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The roles of religious conviction in a publicly justified polity

The implications of convergence, asymmetry and political institutions

Abstract   We discuss whether religious reasons may be appealed to in justification and political debate in a polity whose laws must be justified to those subject to them in terms of reasons that are accessible to one and all. We argue that, properly understood, a commitment to public justification provides no grounds for the exclusion of religious reasons from politics. We trace the view that religious reasons are excluded from public reason to three basic errors: (1) the error of supposing that public justification must be based on shared reasons; (2) the error of supposing that in public justification the same constraints apply to reasons to impose coercion and reasons to resist coercion; and (3) the error of supposing that generating publicly justified laws must occur through public deliberations in which all aim at such laws.

Key words   liberalism · pluralism · public justification · religion · public reason

1 Three errors of explication

Our concern in this article is the roles of religious conviction in what we call a 'publicly justified polity' – one in which the laws conform to the Principle of Public Justification, according to which (in a sense that will become clearer) each citizen must have conclusive reason to accept each law as binding. According to 'justificatory liberalism',[1] this public justification requirement follows from the core liberal commitment of

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respect for the freedom and equality of all citizens.[2] To respect each as free and equal requires that no one simply be forced to submit to the judgments of others as to what she must do. Laws must be justified *to* those subject to them – each must accept grounds that justify the law. As Kant indicated, if such a condition is achieved, each is both subject and legislator: each is subject to the law, yet each legislates the law, and so all are free and equal under the law.[3] Now it would appear that if we are to justify laws to each and every person, the reasons for these laws must be 'accessible to all'.[4] Religious reasons, however, are not shared by everyone, and may be inaccessible to some: they would thereby seem inappropriate in public justification. On the face of it, justificatory liberals seem committed to expunging religious-based reasoning from political justification.

Not surprisingly, this apparent commitment of justificatory liberalism is adamantly rejected by many citizens of faith who consider themselves liberals. These citizens embrace the traditional liberal freedoms and rights and, moreover, reject any suggestion that a legitimate polity might seek to establish a religion, much less a theocracy. Yet they reject the idea – again, which seems implied by justificatory liberalism – that when publicly debating and voting upon political issues citizens and legislators should refrain from crucially relying on religious convictions.

We argue in this article that this widely accepted understanding of justificatory liberalism is confused; properly understood, a commitment to public justification provides no grounds for excluding religious reasons from politics. We trace this misunderstanding to three common errors – made by both friends and foes alike – in the explication of the theory's core ideas. First, we identify the *Error of Consensus*. It is almost universally supposed that public justification requires that for every justified law there is at least one justificatory reason that all citizens accept – upon which there is consensus. This is an error. Respect for each as free and equal requires that for a law to be justified every citizen must have some conclusive reason to accept it: they need not all have the same reason. The second error of explication is the *Error of Symmetry*. Many have held that reasons for supporting a proposal, and reasons for objecting to it, are subject to the same requirements. If justifying a law requires that we give others a reason they accept, then to reject a justification must also require providing a reason others accept. We will show that this cannot be the case. There is a fundamental asymmetry between reasons to *justify to another* a law and reasons to *reject* that law. This basic asymmetry allows non-shared reasons to play a crucial role in public justification. The third source of misunderstanding is the *Error of Deliberation as Constitutive of Justification*. To say that justificatory liberalism is committed to the public justification of laws is ambiguous between (1) it is committed to an ongoing activity of justification – an

exchange of reasons between citizens – and (2) the requirement that laws be justified to all citizens. Many interpret justificatory liberalism in such a way that (1) is the only way to meet (2), or that (2) is somehow constituted by (1). They suppose that a justified polity can arise only out of a deliberative politics that aims at public justification. We shall show that this is not so. The core commitment of justificatory liberalism is (2): that laws *be* justified. Once we fully appreciate this, we shall see that a deliberative politics in which participants seek publicly justified outcomes through presenting others with good reasons is by no means the only – nor even the most important – way to honor this commitment.

The first two errors lead to a limited understanding of what reasons are relevant to public justification; the third error misrepresents justificatory liberalism as an account of a type of political reasoning or interpersonal justificatory activity. Once these errors have been corrected, we shall see that justificatory liberalism seeks a polity in which all are treated as free and equal, not one in which the reasons of some are privileged over those of others.

2 Public justification and its apparent hostility to religious reasons

2.1 Public justification

Before turning to the errors of explication, let us briefly review the core commitments of justificatory liberalism, which can be understood as a family of political views committed to two core principles. The first is:

> *The Liberty Principle*: 'liberty should be the norm, [respect for persons as free and equal requires that] coercion always needs some special justification.'[5] Unjustified coercion is wrong.

