Steffen Ganghof

Does public reason require supermajoritarian democracy? Liberty, equality, and history in the justification of political institutions

Suggested citation referring to the original publication:
Politics, Philosophy & Economics, 12(2), 2012, pp. 179–196
DOI http://dx.doi.org/10.1177/1470594X12447786
ISSN (print) 1470-594X
ISSN (online) 1741-3060

Article

Politics, Philosophy & Economics
12(2) 179–196

DOI: 10.1177/1470594X12447786
ppe.sagepub.com
SAGE

Does public reason require super-majoritarian democracy? Liberty, equality, and history in the justification of political institutions

Steffen Ganghof
University of Potsdam, Germany

Abstract
The project of public-reason liberalism faces a basic problem: publicly justified principles are typically too abstract and vague to be directly applied to practical political disputes, whereas applicable specifications of these principles are not uniquely publicly justified. One solution could be a legislative procedure that selects one member from the eligible set of inconclusively justified proposals. Yet if liberal principles are too vague to select sufficiently specific legislative proposals, can they, nevertheless, select specific legislative procedures? Based on the work of Gerald Gaus, this article argues that the only candidate for a conclusively justified decision procedure is a majoritarian or otherwise 'neutral' democracy. If the justification of democracy requires an equality baseline in the design of political regimes and if justifications for departure from this baseline are subject to reasonable disagreement, a majoritarian design is justified by default. Gaus's own preference for super-majoritarian procedures is based on disputable *specifications* of justified liberal principles. These procedures can only be defended as a sectarian preference if the equality baseline is rejected, but then it is not clear how the set of justifiable political regimes can be restricted to full democracies.

Corresponding author:
Steffen Ganghof, University of Potsdam, Faculty of Economics and Social Science, August-Bebel-Str. 89, 14482 Potsdam, Germany.
Email: ganghof@uni-potsdam.de

Keywords
public-reason liberalism, democracy, coercion, political equality, majority rule, Gerald Gaus

1. Introduction

Many versions of liberalism can be grouped under the label of 'justificatory' or 'public reason' liberalism. They share the idea that state coercion must be justified to all members of some adequately 'qualified' or 'reasonable' public; it must be *publicly* justified.[1] Core problems of this approach to political theory are disagreement and vague agreement. Due to deep and persistent disagreement among the members of the public, very little may be conclusively publicly justified. To the extent that there are liberal principles that can be justified to all, these tend to be vague and abstract, so that their interpretation and application remain unclear.

One solution to the problem of vague agreement could be procedures for choosing between competing specifications of justified principles. These procedures would work like an umpire who adjudicates between competing judgements about how justified principles ought to be applied to particular situations and problems. Yet if this solution requires the conclusive justification of specific procedures, the problems of disagreement and vagueness may simply resurface at a higher level. If liberal citizens cannot agree on conclusive specifications of vague liberal principles with respect to particular political decisions, can we, nevertheless, expect them to be able to do so with respect to particular decision procedures?

Few proponents of public-reason liberalism have tried to give systematic and detailed answers to these questions. One notable exception is Gerald Gaus, who argues in *Justificatory Liberalism* (hereafter, referred to as JL) that the conclusive justification of umpiring procedures is necessary and that liberal principles imply non-neutral or super-majoritarian procedures (Gaus, 1996).[2] Impartial reason, he claims, eliminates majority rule from the set of procedures eligible for use in legitimate liberal democracies. His more recent *The Order of Public Reason* (hereafter, referred to as OPR) reaffirms this position by denying that 'we should ever aim at legislative systems that are strictly neutral between imposing and not imposing laws' (Gaus, 2011a: 459; see also Gaus and Vallier, 2009). Moreover, for Gaus the design of political institutions is not a theoretical afterthought, but crucial to the entire project of public-reason liberalism: 'Rather than seeking to restrain citizen inputs, the important project for justificatory liberals is to develop the theory of constitutional government that takes the real-world imperfect inputs we confront, and yields laws that tend to be publicly justified' (Gaus and Vallier, 2009: 70). The way to do this is some form of super-majoritarianism.

This article challenges these claims. It argues that if public-reason liberalism can conclusively justify any specific procedure for democracy at all, this must be a fair and neutral one such as majority rule.[3] My critique differs from the arguments by other recent critics of Gaus, who reject his theory outright by rejecting at least one of his foundational principles. Most notably, they reject the 'liberty' or 'non-coercion' principle, on which Gaus's case for super-majoritarianism builds (Christiano, 2008: 220–1; Lister, 2010;

Quong, 2010: 202–3; Wall, 2010). Perhaps this also explains why these critics have taken little or no interest in his advocacy of super-majoritarian procedures. In contrast, the critique developed here is meant to be an internal one. I accept, for the purposes of this article, the basic theoretical ideas and principles of JL (and OPR), but try to show that the case for super-majoritarianism must be rejected. One can fully embrace a *moral bias against coercion* and at the same time reject an *institutional bias against legislation*. Once this is recognized, Gaus's justification of democracy in JL implies a justification of majoritarian (or otherwise neutral) democracy.

The discussion of Gaus's views is complicated by the fact that some of them have changed since the publication of JL. OPR partly reaffirms and elaborates on some of his earlier positions, but it also abandons some crucial theoretical commitments of JL. My strategy is to focus first on his account in JL and only refer to Gaus's more recent arguments whenever I read these as clarifying or elaborating on his older ideas. Section 2 summarizes this account and Section 3 criticizes the argument for super-majoritarian procedures. In a second step, in Section 4, I consider some basic theoretical changes in OPR. These changes allow Gaus to defend his super-majoritarianism as a sectarian preference, but they raise new worries about his justification of democracy. Section 5 concludes with a brief summary.

