one is without being forced under the dominion of a private institution. Government, however, some government, has exclusive dominion over where one is. It a forced association. As such, it has an air of illegitimacy about it in principle. For the force that necessarily characterizes it vitiates the consent that is the bedrock of legitimacy. This is the aspect of government that advocates of "good government"--people who conceive of government as an instrument for "doing good"--fail fundamentally to grasp. The classical theorists, who saw government not as an instrument of good but as a "necessary evil," had the surer grasp.

C. Implications of the Limits of Process

These findings show, among other things, why the legal positivist agenda can never really be completed. Arising in reaction to a substantive approach to legitimacy that failed too often to distinguish law from morality--and sought, as well, to say that bad law was no law at all--the legal positivists tried to draw a clear distinction between the two, with the aim of determining what the law is. In pursuit of that agenda they fastened for the most part on the process approach to legal legitimacy. But as we have just seen, the consent criterion that underpins this approach is never deeply satisfied. As a result, a large part of the "law,"

insofar as its existence turns upon consent, will always be indeterminate.

Moreover, and more important, even if the consent criterion were satisfied to a degree sufficient to enable a prima facie assessment of legal legitimacy, in a system such as the American constitutional system, where the "law" that flows from occurrent consent is always subject to judicial review that looks to the Constitution, the determination of whether such positive law is law in fact often requires repair not simply to the Constitution but to the higher law that informs the Constitution's broad language. The primordial consent of the ratifiers may have made the Constitution our basic law, that is, but it will not always tell us what that law is, such that we can determine whether the "law" that flows from occurrent consent is in fact law. To make that determination we may need to repair to the higher law that stands behind the Constitution--to what the law ought to be and, indeed, is, but only by implication. Here, perhaps above all, is the nexus between law and morality.

A second implication of these findings returns us to the idea of acceptance. As noted at the outset, at the level of ordinary discourse, the fact that a regime is "accepted" by the people it rules will tend to sort out legitimate from illegitimate regimes--with the emphasis on "tend." As we now see, however, especially from discerning the "forced consent"

that surrounds all regimes, far-reaching conclusions about legitimacy can hardly be drawn from the fact that people stay where they are. For their choice is always the imperfect one of going from one forced association to another. From the "acceptance" implicit in this movement, or lack of movement, we can draw only the crudest conclusions about legitimacy. In particular, this acceptance is not equivalent to the consent that serves to legitimate.

What acceptance does suggest, however, is that people may be making an ongoing calculation that in some unconscious way sums the procedural and substantive elements of legitimacy, the will-based and the reason-based criteria, respectively. We should imagine, for example, that people would sooner "accept" rule by a beneficent king than by a tyrannical majority. What this further suggests, however, is that process may serve rather less as a legitimizing mechanism than as a policing mechanism, that the real contours and foundations of legitimacy are to be found primarily in substance, not process, in the congruence between positive law and the higher law of reason, not the higher law of will, democratic or otherwise.

Indeed, as can now be seen, the will-based foundations of legitimacy must be thin, at best, even for the majority that can be said to "consent." For apart from referenda, which in America occur only in limited ways and mostly at the state level, when individuals vote they consent not to laws

but to be ruled by lawmakers of various kinds who thereafter, if elected, stand for or constitute "the government": as noted earlier, that is, the majority gives its consent to the government as such; whatever consent is given to the government actions that follow is a matter of inference at best--and faith at least. Thus government actions, our principal concern, are consented to by the majority only indirectly--if they are consented to at all. Nor will it help to say that those actions are constrained by the Constitution, as noted above, for it is the consent of those ruled that must legitimate, not primordial consent by those long departed. Whatever legitimacy these actions enjoy, then, must be derived primarily not from procedural but from substantive considerations. If they are legitimate, that is, it is primarily due not to our having consented to them but to their reflection of the higher law that is itself inherently legitimate.

## V. THE RETURN TO SUBSTANCE

### A. The Roots of the Private Law

Examination of the procedural approach to legitimacy has forced us back, then, to the substantive approach. In an era of overweening democracy, such a return is heresy, of course. But candor requires it. Candor requires also that we heed the problems and excesses of the earlier substantive era. In truth, however, by the late 18th century those problems had

already been heeded to a large extent with the advent of natural rights theory and the decline of natural law, prior to the rise of a far-reaching democratic impetus.

