

## **Gaus on Coercion and Welfare-State Capitalism: A Critique**

Recent decades have seen a lively controversy amongst political theorists about the type of economic regime that most adequately realizes the demands of justice. The starting gun for the current round of debate is John Rawls' discussion of the institutions of a just society in *Justice as Fairness: A Restatement* (2001, p. 136). Rawls argues that only two of five regimes he distinguishes are compatible with his principles of justice: the regime he calls *liberal socialism*, in which non-human capital is collectively and democratically controlled and the regime he calls *property-owning democracy*, which disperses the private ownership of non-human capital evenly amongst citizens. He rejects the remaining three regimes: a command economy run by a one-party political system (*state socialism*), and two capitalist regimes: one accompanied by a social safety net (*welfare-state capitalism*), and one that lacks a safety net (*laissez-faire capitalism*).<sup>1</sup> Most would endorse Rawls' rejection of the extreme regimes of state socialism and laissez-faire capitalism. The debate over economic regimes in the foreseeable future is likely to concentrate on the three intermediate regimes.

This paper examines a novel line of argument in support of welfare-state capitalism proposed by Gerald Gaus (2011). The novelty of Gaus' argument lies in its contention that welfare-state capitalism can be justified on the basis of the contractualist mode of justification made famous by Rawls himself (1996; 1999; 2001). Gaus thus eschews reliance on the idea of a fundamental right to "self-ownership", the strategy for defending capitalism usually favoured, for example, by libertarian political theorists (Nozick, 1974; Steiner, 1994).<sup>2</sup> Neither does he seek to justify welfare-state capitalism, as some utilitarians do, on the ground that it is the economic regime that (allegedly)

produces the greatest sum of happiness in society.<sup>3</sup> Instead, he argues that welfare-state capitalism is justified because it gives best institutional expression to a hypothetical contract between parties concerned to specify the fair terms of their social cooperation. More specifically, Gaus argues that economic regimes, such as property-owning democracy and liberal socialism, are more coercive than welfare-state capitalism insofar as they require a greater degree of tax-imposed redistribution among citizens. Given the degree of coercion needed by these regimes, he contends that parties to a contract would not agree to them, whereas they would agree to welfare-state capitalism, in virtue of the lesser degree of coercion it needs.

Although a contractualist case for welfare-state capitalism has been proposed before (see Gray, 1989; Shapiro, 1995), Gaus' work is part of a recent revival that has developed this mode of justification at a greater level of sophistication.<sup>4</sup> The other main writer who has led this revival is John Tomasi (2012). However, there are important differences between Gaus' and Tomasi's approaches. Gaus' contractualism is orientated towards identifying an economic regime that can sustain agreement in contemporary society, whereas Tomasi's contractualism seeks to identify the economic regime that is most justifiable to people in their capacity as free and equal citizens (Tomasi's approach is thus closer in spirit to Rawlsian contractualism). Furthermore, in contrast to Gaus' claim that contracting parties have *coercion*-based reasons for preferring welfare-state capitalism, Tomasi relies on the claim that parties would prefer welfare-state capitalism on the grounds that it better enables them to engage in *intrinsically valuable forms of economic activity*. Since Tomasi's argument has been subjected to close scrutiny already (Arnold, 2013; Patten, 2014; Stiltz, 2014), I will focus exclusively on Gaus' coercion-based case for welfare-state capitalism. In this paper, I will argue that Gaus' coercion-based case fails.

## Distinguishing the Regimes

There is a confusing discrepancy between the terminology used in everyday political discourse and the terminology that Rawls and other political philosophers use when discussing economic regimes. In particular, when we refer, in everyday discourse, to the “welfare state”, we usually have in mind a set of institutions associated with left-of-centre political parties or movements. However, when Rawls and other political philosophers refer to “welfare-state capitalism” (henceforth, WSC) they have in mind a *right-wing* alternative to “property owning democracy” (henceforth, POD). This is because Rawls and other political philosophers define WSC as a regime that constrains capitalism only to the extent of supplying a publicly funded safety-net that protects basic needs, a safety-net that could, in principle, be set at a very low level (in which case it would resemble what, in everyday discourse, we mean by a *laissez-faire* regime). It would therefore not be erroneous to say – when using everyday discourse – that Gaus defends a kind of *laissez-faire* regime as opposed to the welfare state. But in this paper, I want to stick to the terminology used by the political philosophers because, as I will now try to show, it helps us to describe the differences between various possible economic regimes in a more fine-grained way. I will therefore continue to refer to the regime that Gaus defends as WSC (albeit WSC with a very low safety-net).