2. Justificatory liberalism and super-majoritarian democracy

Justificatory liberalism is based on two closely related principles. One is this:

> The Public Justification Principle: A system of coercive laws is justified only if each and every member of the qualified public has adequate reason(s) to accept it as a requirement. (Gaus and Vallier, 2009: 53)

This is a generic formulation. If the principle's conditions are met, the imposition of the system of laws by political authority is legitimate, and all members of the adequately idealized public have a duty to obey. Different liberal theories specify the principle differently, and Gaus's specification is very restrictive. First, he insists that each and every law has to be publicly justified, not just constitutional fundamentals (see Gaus, 2011a: 490–5). Second, he rejects an ethical principle of restraint, such as Rawls's duty of civility. Hence even controversial reasons such as those based on religious beliefs can defeat public justification attempts (see Gaus and Vallier, 2009). Third, Gaus establishes a very restrictive default condition in the case that a public justification attempt fails (Gaus and Vallier, 2009: 53):

> Non-Coercion Principle: Liberty is the norm. Respect for persons as free and equal requires that coercion always needs some special justification. Unjustified coercion is wrong.

Gaus (2010a: 195–6, 2010b: 189) asserts that this principle is itself publicly justified and establishes the default condition for subsequent justification attempts. For the justification of state action to be conclusive, it is not enough that all qualified members of the public can see that the state has some set of reasons for coercion. Instead, each member

of the public, drawing on her own evaluative standards, must have an all-things-considered reason to endorse the law over the alternatives and over having no coercive law at all on this matter (Gaus, 2010a: 195–6). The onus of justification is on those that want to coerce others. Given the diversity of evaluative standards of the members of the public and the depth of their reasonable disagreement, successful public justification is thus extremely difficult to achieve. Much potential state action cannot be justified.

Indeed, the justifiability of political authority is in doubt: perhaps all laws lack sufficient justification. Gaus's justification of political authority is based on the idea that the typical situation is one of *nested inconclusiveness*. That is, it is possible conclusively to justify basic principles of justice, or basic rights of agency and jurisdiction, but these are unavoidably vague and indeterminate. Gaus (1996: 165) emphasizes that the very vagueness or abstractness of principles greatly enhances their justifiability. The problem is that the implications of vague principles remain unclear and inapplicable until they are interpreted and specified, but the competing interpretations and specifications are inconclusively justified against one another.

In more recent work, Gaus (2010b: 196) has specified this set of unvictorious, but also undefeated interpretations as the *optimal eligible set*. The idea is that the members of the qualified public disagree in their ranking of legislative proposals, so that no proposal is conclusively justified in a straightforward way. However, members can narrow down the set of proposals in two steps. First, they would use the Pareto principle: if all members agree that some proposal A is better than another proposal B, then B can be eliminated. This elimination of dominated proposals leads to the *optimal* set. Second, based on the non-coercion principle, members would also eliminate all proposals that at least one of them considers worse than no coercion. A law must be a 'net improvement' on liberty (Gaus, 2010a: 249). This second type of elimination leads to the optimal *eligible* set.

How can liberal citizens narrow down the optimal eligible set further? How can they translate abstract principles into actual norms and policies and thereby avoid a demoralized social life? Gaus gives two complementary answers. The more recent answer in OPR is based on a theory of social or cultural evolution, and is discussed in Section 4. The answer of JL is a contractualist account of democracy: the members of the public can agree on a version of constitutional democracy as a sort of 'umpire'. They can conclusively justify procedures that select one member from the optimal eligible set.

The general structure of Gaus's justification of democracy is as follows. He first justifies the rule of law, which implies a principle of political equality. Then he defends democracy in a consequentialist and epistemic manner, arguing that democracy is 'justification-tracking'. More precisely, 'the prime motivation of the contractors is to select a law-making institution that, as closely as possible, tracks the publicly justified morality' (Gaus, 1996: 218). Third, he acknowledges that democracy may not be the *most* justification-tracking procedure, but brings in the political equality principle to argue that departures from equality must be conclusively justified. In addition, he argues that potentially more justification-tracking departures from equality, such as Mill's plural voting scheme or constitutional judges as moral experts, cannot be justified. Gaus's elegant justification of 'adjudicative democracy' can thus be summarized in a single sentence:

> Democracy is justified because, of all the law-making institutions that meet the tracking requirements, it is fair in the sense that it does not violate the principle of equality, and so is uniquely consistent with the rule of law as applied to the constitution. (Gaus, 1996: 253)

Now let us look at some of the details. Gaus highlights two implications of the rule of law. The first is constitutionalism: the substantive principles of a liberal constitution specify those proposals that have been defeated, such as establishing a religion, and those principles that have been victoriously justified, such as free speech (Gaus, 1996: 207). Hence, the umpire is only empowered to adjudicate disputes *within* the optimal eligible set (Gaus, 1996: 211). Gaus (1996: 239) rightly maintains that without a basically just constitution (that is, one that protects victoriously justified principles) liberal politics is impossible. The second component of the rule of law is the political equality principle:

> All inequalities of political authority must be justified; inequalities within the law-making institution must be conclusively justified. Inadequately justified differences in political authority are unjust. (Gaus, 1996: 252)[4]

Equality is thus a sort of baseline or default in the public justification of democratic institutions: 'law-making institutions must not be characterized by political inequalities unless they can be conclusively justified' (Gaus, 1996: 290).[5] Procedural equality implies anonymity and neutrality. *Anonymity* requires that the procedure's results are invariant when the voters' identities are changed, but the overall structure of preferences remains unaltered. Mill's plural voting scheme, for example, violates anonymity. *Neutrality* requires that it is equally easy or difficult for different individuals' positions to be upheld by the umpire; the process should not be biased towards some results rather than others.

Gaus (1996: 251) makes clear that the non-coercion principle is the deeper principle in that it is a basic principle of social morality, whereas the equality principle is a component of the rule of law and applies only to office-holders (including voters). Gaus (1996: 163–5) rejects equality as a basic moral principle, according to which the onus of justification rests on every person who would make distinctions. Since the non-coercion principle is the deeper principle, it can be the basis for departing from procedural equality.

