

Res Publica (2014) 20:9–25
DOI 10.1007/s11158-013-9223-9

Legitimacy, Democracy and Public Justification: Rawls' Political Liberalism Versus Gaus' Justificatory Liberalism

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Published online: 13 August 2013
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Abstract Public justification-based accounts of liberal legitimacy rely on the idea that a polity's basic structure should, in some sense, be acceptable to its citizens. In this paper I discuss the prospects of that approach through the lens of Gerald Gaus' critique of John Rawls' paradigmatic account of democratic public justification. I argue that Gaus does succeed in pointing out some significant problems for Rawls' political liberalism; yet his alternative, justificatory liberalism, is not voluntaristic enough to satisfy the desiderata of a genuinely democratic theory of public justification. So I contend that—pace Gaus, but also Rawls—rather than simply amending political liberalism, the claims of justificatory liberalism bring out fatal tensions between the desiderata of any theory of liberal-democratic legitimacy through public justification.

Keywords John Rawls · Gerald Gaus · Legitimacy · Liberalism · Public justification · Public reason

Introductory

Since the early 1990s the language of public reason and public justification¹ has clearly been playing a pivotal role in contemporary theories of liberalism.² What is

¹ I use 'public reason' and 'public justification' interchangeably unless otherwise specified. One may however distinguish between the two by saying that public reason is the means to public justification.

² The idea of public justification has been pioneered by Rawls (1994, 2001a, b), Nagel (1987), Macedo (1990), and others. More sophisticated theories of public reason have been put forward by D'Agostino (1996), Gaus (1996), and MacGilvray (2004). Also see D'Agostino and Gaus' (1998) edited anthology on public reason.

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somewhat less clear is what exactly are the normative commitments guiding the general thought that the exercise of liberal political authority must be justifiable to those who are subject to it, and to what extent publicly justified polities manage to satisfy those normative commitments. In other words, from what premises would it follow that (liberal) legitimacy requires public justification? And, perhaps more importantly, are those premises compatible with broader liberal normative commitments? In this paper I consider those questions through the lens of the contrast between John Rawls' 'political' liberalism and Gerald Gaus' 'justificatory' liberalism (1995, 1996, 1999, 2003a, b).³

The guiding aspiration of the idea of public justification has been lucidly expressed by a leading proponent of this approach:

The task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it [...] the search for legitimacy can be thought of as an attempt to realise some of the values of *voluntary* participation in a system of institutions that is unavoidably compulsory (Nagel 1991, pp. 33–36, emphasis added).

From that thought we can arrive at a working conjecture on the normative grounds of public justification: what distinguishes public justification theorists from other contemporary liberals is their adherence to what we may call a broadly *consent-based*⁴ account of the foundations of liberalism. They maintain that liberal polities are legitimate because they can be presented as being the object of some sort of hypothetical agreement between those subject to their authority, in so far as the public justification of political principles guarantees their acceptability. Thus it seems that at least part of what (if anything) does the normative work of legitimising political authority is the element of voluntariness conveyed by the hypothetical agreement. Crudely, that is the liberalism of Locke and Rawls.

Invoking voluntariness here may seem controversial; yet, while remaining far from actual consent, the voluntaristic element separates public justification liberals from the liberals they are keen on distancing themselves from, which we may call *substantivists*.⁵ Substantivists ground liberal legitimacy in an account of the values and virtues embodied by liberal political practices and institutions, regardless of the citizens' attitudes towards those values and institutions (hypothetical agreement or consent, on this view, may be markers of the presence of those substantive values, rather than what actually and directly legitimises the exercise of political authority). That is the liberalism of Hume, Mill, and Raz. The key difference between consent-based and substantivist liberalism, then, is that the former understands legitimacy as

³ Here I will not engage directly with the arguments of Gaus' (2010c) most recent book, as that work concerns 'social morality' rather than the narrower issue of liberal legitimacy.

⁴ I use 'consent' in order to range over the contractualism–contractarianism debate.

⁵ The consent-based versus substantivist liberalism distinction is of course related, but not equivalent to the familiar distinctions between perfectionist and neutralistic, teleological and deontological liberalism.

a *relational* concept, whereas for the latter legitimacy is non-relational.⁶ And, as I will argue, the appeal of the relational notion of legitimacy envisaged by consent theorists is that an appropriately specified acceptability relation affords normative force by conveying a measure of voluntariness.

In this paper I consider the prospects of the project of liberal legitimacy through public justification and, more broadly, the contrast between consent-based and substantivist liberalism. I argue that, while some of Gaus' arguments do point out serious problems for Rawls' view, his proposed solution nonetheless fails to meet the desiderata of public justification. In short, Gaus maintains that it is possible and desirable to strip the idea of public justification of its voluntarism whilst holding on to the idea that it is the public nature of an account of normative justifiability that does the legitimising work; but I argue that in so doing he effectively renounces what to most public justification theorists is the main attraction of their approach, namely the voluntaristic claim that public justification can reconcile the government and the governed by making political coercion in some (normatively salient) sense acceptable to those subjected to it. However, contra Rawls, I also argue that the claims of justificatory liberalism expose a problematic tension between the moralistic aspirations and the inherent populism of consent-based liberalism.