A more fine-grained way to understand the differences between WSC and POD is in terms of how they specify three kinds of economic rights:<sup>5</sup> rights to *labour*, i.e., to using one’s body and mind in productive activity; rights to *exercising ownership over personal property*, i.e. deciding whether to exchange, to save, to give, or to consume property that is intended for consumption; and rights to *exercising ownership over productive property*, i.e. to deciding how to use property that can be used to produce goods and services.<sup>6</sup> Where WSC and POD differ is over the nature of (a) the protection

these economic rights provide and (b) the scope of the protection they provide. Let me elaborate.

(a) *Protection*. Economic rights can provide two different types of protection. *Negative* economic rights provide *protection against interference* by others with one's own decisions about whether and how to undertake a given economic activity. By contrast, a *positive* economic right "protects" an activity in the sense that it ensures support for its execution. The "right to labour", for example, can be construed as a right to be offered a job if one cannot find a job on the private labour market.

(b) *Scope*. Economic rights are sometimes spoken of as having "broader" or "narrower" scope. Note, however, that we often use the scope-reference in one sense when speaking of the right to labour, while using it in another sense, when speaking of the right to exercise ownership. In the context of a right to labour, a "broad" right usually refers to the extent of *activity-types* protected by the right (e.g. whether these include the right to sell sexual services). By a "broad" right to ownership, however, we tend to refer the extent of *property accumulation* protected by that right. It is of course true that rights to ownership can also differ in terms of the activity-types they protect - e.g. in whether they include the right to use an object as one pleases within the limit of no-harm to others, the right to exclude others from its use, and so on (Honoré, 1961). But the extent of protected activity-types is not what we usually have in mind when we say that an economic regime, such as welfare-state capitalism, protects a "broad" right to own property. We rather mean that individuals in such regimes have a right to accumulate a large amount of property. Henceforth, I stick to the (confusing but somewhat settled) convention of referring to *activity-types* when speaking of the scope of the right to labour, and *accumulation* when speaking of the scope of the right to ownership.

### *Property-owning democracy*

Although POD has a long history of diverse usages, I employ it as a term that refers to the economic institutions ideally designed to realize Rawls' two famous principles of justice. Rawls' first principle requires the protection of the *fair value* of political liberty – i.e. the socio-economic conditions that Rawls regards as pre-requisites for the effective right to participate in the political process. Rawls' second principle contains two parts: (a) the *fair equality of opportunity principle* requires that citizens not be impeded by social circumstances from enjoying equal opportunities; and (b) the *difference principle* requires that the basic structure of society function so as to maximize the lowest level of income prospects in society.

POD aims to realize Rawls' two principles through a variety of positive economic rights, including generous rights to receive primary and secondary education and rights to receive cash transfers in the form of a negative income tax. But POD also upholds negative economic rights. Key among these is the negative right of occupational choice, i.e. to choose the work one wishes to do and the circumstances in which one does it without interference by others. This right is implied by the fair equality of opportunity principle, which declares as important not only that individuals have *fair access* to jobs and careers, but that it is *jobs and careers* to which individuals must have fair access, and so implicitly endorses choice of jobs and careers as central to the ability of citizens to pursue their plans of life. Another negative right upheld by Rawls' first principle of justice – and so also by POD – is a limited negative right to own personal property: “to hold and to have exclusive use of personal property” (1999, p. 53; 2001, p. 114). Rawls' illustration of this right indicates that it protects only the kinds of property needed to secure a basic form of personal independence: he refers to the right to own “dwellings and private grounds” (Rawls. 2001, 114, fn. 36). Given the narrowness of this negative

right of property, it does not stand in the way of the redistributive taxation and expenditure policies that make up POD's key strategies.<sup>7</sup>

### *Welfare-state capitalism*

WSC differs from POD in two respects: it contains fewer positive rights and its negative right to own private property is broader. With respect to the negative right of labour, however, the regimes actually differ only slightly. Rawls explicitly includes, within freedom of occupational choice, the freedom to decide how hard one works: "What kind of work people do, and how hard they do it, is up to them to decide" (2001, p. 64). The only regard in which POD and WSC might differ with respect to the right of labour, is the right against interference by the state with one's decisions about the wage at which one chooses to work. Recall that WSC means capitalism constrained only by a social safety-net, so (in the political philosophers' sense) WSC allows individual discretion in wage setting. By contrast, Rawls does not explicitly include as an instance of the basic right of labour that persons must be able to set wages individually. He allows the government to regulate this matter.<sup>8</sup>

In summary, the key difference between POD and WSC lies in how broadly they conceive the scope of the negative right to own property – both of private and productive property. This difference arises because WSC does not give priority to the strategies of wide dispersal and economic reciprocity that characterize POD, and hence does not see the need to limit the negative right to private property to the extent POD requires. Instead, WSC limits that right only to the extent necessary for fulfilling the basic needs of others. Presumably, these include primary and secondary education, basic health care, food, and shelter. The modest taxation needed to fund such needs would allow citizens to retain a far larger amount of private property than they would be allowed to retain under POD. Under WSC, furthermore, the negative right to productive property is unlimited

whereas under POD, it is limited so as to prevent concentrations that might undermine the equal enjoyment of the fair value of political liberty.<sup>9</sup>

