GAUS ON LEGAL COORDINATION

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Gaus' paper argues that social coordination is legitimate only if it satisfies the following two requirements: (a) there should be no Pareto-superior outcomes, and (b) "the authority of law derives from its role in *improving everyone's lot*" (p. 9, Gaus' emphasis). The former requirement may be thought to warrant legal activism whenever this leads to Pareto optimal equilibria. But this inference would be a mistake, since the costs of moving to one such equilibrium may be greater than the benefits accruing from being in it. The QWERTY keyboard has been routinely used to illustrate such a situation: on the assumption that we want maximal typing speed, the QWERTY keyboard is less efficient than others. However, it may well be inefficient to pass a law forcing producers into the most "efficient" keyboard, for transition costs (e.g., training, replacement of capital goods) may more than offset the expected gains from the new keyboard. So, although QWERTY-like outcomes do not satisfy the first of Gaus' requirements, his second requirement blocks legislative action aimed at imposing the Pareto-superior coordination equilibrium in which people use the most efficient keyboard—such legislative action would not improve everyone's lot. This shows that the above two requirements of Gaus' are mutually consistent only if transition costs are taken into account in the characterization of Pareto-superior outcomes.

I now turn to may main remark on Gaus' paper. He asserts that majority rule may not lead to coordination equilibria in the absence of constitutional rights. I doubt, however, that majoritarianism really needs to be *constrained by* rights in order to lead to such equilibria. In showing this, I will not dispute Gaus' interpretation of Waldron's

texts; rather, I shall take at face value Gaus' interpretation of those texts since I think it is worth discussing.

Gaus' Figure 7 depicts a scenario where majoritarianism and coordination equilibrium may part company. In this scenario the operation of majority rule allows for outcomes that are not Pareto superior to the status quo. The conception of majoritarianism that gives rise to such scenarios is what I shall call the *thin* conception of majoritarianism. On this conception, majority of *votes* is both necessary and sufficient for legitimate political decisions. This conception may indeed lead to the worries that Gaus expounds, for when we require majority of votes we need not even assume a right to life—except, perhaps, to the extent that being alive is a conceptual precondition of casting a valid vote.

There is another conception of majoritarianism, though. I shall call it the *thick* conception. It asserts that public policies ought to be *selected* by the majority. By "selection" I mean something different from "choice." In a natural sense, nobody wants to make some choices—e.g., choices under coercion or ignorance. My use of "selection" excludes these cases. Put roughly, it means "valuable choice," choice by an agent who has the effective power to do something he deems valuable. Some philosophers term this power "positive freedom." On the thick conception of majoritarianism, the vote plays an evidential not a constitutive role in determining legitimate policies. This conception sharply distinguishes between deliberative and non-deliberative processes through which people acquire beliefs; among the latter processes are various forms of indoctrination and brainwashing. Public deliberation presupposes freedom of speech, religion, and assembly, and immunities against some arbitrary takings of private property and aggression against bodily integrity. Were such freedoms and immunities absent, citizens' choices would fall prey to various forms of coercion and (unavoidable) ignorance. In short, public opinion requires a host of core rights in the liberal tradition. Such rights are conceptual prerequisites of selecting policies (candidates, etc.).

Armed with this distinction between these two conceptions of majoritarianism, we can now tell a story about the relations between majoritarianism and rights that differs from Gaus'. Gaus rightly observes that, because majority rule may lead to outcomes that are not Pareto-superior to the *status quo*, it may not lead to coordination equilibria. Notice, however, that thick majoritarianism rules out coordination outcomes

that are too burdensome to minorities. This is not because of rights acting as side constraints on majoritarian selection of policies, but rather because an appropriate understanding of what selecting a policy means, especially for normative purposes, points to an environment of freedoms and immunities that makes selection of policies possible. Thus, nobody can be said to be selecting a policy if censorship of alternative policies prevented her from becoming informed about the alternatives. The concept of selection used in this rendering of the majoritarian idea embodies some fundamental rights. These do not restrict from the outside, as it were, the scope of majority rule but rather are constitutive of it.

This being so, Gaus' reservations against an irrestricted majority rule affect only the thin version of majoritarianism: in the absence of rights, votes can indeed give rise to civil disobedience on the part of those who stand to gain from a return to the state of nature. But this leaves untouched the claim that thick majoritarianism allows us to coordinate on points that Pareto-dominate all no-agreement points: citizens can select policies only against the framework of certain rights that they lacked in the state of nature. Thick majoritarianism cannot violate such rights without lapsing into thin majoritarianism.

Indeed, given certain rules for political decision making, thick majoritarianism will arguably yield Pareto-efficient outcomes. For example, the more costly it is for citizens to emigrate to other political units, the more natural it is for us to say that they are coerced (or exploited) by their government. In the absence of emigration costs, inhabitants of political units who find the package of public goods/taxes less attractive than that offered by other units will tend to emigrate to the latter. This provides governments with an incentive to attain efficient levels of public goods production. In short, thick majoritarianism promotes Pareto improvements in a strongly federal system. I am assuming here that thick majoritarianism embodies a right to emigrate—this right arguably enhances the prospects of citizens' selecting the policies under they want to live. Notice, however, that I am *not* postulating rights over and above those very basic civil rights and liberties presupposed by meaningful political choices. Individuals need not have stringent property rights, for example, except in the derivative sense in which a regime protecting such rights is a public good.

Let me summarize. As Gaus points out, majority rule need not take us out of a Hobbesian state of nature. This claim, however, applies only to thin majoritarianism.

After all, thin majoritarianism is but a vehicle for the aggressive and exploitative behavior that supposedly permeates a Hobbesian state of nature. Thin majoritarianism induces people to build exploitative coalitions. In contrast, thick majoritarianism holds out hope of efficient outcomes, provided certain procedural rules for political decision making (such as in strong federalism) obtain. At the very least, it commits us to fundamental rights that would take us away from the Hobbesian jungle. Whether it allows us to coordinate on the production of public goods and other efficiency-enhancing measures will depend on the specifics of the scenario in which thick majoritarianism operates: in the above federal system, thick majoritarianism will arguably yield those happy outcomes. If we focus on the thick, and more interesting, conception of majoritarianism, our analysis will have to address such institutional factors, and our conclusions might well differ from Gaus's.