The paper's structure is this. In the first section, after briefly describing the core features of public justification and their instantiation in Rawls' political liberalism, I present Gaus' case against that theory. I break down his critique into three main arguments and discuss two of them. I then begin the second section by showing how Gaus' arguments lead to the formulation of his alternative theory of legitimacy through public justification. That sets the stage for my critical assessment of justificatory liberalism. I then briefly expand on the relevance of my analysis of the contrast between political and justificatory liberalism for an overall assessment of consent-based accounts of liberal legitimacy. In the third and final section I recapitulate my argument.

Political Versus Justificatory Liberalism

The theory of legitimacy at the core of Rawls' political liberalism grounds the authority of principles of justice characterising a political framework—a polity's constitutional essentials and matters of basic justice—by presenting them as the output of a process of public justification. The idea is to define a set of rules for the conduct of deliberation about these principles; the rules are such that, if they are (or could have been) followed, we will be warranted in saying that the citizens hypothetically consented to the chosen principles. However, principles justified through public reason do not need to be acceptable to all citizens, just to *reasonable* citizens. Reasonableness is then defined as a set of epistemological and—mainly—moral

⁶ I use 'non-relational' rather than the more controversial 'intrinsic', following Weatherson (2008, section 2.1), who also shows how relationality is a property of concepts, rather than of properties. So when consent theorists and substantivists disagree about whether a polity is legitimate they do not disagree about whether that polity has a certain property: the disagreement is about what (the concept of) legitimacy amounts to.

constraints operating on the sort of reasons that may legitimately be deployed when arguing about the principles of justice regulating the political framework. So publicly justified principles are acceptable for reasonable citizens in the sense that they will or could have been chosen without violating these citizens' freedom and equality as envisaged by the 'political conception of the person' (Rawls 1994, pp. 29–36).

Here one may argue that Rawls' notion of reasonableness is just a way of articulating the substantive values grounding liberal political authority through the argumentative device of a hypothetical agreement:

Rawls's principle of legitimacy demands that uses of political power be justified by reasons that are consistent with the constitutive requirements of being a reasonable person. [...] It seems simpler, less confusing, and more direct simply to require that reasons be such as to conform to these substantive standards: they must cohere with the constitutive requirements of reasonableness. In short, the test of what reasons people "could accept" is unhelpful, unworkable, and effectively otiose (Bohman and Richardson 2009, pp. 259–260).

In response to that argument, however, consider a more deliberative (and thus more voluntaristic and democratic) reading of Rawls. On this reading, coherence with the constitutive requirements of reasonableness is only a necessary, but not sufficient, condition for legitimacy. Reasonably justified norms become legitimate for a given polity only if they also happen to have been developed and put into place within that polity's own democratic political culture and practices—organically, as it were. So if (say) a foreign power invaded that polity and imposed equally reasonably justifiable norms, those would not be legitimate; and it seems uncharitable to not ascribe this view to Rawls (cf. Rawls 1994, pp. 66–69).⁷ As we will see below, Gaus also overlooks this deliberative reading of Rawls' position, which arguably is one of the reasons why he takes his view to be as voluntaristic as Rawls'. As should become clearer later, one may say that Gaus' account of legitimacy is geared towards the safeguard of liberal normative commitments (Gaus 2010a), whereas Rawls' seeks to strike a balance between democratic and liberal values. Arguably, then, the above argument against public justification applies to Gaus' position, but not to Rawls'.⁸

Also note how Rawls' concept of legitimacy through public justification is a relational one: 'The idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's *relation* to its citizens and their *relation* to one another' (Rawls 2001b, p. 574, emphasis added). Establishing an appropriate relation of that kind is what Steven Wall calls the 'reconciling function' of public justification (Wall 2002, p. 387). To connect that point with the above account of public justification, note

⁷ Also see the relevant discussion in the next section.

⁸ As shall become clearer below, even though Gaus' public justification requirement applies to coercive state action directly rather than to reasons used in public debate (as in Rawls' theory), Gaus' view remains less voluntaristic than Rawls' in light of that deliberative reading of political liberalism.

how Wall understands public justification in terms of two requirements, *publicity* and *acceptability*:

Reconciliation requires that some sincere intelligible justification be available for the coercive political authority. [...] That explains] why proponents of the public justification principle rightly insist on the publicity and acceptability requirements. Violation of the publicity requirement makes it difficult, if not impossible, for people to *understand* the reasons which explain why they should accept the authority that constrains them. Violation of the acceptability requirement makes it impossible for them reasonably to *accept* these reasons (Wall 2002, pp. 387–388, emphasis added).

So publicity and acceptability are necessary conditions, and their conjunction is a necessary and sufficient condition for reconciliation, and thus for liberal legitimacy. However, to get a clearer picture of how public justification aspires to political reconciliation we need to disambiguate the idea of reasonable acceptance. It seems to me that there are at least two (related) arguments why we should understand acceptability as the possibility of voluntarily acting from a reason, rather than simply the possibility of recognising something as a reason.