### **Is Redistribution More Coercive?**

While Gaus does not use the term “contractualist” to describe his approach to political justification, he endorses the key test common to all versions of contractualism. This is an *agreement test*: coercive laws must be agreed to by members of a relevant public before they are justified.<sup>10</sup> Gaus does not believe that the source of authority of a given rule of social morality lies in the actual or hypothetical *consent* of individuals who are subject to it. Rather, the source of a given rule’s authority is the fact that individuals have sufficient reason to internalize that rule. Gaus names this principle, the Basic Public Justification Principle. He uses the agreement test as a test for identifying the rules of social morality that comply with the Basic Public Justification Principle. As he writes: “[W]e can (partly) translate the Basic Public Justification Principle into a deliberative version: L is a bona fide rule of social morality only if each and every Member of the Public endorses L as binding (and so to be internalized)” (2011, 267).

Different types of contractualism differ according to how idealized a conception of the public they assume must agree to coercive law. At one end of the spectrum is a type of contractualism that assumes a public that departs minimally from the beliefs, interests and circumstances of real people, like you and me. There are different steps one can take, away from this extreme, towards the more idealizing end of the spectrum. Gaus’ contractualism lies close to the “real” end of the spectrum: he stipulates that contracting representatives hold the *same* views of actually existing persons, and that they differ from actually existing persons only insofar as their reasoning is free of logical error. The objections I shall raise against Gaus don’t take issue with how he locates his contractualism on the “real-to-idealized” spectrum.

A key argument Gaus provides for why contractual agreement would select WSC over POD is that POD requires a higher amount of coercion than WSC in virtue of the fact that its policies redistribute more property than WSC's policies. State coercion, however, must be shown to be acceptable to all members of the public, and, given the pluralism of views of the good life that circulate in society, there will be at least some citizens who would not accept policies that would increase the amount of coercion required by WSC to the greater level (supposedly) required by POD. Gaus thus concludes that POD is not a permissible economic regime.

It is helpful to note two points when evaluating Gaus' argument. First, Gaus assumes that increments in state coercion need to be justified to all persons because all persons have a right not to be coerced that, in his words, is "fundamental in the order of justification" (2011, p. 481).<sup>11</sup> Therefore, to identify a just economic regime according to Gaus' contractualism, we must ask, of each increment in state coercion, whether all contracting parties can accept that increment. Economic regimes that require state coercion beyond the highest accepted increment of state coercion are, by this reasoning, unacceptable. Secondly, Gaus assumes that state coercion increases as we move along the following sequence of regimes: (a) anarchy, (b) laissez-faire capitalism, (c) WSC, and (d) POD.

According to Gaus (2011, pp. 374-381), citizens would prefer a regime that protects laissez-faire capitalism to anarchy (a regime that does not even protect private property rights). Furthermore, Gaus argues that if people reasoned without error about what they need in order to protect their basic capacity for agency, they would endorse minimal welfare rights, so they would endorse WSC over laissez-faire capitalism (2011, p. 367). However, Gaus maintains that citizens would not accept policies that would increase the amount of coercion required by WSC to the greater level (supposedly) required by POD. He thus concludes that WSC is the most justified regime (2011, p.



526).

My critical analysis of Gaus' argument grants that all citizens will or would accept WSC over laissez-faire capitalism as well as over anarchy. My focus is on Gaus' contention that the sequence moving from WSC to POD is a sequence of increasing coercion. I will reject four distinct ways in which Gaus proposes that higher tax regimes such as POD should be rejected on grounds that they are more coercive than WSC.

(a) *Correcting non-compliance.* The first reason why POD might be more coercive than WSC is that it will need to employ the criminal law, or other freedom-restricting means, in order to secure sufficiently high levels of compliance with its tax laws. Gaus assumes that there is a positive correlation between the degree of state-imposed redistribution through taxation and the degree of non-compliance with taxation law. The claim is that more citizens would fail to comply with, for example, a highly redistributive, flat income tax of 80% than with a less redistributive flat income tax of 20%. Greater amounts of non-compliance, require, in turn, that the state resort to a greater amount of coercion through the criminal law in order to secure tax payments (2011, p. 523).

Three problems beset Gaus' non-compliance argument. First, the extent to which citizens will comply with tax laws depends on, among other things, their sense of justice, in particular whether they morally endorse the economic regime in question. The level of tax non-compliance that is likely to occur in POD relative to WSC will thus depend on how the sense of justice evolves amongst citizens who live under those two respective regimes.<sup>12</sup> We cannot develop a conjecture about that based on observations about how citizens behave under current conditions, and it is certainly possible that POD will instil a *greater* sense of justice in citizens than WSC and hence that it will need to correct non-compliance *less*.