This 'presumption in favor of liberty' is widely embraced in the liberal tradition, from John Stuart Mill to Joel Feinberg, John Rawls and Stanley Benn.[6] The second principle identifies when the first principle's presumption in favor of liberty can be overcome:

> *The Public Justification Principle*: L is a justified coercive law only if each and every member of the public P has conclusive reason(s) R to accept L as a requirement.

The Public Justification Principle maintains that on some specification of the public P, if each member has conclusive reason to accept the law, then the imposition of the law by political authority is permissible, and all are required to act on it.[7] Because their reasoning is the benchmark for public justification some idealization in the description of P is necessary; for example, members of the public must be understood as

free from gross defects of reasoning, and because they conceive of each other as free and equal persons they do not have deep antipathy or contempt for each others' values (see further §3.3). In filling out a justificatory view it is critical to provide a compelling specification of P: just how idealized is their reasoning, and how does it relate to that of actual citizens? One Kantian specification of P is the realm of rational beings; insofar as we act as members of P we act in accord with our status as rational moral beings. Rawls, in contrast, relies on a political conception of persons as reasonable and rational. These are important differences among justificatory liberalisms; for the most part, however, our analysis does not turn on any particular specification, and so is consistent with a number of justificatory liberalisms (however, see §§2.2, 3.1, 3.3).

Notice that justifying reasons must be conclusive: they must *defeat* other considerations one might have.[8] This conclusiveness requirement is crucial. To see its motivation assume that Alf and Betty are both members of P, and Alf proposes law L_A. Suppose that Alf advances reason R_1 for Betty to endorse L_A; although Betty's system of beliefs and values commits her to acknowledging that R_1 is *a* reason for endorsing L_A, she also holds that she has reason R_2 to endorse L_B over L_A (where L_A and L_B are incompatible alternatives). Suppose that, exercising her reason as a free and equal member of the public, Betty concludes that R_2 outweighs (or defeats) R_1, and so she concludes that L_B is better than L_A.

Some insist that, nevertheless, Alf has provided an adequate justification of L_A as he has provided a non-sectarian reason R_1 in support of L_A – a reason that as a free and equal member of the public Betty appreciates and, indeed, endorses.[9] Yet, exercising her capacities as a free and equal member of the public, Betty concludes that she has more reason to accept L_B than L_A. For Alf to *simply* impose L_A on Betty is inconsistent with treating her as a free and equal member of the public. How could such a law be seen as exemplifying self-legislation by Betty?

2.2 Reasonable pluralism

Suppose that at the appropriate level of idealization, members of the public all accept the same conception of the good, or reason on the basis of the same substantive moral theory. In this case the Public Justification Principle would not be a significant justificatory requirement: most of the work in justifying a law would be done by the shared conception of the good or the moral theory. The Public Justification Principle becomes an important substantive test of a law's justifiability when we accept Rawls' insight that a wide range of rational disagreement is the 'normal result of the exercise of human reason'.[10] Justificatory liberalism takes as a basic feature of our evaluative life what Rawls calls 'the fact of reasonable pluralism'.[11] Members of the public, looking at the same

evidence and considering the same arguments, will typically come to different conclusions about even the most basic questions of the good and value. Often this is put in terms of the moral relevance of differing conceptions of the good, or 'comprehensive' conceptions: in evaluating proposed laws people draw on a wide variety of values, interests and so on. Thus, according to justificatory liberalism, reasonable disagreement about the ends of life among free and equal members of the public is (1) a permanent feature of life in modern liberal democracies and (2) relevant to determining what laws a member of the public has reason to accept.

We further suppose that reasonable pluralism includes religious beliefs: some of the public (*P*) have religious beliefs while others do not. Some secular liberals argue that fully rational and informed individuals would not have any religious beliefs, while some religiously inclined philosophers insist that all fully rational individuals would accept at least some religious beliefs. We can set aside this debate: at best it only concerns extreme characterizations of the relevant public in terms of the perfectly rational. We suppose that given a plausible characterization of the deliberative capacities of members of the public, many, but not all, reason on the basis of religious or faith-based considerations. For present purposes, we need not specify precisely the nature of religious or faith-based reasons (as will be seen, the analysis does not depend on any particular specification, except that they are reasonable and not universally affirmed by members of *P*).

2.3 Why public justification seems hostile to religious arguments in politics

Justificatory liberalism, then, is based on the idea that if we are to respect others as free and equal, laws must be justified to them. As Christopher J. Eberle observes, justificatory liberalism's specification of respect for persons appears to have implications for the public behavior of ordinary voters.[12] Assume a member of the public, Alf, endorses a law; if he is to respect Betty the law cannot be imposed on her unless she has conclusive reason to accept it. Suppose she dissents. Because Alf is committed to respecting her, he appears committed to showing her that she has conclusive reason to accept the law. He cannot do this by appealing to the reason why *he* endorses the law, for his reason only justifies the law if it is a conclusive reason for Betty too. Thus public justification apparently requires that they *share the conclusive reason*: if Alf's reason is not shared by Betty, it cannot enter into a justification of the law to her.

