The Problem of Political Truancy

The private arbitration model of dispute resolution advanced by Michael Huemer in *The Problem of Political Authority*, and especially its reductive effects on social issues and liberalization stemming from lack of legal precedent as decided by a Supreme Court analogue, creates a system of justice prone to factionalization and conservatism. In keeping with the source material, this essay will be organized in the style of Huemer.

1 Expansionist incentives in the modern judiciary

While Huemer finds significant issue with government, his primary objections stand against the use of coercion to enforce laws, as opposed to the process of the creation of laws, as is the purview of the modern democracy's judicial system. That said, his complaints regarding checks and balances should be addressed in defense of the existing judicial branch. In section 9.4.9, "Of checks, balances, and the separation of powers," Huemer argues that due to the incentive structure of the United States federal government, the legislature may quite readily "[pass] laws that extend beyond the matters that the Constitution authorizes it to regulate," and, in response, "the [executive and judicial] branches should be expected to expand" because "the more laws there are to enforce, the larger the executive branch will have to be. Likewise, the more restrictive the legal regime is, the more cases the courts will have to try and thus the larger the judiciary will have to be." However, incentives take place at the level of the individual, not the branch as a whole. While a given branch of government may gain power by establishing and enforcing unconstitutional laws, no judge is likely to see a personal benefit by upholding such a law. In fact, though the approval of such a law would see greater power granted to the judiciary as a whole, that power would be gained by way of the expansion of the branch, which actually

lessens the ability of any one judge to make influential decisions. Since no law can be upheld without judicial support, this effectively prevents the consequent expansion of the executive branch.

Additionally, the Supreme Court itself has remained limited in size to nine judges for 148 years despite an attempt by Franklin D. Roosevelt to expand the court in support of his New Deal (Hodak), as referenced by Huemer in 9.4.8. In this section, Huemer somewhat deceptively states that "shortly after Roosevelt proposed this plan, the court switched direction and began to approve of Roosevelt's programs . . . FDR thus abandoned his 'court-packing' plan." In reality, per the journal of the American Bar Association, these events took place in reverse order; FDR's plan was "roundly denounced" by Congress, and only afterwards did the Supreme Court begin to rule in FDR's favor—a demonstration of checks and balances in proper operation. Huemer further states because the judges later appointed by Roosevelt "owed their tenure to [FDR] . . . [they] were determined to approve of Roosevelt's agenda, no matter what the Constitution said," ignoring the fact of lifetime appointment of Supreme Court judges, by which Roosevelt would have no recourse in attempting to deny any decisions handed down by those judges. In short, the judges of the Supreme Court effectively "owe" their appointers nothing because the appointers have no means of claiming any imagined dues. To use Huemer's own phrasing, the ability of Supreme Court appointees to rule against the wishes of their appointers is "borne out by experience," as, referring broadly to the following source in order not to sacrifice argumentative space for further detail, this scenario has played out several times throughout the history of the Supreme Court (Purdum).

Huemer's secondary issues with the US federal court system—especially its tendency to appoint judges in alignment with the operating party of the executive branch over more neutral candidates—are substantial, and I will not attempt to address most them except to say that weaknesses undoubtedly exist in the United States' current justice system, but those weaknesses do not affect the feasibility of checks to judicial power as defended in the previous paragraphs. Cases of the federal government expanding beyond those powers granted by the Constitution are fairly undeniable, but where Huemer sees such expansions as failures, they may be interpreted from a consequentialist perspective as significant strengths. It is the same ability to overrule the constitution that provides the court the ability to affect social liberalization at the institutional level, a change Huemer himself appears to be in support of.

2 Social liberalization as affected by the Supreme Court

The liberalizing effect of Supreme Court rulings is most clearly demonstrated in the decisions of the Warren Court. In particular, a September 1956 representative poll occurring two years after the *Brown v. Board of Education* decision reveals a near-perfect divide in "general attitudes toward black and white students attending the same school": 48% for, 49% against[1]. With such an even split, the Supreme Court acts as an arbiter of national social policy; given that these populations (for and against integration) are largely divided by region, without pressure at the federal level, integration would otherwise likely have occurred in Liberal states and remained a remote fantasy in Conservative states. While this or any such speculation amounts to conjecture at best, it is supported by the longevity of school segregation even following the decision: a

[1] April and June polls of the same year reveal very slightly more positive opinions within the expected error—49% for, 47% against and 49% for, 49% against, respectively. The September poll is used over these two because it is the only poll for that year to include both white and non-white subpopulations.

school district in Mississippi required federal intervention to achieve integration with a 99.7% black school as recently as 2016—one of 43 desegregation suits in Mississippi alone (Domonoske). The Warren Court additionally upheld decisions against anti-miscegenation laws and mandatory bible readings in public schools, as well as decisions in support of a right to privacy and the establishment of Miranda Rights. Taking Huemer's support of at least some of these policies as assumed (any policy falling under the umbrella of social lowercase-'l'-liberalism seems to be supported by Huemer per 9.2.2), and thereby taking the policies themselves (if not their enforcement) as fundamentally "good" in effect, consequentialist support for Huemer's suggestion of arbitration firms as a replacement for the judicial branch hinges on their having an equivalent or greater effect on the maintenance of a liberal society.