JL says surprisingly little about the justification of the political equality principle. The basic idea is that our interest in public justification is ultimately practical (rather than purely epistemological) and that the achievement of this practical aim is predicated on the fair resolution of disputes:

> For justificatory liberalism the ideal of the rule of law has a *telos* – resolving conflicts fairly and providing a framework for cooperation through decisions by an umpire – and so contains within it the criteria of its own perfection. That the *telos* is a *fair* resolution of disputes merits emphasis. A cardinal virtue of umpires is fairness or impartiality. (Gaus, 1996: 198, original emphasis)

Gaus (1996: 253) thus characterizes his argument for democracy as a mixture of consequentialist and fairness considerations. Yet, despite this pride of place given to fairness,

Gaus's discussion of departures from equality in JL is strikingly unbalanced. When he discusses Mill's plural voting scheme (Gaus, 1996: Ch. 14) and strong judicial review with judges as moral experts (Gaus, 1996: Ch. 16), his focus is on the ways in which the arguments for these departures from equality are inconclusive. In contrast, his own case for super-majoritarian procedures is completed (Gaus, 1996: Ch. 13) *before* he elaborates on the political equality principle (Gaus, 1996: Ch. 14); and he does not even explicitly consider the questions of whether and how this case might be inconclusive.

So let us turn to Gaus's argument for super-majoritarianism.[6] The basic intuition is clear: since the non-coercion principle establishes a *moral* bias against coercion, legislative procedures must establish an *institutional* bias against legislation. He observes that the democratic umpire can make two types of mistake: enacting 'tyrannical laws' that are not in the eligible set (false positives) and not enacting any laws when the set is non-empty (false negatives). His core idea is that the non-coercion principle implies that the former is worse than the latter. Hence: 'the stringency of the requirements for justified impositions indicates that a system of adjudication should display a bias against justifying impositions' (Gaus, 1996: 239); 'a system with a general bias against legislation can be justified to all' (Gaus, 1996: 240).

Gaus believes that this general argument works in two distinct cases: when there is agreement on the optimal eligible set and when there is disagreement on this set. For the case of *agreement* on the set, he says:

> Suppose, for a moment, that we could be sure that all the competing judgments [about justice and the common good] fell into this category [of undefeated and unvictorious judgements, that is, the optimal eligible set]. In this case our ideal liberal contractors would endorse a bias against legislation because the onus of justification is on those who would limit the liberty of others. Insofar as all the competing judgments are genuinely inconclusive, no one can claim it is a fundamental injustice if her or his favoured legislation is not enacted. (Gaus, 1996: 238)

For the case of *disagreement*, the crucial assumption is that there are 'wrong-headed' voters or representatives. Wrong-headed reformers wrongfully insist that some proposal is in the eligible set and thereby create the danger that democratic adjudication leads to false positives (tyrannical laws). Conversely, wrong-headed conservatives insist that some proposal is not in this set, when in reality it is, thereby creating the danger of false negatives, that is, justified, but not enacted laws. While the problem of wrong-headedness is symmetric, the non-coercion principle seems to demand a bias against wrong-headed reformers: 'procedures that make it difficult to enact laws are the main defense against those who would mistakenly press defeated or merely inconclusive proposals as eligible for adjudication, thus meriting legislative consideration' (Gaus, 1996: 239). Gaus gives the example of the Clintons' health-care plan, which is perhaps also applicable to Obama's health-care plan. Many opponents of these plans 'insist that no health care crisis exists, at least in a way that implies that an injustice is occurring' (Gaus, 1996: 239). With respect to political equality, Gaus agrees that if a system were biased against all the views of, say, Betty, this would be unacceptable. However, when the

system is biased against Betty because she advocates legislation (for example, health-care reform), she can be given 'good reason' for this (Gaus, 1996: 240).

3. Why justificatory liberalism implies majoritarian democracy

This section argues that Gaus's case for super-majoritarian democracy fails. The theory in JL implies majoritarian (or otherwise neutral) democracy – at least in the absence of special conditions such as structural minorities. The discussion focuses on the case of disagreement on the optimal eligible set (Subsection 3.3). First, however, I briefly consider the case of agreement on this set (Subsection 3.1) and a basic methodological issue in justifying political procedures (Subsection 3.2).

3.1. Agreement on the optimal eligible set

Gaus's argument for the case of agreement about the optimal eligible set is that the members of the public would endorse a bias against legislation because the onus of justification is on those who would limit liberty (see Section 2). This argument is invalid, because, by definition of the eligible set, all of its proposals are conclusively justified against the case of no law at all. As he acknowledges in later work, all proposals 'possess precisely the same degree of public justification' (Gaus, 2010b: 205), so that there is no basis for institutionally privileging some of them over others. No one can claim it is a fundamental injustice if a proposal within the set not favoured by him or her is enacted. *Ex hypothesi*, there are no tyrannical laws on the table. Moreover, the political equality principle implies that there is an important form of injustice if there is an unjustified institutional bias against legislation *within* the optimal eligible set.

3.2. Decision procedures in non-ideal circumstances

The following discussion concerns a non-ideal world with potentially wrong-headed, strategic, and (partially) self-interested actors. These real-world complications play a central role in Gaus's discussion of decision procedures in JL. It is important to note, therefore, that reasonable disagreement about how to deal with these complications may be sufficient to undermine any argument for super-majoritarian decision rules. Consider two examples.

First, real-world actors may behave strategically in order to further their narrow self-interest, and super-majority rules may reinforce such behaviour. This problem of strategic behaviour has led authors such as Goodin (1996: 340) to reject minority vetoes. Gaus (1996: 272–3) voiced concerns very similar to Goodin's, but came to a different conclusion.

Second, some of Gaus's arguments emphasize the real-world importance of transaction costs. Most notably, he claims that direct democracy and other radical democratic schemes are not publicly justified even if they were epistemically superior to representative democracy in an ideal world without transaction costs (Gaus, 1991: 271–2). His arguments for super-majoritarianism, however, neglect transaction costs, even though these costs tend to create a sort of natural status quo bias in political processes (see Lupia

and McCubbins, 2005: 610). Another well-researched source of natural bias is psychological: 'the status quo bias is a general source of opposition to reform even when people regard the consequences of reform as an improvement' (Baron et al., 2006: 126). Both forms of natural status quo bias may render super-majoritarian procedures superfluous.