This line of thought has led many justificatory liberals to advocate *principles of restraint* which articulate ethical requirements against advancing reasons or rationales for laws that are not affirmed by all members

of the public. Stephen Macedo, for example, claims that a commitment to public justification entails a 'duty of civility according to which citizens owe each other reasons that they can share'.[13] Only shareable reasons would be admissible in public justification.[14] Because religious reasons are not affirmed by all members of the public (§2.2), they therefore seem excluded. To be sure, there are differences in interpreting this share-ability requirement and how it leads to restraint on appeal to religious reasons in political life (see §3.1). Macedo is perhaps the most exclu-sivist, arguing that religious reasons simply are inappropriate vehicles for public justification.[15] Robert Audi's position is somewhat more permissive. Audi allows that a citizen legitimately may be motivated by religious considerations and rely on religious rationales for supporting a particular proposal – with the proviso that the citizen possesses (1) some secular motive that is motivationally sufficient for him or her to support the proposal and (2) a sufficient secular rationale of it.[16] Rawls' position is more permissive still. He advocates what he calls the 'wide view' of public reason, which means, more or less, that citizens can rely on religious reasons to motivate or justify support of particular policies so long as an adequate public justification is forthcoming.[17]

More than anything else, it is such principles of restraint that have generated outcry among those friendly to religion. A typical objection is articulated by Nicholas Wolterstorff:

> It belongs to the religious convictions of a good many religious people in our society that they ought to base their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do so. It is their conviction that they ought to strive for wholeness, integrity, integration, in their lives . . . etc. Their religion is not, for them, about something other than their social and politi-cal existence; it is also about their social and political existence.[18]

According to this the *integrity* or *privatization* objection, the principles of restraint that justificatory liberals defend somehow rob a citizen of faith of her or his religious identity by restricting it to the private sphere.[19] Similar objections have been proffered by Eberle, Michael Perry and Kent Greenawalt – to name a few among philosophers – and various members of the theological community and theologically-oriented popular press.[20]

3 The error of consensus

3.1 Reasons that are 'accessible to all': intelligibility v. shareability

If we accept a basic requirement that public justification must be grounded on reasons that are accessible to all (§1), it may seem that reasons which enter into public justification must in some way be shared

by all members of the public. Prima facie, if I appeal to a reason that you do not share, then my reason will not be accessible to you as a bona fide justification. However, as we shall see, this is far too strong an interpretation of 'accessible to all'. What a plausible notion of accessibility requires is not that Alf and Betty share justificatory reasons, but that their reasons are mutually intelligible to each other *as reasons*. To see why, assume the opposite: suppose that Betty accepts R as a conclusive reason to accept L, but to Alf R is no reason at all to accept L. (Suppose R is 'The little bird outside my window told me so' and L is 'abortion is to be prohibited'.) If Alf is to respect Betty as free and equal, he must have reason to suppose that the Public Justification Principle is met when calling on the force of L; but that means that he must think, or at least have reason to suppose, that Betty really does have reason to endorse the law. But in this case he does not: she may acquiesce, but he cannot possibly think she has reason to accept. That her unreasonable views lead her to endorse L cannot lead him to think she has a reason to endorse L, so he could not conclude that L is publicly justified.

It has been objected that intelligibility requirements are difficult to make precise.[21] Questions naturally arise: to whom must the reasons be intelligible (those with a high-school education? a college degree? professional philosophers?); what makes a reason unintelligible (it cannot be communicated? it cannot be made sense of?). Now the answers to these queries are implicit in the assumption of reasonable pluralism in the statement of the justificatory problem (§2.2). Recall that public justification requires a certain idealization of members of the public and their reasonably pluralistic values, conceptions of the good and so on. So *ex hypothesi*, any consideration that is employed by members of P is within the realm of reasonable (as opposed to merely factual) pluralism. Members of the public – the touchstone for all justification – acknowledge that they reasonably employ different values and goods in their reasoning about what laws to accept, and so they view each other as different, but intelligible. All accept that reasoning on the basis of these different values is within the range of the intelligible use of human reason on these difficult matters. An intelligible reason, then, is a reason that is within the range of reasonably pluralistic considerations that members of the public draw upon in reasoning about laws. A core part of any justificatory liberalism is specifying the range of this reasonable pluralism. However, we have stressed that every plausible version will acknowledge that many religious convictions fall within the range of reasonable pluralism; all such considerations are therefore intelligible as a basis of public justification.