The first argument—as anticipated, and as will be discussed further in the next section—relies on the thought that the relation established through public justification has to convey some measure of voluntariness, lest it defeat the purpose of resorting to public justification in the first place. It is just not clear how reconciliation without an element of voluntariness could carry any normative force, at least in relation to the core liberal commitment to personal autonomy that underpins the consent view of legitimacy. And, despite the somewhat voluntaristic ring of ‘acceptability’, being able to recognise something as a reason is an epistemic rather than a volitional relation—there are no elements of choice, volition, or intention there. In other words, it does not seem enough to say that something is justified to me in an epistemic sense: to be normatively binding that justification has to connect to my agency in a normatively salient way.

Clarifying that point brings us to the second argument, which is in two steps: (a) we should hold on to a normatively salient distinction between publicity and acceptability, and (b) the only way to do so is to understand acceptability in the strong sense I just proposed. With regard to (a), simply note how we naturally and rightly want to be able to say (and mean) things along the lines of ‘I see your point, but I cannot accept it’, rather than just ‘I see your point, but I do not accept it’. Moving on to (b), the thought is that if I can understand a reason, then it should be (just) *possible* for me to accept it, even though as it happens I do not accept it: understanding a reason just means being able to conceive what it is like to accept it as a reason. For mental states (such as acceptance) conceivability just is possibility. For instance, I cannot *understand* why the fact that a command is attributed to a deity by an ancient text is a reason for me to follow that command, and that is why it is not possible for me to *accept* Scripture-revealed divine command *as a reason*. So I maintain that the acceptability requirement of public justification must demand something more than the possibility of something being acceptable as a reason.

Coupling that with the voluntaristic aspirations of public justification, then, leads us to understand acceptability as the possibility to voluntarily act from that reason.

This understanding of acceptability is of course connected to the above point about the deliberative-democratic voluntarism of public justification: if a publicly justifiable principle has come to be accepted organically we can rest assured that the citizenry can voluntarily act from those reasons,⁹ rather than just being able to accept them as reasons.¹⁰

Gaus subscribes to what he takes to be the guiding ideas of the public justification-based view of liberal legitimacy, but he also maintains that this general approach is in need of some corrective amendments.¹¹ The core idea he ostensibly shares with the proponents of consent-based theories of liberal legitimacy is that liberal political authority is grounded in its being in some sense ‘publicly acceptable’.¹² So for Gaus a liberal theory of legitimacy should consist essentially of

a normative theory of justification—a theory that allows [justificatory liberals] to claim that some set of principles is publicly justified, even given the fact that they are contested by some. And this, in turn, appears to call for a moral epistemology, in the sense of an account of the conditions for justified moral belief, or at least justified adherence to social principles (Gaus 1996, p. 3, emphasis added).

That is also where Gaus thinks that Rawls and his followers fail to deliver, as it were: Gaus’ main contention is that political liberals’ aim to characterise a conception of public justification without relying on a substantial moral epistemology such as that of ‘justificatory’ liberalism is wrong-headed. For the purposes of this paper it will now be useful to discuss two of what I identify as Gaus’ three main arguments for that conclusion.¹³

⁹ Any issues to do with the distinction between acting from a reason and acting in accordance with a reason are addressed by Rawls’ idea of the overlapping consensus (Rawls 1994, p. 39ff), which cannot be discussed in any detail here.

¹⁰ One may point out that my distinction between acceptability and voluntariness depends on a form of internalism about reasons. Clearly the externalism–internalism debate cannot be tackled here. Note, however, that the internalist position is less controversial in this context, insofar as externalism is usually associated with ‘thick’ conceptions of morality of the sort that Rawls would rule out as comprehensive doctrines.

¹¹ See Gaus (1999, p. 274). The guiding ideas he lists are: (1) the fact that Respect for citizens’ freedom and equality requires public justifiability of political authority, (2) the persistence of reasonable disagreement among citizens about both ordinary politics and constitutional essentials, and (3) the unsuitability for public justification of beliefs and considerations that are subject to reasonable disagreement.

¹² Gaus (1996, p. 3). However, as we shall see below, Gaus’ account of publicity actually relies on *accessibility* rather than acceptability.

¹³ Very briefly, Gaus’ third main argument persuasively proceeds from the idea that, pace Rawls, pluralism extends to the domain of the political: there is no agreement on what constitutes the sphere of application of the various competing political conceptions of justice, as each conception of justice may carry with itself a specific account of the nature of ‘the political’. And with no agreement on the scope of political conceptions of justice Rawls’ envisaged hypothetical deliberation procedure cannot take place. See Gaus (1997, 1999).

The Reasonable Cannot Float Free of the Rational (Gaus 1997, pp. 130–133, 1999)

This is how Gaus summarises the argument: ‘The reasonable is much more closely bound to the rational than Rawls and other political liberals would have us believe [...] the rational is far more basic to political justification than political liberals suppose; and this [...] points to grave difficulties for political liberalism’s pragmatic understanding of justification’ (Gaus 1994, p. 235). In fact for Rawls ‘the idea of reasonable justification... [is] a practical and not an epistemological problem’ (Rawls 1994, p. 62). Rawls’ aim is to construct a conception of justification which is not exclusively dependent on matters over which the (reasonable) citizens of a liberal democratic society disagree, namely the matters encompassed by moral, religious and philosophical ‘comprehensive doctrines’. The idea is that citizens can be reasonably expected to endorse a political framework justified in this way because, *given the aim of seeking fair terms of cooperation between free and equals*,¹⁴ they can be expected to have a (moral) motivation to forsake their preferred political framework in favour of one which others can also reasonably be expected to endorse in virtue of their commitment to a shared ideal of reasonableness, even though the latter framework may be sub-optimal as regards the ideals they believe they have most reason to pursue in the light of their comprehensive doctrine.