3 The neutrality of arbitration firms

In the service of criminal justice and dispute resolution, Huemer proposes "[peaceful resolution] through the mediation of wise and fair-minded private arbitrators" (11.0). These arbitrators are different from justices of the current legal system in that they belong to privatized firms which resolve disputes for a fee, and are, to Huemer's eyes, neutral by way of competition. That is, it is within the firm's interest to remain neutral because neutrality will attract the largest customer base.

Within the proposed anarcho-capitalistic system, then, arbitration firms effectively decide what behavior in a given society is permissible. In this respect, in the absence of a centralized government, arbitration firms at least decide the principles of governance. It seems unlikely, however, given the requirements for the realization of anarchy, that participants would be willing to be beholden to an arbitration firm operating under and making decisions of legality for such a

massive region as any currently-existing state. Yet despite this difficulty, it is unrealistic to imagine that no arbitration firm would ever have to make a decision relating to the social issues which define the shape of society across a given region.

Take, for example, a situation in which a private school loses a case ruling on the morality of its existing policy of segregation. That school would then be forced to operate under the knowledge that its chosen arbitration firm would rule against it in any similar case brought on by another student, and so, in order to avoid continual payment of damages, would be forced to change its policy. Not only this, but nearby schools would additionally be aware of the (presumably public) ruling, creating an effect on a broad area—the entire area serviced by a given arbitration firm. Of course, the society is anarcho-capitalistic, and firms are not beholden to the concept of jurisdiction. Why would the segregated school, then, fearing for its ability to continue segregating students, agree to cooperate with the well-regarded firm's decision, and not simply move to operate within a sympathetic region? Huemer offers only that the patrons in disagreement "seek something that they can agree upon that might be used to generate a solution to the original dispute. Given that goal, it makes sense for both parties to choose an arbitrator who is generally viewed in their society as fair" (11.1). But why, in this case, would the school desire resolution anyway? Imagine, as is not difficult given the globally rising climate of extreme conservatism, that the school does in fact move its base of operations in order to cater to a substantial population of white nationalists. This population is tight-knit given their relative scarcity, and there is plenty of money going around to support the school on this population alone. In this case, provided that the owner of the school is perfectly comfortable catering to a

group of fairly constant size and not desiring to earn more money by expanding their customer base, there is no motivation to seek resolution.

A likely response, in this case, would be “leave well enough alone.” The budding white nationalist community has achieved its goal of total segregation not just from anyone of color, but from anyone who likes the idea of anyone of color. Ignoring the fact that there is now a socially accepted and somewhat sizeable segregated landmass which anybody of color had really better avoid, the population does no harm to outsiders who do indeed leave well enough alone, and in fact the remainder of society is likely better without them. Taking as granted, then, that arbitration firms will be making social decisions for an anarchistic society, and that those decisions will have effects beyond a particular case, the issue emphasized by the case of the segregationists lies with the potential for the remainder of society to further divide along ideological lines, each brought to its inception by awareness of the decisions of well-regarded arbitration firms which these ideological groups seek to avoid, and potentially led by those few arbitration firms which would decide in their favor.

4 Anarchy as decentralized democracy

Anarchist society is naturally a form of democracy in that, in the absence of centralized leadership, the decisions which must take place to shape a society fall to majority opinion. Arbitration firms cannot be all neutral, then, not because they will make social decisions on the basis of majority public support, but because some issues do not in fact require resolution between two parties, and the chosen firms of the groups on either side of such an issue are passively selected by reference to their ruling on that issue. By consequence, where a society falls on social issues would be decided by whichever group is best-represented. The pitfalls of

anarchy are just the pitfalls of any direct democracy, in which, per James Madison's influential *Federalist No. 10*, factions composed of "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community" are not held together by any unifying force of government. As such, "when a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens." In order to avoid this form of subjugation, those affected would likely leave the regional society for one better fitted to their interests and stances. Resultant societies may be peaceable due to their insularity, but even ignoring the possibility for that insularity to breed extremism on either end of the political spectrum, only a very select few societies would align themselves with what are today considered progressive liberal ideals.

5 Localized progress

Ideologies are already and increasingly divided along urban-rural and regional lines (Pew Research Center), so, while decisions such as those of the Warren Court certainly advance social liberalization, without federal powers being granted by the state, this liberalization would be thoroughly localized, and the tyranny of the majority upheld (given the strong tendency towards Conservatism in rural regions) throughout the vast majority of the area currently under the jurisdiction of the United States federal government.

6 Conclusion

The important factors for the successful maintenance of a liberal society require that legal change is continuous—that is, beginning with a basic system of law which is progressively

modified in response to changing public opinion and new relevant information—and dealt with at the level of individual dispute but applied to the nation as a whole. In contrast, an anarchistic judicial system based on arbitration firms deals with the facts surrounding a court case in an isolated manner not reflected by application to the whole of any nation. In effect, if those with differing ideals are allowed to section themselves off instead of compromise with more progressive populations, progress can only occur among a very select, enlightened few, to the substantial detriment of the subjects of regressive, crude ideals. Law must be universally applied in order to function properly.

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