In contrast to intelligibility, which is required if all members of the public are to view the laws as publicly justified, the *shareability* requirement – that we all affirm the same justifying reasons as conclusive – is

inconsistent with members of the public reasoning on pluralistic standards.[22] In arguments for principles of restraint it is supposed that for Alf to justify his proposal to Betty it must be the case that she shares his reason in the sense that the consideration (or set of considerations) that justified the law for him does so for her as well. If R is a conclusive reason (or part of one) for Alf accepting L, shareability requires that it also be such a reason for Betty. If we embrace shareability we must follow Rawls in redescribing the justificatory problem so that everyone reasons in the same way: because 'everyone is equally rational and similarly situated, each is convinced by the same arguments'.[23] Consequently although the original position begins by posing a problem of choice among people who disagree, the problem is reduced to a choice by one person.[24] This is inevitable if shareability is endorsed. But this raises a puzzle: why would justificatory liberals, starting out with a strong commitment to reasonable pluralism as the outcome of the free use of human reason, embrace a conception of public justification that assumes we reason identically?

3.2 Consensus v. convergence

The shareability requirement and the principles of restraint to which it gives rise are motivated by a particular conception of public justification – the *consensus* conception – which, Fred D'Agostino notes, can be contrasted with a *convergence* conception of public justification:

> If both A and B share a reason R that makes a regime reasonable for them, then the justification of the regime is grounded in their *consensus* with respect to R. If A has a reason R_a that makes the regime reasonable for him, *and* B has a reason R_b that makes the regime reasonable for her, then the justification of the regime is based on *convergence* on it from separate points of view.[25]

It is manifest how a commitment to consensus justification drives religious reasoning out of public justification. The consensus conception requires that we all have the same reason R to support L. Our assumption of reasonable pluralism is that some, but not all, members of the public have faith-based reasons. Because we cannot reasonably expect all members of the public to actually endorse religious reasons as good reasons, they are not justificatory reasons (or, as the literature refers to them, *public* reasons).[26]

The consensus conception of public justification is hostile to invoking religious reasoning because it is hostile to any genuinely pluralistic reasoning in public justification. Contrast this to the convergence conception according to which members of the public may arrive at common laws by reasoning based on diverse values and concerns. Here pluralistic

reasoning is the very basis of justification. As long as intelligibility obtains, all members of the public acknowledge that everyone engages in genuine reasoning such that each person's conclusions provide her or him with reasons to accept the law. So everyone can see everyone else as a self-legislator and freely subject to the law. Appealing to a law justified in this manner respects each person as free and equal, without any insistence that we reason in the same way.

It is, then, an error in explicating the core ideals of justificatory liberalism to insist that all justification must be via consensus. By recognizing that reasonable citizens have different reasons to accept a proposal, public recognition of convergence justification reinforces the public awareness of reasonable pluralism. Convergence reasoning, then, expresses a commitment to pluralism of values in public justification. To be sure, there is nothing wrong with a public justification built on consensus – that is one way in which a law might be justified to all. But the aim of consensus tends to be frustrated by the very reasonable pluralism upon which justificatory liberalism is based.

3.3 Two worries about convergence justifications

It is something of a mystery why justificatory liberals have relied so little on convergence justifications. Surely one explanation is that on some views the very concept of 'a reason' demands that all justification must take the form of consensus. As some see it, if *R* is a *bona fide* reason for Alf then it must be, *mutatis mutandis*, a reason for Betty. As Christine Korsgaard argues, the very idea of a private reason is incoherent, for reasons 'are public in their very essence'.[27] If what is a reason for me is necessarily also a reason for you, I could not have one reason to endorse a law, and you another. Justificatory liberalism, however, need not take a stand on this metaphysical issue about the nature of reasons. What matters is that at the appropriate level of idealization, members of *P* are both reasonable and disagree about what their reasons are. Perhaps, ultimately, in such disputes only one party really has reason on his or her side. But so long as the characterization of members of the public is such that reasonable pluralism obtains, each can be understood as having his or her own reasons, not shared by others.

D'Agostino, who recognizes convergence justification as a *bona fide* form of public reasoning, advances a different concern: such justifications tend toward an unstable practical politics.

> Difficulties might arise, however, were convergence rather than consensus required for adequate justification. There are A and R_b such that, were A to come to realize that B finds the regime reasonable on account of R_b, A would not be able himself to find it reasonable, whatever other grounds he might have for doing so. For instance, if R_b was that B would be able to

> fulfill her conception of the good in that regime and if A believed B's
> conception of the good was depraved, then A might not be able any longer
> to support the implementation of such a regime, perhaps even despite the
> fact that in it his conception of the good might also be realizable.[28]

To focus on the case of religion, if one citizen is a fervent secularist while
the other is a devout Christian, though each may have her or his own
reason for supporting *L*, each might be so appalled that the other's
pernicious views endorse *L* as to reject *L* precisely on that ground. If
the pernicious view supports *L*, there must be something wrong with it,
and so a citizen may withdraw support.