Now for Gaus the crucial question seems to be whether it makes sense for a rational citizen to act sub-rationally for the sake of reasonableness (i.e. for the sake of the moral ideals embedded in the idea of reasonableness). To use Rawls’ terminology, the question is whether it is possible to provide an account of reasonable justification, which can solve the *practical* problem of identifying fair terms of cooperation between free and equal citizens while—as it were—circumnavigating the thorny and divisive *epistemological* issue of what are the most rational terms of cooperation. Gaus argues that, pace Rawls, this question cannot be answered affirmatively. The argument can be (roughly) summarised as follows.

If a citizen adheres to a comprehensive doctrine (i.e. *believes* in it), then *epistemic* rationality requires her to also believe that the political framework most in line with her comprehensive doctrine is the political framework that it is most rational to put into place (given a fair chance of success in doing so). However, given the fact of reasonable pluralism, it is unlikely that the rest of the (reasonable, let alone unreasonable) citizenry could be expected to endorse this rationally preferable (from her perspective) political framework. Now the problem is that in order to endorse a different political framework, our citizen would need to form the *belief* that there is most reason to endorse that framework. The Rawlsian would say here that in order to do so she need only make an appeal to her reasonableness, i.e. to her commitment to finding fair terms of social cooperation between free and equal citizens. But Gaus objects that this practical purpose cannot compensate for the failure of epistemic rationality required by the forsaking of the preferred

¹⁴ And for Rawls having this aim is essentially what it means to be reasonable (Rawls 1994, p. 62).

political framework: ‘coming to believe on the basis of reasons irrelevant to its epistemic status indicates irrationality’ (Gaus 1999, p. 244). So our citizen cannot regard the agreed upon political framework as being truly justified, because ‘justification, as distinct from persuasion, necessarily involves giving *good* reasons’ (Gaus 1999, p. 249, emphasis added).¹⁵ In other (and more Kantian) words, endorsing a sub-optimal (from the point of view of epistemic rationality) political framework demands a failure of rationality that no rational citizen should be expected—let alone required—to go along with. However, Gaus’ sense of ‘justification’ here seems to leave hardly any room for the ‘reconciling function’ of public justification. As we shall see in more detail below, such unwillingness to strike a balance between ‘good reasons’ and reasons people could voluntarily act on makes Gaus an unlikely public justification theorist.¹⁶

At any rate, Gaus’ argument is not a genuine problem for Rawls within the terms of his theory. Crudely put, Gaus points out that it is indeed rather odd to ask someone to act as if their beliefs were different for the sake of achieving some moral ideal such as fair cooperation between free and equal citizens (at least, one might add, it is rather odd without an argument accounting for why those ideals should take priority).¹⁷ But the Rawlsian conception of public justification just demands that (reasonable) citizens form or possess a higher order—as it were—moral *belief* that, at least when deliberating about the basic structure of society, seeking fair terms of cooperation should take priority over pursuing the political arrangements that, *were they not committed to the ideals expressed by Rawlsian reasonableness*, it would be most rational for them to pursue in light of their comprehensive conception of the good.¹⁸ To use a familiar Kantian distinction, political liberalism’s citizens are not required to act *from* the publicly justified reasons, but only *in accordance* with them; but they are required to act from the liberal commitment to seeking fair terms of cooperation. So in this sense the Rawlsian conception of public justification does not impose a demand of irrationality on the citizenry: it just requires them to hold a belief according to which they will prioritise the pursuit of fair terms of cooperation over the pursuit of their own conception of the good.¹⁹ Now this demand may well be a problem in its own right for Rawls’ theory of legitimacy—for it leaves very little room for substantial disagreement among reasonable citizens—yet if we read the theory in this way, we come to see that Gaus’ argument cannot do the work it is supposed to do.

¹⁵ This isn’t to say that Gaus rejects Rawls’ idea of a qualified acceptability requirement, but simply that he maintains that Rawls’ standard of reasonableness sets the justifiability bar too low (cf. Gaus 2003a, b).

¹⁶ One may put this point in a slightly different way and say that Gaus’ theory would maintain the same substantive standards of legitimacy even if he dropped the language of acceptability.

¹⁷ Gaus’ argument is much more complex than this. However, since it is not my intention to question any of its steps, but rather to judge what the impact of its conclusions is, it will not be necessary to illustrate it in much detail.

¹⁸ However, as envisaged by Rawls’ idea of the overlapping consent, the publicly justified political conception of justice will still be justifiable from within those citizens’ conception of the good.

¹⁹ It is not clear that prioritising the pursuit of fair terms of cooperation requires the separateness of the political, which Gaus cogently rejects (as noted earlier): to engage in the pursuit of those terms there is no need for an agreement on the sphere they should regulate.