What the Enlightenment theorists understood in substantial measure was that the higher law that is grounded in reason must guide the creation of positive law if that law is to be legitimate. But higher law itself is constituted by both the theory of rights and the theory of value, the former deontological, rooted in rational consent, the latter teleological, rooted in interest and in what Hume called "sentiment" or "a fellow feeling with others." This distinction between rights and values was critical, for it pointed to a further distinction, by implication, between that domain of morality in which we can agree by turning to principles of reason, thereby overcoming the fundamental problem of the earlier approaches, and that domain where reasonable men may disagree, there being no principles of reason to which to turn.

Although it remained for later epistemologists to secure these foundations more surely, the Enlightenment theorists got their conclusions essentially right nonetheless. In particular, they understood that the right of self-rule was tantamount to dominion over one's life, liberty, and property; that that right was grounded in a principle or a presumption of moral equality and hence was held equally by all; and that these "truths," as the American Founders

declared, were "self-evident"--rooted, that is, not in empirical observation, much less in values, but in reason. Here, in essence, was the private law, the law that defined the relationships between man and man, prior to the creation of government and hence independent of any political will that might be exercised through government. This private law, in its basic outline, was not a function of occurrent consent; it was not something that majorities could alter or abolish at will. Rather, it was grounded in rational consent, the consent that self-evident truth compels. Derived thus from the higher law, and bound up in that law, the private law stood independent of majoritarian process. The only business of government was to declare and enforce the law, not to make it at will.

B. The Roots of the State

These two functions, however, the declaration and enforcement of the private law of reason, led ineluctably to the public law of will and hence to the need for some degree of process. For while the foundations and the broad outlines of the law were understood to be rooted in reason and hence in substantive considerations, reason takes us only so far in declaring the law. In such areas as nuisance, risk, or remedies, for example, we simply run out of principles to be derived. How much noise or particulate matter shall be permitted before one man's right of use violates another

man's right of quiet enjoyment are not matters of reason--not at the margin, at least--but rather are matters of value, as are the remedies that will right the various tortious, criminal, or contractual wrongs that may occur between men, not to mention the steps that may be taken toward enforcing one's rights in the face of uncertainty about the identity of the wrongdoer. Because these are not matters of reason, strictly speaking, reasonable men may disagree about what their rights are in these areas. In a world without institutions to force resolution, both irresolution and resort to self-declaration and self-enforcement are likely to result, neither of which is desirable or efficient on most utility schedules.

It is important to recognize, however, that self-declaration, in these uncertain areas, and self-enforcement are entailed by the right of self-rule. At the least, no one has yet developed an argument that shows that the need to come in out of the state of nature is grounded in anything other than practical considerations. Compelling as those practical considerations may be to "reasonable" people, "reasonable," as used here, is freighted with value-judgments; it is not the reason of logical necessity, the reason that compels consent on pain of self-contradiction. Accordingly, we do indeed force the unwilling out of the state of nature.



### C. The Roots of Illegitimacy

Forcing unwilling individuals into civil society is thus the first step we take down the road of illegitimacy. Most people, to be sure, would not object to this step; thus, with respect to them there is no illegitimacy. Still, the matter of principle cannot be ignored: it is there, and must be faced, especially if we are to continue to take seriously the individual, the elemental unit in society. Moreover, a crucial presumption is secured by recognizing the inherent illegitimacy of this first step. That presumption is in favor of private action, against public action; in favor of limited government, against expansive government. For if the very first step toward creating a public sector is colored, in principle, by an air of illegitimacy, then any subsequent steps toward expanding that sector will bear this same stigma. Each additional step, that is, entails only more forced association. However good or noble the purpose behind those additional steps, if individuals have a right to rule themselves, they have a right not to be forced into the pursuit of purposes not their own. From a moral perspective, then, from respect for individual rights, there is a heavy burden upon those who would pursue their ends through public institutions to show why those ends must be thus pursued.

Although the creation of a state is the creation of a forced association, it is important to limit the illegitimacy as much as possible, not simply by initially limiting the

scope or domain of state action to declaring our rights, where they are uncertain, and enforcing them generally, but by instituting decision procedures and policing mechanisms that will themselves serve to preserve the right of self-rule as much as possible. Here the familiar institutions of democracy come to mind, from majority rule, which enables the larger number to rule themselves, to judicial review, which limits public will to its proper domain, to public accountability, which insures the information needed to monitor the process. Insofar as these institutions do serve to preserve the right of self-rule, they also limit illegitimacy. Properly employed, then, they are policing mechanisms, designed to maximize self-rule. When misused, or misunderstood and thought to be mechanisms to legitimate, they become themselves instruments of illegitimacy.