We must distinguish two interpretations of D'Agostino's case. First,
we might be focusing on a dispute that – at least in the eyes of the
disputants – is outside the bounds of reasonable pluralism. Each denies
that the other's considerations are within the set of reasonable views
that can intelligibly provide the other with genuine reasons for choice
and which merit respect insofar as they are held by reasonable members
of the public. After all, if one insists that the views of the other are
'depraved' it is hard to see how one is conceiving of the other as a free
and equal member of the public, whose values have been arrived through
competent use of human reason. To see that the real problem in this case
is not instability, but an absence of justification based on reasonable
pluralism, suppose that the disputants see each other as having depraved
values, but stop short of the radical (destabilizing) response of with-
drawing their support of the law just because the other endorses it. Even
if stability could be achieved in this way it would be stability for the
wrong reasons, for neither party could reasonably conclude that the law
is justified if the other's only support for it is depraved. One cannot
justify a law by showing that it is endorsed by depraved values. Indeed,
in this case withdrawing support for the law – not out of spite or con-
tempt, but out of respect for others – would, ultimately, be appropriate.
If some members of the public embrace the law only by appealing to
depraved values the law is not publicly justified (§2.1). It is absolutely
crucial to stress that, on almost every version of justificatory liberalism,
to have a reason to accept *L* is not the same as actually accepting it.[29]
So if others accept *L* for bad reasons, and they have no good reason to
accept it, *L* fails the test of public justification.

The second version of D'Agostino's case would be one in which the
dispute really is within the bounds of reasonable pluralism. Talk of
'depravity' is too strong, but we can imagine that on some specification
of the public, Alf might view his values as in competition with Betty's,
such that what he truly values is not simply that the laws are endorsed
by his values narrowly understood, but that the laws actually tend to
set back Betty's. These sorts of hostile value systems (or, we might say,
'external preferences' that the values of others are thwarted) do indeed

pose deep problems for the justificatory enterprise, but the core problem is one of justification, not stability.[30] If value systems are competitive in this way there is a danger that no laws at all can be justified. If what is good for me simply is that the laws are bad for you, it is hard to see how we can converge on any laws. The social contract tradition – of which justificatory liberalism is a development – has long wrestled with this problem: if life is thoroughly conflict-ridden there will be no social contract to which all agree. However, as Hobbes so effectively showed, even given great conflicts in aims, there is also great scope for a system of laws that everyone judges as an improvement.[31] Social life is an arena of both competition and mutual benefit; so long as members of the public possess value systems that are not deeply hostile, systems of laws that are endorsed by all are possible. Indeed, liberalism became possible in western Europe when proponents of different creeds came to moderate their hostility to each other and increasingly valued opportunities for a cooperative social life.

3.4 The minimalist proviso

It is, then, an error in explicating core ideas that leads justificatory liberals to exclude religious beliefs from public justification. Given the importance of convergence justifications, even if they are not shared by all, religious reasons can enter into a network of justificatory relations, crisscrossing and overlapping diverse reasonable viewpoints to secure an overall public justification. So any blanket prohibition on appeal to religious reasons in justifying laws is certainly an error. Even Rawls' permissive view as expressed in his 'proviso' is too restrictive: the legitimacy of appealing to religious reasons in the public arena in support of L does not require that 'in due course' a 'proper' public reason that all citizens can share is introduced to support L.[32] However, as a matter of contingent fact (and so not of core doctrine) it looks plausible for justificatory liberals to endorse in our society a minimalist version of Rawls' proviso even under convergence justification, namely, a citizen should not endorse a law which she or he believes has only a religious rationale. Contemporary western societies are, as a matter of fact, over-whelmingly secular. Although the United States is a more religious society than Europe, both are largely secular in the sense that all citizens reason most of the time on secular, non-religious, grounds, and only some citizens ever reason on religious grounds. Given this feature of contemporary society, a law for which there is *only* religious grounding could not be publicly justified, while many laws for which there are only secular groundings will be justifiable. Even citizens who reason on religious grounds share most of these secular concerns: health, housing, earning and protecting income and public safety – laws that appeal to these are often endorsed by all members of the public.