Political Liberalism is Guilty of 'Justificatory Populism' (Gaus 1996, pp. 130–134)

In a nutshell, the worry here is that Rawls' choice of constructing public reason from the reasons available to actual (albeit reasonable) citizens commits him to sanctioning normative principles that do not satisfy even rather modest standards of rational justification. Gaus' contention is that, despite the fact that the reasonable citizen is a rather conspicuously idealised counterpart of most actual citizens of contemporary liberal democracies, the constraints on the conduct of deliberation about the political framework required by Rawls' conception of public reason do not guarantee that the principles arrived at through public deliberation will be epistemically satisfactory. As Gaus argues, Rawls' reasonable citizens rely heavily on common sense modes of inference (because 'citizens actually [need to] appreciate the inferences'),²⁰ yet empirical studies show that these modes of inference are not reliable: 'Commonsense reasoning is deviant from the justified perspectives of many' (Gaus 1996, p. 133).

So if reliance on common sense yields a 'deviant' theory of public reason, we should be using a 'minimalist' one instead (Gaus 1996, p. 133), i.e. one that uses inferences that are *accessible* to all (reasonable) citizens, while not necessarily favoring those inferences that these citizens tend to regard as *most persuasive*. Gaus' point here is that, once we become aware of these facts, accepting a reasonable but not rationally justified political framework would again demand an intolerable failure of (epistemic) rationality. However it may be worth anticipating a point I will argue more thoroughly below: Gaus' contrasting of accessible inferences with those that are most persuasive leaves some important middle ground out of the picture: what about those reasons and inferences that are simply *acceptable*, i.e. they are not the most persuasive, and yet are more than just accessible, in the sense that they could be *voluntarily acted* on, rather than just be *understood* to be conclusively justificatory?

At any rate, if we grant Gaus his empirical claims, he does seem to have established that political liberalism is an epistemically unreliable resource for the normative assessment of political principles. But is this critique pertinent, as far as Rawls' project is concerned? Strictly speaking, no: after all, Rawls is concerned with constructing a procedure that generates principles that the (reasonable) citizens could accept, not one which generates accessible principles that are above a certain epistemic standard. To be sure, Rawls' notion of reasonableness, through the idea of the burdens of judgment, does contain some minimal epistemic standards²¹; but if we accept Gaus' observations about common sense modes of inference those standards turn out to be too permissive, thus leaving the publicly justified principles open to reasonable rejection. That is a worthwhile concern in its own right, but it does not have much of a bearing as far as the Rawlsian ideal of public justification is concerned: whether or not the normative principles regulating the basic structure

²⁰ Gaus (1996, p. 136): 'Rawls is very clear that his aim is to articulate an understanding of public justification that induces stability, because citizens actually appreciate the inferences.'

²¹ Rawls says: "Being reasonable is not an epistemological idea (though it has epistemological elements). Rather, it is part of a political idea of democratic citizenship" (Rawls 1994, p. 62). In other words, Rawlsian reasonableness is primarily a moral notion.

satisfy certain standards of epistemic rationality has very little to do with whether those principles can be presented as acceptable to reasonable citizens (if reasonableness is more about seeking fair terms of cooperation than about acting rationally). As seen in the first section, there is a deliberative-democratic dimension to Rawls' account of public justification: publicly justified principles can be legitimate even if they are open to reasonable or rational rejection, because their reasonableness can make them legitimate only in conjunction with the fact that they happen to be the ones (among other equally reasonable ones) that have organically come to be instantiated in the political framework of a given polity. There is more to Rawlsian public justification than the 'modality of possibility'.²²

So Gaus' argument can be understood not as pointing out an inconsistency or a tension within Rawls' view, but rather as flagging a major aspect of what is valuable about the normative principles regulating the political framework, namely their epistemic status and, therefore, the measure to which they are likely to approximate correctness—an aspect which Rawls neglects (with some reason, as far as his project is concerned, but arguably not with sufficient all-things-considered reason, as Gaus shows).

Normative Justifiability, Acceptability, and Accessibility

Let us now turn to how Gaus' justificatory liberalism emerges from his critique of political liberalism. Gaus maintains that Rawls cannot solve the practical problem of individuating a consensus on fair terms of cooperation using the notion of reasonableness to bypass the epistemological problem of individuating terms that citizens will find rational to uphold: 'because most of our beliefs are reasonably held, but can be reasonably rejected by others, arguments that require others to accept these beliefs are inadequate from the perspective of liberal legitimacy' (Gaus 1996, p. 276). To overcome this difficulty Gaus proposes a conception of public justification with standards stronger than Rawls' reasonableness: 'For a justificatory liberalism, then, satisfying liberal legitimacy requires a justification of coercive authority that is not open to reasonable doubt' (Gaus 1996, p. 276). Arguments constructed for the purpose of public justification need to be shielded from reasonable doubt thanks to modes of inference that are of a higher epistemic standard than the commonsense inferences sanctioned by populist theories such as Rawls'. But, as we shall see, that move has a cost.