Secondly, and more seriously, the empirical evidence that citizens would, even under our current non-POD conditions, comply less with higher tax laws is decidedly mixed. Indeed, some cross-country studies show that tax non-compliance *decreases* as tax rates increase (Doerrenberg and Peichl, 2013; Richardson, 2006). One study finds that “tax morale”, or the intrinsic motivation to pay tax, rises in higher tax jurisdictions, and thus dovetails with the possibility broached in the previous paragraph, i.e. that the sense of justice amongst citizens might well evolve and align with the underlying principles of an economic regime that redistributes more than WSC, such as POD.<sup>13</sup> Note that I am not arguing that tax compliance will rise as tax rates rise *for all levels of taxation*. It is possible that tax compliance will start falling as tax rates become extremely high. I am making the more modest claim that there is no conclusive evidence that tax compliance falls as tax rates rise to the levels required by POD.

Thirdly, even if tax-noncompliance did increase as tax rates rise, the level of coercion needed to ensure a sufficiently high degree of tax compliance may not be so great as to dissuade parties to a hypothetical contract from selecting higher tax rates. The degree of coercion needed in to secure sufficient tax compliance in jurisdictions such as Norway, Denmark, Sweden, and France, to name a few, is far from draconian, and there is no reason to think that the nature of human beings who live in low tax jurisdictions is so profoundly different that they will never be able to follow suit. In sum, we should dismiss Gaus’ non-compliance argument as inconclusive at best.

(b) *Tax as a cost on options*. A second argument Gaus offers for why POD is more coercive than WSC is that POD, in imposing higher tax rates, prices certain options out of the choice-worthy set available to citizens. Higher tax rates impose higher costs on market activity, thus rendering market activity a less eligible choice. If we think of a person’s options as a series of railroad tracks, “high tax rates make it very difficult to

follow a great many; given the costs involved in taking those routes, they are effectively closed.” (2011, pp. 523-4) And for one agent to close off the routes of another is coercive.<sup>14</sup>

To see the problem with this argument it is helpful to recall G. A. Cohen’s classic discussion of the relationship between freedom, private property, and redistribution (Cohen, 1981; see also Cohen, 2001). Cohen’s key claim is that the state acts coercively – and infringes people’s freedom – not only when it forcibly redistributes property from one person to another, but also when it protects the right of the first person to hold on to his private property by threatening others with legal punishment should they wish to take it from him.<sup>15</sup>

Suppose A currently possesses a town house and a country house, whereas B is homeless. Now compare two schemes: the first protects A’s right of property in both of his houses, whereas the second scheme, enforces the transfer of A’s town house to B. The second, redistributive scheme is coercive. It consists of two acts of coercion: (i) it threatens A with sanction if he refuses to transfer his town house to B and (ii) it threatens B with sanction if B attempts to seize A’s country house. But the non-redistributive scheme is also coercive and it also consists of two acts of coercion: (i) it threatens B with sanction if B attempts to seize A’s town house and (ii) it threatens B with sanction if B attempts to seize A’s country house. The general point is this: of any proposed enforced transfer of an item from one person to another, it is true that the non-redistributive alternative of protecting the first person’s possession of that item against seizure is also coercive. This means that a state that protects property instead of forcibly redistributing is also engaged in coercion.

If all of this is true, why, in the course of comparing economic regimes, is it frequently assumed that a trade-off exists between freedom-with-inequality, on the one hand, and equality-with-coercion, on the other? The main reason is that we fail to

appreciate that the structure of social relations that make up a distribution of private property in our society is a revocable product of social choice. Instead we see it as a natural landscape within which we pursue our lives. And because we do not (ordinarily) consider our landscape a restriction on our freedom, we fail to see the distribution of private property as a restriction on freedom. In this frame of mind, only enforced redistribution appears disruptive of freedom, while non-redistribution appears inoffensive to freedom. This way of seeing things comes most naturally to persons who own private property themselves. But as Waldron notes (1993, p. 325), to the propertyless – to the homeless, harried off private property and confined, on pain of sanction, to parks and train stations - it is obvious that the state acts coercively when it protects private property.

Return to Gaus' argument, that higher taxes are coercive insofar as they render market activities less choice-worthy than alternative activities (such as leisure activities). As we can now see, one can grant this, while insisting that those higher taxes do not increase state coercion relative to WSC. With higher taxes on market activity, some citizens may well be "coerced" away from market activity or coerced into transferring resources, *via* the state, to others. But removing those higher taxes does not eliminate coercion; it only means that poorer citizens will be coerced away from obtaining the pre-tax income of richer citizens, and, without that income, poorer citizens will be coerced away from the options that only higher purchasing power could have made available to them. It is one-sided, then, to hold that the state interacts with citizens in a more coercive way only when it imposes higher taxes on market activity; it interacts no less coercively with them when it uses the threat of legal punishment to protect private property.