While these sorts of empirically based objections alone may be sufficient to undermine Gaus's arguments, the following discussion focuses on more basic conceptual objections. Ultimately, though, the two types of objections are related. The reason, as we will see, is that in a more ideal world without strategic behaviour and transaction costs, certain conceptual objections could likely be circumvented through the use of very complex decision procedures that would be extremely vulnerable to the problems of strategic behaviour and transaction costs.

3.3. Disagreement on the optimal eligible set

In the case of disagreement on the optimal eligible set (that is, with wrong-headed agents), Gaus's idea is that the justified non-coercion principle can justify a bias against legislation. Yet the kind of non-coercion principle that can reasonably be said to be publicly justified is much too vague and abstract for this purpose. Gaus implicitly shifts to a highly specific and sectarian interpretation of the non-coercion principle. I focus on three areas of reasonable disagreement: (1) the basic conception of the principle, (2) the conception of state coercion, and (3) the relationship between the non-coercion principle and a harm principle that Gaus also considers to be publicly justified (see Sub-subsections 3.3.1–3.3.3, respectively).

3.3.1. The conception of the non-coercion principle. This conception is not spelled out in JL, but Gaus's argument clearly requires a distinctly deontological view, as he clarified in OPR. There he distinguishes a consequentialist 'Baseline View' of state coercion from a deontological 'Rights View' (Gaus, 2011a: 486–7). According to the former, a non-coercive state of affairs does not stand in need of justification, but all departures from it do. According to the rights view, there is a right not to be coerced, so that coercion needs to be justified, regardless of whether we are in a state of affairs with little or much coercion. Gaus (2011: 487) insists that some critics have mistakenly ascribed to him the baseline view (see Christiano, 2008: 220–1; Lister, 2010).

Gaus (2011: 487) contends that both views 'lead to a rejection of the neutrality constraint on legislative processes'. For the baseline view, though, this is only part of the truth. Gaus is correct that if we are in a state with lots of liberty, all moves towards lesser liberty must be justified while staying at the liberty baseline does not. Yet the baseline view also implies that if we are in a state with much coercion, and proposals are made that would reduce it, the legislative process should be biased *in favour of* the proposal. Moreover, there will often be a great deal of reasonable disagreement about what kind of state we are in and what state a new proposal would move us into. It is clear, therefore, that the baseline view cannot justify super-majority rules as the standard decision procedure.

To justify these rules, Gaus would thus have to claim that the baseline view is unreasonable. He seems to do so by stating that it is 'clear that the [non-coercion] principle

does not specify a goal that coercion be reduced' or 'that unjustified coercion be minimized' (Gaus, 2011a: 485). However, while he provides arguments for preferring the rights view, he gives no reason why the baseline view should be outside of the eligible set of interpretations of the non-coercion principle. He states that normal moral agents do not find deontic reasoning 'bizarre or clearly wrong', but the same is true with respect to consequentialist reasoning (Gaus, 2011a: 489). It is unclear how a deontic non-coercion principle could be justified to all members of the public.

3.3.2. The conception of state coercion. The specific conception of the non-coercion principle is of limited importance, however, because even with a deontological conception in place, the argument for super-majority rules requires a disputable conception of state coercion. Gaus makes the assumption that the *passing* of a legislative proposal in some sense realizes and completes the coercive act. This model of the state is certainly not uniquely reasonable – if it is reasonable at all. Compare the following two views on the coerciveness of laws.

> *Realization view*: While the coerciveness of a law is ultimately based on its enforcement, the passing of a law in some sense realizes, and completes, the coercive act.
>
> *Authorization view*: Passing a law is a non-coercive act, which authorizes coercive acts and typically leads to a continuous pattern of such acts.

Gaus seems to embrace the realization view. Thinking about a coercive law in terms of the 'formal text' is a useful 'simplification' for him; and while a more sophisticated view must take enforcement into account, 'we cannot introduce all the complications at once' (Gaus, 2011a: 480).

The authorization view starts from the observation that when a law is passed in the legislature, there is no coercion of citizens involved. Legislators merely get together, talk, take votes, and eventually publish a document in a certain way. What makes a law coercive is the threat of coercive acts in enforcing this law. For this threat to be credible, there must usually be some pattern of actual enforcement. The coerciveness of law is thus derived from its enforcement. Moreover, the coercive act is in no way completed by the passing of the law. To the contrary, actual coercion usually starts *after* the law has come into effect. The authorization view therefore has no problem dealing with special cases. For instance, Gaus admits that there are non-coercive laws, for example, a purely educational campaign. The realization view can only deal with this by allowing an exception in which the individual law is *not* the unit of analysis, but has to be evaluated in conjunction with some other (taxation) law (Gaus, 2009: 91–2). The authorization view needs no exception here because it evaluates *every* law based on whether it has coercive *consequences*; and since an educational campaign requires funding, it is likely to have such consequences. Another special case is laws that are passed, but not enforced. The German Constitutional Court once nullified a tax law on the basis that the tax could not be enforced for certain types of incomes, thus leading to violation of the equality principle in taxation. If a law is published, but not coercively enforced, and if this non-enforcement is common knowledge, the law is not obviously coercive.

The authorization view does not imply super-majority procedures, because if coercion is in the enforcement of laws, the moral asymmetry between coercion and non-coercion does not create an asymmetry between the (potentially wrong-headed) proponents and opponents of new laws. The authorization view requires that we apply the right not to be coerced (assuming that there is such a right) to the coercive acts of enforcement rather than the legislative acts of authorization. For instance, Gaus (2011: 522–5) argues in OPR that a higher tax rate (80 percent instead of 20 percent) increases the number of coercive acts by that state (that is, in the form of penalties) and the coerciveness of these acts (in the sense of increasing taxpayer's costs of taking certain actions). Yet if the state wanted to pass an amendment law that reduced the tax rate from 80 percent to 20 percent, the realization view would imply a bias *against* this law. This is a crucial problem for Gaus, which he does not discuss.[7] The authorization view leads to a different result, regardless of whether or not we assume agreement on the consequence of the tax reduction.[8] If there was agreement that the tax reduction would result in fewer coercive acts (for example, because the amendment law links tax reduction to expenditure reduction), the non-coercion principle would require that there be no bias against the new law, and perhaps even a bias in its favour. In the case of disagreement about the consequences (for example, because some believe that the tax reduction will result in an increase of some other, more coercive tax), the problem of wrong-headedness would be symmetric. Coercive acts outside of the optimal eligible set could result not only from wrong-headed reforms, but also from wrong-headed non-reforms. The authorization view implies that the problem of wrong-headedness is symmetric after all, so that the case for super-majoritarian procedures disappears.