What exactly are those epistemic standards that can make a publicly justified principle 'normatively justificatory'? For Rawls a publicly justified principle is *acceptable* to reasonable citizens, which (if my interpretation is correct) can be taken to mean that those citizens must be able to voluntarily act on that principle. Consistently with the deliberative-democratic interpretation of his account of legitimacy I presented above, Rawls says that one of the 'levels' at which appropriately justified political principles are public is achieved when 'citizens accept and know that others likewise accept those principles, and this knowledge in

²² Pace Bohman and Richardson (2009, p. 254).

turn is publicly recognised' (Rawls 1994, p. 66).²³ So public justification aims to individuate a consent, and it is not just a heuristic to identify a criterion of normative adequacy. For Gaus, on the other hand, a publicly justified principle (i) is likely to track the truth of the matter, or in any case satisfies certain epistemological standards, and (ii) is arrived at through modes of inference that are the best available, subject to the condition that they also be *accessible* to all reasonable citizens (where 'accessible' does not mean that those modes of inference need to be the most widely shared by reasonable citizens, or even that the citizens should consider them acceptable, but simply ones that can be understood). Condition (ii) acts as a constraint on condition (i): the truth-tracking is restrained by an accessibility requirement. The crucial question, then, is how much normative work can be done by that requirement.

As anticipated, I maintain that Gaus' view cannot be reconciled to the voluntaristic aspects of the consent-based approach. As Steven Wall puts it, once we understand that a voluntaristic element is implicit in the idea of public justification, 'the reconciling function of the public justification principle therefore explains why correctness-based justifications may not be sufficient for legitimizing coercive political authority' (Wall 2002, p. 387). (For Wall a correctness-based justification 'demonstrates that a conclusion is correct, irrespective of whether all persons can reasonably accept it' (Wall 2002, p. 386)). In short, my point is that Gaus' account of public justification as accessible normative justifiability is problematic because, despite being centred on a (strictly speaking) relational concept of legitimacy (thanks to the accessibility requirement), it is devoid of voluntarism and, therefore, its normative standing is not different enough from that of correctness-based accounts of justification—even though those are non-relational and, therefore, substantivist. Gaus would reply that accessibility is normatively equivalent to acceptability. In fact he uses 'public', 'accessible', and 'acceptable' in largely interchangeable ways. Recall, however, the account of acceptability I put forward in the first section: we need to distinguish between publicity and acceptability, and to do so we need to understand the latter as the possibility to voluntarily act from a reason, not just to accept a reason as such.²⁴ Now, since understanding a reason and accepting it as a reason can be considered equivalent, we can see that Gaus' relational constraint of accessibility just is what we have been calling publicity. His account of public justification lacks the voluntarism conveyed by the acceptability requirement; thus it cannot establish the sort of relation between state and citizens that the consent view of public justification considers necessary for legitimacy. I am not claiming that Gaus' theory is equivalent to a correctness-based account of justification, because clearly the best justification (i.e. the correct one) could still be one that is reasonably rejectable, and so would not pass Gaus'

²³ Rawls adds: 'Principles are to be rejected that might work quite well provided they were not publicly acknowledged, or provided the general facts upon which they are founded are not commonly known or believed' (Rawls 1994, p. 69).

²⁴ One may point out that accessibility allows the citizens to see that some effort is being made to justify coercion to them. But it is not clear how that would be enough to carry out the reconciling function, as one could meet that demand simply by disingenuously offering any accessible argument, regardless of its manifest implausibility.

test; however it could be considered a satisficing-correctness account, insofar as an epistemic threshold has to be met *before* acceptability even comes into play. In other words, by redefining acceptability (and thus liberal legitimacy) in terms of reasonable beliefs rather than the beliefs of reasonable people—a move he recently described as ‘convergence’ rather than ‘consensus’ justification—Gaus deprives public justification of much of its voluntarism.²⁵ Gaus’ choice of situating his theory within the broadly Rawlsian family of theories of legitimacy through public justification, then, appears perplexing.

The voluntarism of the idea of public justification becomes clearer if we consider how Rawls claims that a publicly justified political framework manages to avoid ‘the fact of oppression’ (Rawls 1994, p. 37). For Rawls state authority can be ‘freely accepted’ in this sense:

We may over the course of life come freely to accept, as the outcome of reflective thought and reasoned judgment, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject. This is the outer limit of our freedom (Rawls 1994, p. 222).

Public justification, then, *enables* that acceptance. That is why public justification is best understood in the Rawlsian sense of a lightly voluntaristic social contract: in Rawls’ perspective epistemically accessible normative justifiability by itself would constitute ‘oppression’. However these voluntaristic aspirations, as our earlier discussion of Gaus’ arguments shows, give the idea of public justification both its most distinctive feature and its most serious problems.

That characterisation of the Rawlsian approach should help us get a better sense of why Gaus’ account of legitimacy cannot compete on the same (voluntaristic) turf as Rawls’: it is not clear how the mere fact that the publicly justified principles will be ‘accessible’ to reasonable citizens will produce any sort of normatively salient hypothetical agreement, as citizens may well (somewhat akratically) see the overwhelming reasons in favor of a principle, and yet not be able to regard it as something they could accept, in the sense of being able to voluntarily act on those reasons. Actually seeing (strong accessibility) or being able to see (weak accessibility) that I have a *pro tanto* or even a conclusive reason to do X is importantly different from being able to freely choose to do X (acceptability)—arguably a difference in kind, not just in degree. To be sure, there is a sense in which a principle whose justification is accessible but not acceptable to me is justified to me (hence the relational aspect of Gaus’ concept of legitimacy); but this sort of justification is insufficient for the sort of reconciliation that would legitimise coercion, as its object X is not something I could have *voluntarily* undertaken (in the sense that I could not have brought myself to do X in the absence of coercion). More formally, it is not necessarily the case that there is an accessibility relation between a world in which I appreciate the inference whose conclusion is that I should do X, and a world in which I choose to do X. That gap separates Gaus’ justificatory