Consider a reply Gaus might give to this objection. He might concede that POD is not more coercive than WSC, but still insist that our concern with coercion should take a form that favours WSC. He might say that the concern with coercion should not focus on

minimizing the overall amount of coercion the state inflicts on citizens, nor on achieving a particular distribution of coercion across citizens, but on the right of each individual not to be treated in certain ways by others (as Nozick puts it, it is a concern that identifies a *side-constraint* on state-action, not an *end-state* the state must achieve).<sup>16</sup> That right, Gaus can argue, blocks the higher degree of taxation required by POD.

This reply fails for a straightforward reason. Because state policies that protect property coerce others not to seize that property, such policies breach freedom-based side-constraint as much as redistributive tax policies do. Put differently, if freedom is a side-constraint on state action, and if the state infringes the freedom of a person when it coerces him not to seize another person's possessions, then a regime of broad property rights violates freedom as a side-constraint as much as a redistributive regime does. The appeal to freedom as a side-constraint thus fails to show why redistribution is more problematic than protecting property rights.

(c) *Reasonable disagreement about the costs of coercion.* A third coercion-based argument Gaus offers for why we should reject POD appeals to the idea that people can reasonably disagree about the costs of coercion. Gaus imagines a group of people he calls "Millians" who are more sensitive to coercion than others are – i.e., they think coercion is more costly than others do. Gaus thinks that the presence of Millians in our society, together with the requirement that laws be acceptable to all members of the public, "pushes the eligible set [of laws] toward less coercive laws." (2011, p. 505) He concludes that "Millian members of the population will move the eligible set in a classical liberal direction" (2011, p. 505) – or, in other words, away from POD.

If the Cohen-inspired argument I made under section (b) above is correct, then this third argument fails. For that argument implies that Millians who attach high costs to coercion should be as concerned with moving in a "classical liberal direction" as they

should be in moving in the direction of POD. They should be as concerned with moving towards laws that are less redistributive (and which protect more private property against redistribution) as they should be in moving towards laws that redistribute to the extent required by POD. Gaus may be correct to say that some people may more strongly object to coercion than others (because they attach higher costs to it), but he cannot infer from that that we should reject POD and move in a classical liberal direction.<sup>17</sup>

### **The Order of Justification**

As we have seen, Gaus' general argument in favour of WSC, and against more redistributive regimes, relies on the claim that state coercion increases as we move from WSC to POD. So far, I have been assuming that Gaus' argument uses a non-moralized conception of coercion. According to that conception, whether an act counts as "coercion" does not depend on whether that act violates a right, but simply on whether it prevents a person from doing something she wishes to do.<sup>18</sup> We now need to consider Gaus' argument on the different assumption that it employs a moralized conception of coercion.<sup>19</sup> His argument would in that case be the following: parties would reject the greater redistribution required by POD, not on the ground that it is more coercive *period*, but on the ground that POD, as a result of the additional redistributive laws it imposes relative to WSC, involves a greater amount of coercive violations of property rights.

Now proponents of POD will of course maintain that POD does not violate property rights, but upholds property rights. They will argue that the so-called property rights that POD violates aren't *genuine* property rights at all. Rather than engaging directly with arguments that proponents of POD would adduce for their conception of property rights (e.g. that all must enjoy the fair value of political liberty, fair equality of opportunity and a reciprocal sharing of the benefits of economic cooperation), Gaus argues that contracting parties would endorse property rights at an earlier stage in the

“order of justification” (2011, p. 275) – earlier, that is, than their assessment of arguments for or against particular economic regimes. In referring to an earlier stage in the “order of justification”, Gaus assumes that the considerations that move contracting parties in their assessment of certain issues in political morality (such as the right to private property) can take forms that are more or less abstract, and, furthermore, that some more abstract considerations can constrain the agreement that contracting parties eventually settle on with respect to those issues.

Before considering the abstract consideration that Gaus believes would move contracting parties to recognize a right to private property that precludes redistribution beyond what is required by WSC, it may be instructive to consider the following abstract consideration. One might propose that contracting parties would insist that they should have the right to privately own at least *some* amount of property and have a right to transfer to others at least some amount of property as they please. That claim, so one might believe, is sufficient to furnish the conclusion that POD, insofar as it redistributes more property than WSC, is *ipso facto* more coercive than WSC.

The problem with this argument is that it does not show that POD-levels of redistribution violate genuine property rights. POD recognizes the right to privately own at least *some* amount of property as much as WSC does. Recall that Rawls’ first principle of justice includes a right to own the amount of private property needed to secure a basic form of personal independence – a right, Rawls says, to “dwellings and private grounds” (2001, p. 114, fn. 36). To properly establish that POD-levels of redistribution are offensively coercive, it must be shown that what POD forcibly takes away from some and gives to others lies *within* the uncontroversial baseline amount that all must have a right to privately own. This is the challenge that the “order of justification” argument must meet.