But we have to be careful here. The problem of wrong-headedness is symmetric with respect to acts of authorization (that is, laws), not with respect to acts of *coercion*. Based on the authorization view, Gaus could define the optimal eligible set with respect to coercive acts of enforcement and defend a sort of 'temporally neutral' minority veto applying to all present acts of coercion. That is, if a minority of some size, say, 35 percent, is given the legal right to veto *new* authorizations of coercion, it should also have the right to veto *past* authorizations. This veto would allow a minority of some size to repeal any law and thus force the democratic state to either pass a new law with super-majoritarian support or to eschew legislation, thus letting (market) society decide.

For the minority veto envisaged by Gaus, in contrast, temporal sequences of legislation are crucial. Consider one of his examples in OPR (Gaus, 2011a: 488–9). A law L is proposed to replace existing law K, with the effect that a large group g_1 is coerced much less than before, whereas a smaller group g_2 is coerced somewhat more. Gaus (2011: 489) insists that the coercion of g_2 must still be justified and that a law such as L, which moves us to a more just or less coercive state, is not 'necessarily justified'. This is certainly correct, but irrelevant for the issue of decision rules. The question is not whether L must be justified (of course it must), but whether an *institutional bias* against L and in favour of K is justified. Based on the authorization view, this is not the case. Since laws authorize a continuous pattern of coercive acts, there is a continuous need to justify these acts of enforcement. It is far from clear why the requirement of public justification should end with the publication of some document. For instance, an existing law may turn out to be a false positive based on a wrong-headed proposal. Alternatively, it may

have been within the optimal eligible set in the past, but moved out of it due to changed background conditions or changes in other laws. It is Gaus who thinks that some coercion is 'necessarily justified': he assumes that the coercion of g_1 is justified in the future simply because it was authorized in the past. In contrast, a temporally neutral minority veto would treat the two laws *K* and *L* as if they were alternatives considered simultaneously.

This type of veto raises many positive and normative questions, and it is far from clear that it could be a stable institution.[9] Yet the point of the discussion has not been to propose this veto, but to show that a consistent argument for Gaus's temporally discriminating minority veto must be based not only on the rights view of the non-coercion principle, but also on the realization view of state coercion (or something close to it). By adopting these views, Gaus turns the generic presumption against coercion into a specific presumption against *changes in a given pattern of coercive acts* and hence in favour of legislative stability. Standard super-majority rules create an institutional asymmetry between reformers and conservatives that has no justification in the generic asymmetry between coercion and non-coercion.

3.3.3. The relationship between the non-coercion and harm principles. Even if there was a uniquely justified specification of the non-coercion principle that could justify a (temporally neutral) minority veto, we also need to specify the principle's relation to other justified principles, especially the harm principle. Gaus (1996: 174) embraces a generic harm principle as conclusively justified in JL and elaborates on it in his *Social Philosophy* (1999).[10] In the latter, Gaus characterizes harm and the harm principle as follows:

> Alf's action X harms Betty if X sets back or prejudices Betty's welfare interests, where this set-back does not depend on any belief of Betty's that Y is perverse, wrong, bad, or immoral. According to the harm principle, that Alf's X-ing harms Betty is always a relevant reason for justifying a limitation of Alf's liberty to X. (Gaus, 1999: 149–50)

Of course, the mere fact that Alf harms Betty does not show that the regulation of his action could be publicly justified. But:

> The finding that an act is harmful does not show that it is wrong; *what it does do is reverse the onus of justification*. According to the Liberal Principle, a person is free to act, and need not provide any justification for her actions … However, once it has been shown that Betty's *X*-ing is harmful, an initial case for interference has been made out. Betty thus has a charge to answer: her doing *X* is harmful to others, why should she be allowed to *X*? *It is now up to Betty to provide reasons why, despite the harm done by X-ing, she should still be free to X.* (Gaus, 1999: 150, original emphasis)

The problem is that Gaus has not applied this idea of reversed onus to the discussion of decision rules (1996: 215–45). To do this, we have to distinguish two stages of decision-making. The first stage is about whether there is harm (call this the *harm question*); the second about whether harm, if it has been established, needs to be regulated (the *regulation question*). In a world with wrong-headedness, but without strategic behaviour, liberal contractors might agree on a two-stage decision procedure. Gaus's arguments for

super-majoritarianism would apply to the first stage. We might assume that the showing of harm must be conclusive, and since the non-coercion principle implies that false positives (seeing harm where none exists) are worse than false negatives (not seeing harm where it does exist), there could be a sort of minority veto against establishing harm. Once harm is established, however, reversed onus also reverses the argument for the minority veto: there should thus be a bias *in favour of* regulation at the second stage.

For a world with strategic behaviour and transactions costs, though, this two-stage procedure is extremely difficult to justify. One problem is how to implement the second-stage bias without creating a great deal of legislative instability. Another problem is strategic behaviour at the first stage: the two-stage procedure creates very strong incentives for legislators to anticipate the result of the second stage and adjust their verdict accordingly. Assume, for instance, that a major financial crisis has made clear that the internal practices of large banks and other financial institutions (for example, their low capitalization) can be extremely harmful for the large majority of citizens. However, while market-friendly legislators would readily accept this harmfulness at the first stage, they fear that regulation would be unjustifiably strict or that banks would be nationalized at the second stage. The two-stage procedure would thus provide these legislators with a strong incentive to misrepresent their true beliefs at the first stage and wrongfully deny existing harm.