²⁵ Cf. Gaus and Vallier (2009) and Gaus (2007), where Gaus explains the relationship between rationality and reasonableness in his theory.

liberalism from the constitutively voluntaristic project of legitimacy through public justification. Arguably Gaus does not distinguish between acceptability and accessibility because of the rationalistic notion of autonomy that underpins his theory. Gaus maintains that this notion of autonomy is in line with the normative commitments underlying the Rawlsian account of public justification, yet we have seen that Rawls' approach has a more voluntaristic bent. And that is because it is not clear why one would resort to the idea of public justification if not to establish a consensus, and how one could establish a consensus without a measure of voluntarism. If I am unable to accept something even despite seeing that it is rationally optimal, then coercing me to act as if I could accept it is a violation of my autonomy, at least on a voluntaristic rather than a rationalistic notion of autonomy. Gaus' Kantian view may be plausible in its own right, but it is hardly appealing for public justification theorists, for it gives priority to compliance with the demands of rationality over voluntariness. It does not seem feasible to preserve what is appealing about public justification (voluntariness) whilst adhering to ideal standards of normative justifiability. Gaus' accessibility requirement does introduce a measure of concern for citizens' potential response to the publicly justified principles, but it is decidedly weaker than the concern we find in Rawls' notion of public justification²⁶ and it is not clear how the sort of relation it envisages can have legitimising force.

Put another way, for Rawls there is an important sense in which I can be free and autonomous even if I fail to adequately respond to the demands of reason. Kant would deny this, and Gaus is inclined to follow suit: 'If, as political liberals insist, the commitment to public justification rests upon a commitment to respect persons, it is impossible to understand how this commitment could be honoured by appealing to what is seen as an irrational belief' (Gaus 1995, p. 249). And: 'The Kantian view defended here [...] takes as central [...] the idea that an autonomous will is one determined by moral reason, and that we are free when we act rationally in this way' (Gaus 2005, p. 283)²⁷ But some may plausibly maintain that my autonomy—on any non-hyper-Kantian and hyper-rationalist conception of autonomy—would be violated if someone forced me to act against my considered judgement and inclinations, even if they fly in the face of the conclusions warranted by my rational faculties (conclusions that I can access, but that I may well not be able to accept, in the sense that I may not be able to voluntarily act on them). Relatedly, Geuss—partly following Isaiah Berlin—observes how many (mostly pre-Rawlsian) liberals are 'highly suspicious of Kantian freedom-based-on-reason' (Geuss 2005, p. 17). In fact a significant part of the controversy discussed here hinges on the interpretation of the core normative commitments of the liberal tradition—such as autonomy—and how they fit within the substantivist or the consent view of liberal legitimacy. Yet it is not my concern to argue against Gaus' conception of autonomy *per se* or in relation to liberalism generally. My point is just that Gaus' rationalistic autonomy is not compatible with the consent view, which however is the cornerstone of the

²⁶ That is why, as anticipated in the first section, the argument against the consent view of public justification advanced by Bohman and Richardson (2009) applies to Gaus' view, but not to Rawls'.

²⁷ Also see the discussion of autonomy in Gaus (2010b).

project of legitimacy through public justification. So, at the very least, it is unhelpful to turn the idea of public justification into a heuristic for the individuation of accessible principles supported by good reasons.²⁸

However Gaus would take issue with that understanding of the consent view and, more broadly, of the social contract tradition: he maintains that since Kant the consent-based approach has lost all its voluntarism and that ‘contractualist liberalism becomes justificatory liberalism’ (D’Agostino and Gaus 2008, section 6).²⁹ I hope to have shown how that need not be the case: Gaus’ justificatory liberalism is more Kantian and more rationalistic than Rawls’ account of public justification, which does preserve some elements of voluntarism. So Rawls’ Kantianism consists mostly of his insistence on the idea of reciprocity between free and equal citizens,³⁰ whereas Gaus is more Kantian because he also espouses a rationalistic conception of autonomy. A political principle is publicly justified when it is not subject to reasonable disagreement; but for Gaus that just means that the citizens will *have no reason* to do so, even though they might very well not realise that. Yet they *could* realise it, because of the accessibility requirement—that is Gaus’ only blandly voluntaristic gesture. In other words, Gaus says that for a normative principle to be publicly justified just means that it is ‘supported by good reasons that all rational citizens should be able to appreciate’ (Gaus 1996, p. 160). But then what is doing the legitimising work is almost exclusively the fact that the principle is rational *per se*: the accessibility requirement plays an almost negligible role: there is a distinction, but not much of a difference between rational individuals’ ability to appreciate the reasons in support of X and X being supported by good reasons. And that is quite close to saying that liberal political authority is legitimate when it can be shown that there is a *substantive* case to be made for the rationality of the normative principles regulating its exercise. Gaus would reply that his understanding of rationality is procedural, thus it would be (in principle) possible for a fully rational agent to come to a conclusion considered unacceptable from a correctness-based point of view:

However, we possess a notion of the rational that is not simply derivative of our understanding of what is the best reason. A rational person takes into account all the relevant available evidence, takes care when evaluating it, is not subject to various distortions of deliberation [...], and so on. It is a demanding ideal, much more demanding than being simply a reasonable person [...]. Nevertheless, we can apply it even when we do not know what is the best reason (Gaus 2003b, pp. 143–144).