We must be careful here. The minimalist proviso does not hold that (1) if citizen Alf only has religious grounds for endorsing *L*, his appeal to these grounds is irrelevant to public justification and in some sense inappropriate in the public sphere. Rather, the minimalist proviso holds that (2) given the contingent facts of contemporary western society, if citizen Alf proposes *L* on purely reasonable religious grounds, for Alf to legitimately endorse *L* in the public sphere he must believe that there are non-religious grounds that plausibly justify *L* to reasonable non-religious members of the public. While minimalist, this proviso is still significant. Its upshot is that, in the conditions of contemporary western society, a religious citizen must always believe that there is a reasonable secular rationale (though it need not be one he or she accepts) for any law he or she proposes, even if his or her own grounds are thoroughly religious. It is important to realize, though, that (1) this minimalist proviso only follows given contingent facts about contemporary western society and (2) the rationale for it only supposes correction of the first error of explication. As we shall see, after we correct the third error, the case for the minimalist proviso is greatly weakened.[33]

4 The error of symmetry

4.1 Integrity and non-domination

The minimalist proviso implies that all justifiable laws in our society must have some secular rationale among their various grounds, and so religious citizens should therefore refrain from endorsing laws that they are convinced have no such rationale. Yet even once the first error of explication is corrected, justificatory liberalism may still provoke the integrity objection (§2.2). Citizens of faith cannot advocate a law solely because it is based on their own view of the truth. A religious citizen, at least in principle, must be prepared to refrain from acting in the political arena on her or his conviction as to what the law must be – even if this is a deeply held conviction at the heart of what she or he values – if she or he is convinced that there is no secular rationale for it. To impose it absent such a rationale would entail imposing a coercive law on some of her or his fellows that they do not have conclusive reason to accept. Here the justificatory liberal is clear: if 'integrity' requires that one dominate others by imposing publicly unjustified coercive legislation, then integrity must give way to the principle of respect for others. Such integrity would require the domination of fellow citizens, and if acted upon would be wrongful. At the core of the liberal tradition has been the sanctity of conscience, but this has never included the sanctity of one's conscience when it instructs one to coerce others to live by one's

own lights. It is not merely justificatory liberalism that denies such an appeal to integrity, but the entire history of liberal thought. John Stuart Mill famously (and rightly) rejected 'the logic of persecutors' who insist that we may coerce others into following our conscience because we are right, but others that must not coerce us into following theirs because they are wrong.[34]

However, this same liberal commitment to non-domination and sanctity of conscience implies that religious citizens must not have laws imposed upon them which they have no conclusive reason to accept. Even if a secular rationale is necessary in our society for a publicly justified law, it can be defeated by a reasonable religious conviction without any secular backing.[35] If, given his or her reasonable religious beliefs, a religious citizen has weightier reason to reject a proposal than accept it, the proposal is not publicly justified. It is here that justificatory liberalism protects the integrity of citizens of faith, as it does all citizens. In a pluralist world, the only integrity that all citizens can simultaneously possess is to be free of coercive laws that violate one's reasonable values and understandings of the good.

Those who would prohibit religious belief (unsupported by secular rationales) from performing this defeater role severely undermine liberalism's commitment to non-domination – to ensuring that none are coerced to act in ways that violate their conception of ultimate values. Suppose the more radical exclusionists are correct: any appeal to a religious belief is illegitimate in public justification because these beliefs are not shareable (§§2.2, 3.1). So, they claim, only secular reasons can enter into public justification. Consider that the justification of laws typically depends on trade-offs: what values are to be honored or advanced at the cost of what others? If only secular reasons – or, more generally, only those that are shared – are admissible, these trade-offs will strongly favor secular values. To take an example: in educational policy we face continuing conflicts between the values of an educational system that promotes shared democratic values and the value of respecting the religious commitments of some citizens about the way they are to raise their children. To be sure, even on a purely secularized version of the debate we still have a conflict between, say, shared education in democracy and individual freedom in choosing schooling, but if we restrict ourselves to these secularized (i.e. shared) values, there may be a good case for shared education in democratic values. However, citizens of faith may reasonably retort that this is not the important value conflict: *that* conflict is between democratic education and core religious convictions, and in *their* deliberations religious convictions outweigh the value of shared democratic education. To ignore this retort because it is based solely on religious reasons that are not supported by secular considerations is to countenance the subjection of some to the values of others

– and all in the name of public reason. It is both disingenuous and illiberal to say to the citizen of faith 'You are not being coerced against your conscience because you share the relevant justificatory secular reason – although, given your reasonable system of values, your conscience instructs you to oppose this legislation.'

Macedo seems unmoved: he provocatively asserts that 'If some people . . . feel "silenced" or "marginalized" by the fact that some of us believe that it is wrong to seek to shape basic liberties on the basis of religious or metaphysical claims, I can only say "grow up!"'[36] Within the idea of the 'shape' of individual liberties lies a critical ambiguity. If we have in mind a case in which one employs religious or metaphysical claims to limit the liberty of those who reasonably dissent, and the minimalist proviso is not met, then Macedo is entirely correct. Liberalism gives no weight to claims that one's integrity requires such imposition on others. However, if we have in mind a case in which the 'shape' of basic liberties is determined by some employing their controversial religious or metaphysical claims to reject proposed legislation (even when the rejector's objection does not meet the minimalist proviso), then Macedo is in error: it is precisely such claims to integrity and freedom of conscience that liberals are committed to respecting. We cannot assume that the characteristics of an acceptable proposal for coercion are the same as a good reason to object; this is the error of symmetry. Many justificatory liberals have missed this crucial difference, advancing sweeping declarations about the inappropriateness of appeals to religious convictions in public justification.