In light of these problems, a majoritarian procedure which decides the harm and the regulation question simultaneously seems as reasonable as the two-stage procedure with shifting minority vetoes. Moreover, if there is reasonable disagreement about how to deal with these problems, the majoritarian procedure is required by the egalitarian baseline. Hence, even if we were to accept Gaus's deontological rights view and the basic idea of a (temporally neutral) minority veto against coercive acts, reasonable disagreement about the harm of non-legislation renders the general case for such a veto inconclusive.

In sum, once we take account of the full range of relevant reasonable disagreements, the theory in JL implies a majoritarian or otherwise neutral form of democracy – at least in the absence of special conditions such as structural minorities. Note that this conclusion is close to Gaus's own position when he began to develop his account of liberal democracy (1991: 277–8). It follows directly from the combination of an equality baseline in institutional design and deep reasonable disagreements about departures from this baseline. Gaus's theory thus offers an alternative way to argue for the kind of democracy defended in more foundationalist egalitarian theories (for example, Christiano, 2008). In JL, Gaus wants to avoid this conclusion, but this avoidance is predicated on sectarian theoretical commitments.

4. Equality and history in the order of public reason

In OPR, Gaus chooses a different way to avoid the justification of majoritarian democracy. He effectively abandons the egalitarian baseline in democratic design and moves to an entirely instrumentalist justification of a broad set of rights-protecting political regimes, within which history selects. This revised theory is consistent with a sectarian preference for super-majoritarianism, but it provides only a weak justification of

democracy. I start with a rough summary of some basic features of OPR and then offer four comments on Gaus's revised position.

Gaus has moved away from the social contract tradition and towards a more evolutionary account of the authority of the liberal democratic state. He now insists that 'justified social morality does not reduce to justified law' (Gaus, 2011a: 449). A member of the optimal eligible set of social rules or norms can be selected by a path-dependent process of social or cultural evolution. This process may lead to a strategic (correlated) equilibrium on one member of the eligible set, so that every member of the public has reason to follow the norm if others do so as well. The norm is in this sense authoritative even if it is not seen as uniquely best by every citizen – and even if the historical process that selected it could not itself be publicly justified (Gaus, 2011a: 392). Hence a social process that itself need not be justified can lead to a uniquely justified outcome without resort to the political process (Gaus, 2011a: 455, Gaus, 2012: 122–23). Democracy is not the only way of choosing within the optimal eligible set.

Representative democracy is still considered justified, but Gaus's justification has changed. In OPR, he draws heavily on his justification in JL, but the political equality principle is not mentioned. He claims that 'only law-making procedures that are widely responsive to the judgments of the citizenry are reliable protectors of basic individual rights' (Gaus, 2011a: 451–2) and that there is 'no plausible case that nondemocratic regimes could … qualify' (Gaus, 2011a: 454). The eligible set of political regimes includes those that are, by being widely responsive, reliable protectors of abstractly justified rights of agency and jurisdiction. In other recent writing, he still seems to embrace some sort of vague fairness principle, but now argues that its implications are subject to reasonable disagreement and thus cannot provide any significant guidance (Gaus, 2011b: 89). Gaus thus seems to have either abandoned the political equality principle or the idea that this principle has any significant implications on which the members of the public could agree. There is no equality baseline anymore in institutional design.

As a consequence, Gaus (2011: 454) now also rejects the idea that fairly specific types of democracy can be conclusively justified: members of the public can have 'reasonable differences about how to rank different democratic regimes'. Within the set of widely responsive political regimes, history must choose. Gaus (2011: 455) sees types of democracy as equilibria that have a path-dependent history and which are also based in informal social morality in the form of a political-moral culture.

> Political authority too relies on informal social authority – an evolution of a political culture leading to the selection of one of a wide range of acceptable political systems … [T]he state thus understood is itself a development of social morality, and so like all social morality it is the result of numerous individual choices over a long process that leads to a specific social equilibrium. Again, this is not a collective 'we choice' that we make together, or a one-time social contract or constitutional convention. It is an ongoing social choice, arrived at by a path-dependent history, and continually reaffirmed by the choices of its members. (Gaus, 2012; see also Gaus, 2011a: 455)

I believe that Gaus's complex theory of social morality in OPR is of great importance, and I cannot do justice to it here. Based on the discussion in Section 3, however, I want to

make four more comments on his revised position on justified decision procedures. First, while Gaus has moderated his defence of super-majoritarianism, he continues to see it as a *constraint* on the eligible set of justifiable political regimes. He now accepts that in a deeply unjust society one may well 'favour systems that incline towards majoritarianism' (Gaus, 2011a: 459). Yet he denies that 'we should ever aim at legislative systems that are strictly neutral between imposing and not imposing laws ... for ... all coercive legislation, even that which improves our system of morality, must overcome a presumption against employing force against persons' (Gaus, 2011a: 459; also see Gaus and Vallier, 2009). As argued above, though, the idea that super-majoritarianism is a constraint on the eligible set of regimes has to be rejected. Gaus could at best defend super-majoritarianism as a sectarian preference *within* the eligible set. This is rendered permissible by his rejection of an (effective) political equality principle. Yet this rejection, together with the kind of reasonable disagreements about the non-coercion principle discussed in Section 3, might also allow highly power-concentrating systems such as the British 'Westminster' system into the eligible set, as long as they are minimally responsive to the citizenry and protect basic rights.