Consider, now, two ways in which Gaus might attempt to meet that challenge. The first is proposed by Gaus himself; the second is an argument that might naturally suggest itself, given some of his other remarks.

First, Gaus appeals to the idea that the right to private property is a “jurisdictional right”. He uses the term “jurisdictional right” to refer to a function a given right can have, namely that it protects a sphere of action over which the right-bearer’s judgments have authority (2011, p. 374). Property rights have this jurisdictional function: they give individuals, *qua* owners, authority to decide what happens with respect to the items over which they have property. If I own a piece of land, for example, I decide (within limits) what happens on that land. Rights to private property thus effectively partition social space into individualized spheres of authority. This feature of rights to private property is an important abstract consideration, Gaus believes, that would lead parties to endorse rights to private property at an early stage of justification. By recognizing rights to private property they can accord each other individualized spheres of authority within which they can pursue, without conflict, their contrasting views about what constitutes acceptable forms of social interaction.

So the reason Gaus adduces for why POD-levels of redistribution violate genuine property rights, whereas WSC’s non-redistribution does not violate any rights, is that POD violates the individualized spheres of authority that all parties would supposedly agree they should have a right to. (Gaus believes that *laissez-faire* capitalism, for its part, would violate the minimal welfare rights that he believes are also justified at an early stage of justification.) We should, in other words, take those rights to private property that are necessary for serving the jurisdictional function that all contracting parties would value as a “given” when we come to debate further possible laws, or, as a baseline against which further adjustments need to be justified. Protecting people’s property rights against interference thus does not count as coercive, whereas taking someone’s property



in order to raise others above a basic minimum does. Hence, when POD adds further redistributive laws to those that exist under WSC, it is being more coercive than WSC, because it is using force against people that violates their pre-established rights.

When assessing Gaus' appeal to the jurisdictional function of private property, it is helpful to think about the following analogy. Consider a (relatively) uncontroversial right of property, for example, the right of property in one's body parts. Now compare two cases. In case 1, the state prevents others from taking people's kidneys without their consent. In case 2, the state forcibly redistributes kidneys from some people to others. Given the assumption that people have rights of property in their body parts, the state's intervention in case 2 is coercive (on a moralized conception of coercion), whereas the state's intervention in case 1 is not. Gaus' argument is that rights of property in external resources, such as land or houses, are like rights of property in kidneys: by virtue of their jurisdictional features these rights in external resources would be endorsed by contracting parties without controversy. Hence, POD, insofar as it redistributes external resources more than WSC, is more coercive than WSC.

The analogy reveals two problems with Gaus' appeal to the jurisdictional function of private property. First, the claim that private property serves a jurisdictional function does not explain how *much* property beyond one's own body parts constitutes the uncontroversial baseline against which we may judge redistribution coercive. Gaus may be right that private property enables people in a pluralistic society to partition social space into individualized spheres of authority. But exactly how much authority (beyond that of being able to decide what we do with our body parts) must we devolve to individual spheres under the auspices of a right to private property? Gaus' argument is indeterminate with respect to that question. Must people have a broad negative right to accumulate large amounts of private property, or is the more restricted basic right to private property recognized by POD sufficient (i.e. to "dwellings and private grounds")?

Given its indeterminacy with respect to this question, the jurisdictional function consideration cannot justify the conclusion that the greater redistribution required by POD violates an uncontroversially established right to private property.

The second problem with Gaus' appeal to the jurisdictional function of property rights is more serious. Not only is this appeal indeterminate with respect to setting an uncontroversial private property baseline: it is in fact difficult to see how it could be made determinate in a non-circular way – that is, without assuming what it is meant to justify. Gaus says that, given our context of evaluative pluralism – i.e. a context in which people espouse different conceptions of the good and of what is just – we should avoid regulating social space through collective agreement when we can adopt the alternative strategy of establishing rights of property (and other rights) in order to partition social space into individualized spheres of authority. But, for all we know, POD might constitute the correct way in which to partition social space into individual spheres of authority. When it redistributes resources in order to provide those who receive those resources with important freedoms they otherwise wouldn't have, a POD regime is, in effect, "partitioning social space" in a way that expands the recipients' spheres of authority beyond what they otherwise would be. The appeal to the jurisdictional function of property rights cannot, therefore, be used to conclude that POD-levels of taxation violate pre-established rights unless we already assume that POD is an unacceptable way in which to partition social space. But that would be circular.