#### D. The Police Power and the Power of Eminent Domain

To illustrate how this can happen I want finally to look at two powers in the American system, the police power and the power of eminent domain, both of which have counterparts in other legal systems. Although the police power has been called the power that is inherent in sovereignty, its function and scope, strictly speaking, are as its name implies. As the Declaration of Independence moved from the private to the public domain, it stated the purpose and, by implication, the limits of this power most succinctly: "that

to secure these rights, governments are instituted among men." There, in its purest form, is the police power, the power to secure our rights, which each of us has in the state of nature but gives up to the state, to exercise on our behalf, when we enter into civil society.

The importance of locating the roots of the public police power in the private police power cannot be overstated, as we will soon see. For if the public police power does indeed find its roots not in the public law of will but in the private law of reason, then its scope and contours can be no greater than those of the private power. After all, individuals cannot yield up to the state powers they do not have to yield up. Any police power the state has that extends beyond the private police power must be justified, therefore, by unanimous consent, for it cannot be justified on substantive grounds. Insofar as it reflects the scope and contours of the private police power, then, the public police power is illegitimate only to the extent that it usurps the private exercise of that power. Those individuals who did not want to yield up their power can complain that they have been forced to do so; they cannot complain that the power itself is illegitimate.

When we turn to the power of eminent domain, however, it is another matter. At the time they constituted the American republic, the Framers thought it wise to include in the public law not simply the police power but the power of

eminent domain, which enabled the state to take private property for public use, but only with just compensation for the property taken. Clearly, this was a substantial step down the road of illegitimacy, for no such power could be found in the state of nature. Private individuals, after all, could hardly go around condemning their neighbors' property, even if doing so would create some great public good and even if they did offer compensation. Equality of rights is the bedrock; no one has a right to impose his vision of the good on others, even with compensation.

In the end, perhaps, the power of eminent domain may be necessary. But unlike the police power, it is not simply once but twice illegitimate. Like the police power, it is illegitimate insofar as it arises, and has to be paid for, by other than a process of unanimous consent. But unlike the police power, this power cannot be located as a rightful power in private individuals. Thus individuals against whom it is exercised can complain that the power itself is illegitimate, a complaint they cannot make against otherwise rightful exercises of the police power. It is some comfort, of course, that these individuals are compensated for what is taken from them, which mitigates but does not remove the wrongfulness. Doubtless too the compensation and public-use requirements serve to limit the power: when the public has to pay for what it takes, its appetite is necessarily constrained.

Notwithstanding these elements of illegitimacy, however, these two powers, thus limited, will result in a relatively limited and thus a relatively legitimate government. The police power is limited by the scope and contours of the private police power. The power of eminent domain is limited by the public use and compensation requirements. Any private actions that are restricted or taken under the police power are wrongful actions to begin with. Any private property that is taken under eminent domain has to be paid for, which will limit the expanse of the public sector here too.

What we have seen in the 20th century, however, with the rise of the democratic impetus, is the breakdown of this system of constraints, rooted in reason, and the emergence of a rapacious public appetite, rooted in will and legitimated, ostensibly, by democratic process. This appetite for "public goods"--from scenic views to limits on rental costs to moratoria on building--could not have been satisfied, of course, through condemnation under the power of eminent domain, for that would have cost the public more than it is willing to pay. Accordingly, a distinction had to be drawn between property and its uses; only the uses were "condemned" or prohibited through public regulation, leaving the "property" with the private owner; and all of this was accomplished not through the power of eminent domain but through an expanded conception of the police power. No longer confined to reflecting the private police power, this

enlarged conception enabled the majority--or those who influenced the officials elected by the majority--to pursue its appetite, unrestrained either by the wrongness of its takings or the need to pay for what it took.

As a matter of legitimacy, then, we may summarize this scenario as follows. The public police power, as originally constrained, could not be justified on process grounds but could on substantive grounds; whereas it was marginally wrong for the state to exercise it, the power itself was otherwise legitimate--a classic case of justifying governmental action not on procedural but on substantive criteria. The power of eminent domain, by contrast, could be justified neither on procedural nor on substantive grounds; nevertheless, the public use and just compensation requirements served both to recognize and mitigate its inherent illegitimacy and to limit its use. The expanded police power, however, like eminent domain, can be justified on neither procedural nor substantive grounds; but unlike with eminent domain, there are no public use or compensation requirements that would either give recognition to its inherent illegitimacy, mitigate its effects, or limit its use. Absent judicial oversight, which has been conspicuously absent in this area in this century, the only possible restraint upon this thrice illegitimate power is through the democratic process--the very process that gave us the power. The findings of the Public Choice School do not give comfort here. We are well

advised, then, to turn our attention to the judiciary, to their loss of confidence in the face of the democratic onslaught, and to what it will take to restore that confidence and return the public domain to its legitimate foundations.