Second, Gaus's evolutionary account of political authority is merely a rough sketch that leaves many questions unanswered. Most notably, it neglects the important ways in which the emergence and change of a political order differ from the decentralized evolution of social morality. For one thing, constitutional change involves the centralized strategic bargaining of political elites. For another, this bargaining is decisively structured by the meta-procedures for changing and amending the constitution. The process of constitutional change is a highly political process. Note especially that when meta-procedures for constitutional change are themselves super-majoritarian, or otherwise highly restrictive, they can lock in decision procedures for normal legislation even when a large majority of the population dislikes them or sees them as unjust. In the recent constitutional reform process in Germany, for instance, all parliamentary parties (representing almost all of the German electorate) agreed on the goal of reducing the veto power of the second chamber in order to strengthen the democratic rights of the majority, but the constitutional veto power of states made far-reaching reform infeasible (Ganghof, 2010: 690). Similarly, in the USA inequality-reducing reforms of the Senate or the Electoral College seem out of the question (and thus not really worth much political energy and deliberation) simply due to highly restrictive meta-procedures. It is thus unclear how the political processes in countries such as Germany or the USA can be said to be 'continually reaffirmed' by citizens in a sort of pre-political social process.[11] The process of changing the political order is not a pre-political social process, but a highly political (and potentially biased) process that requires justification.

Third, since Gaus's justification of democracy has become more minimal and fully instrumentalist, it can easily be extended to meta-procedures. For these procedures, too, we can think of an optimal eligible set defined by the requirement of basic rights protection. However, we have very limited knowledge about which meta-procedures promote (*in the long run*) procedures for normal legislation that promote rights protection. The bounds of the eligible set of meta-procedures are vague at best. I think a similar problem exists for Gaus's justification of democracy in general. Based on the available knowledge in political science, it is far from clear what the bounds of the eligible set of political

regimes are. More specifically, it is unclear if and how pure instrumentalism can keep all non-democracies or partial democracies out of this set. While there is a correlation between 'democracy' and 'rights protection', it remains rather unclear which aspects of democracy are related to what kinds of basic rights protection, and under what background conditions.[12] Depending on the operational definition of democracy (which Gaus does not provide), there may exist non-democracies or partial democracies that are as reliable or unreliable in protecting important basic rights as are full democracies. Gaus himself argued in JL that many different regimes may achieve wide responsiveness and thus rights protection, including 'Mill's plural voting scheme' or 'a regime in which the aristocracy proposes law but the commoners reject them' (Gaus, 1996: 288–9). Another example is Switzerland prior to the introduction of female suffrage in 1971. If we plausibly assume that basic rights of agency and jurisdiction were protected in Switzerland before 1971, Gaus's instrumentalist view seems to imply that the sort of liberal-male guardianship regime in Switzerland was sufficiently justified and that demands for female suffrage were sectarian, perhaps based on some contestable conception of political equality. In my view, these examples suggest that a robust justification of democracy requires at least some minimal reasonable agreement on an effective political fairness principle.

Finally, if we assume that such a principle can be agreed upon, this might also have important implications for Gaus's discussion of fairness considerations in the social evolution of norms. One crucial fairness problem results from the fact that social evolution *in the real world* may be driven by a great deal of political power and private coercion. Gaus readily admits that 'many of our current rules were simply imposed on society by the powerful' (2011: 416). Yet, in thinking about how members of the public might react to this obvious lack of fairness in the selection from the eligible set, he considers, and rejects, only two extreme and implausible fairness requirements. One is that every justifiable rule must have a perfectly fair evolutionary history (Gaus, 2011a: 417). The other is that the members of the public agree on a distributive norm of 'meta-fairness', according to which the *outcomes* of social evolution must in some sense fairly satisfy the evaluative standards of each (Gaus, 2011a: 406–9). I think there is a more plausible and empirically relevant possibility: the members of the public may see social evolution and political democracy as *complements*. That is, they may accept the lack of procedural fairness in social evolution *because* there is a fair political procedure that can, at least in principle, authorize changes within the eligible set.

One familiar objection to this idea is that a fair political procedure might lead to unstable ('cyclical') decisions within the eligible set, as one majority coalition can be quickly replaced by the next. However, transaction costs and psychological status quo bias tend to reduce cycling in the real world (Lupia and McCubbins, 2005). Moreover, the remaining *potential* for cycling implied by a fair majoritarian process may be valuable to the members of the public in two ways.[13] It may be intrinsically valuable in that it publicly expresses the equality of citizens in a way that social evolution cannot; it allows citizens to *see* that they are members of a minimally just regime.[14] It may also be instrumentally valuable by increasing the willingness of agents with strong fairness concerns to accept not only the results of the legislative process as binding, but also those of social evolution. If individual agents feel that their own evaluative standards were deprived of

fair consideration in social evolution *and* in the political process, their acceptance of social rules may be reduced. More technically, fairness concerns could enter some agents' utility functions so that proposals with a coercively biased history are eliminated from the eligible set.[15] By addressing such fairness concerns, therefore, the *availability* of a fair democratic process could help to *constitute* a sizeable eligible set in the process of social evolution. Moreover, it could do so even if (due to natural status quo bias) actual political efforts to change the results of social evolution are rare and hardly ever successful. Social evolution and political democracy may be complements rather than alternatives.

5. Conclusion

What, if anything, does public-reason liberalism imply for the design of political regimes? The answer, I have argued, depends on whether we assume reasonable agreement on a sufficiently specific political equality principle. If we do not, the ideal of public reason only implies the instrumentalist idea that eligible political regimes must protect justified rights or principles. What is less clear is if and how the eligible set of regimes can be restricted to full democracies. Moreover, Gaus's additional claim that all eligible regimes are super-majoritarian must be rejected as sectarian. His justification of super-majoritarianism relies on a reasonably objectionable conception of the non-coercion principle and it ignores the way in which the harm principle reverses the onus of justification.

If we do assume reasonable agreement on an effective political equality principle, the implications of Gaus's theory resemble those of more foundationalist egalitarian theories. The same principle that leads to a robust justification of democracy also implies, except under special conditions, a fairly majoritarian (or otherwise neutral) *type* of democracy. Since significant departures from the equality baseline in institutional design tend to be subject to reasonable disagreement, majoritarian democracy is often justified by default.

Notes

I thank Peter Dietsch, Thorsten Hüller, Peter Niesen, Andrew Lister, Peter Rinderle, Fritz W. Scharpf, Fabian Wendt, *PPE*'s anonymous reviewers, and especially Jerry Gaus for many helpful comments and discussions.