Consider now a second argument one might adduce in order to show that contracting parties would agree to rights to private property that render POD-levels of redistribution coercive. This version does not appeal to the jurisdictional function of property rights. It points out, instead, that everyone would prefer the form that the right of private property takes under WSC to the form it takes under *laissez-faire* capitalism, but that not everyone would prefer the form it takes under POD to the form it takes under

WSC. In other words, the right to private property under WSC is the “last stop” that everyone can agree to, as we move away from *laissez-faire* capitalism towards more redistributive regimes. This form of the right, so one might conclude, thus sets the uncontroversial baseline against which redistribution can be judged coercive.

The question is why we should accept this “sequential method” for identifying a baseline right to private property. One might attempt to justify it as follows: increments in state coercion need to be justified to all persons because all persons have a right not to be coerced that is “fundamental in the order of justification” (Gaus, 2011, p. 481). Notice, however, that this justification for the sequential method fails, for a reason we have already noted during our discussion of the “Millians” who are more sensitive to coercion than others are. As we saw earlier, Gaus thinks that “Millian members of the population will move the eligible set [of laws] in a classical liberal direction” (2011, p. 505) – or, in other words, away from POD. However, remember that Cohen’s arguments show that the property-protecting laws that characterize *laissez-faire* capitalism are no less coercive than the more redistributive laws that characterize WSC, or that characterize POD, even further to the left. So it is a mistake to assume that the less coercive starting point is *laissez-faire* capitalism and that we must thus seek universal agreement before moving from there to the left of the political spectrum. We might as well adopt the method of starting from POD and then seek universal agreement before moving from there to the right of the political spectrum, in which case the “last stop” would likely be POD. In short, even if it were true that individuals have a fundamental right not to be coerced, we have no reason to conclude that the right of private property recognized by WSC sets the uncontroversial baseline against which we can reasonably judge more redistributive regimes, such as, POD, coercive.

## **The Distribution of Coercion**

So far this paper has raised objections to Gaus' coercion-based argument against regimes that redistribute more than WSC. I now want to argue that considerations regarding the extent and ways in which the state coerces individuals may, in fact, point us in the other direction. They may lead us to prefer POD to WSC.

The reason for this has to do with the different ways in which POD and WSC distribute coercion between citizens. Consider, first, how WSC distributes coercion. It coerces a high income-earning individual, insofar as it imposes redistributive taxation on him on pain of punishment. But it also coerces those who live on the basic needs minimum, and it coerces them much more, insofar as it threatens them with punishment if they should try to take or use (other people's) property beyond the minimal amount they are guaranteed by the state. We can appreciate the inequality in coercion that a high income-earning individual and an individual who lives on the basic minimum are subjected to if we compare all the things a high income-earning person can do without being punished, to all the things a person on a basic minimum can do without being punished.<sup>20</sup>

Now consider the way in which the distribution of coercion changes as we move from WSC to POD. POD increases the extent to which its higher income-earning individuals are coerced relative to the extent to which they are coerced under WSC (it taxes them more), but it decreases the extent to which its worst off citizens are coerced relative to the coercion they would face under WSC. Under POD, higher income-earning individuals can't do as much without punished as their counterparts can do under WSC, but the worst off members of POD can do much more without being punished than their counterparts can under WSC.

This difference is important. How bad it is for us to be forcibly prevented from performing certain actions depends on how wide a range of valuable actions we are

already able to perform. A person who is able to perform a large range of valuable actions will not be as concerned about being forcibly prevented from being able to perform a further particular action, as will a person who is able to perform only a very small range of valuable actions. For example, being forcibly prevented from using a commercial bus service in one's city is not as bad for an individual who already has the ability to drive around in his own car, as it is for an individual who can't afford a car. Other things equal, contracting parties should therefore prefer an economic regime that shifts coercion away from those who are restricted to the smallest range of valuable actions. This, admittedly, is not an all-thing-considered-argument in favour of POD over WSC. But it is an argument that shows that the *concern with coercion* that is central to the case Gaus makes in favour of WSC and against more redistributive regimes, such as POD, may, in fact, point the other way.

## **Conclusion**

The novelty of Gaus' contribution to the debate over economic regimes is that it seeks to forge a case for WSC on territory long occupied by Rawlsians. However, the coercion-based reason Gaus adduces for why contracting parties would reject economic regimes that are more redistributive than WSC fails. We have no good reason to believe that WSC is less coercive than POD. Indeed, once we direct our attention toward those with the smallest range of valuable opportunities for action, we have reason to worry more about the coercion imposed by WSC than by POD. Gaus' coercion-based case against more redistributive regimes such as POD thus does not offer a more plausible alternative to the standard, beleaguered arguments that libertarians offer against such regimes.

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<sup>1</sup> Contrary to what is often assumed, Rawls does not regard welfare-state capitalism as an adequate institutional expression of his theory of justice. His preferred regime is property-owning democracy (1999, p. xiv).