²⁸ There is, of course, the familiar argument that all hypothetical consent theories really are just substantive theories in disguise, in so far as they smuggle some substantive normative commitments in the antecedent of the conditional expressing the consent relationship. However my point here is just that some accounts of hypothetical consent are more voluntaristic than others, at least in principle.

²⁹ An earlier (Summer 2003) edition of that article, authored by D’Agostino only, was more open-ended on this point and noted the difficulty of understanding exactly in what sense public justification makes something ‘the object of an agreement’. See also Gaus (2009).

³⁰ That refers to *Political Liberalism*, where Rawls envisages a genuine consent. The argument from the original position in *A Theory of Justice* was purely rationalistic, and thus more Kantian.

Now while that notion may not rely on a prior understanding of what the best reason is in any particular case, it does rely on a general prior understanding of what counts as a good reason, which in turn severely restricts the range of a procedure's sanctioned outcomes.³¹ So the demandingness of Gaus' account of rationality as well as the limits of proceduralism prevent justificatory liberalism from performing the reconciling function of public justification. And that largely defeats the purpose of adopting a relational concept of legitimacy.

Furthermore, my analysis of justificatory liberalism shows the high costs of the broadly Rawlsian, public justification-based approach to legitimacy: a more voluntaristic notion of public justification jeopardises the objective rational justifiability of the normative political principles at stake, whilst it still has to exclude 'unreasonable' citizens from the consent—even though precisely because of its 'populist' notion of justification it lacks strong grounds from which to justify this exclusion in a non-circular or non-arbitrary way.³² Crudely, the more we strive to ground political authority in a consensus that is somehow close to the sources of moral motivation present in a pluralist society, the less normatively satisfactory our outcomes will be (and vice versa). Rawls (unsuccessfully, in Gaus' view and in mine) tries to combine substantive liberal normative commitments such as those embedded in his notion of reasonableness with the degree of voluntarism that is constitutive of his idea of public justification. So, by showing the advantages of eliminating the search for consent from an account of normative justifiability Gaus may be seen as contributing to the argument—advanced by a prominent substantivist liberal such as Joseph Raz—that 'there may be no middle way between actual (including implied) agreement and rational justification' (Gaus 1994, p. 96).

Conclusion

This paper started from an account of how Gaus' theory of legitimacy through public justification emerges as a critique of Rawlsian political liberalism: crudely put, Gaus' guiding thought is that the epistemic standards embodied by Rawls' conception of public justification are too relaxed. I argued that, while this line of argument does bring out some genuine problems for Rawlsian political liberalism (chiefly as regards the arbitrary narrowness and normative deficiencies of the consent envisaged by political liberalism), the conception of public justification that emerges from it nonetheless does not qualify as a satisfactory alternative: on the

³¹ On the basis of that problem I have argued against proceduralism in general (Rossi 2009). For the general view I contest in that article see, for instance, Ceva (2009).

³² I develop this line of argument in Rossi (forthcoming 2014). Quong (2011, pp. 137–139) defends political liberalism from that charge by arguing that we should read political liberalism as an argument addressed at liberals, in which case the sort of circularity I refer to shouldn't be considered vicious. Exploring this issue is beyond the remit of this paper; however, while I agree with Quong that a theory of liberal self-understanding has a useful role to play as regards the exploration of political possibility, it also seems worth noting that limiting the appeal of a theory of liberal legitimacy to liberals would be a significant concession to liberalism's enemies.

rationalistic conception of public justification put forward by Gaus, the correctness of normative principles trumps their ability to reconcile the exercise of liberal authority with the citizens' will, which defeats the purpose of public justification-based theories of legitimacy. So, rather than simply amending political liberalism, justificatory liberalism casts serious doubts on the sustainability of the very idea of legitimacy through public justification. In fact I suggested how Gaus' idea that the focus on a consensus tends to weaken the correctness and general normative force of political principles may well be developed into a broader argument against the consent-based view of liberal legitimacy and in favor of the substantive view, which grounds liberalism independently of liberal citizens' attitudes toward political coercion. One may reply that this argument proceeds from a substantivist understanding of what is normatively relevant, but that would just be a way of raising the question of whether the consent-based or the substantivist tradition embody the most appropriate conception of normativity for the purposes of grounding political authority—a question that transcends the remit of this paper.³³

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³³ This paper originates from my PhD research, which was supported by an AHRC doctoral award. I also wish to thank my supervisors, John Skorupski and Rowan Cruft, as well as my examiners, Tim Muga and Leif Wenar, for their helpful feedback. I should also like to thank audiences at LUISS University in Rome and Central European University in Budapest, as well as Andres Moles, Zoltan Miklosi, and an anonymous referee.

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