1. I use the terms 'qualified' and 'reasonable' interchangeably. No specific conception of reasonableness is assumed.
2. Throughout the article, I use 'non-neutral' and 'super-majoritarian' interchangeably. I thereby assume that decision procedures must be determinate, that is, they must be able to select between any pair of options. The idea of an umpire requires determinacy. Super-majoritarian decision rules can be neutral between alternatives if indeterminacy is accepted. See Goodin and List (2006) and Gaus (2008).
3. Throughout this article, I focus on (simple) majority rule, but am agnostic as to whether there are other fair procedures that are generally or sometimes superior to majority rule. See, for example, Risse (2004) and Saunders (2010).

4. Rawls proposed a similar baseline, requiring that political inequalities 'must always be justified to those in the disadvantaged position' (1999: 203).
5. Gaus (1996: 199) introduces the principle before stating it explicitly.
6. Gaus (1996: 243–5, 2011: 529–45) distinguishes between two types of functions of the state: the first, necessary function is to interpret and protect the abstract rights or moral claims of citizens; the second type of 'optional' functions includes efforts to correct market failures and increase efficiency. Here the focus is only on the first function.
7. He only comments on the case in which a law is repealed. He insists that repealing a law is not coercive (Gaus, 2011a: 488).
8. Gaus (2011: 525) acknowledges there may be reasonable disagreement about whether the tax reduction leads to less coercion.
9. There might be institutional alternatives to a temporally neutral minority veto, such as a generalized sunset clause, which requires every law to be repassed, and thus rejustified, after some number of years. Such a clause would greatly increase political transaction costs.
10. OPR also refers to *Social Philosophy* for a more detailed discussion (Gaus, 2011a: 358).
11. My reading of the empirical evidence suggests that when meta-procedures are permissive, majoritarian democracy (that is, democracy that combines proportional representation and legislative majority rule) constitutes a deep equilibrium (Ganghof, 2010).
12. For a useful discussion (which tends to support Gaus's view), see Christiano (2011), as well as the literature cited therein.
13. Of course, cycling ought to be limited to the eligible set. I believe that this is the proper task of a just constitution and a (weak) system of judicial review.
14. This idea of *seeing* procedural fairness realized is highlighted and elaborated in Christiano (2008). I think it also plays a role in Rawls's work (see Weithman, 2012).
15. Gaus dismisses this possibility (2011: 417).

References

Baron J et al (2006) Enlarging the societal pie through wise legislation: A psychological perspective. *Perspectives on Psychological Science* 1: 123–32.

Christiano T (2008) *The Constitution of Equality: Democratic Authority and its Limits*. Oxford: Oxford University Press.

Christiano T (2011) An instrumental argument for a human right to democracy. *Philosophy and Public Affairs* 39(2): 142–76.

Ganghof S (2010) Democratic inclusiveness: A reinterpretation of Lijphart's patterns of democracy. *British Journal of Political Science* 40(3): 679–92.

Gaus GF (1991) Public justification and democratic adjudication. *Constitutional Political Economy* 2(3): 251–81.

Gaus GF (1996) *Justificatory Liberalism: An Essay on Epistemology and Political Theory*. New York: Oxford University Press.

Gaus GF (1999) *Social Philosophy*. Armonk, NY: ME Sharpe.

Gaus GF (2008) The (severe) limits of deliberative democracy as the basis for political choice. *Theoria* 55(117): 26–53.

Gaus GF (2009) The moral foundations of liberal neutrality. In: Christiano T and Christman J (eds) *Contemporary Debates in Political Philosophy*. West Sussex: Blackwell, pp. 81–98.

Gaus GF (2010a) Coercion, ownership and the redistributive state: Justificatory liberalism's classical tilt. *Social Philosophy and Policy* 27(1): 233–75.

Gaus GF (2010b) On two critics of justificatory liberalism: A response to Wall and Lister. *Politics, Philosophy and Economics* 9(2): 177–212.

Gaus GF (2011a) *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*. New York: Cambridge University Press.

Gaus GF (2011b) Between discovery and choice: the general will in a diverse society. *Contemporary Readings in Law and Social Justice* 3(2): 70–95.

Gaus GF (2012) Justification, choice, and promise: Three devices of the consent tradition in a diverse society. *Critical Review of International Social and Political Philosophy* 15: 109–27.

Gaus GF and Vallier K (2009) The roles of religious conviction in a publicly justified polity: The implications of convergence, asymmetry, and political institutions. *Philosophy and Social Criticism* 35(1–2): 51–76.

Goodin RE (1996) Institutionalizing the public interest: The defense of deadlock and beyond. *American Political Science Review* 90(2): 331–42.

Goodin RE and List C (2006) Special majorities rationalized. *British Journal of Political Science* 36(2): 213–41.

Lister A (2010) Public justification and the limits of state action. *Politics, Philosophy and Economics* 9(2): 151–75.

Lupia A and McCubbins MD (2005) Lost in translation: Social choice theory is misapplied against legislative intent. *Journal of Contemporary Legal Issues* 14: 585–617.

Quong J (2010) *Liberalism without Perfection*. Oxford: Oxford University Press.

Rawls J (1999) *A Theory of Justice*, revised edn. New York: Oxford University Press.

Risse M (2004) Arguing for majority rule. *Journal of Political Philosophy* 12(1): 41–64.

Saunders B (2010) Democracy, political equality, and majority rule. *Ethics* 121(1): 148–77.

Wall S (2010) On justificatory liberalism. *Politics, Philosophy and Economics* 9(2): 123–49.

Weithman P (2012) Legitimacy and the project of political liberalism. In: Brooks T and Nussbaum MC (eds) *Rawls's Political Liberalism*. New York: Columbia University Press.

About the author

Steffen Ganghof is Professor of Political Science at the University of Potsdam, Germany. His publications include *The Politics of Income Taxation: A Comparative Analysis* and articles in journals such as the *British Journal of Political Science*, *Comparative Political Studies*, *Journal of European Public Policy*, and *Party Politics*.