<sup>2</sup> Libertarians divide along “left” lines. So-called “left-libertarians” insist on an egalitarian proviso on the just appropriation of natural resources that requires payment to others (George, [1879] 1966; Steiner 1994; Vallentyne 2000), whereas so-called “right-libertarians” believe that just appropriation of natural requires either no payment to others (Kirzner 1978; Rothbard 1978, 1982) or that it is permissible on the non-egalitarian proviso that others not be made worse off compared to their situation prior to appropriation (Nozick 1974).

<sup>3</sup> The utilitarian tradition stretching back to David Hume contains a large number of writers who defend one or another version of capitalism on the ground that it produces the best social consequences. As Freeman writes (2011, p. 25), “all the great classical liberal economists including Adam Smith, David Ricardo, Thomas Malthus, John Stuart Mill, F. Y. Edgeworth, and Alfred Marshall, were utilitarians.”

<sup>4</sup> This revival has been labelled *neoclassical liberalism* (Gaus, 2011; Tomasi, 2012; see also Brennan, 2012; Brennan and Tomasi, 2012). Neoclassical liberalism is also the self-

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proclaimed ideology of some members of the popular blog *Bleeding Heart Libertarians* [<http://bleedingheartlibertarians.com>].

<sup>5</sup> I leave aside liberal socialism in this paper because I agree with Gaus (2011, pp. 378-9) and Tomasi (2012, p. 78) that liberal socialism's strong regulation of the ownership of productive property unreasonably debars people from valuable economic activities. For overviews of liberal socialism (or market socialism), see Miller (1989), Roemer (1994) and Schweickart (2002).

<sup>6</sup> Here I adapt a helpful taxonomy from Nickel (2000).

<sup>7</sup> How exactly POD identifies the negative right to own productive property is a matter of interpretation that we will not need to settle here. Williamson (2012) proposes that POD requires that all productive property be owned equally by citizens (e.g., by providing all citizens with an equal share of "investment coupons" they can use to buy shares in the mutual funds of their choice. Williamson's proposal would bring POD close to the type of liberal socialism proposed by Roemer (1994).

<sup>8</sup> As Freeman (2004) explains, Rawls' policy preference (assuming just background institutions are in place) was that there be *no* minimum wage legislation. Wages should be set by wage bargaining with the government supplementing low wage incomes.

<sup>9</sup> Williamson (2012) provides an excellent discussion of how POD might implement the negative right to own productive property.

<sup>10</sup> For Rawls' statement of the agreement test, see (1996, 139-140).

<sup>11</sup> Gaus believes that our endorsement of our own capacity for agency would lead us to reject proposals that violate a basic right not to be coerced which he defines as a right against "threats made against one's natural person." (2011, p. 352).

<sup>12</sup> Rawls' later work aims to show that his two principles of justice can be stably institutionalised over time by generating a supporting sense of justice amongst citizens

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(1996, pp. xxxv-lx, pp. 133-172). See also Weithman (2011) for an analysis of how Rawls pursues this aim.

<sup>13</sup> Using a sample of 19 countries, Doerrenberg and Peichl (2010, 293) find that “an individual’s tax morale is higher, the more progressive the tax schedule is.” Using a sample of 45 countries, Richardson (2006) finds no significant link between changes in marginal tax rates and tax evasion.

<sup>14</sup> It is not entirely uncontroversial that imposing costs on choices can amount to a form of coerciveness. For a critique of this view, see Hillel Steiner (1991, p. 134).

<sup>15</sup> Andrew Lister (2010, 160) also notices the relevance of Cohen’s claim for the assessment of Gaus’ coercion argument. However, according to Lister there can be reasonable disagreement over whether redistributive schemes are more coercive than non-redistributive schemes that protect private property. As I explain below, I believe, by contrast, that it is unreasonable to regard one scheme as more coercive than the other.

<sup>16</sup> Gaus explains that his view of the right not to be coerced takes this side-constraint form in (2011, pp. 484-487).

<sup>17</sup> Note also that Gaus’ claim (2011, 495-6) that parties must evaluate fine-grained proposals regarding state action (as opposed to anything as general “economic regimes”) does not justify the conclusion that parties would “stop short” of agreeing to the amount of coercion needed by POD. This is because there would, in any case, be an equivalent degree of state coercion if the state did not redistribute to the extent required by POD, but instead protected non-redistributed private property with threats of legal punishment.

<sup>18</sup> For a more detailed discussion of the moralised/non-moralised distinction, see Wertheimer (1987, p. 7).

<sup>19</sup> I have been assuming that Gaus’ first three coercion-based arguments (sections (a) - (c) above) have implicitly employed a non-moralised conception of coercion. If they are to



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be interpreted as employing a moralised conception of coercion, they fail for the reason I point out in this section.

<sup>20</sup> My argument here is intuitive, and touches on a much more complex set of issues pertaining to the measurement of individual freedom. For an excellent defence and exploration of the possibility of measuring the relative freedoms of different individuals, see Carter (1999).

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