4.2 Why strict symmetry renders irrelevant the public justification principle

A plausible account of public justification must reject symmetry. A justificatory liberal holds that L is permissible only if some unanimity condition [$U(l)$] for accepting L is met [L only if $U(l)$] among the idealized members of the public (this, of course, does not require unanimity among actual citizens; see §5.4). But if we accept a strict interpretation of symmetry we think that the reasons and conditions that apply to proposals must apply to rejections, so we will hold that a rejection of L (i.e. that L is not permissible) also requires a unanimity condition. The condition for L to be rejected will then be $U(not\text{-}l)$, i.e. that the rejection of L meets the unanimity condition. So we have concluded: (1) L only if $U(l)$ and (2) *Not-L* only if $U(not\text{-}l)$. Now it will often be the case that neither condition is met (there will not be a unanimous public for or against L), and so in these cases imposing L would be neither permissible nor impermissible. The cost of strict symmetry is thus a large range of disputes in which the Public Justification Principle gives no guidance at all.

The assumption of symmetry, then, not only offends liberal values (§4.1), but renders the Public Justification Principle largely irrelevant. Once we correct the error of symmetry we can appreciate that there is no single doctrine about *the* role of religious belief in public justification, for religious belief can perform different roles for which different criteria of admissibility are appropriate. Importantly, the constraints on coercive proposals must be different from those for rejections: the minimalist proviso applies only to proposals for coercive laws, not to rejecting them.

5 The error of deliberation as constitutive of justification

5.1 The principle of politics as public reasoning

The first two errors of explication have concerned the sorts of reasons that appropriately figure into public justification. Once these two errors are corrected, justificatory liberals who advocate principles of restraint on political discourse (§2.2) must greatly modify their restraining doctrines. As we have seen, first, religious reasons shared among a sub-community may enter into the network of public justification for a proposal and, second, all reasonable religious values, even without supporting secular rationales, can serve as defeaters of proposed justifications. We thus far, then, have shown that justificatory liberals are committed to far more permissive principles of restraint – if they are committed to principles of restraint at all. We must now confront the basic question: what is the motivation for adopting any principle of restraint whatsoever?

'Public reasoning', says Rawls, 'aims at public justification . . . Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.'[37] Such reasoning and argument, he continues, meets the 'duty of civility,'[38] the underlying idea of which is that if public justification is limited to reasons of a particular sort, then citizens engaging in politics have a duty only to offer these reasons in support of their positions. Principles of restraint such as the duty of civility presuppose something along the lines of what might be called the *Principle of Politics as Public Reasoning*:

> Because (1) all laws must be publicly justified and (2) politics is (ultimately) about what laws are to be selected, then (3) politics should aim at public justification, and so (4) politics should be a form of public reasoning – arguments addressed to those who disagree with us that they could reasonably accept.

'Deliberative democracy' endorses this principle. As Joshua Cohen conceives of it '[t]he notion of a deliberative democracy is rooted in the

intuitive idea of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among citizens'.[39] That the justification of the terms of association proceeds *through* 'public argument and reasoning' is the crux of the Principle of Politics as Public Reasoning: the aim of having justified terms of association in our polity is to be achieved through public argument and reasoning seeking such justification. If this is so, we would wish the nature of our public reasoning to reflect the conditions for public justification. If reason R^* cannot publicly justify our terms of association, or a piece of legislation, then R^* should not enter into public reasoning on this matter; and since politics is the arena of public reasoning, R^* should not enter into politics. Put this way, it may seem that the Principle of Politics as Public Reasoning is an inescapable commitment of justificatory liberalism.

Many equate justificatory liberalism with a type of deliberative democracy. Cohen advocates both, as does Rawls himself.[40] However, there is no intrinsic tie between the two doctrines. We will show that the Principle of Politics as Public Reasoning is highly objectionable; since deliberative democracy is committed to it, there is good reason to separate justificatory liberalism from deliberative democracy. Once we do so, the attraction of any principle of restraint quickly fades.

5.2 Two roles of political institutions

Because deliberative democracy is based on the Principle of Politics as Public Reasoning, it is unable to appreciate the complex role of political institutions in generating political outcomes; and for this reason it is very difficult to see how such a view makes sense of political choice in large and complex societies. To see the problem let us contrast two extreme views of the way electoral and legislative institutions relate citizens' judgments to publicly justified legislative outcomes:

> *Institutions as Registers*: The task of electoral and legislative institutions relating to issue i is to accurately register the views of the citizenry about the publicly justified resolution of i.

> *Institutions as Generators*: The task of electoral and legislative institutions relating to issue i is to take a set of citizen views ($cv_1 \ldots cv_n$) about i, and to generate a publicly justified resolution of i.

The contrast between these two conceptions of the role of political institutions correlates with Jon Elster's famous distinction between politics as a forum and as a market.[41] In politics as a forum citizens debate, discuss and change their views in response to the reasoning of others. At the extreme, the task of electoral and legislative institutions is simply

to adequately register the results of the discussion in the forum. In contrast, the 'market' view takes as inputs citizens' views that may reflect a wide variety of concerns and interests and seeks to employ institutions that transform these into a justified political outcome. Adam Smith's idea of the invisible hand underlies the conception of political institutions as generators of publicly justified outcomes. As Smith famously put it, in markets a person often acts as if

> . . . led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the publick good.[42]

Smith, then, understands market institutions as *generating* outcomes that achieve the public good, not registering people's views about how to achieve it. Electoral and legislative institutions may be conceived of in a similar way.

5.3 System-wide justification and the problem of local knowledge

We have focused thus far on the simplest justificatory situation, that between two people. As in economics, focusing on a simple two-person exchange is a good place to start, but a bad place to end: once we understand the dynamics of dyadic interactions, we need to develop a theory of public justification among a complex system of interactions characterized by convergence justifications (§3.2). In a system characterized by such justifications no citizen is in the position to gauge, on the basis of her or his own experiences, the importance and relevance of any given reason (based on a reasonable system of values) to public justification. In contrast to a homogeneous society characterized by consensus reasoning, no one is in the position to judge whether any given proposal should be rejected because it fails to meet a simple test, such as it is not based on a reason shared by all – it is 'sectarian'. On the convergence view, the justification of any proposal depends on the reasons that others have. However, our problem is that we do not know what reasons others have in large and complex societies. We have to *discover* what reasons people have. It is here that justificatory liberals can learn from the analysis of markets.

F. A. Hayek's great contribution to economics was to show how markets discover information. As Hayek understands a modern society, each individual has his or her own projects and plans; whether he or she is successful depends on whether he or she can mesh his or her plans with those of others.[43] If we are to efficiently pursue our own goals in

the context of others pursuing their goals, we must have an idea of whether the resources necessary for our plans are being demanded by others, whether others will be interested in the outputs of our plans and projects and so on. Each of us has both personal and local knowledge not generally available to others, and yet the success of our plans often depends on knowing the personal and local knowledge of others. Personal knowledge consists of one's knowledge of one's own plans and goals. Local knowledge is

> . . . the knowledge of the particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others because he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation.[44]

I wish to employ my local knowledge to exploit those possibilities of which I know. But for me to successfully do this requires that I know about events in far-off places that might affect my plans: what do others want, what alternative uses do they have for resources, what local new possibilities do they see that I don't? How can I possibly know all this? Now – and here is Hayek's great contribution – this knowledge of remote events is conveyed by the price system. The relative prices for goods do not tell us why goods are wanted, or why they are in short supply: it is a summary measure conveying just the crucial information – that others want the good, or that they are having a hard time getting hold of enough. Hayek:

> The marvel [of the market] is that in a case like that of a scarcity of one raw material, without an order being issued, without more than perhaps a handful of people knowing the cause, tens of thousands of people whose identity could not be ascertained by months of investigation, are made to use the material or its products more sparingly; i.e. they move in the right direction.[45]

The market, then, sums up the local and personal knowledge of actors across the world, and converts it into the crucial information that each of us must have so that we can use our own local and personal knowledge to efficiently satisfy our aims.

Even when politics does conform to the Principle of Politics as Public Reasoning (i.e. the citizen endeavours to register his or her considered judgment as to what is publicly justified) a surprisingly similar problem arises.[46] Given convergence justification, the citizen needs to know the personal and local knowledge of others: what are different people's proposals, what are their values and what defeaters have they come across for various proposals? Since system-wide justification depends on the entire network of reasons, a citizen's judgment about what is

publicly justified cannot rest primarily on her or his own personal and local knowledge (as it can on the consensus view). If voters are to register considered judgments about what is publicly justified it is critical that information about views, reasons, proposals, objections, complaints and so on be widely conveyed throughout the polity. Many aspects of the political system act to broadcast such local and personal knowledge: speeches of politicians, media commentary, the number of votes cast for protest parties, campaign platforms – all help inform voters of the current state of the justificatory debate. Many political proposals that are apparently based on inadequate reasoning nevertheless convey information about what is on the minds of fellow citizens (for example, that people are angry or upset with political decisions), and this too is crucial information in coming to an intelligent conclusion about what course of action is publicly justified. Oftentimes, even unreasonable citizens, dogmatists and radicals promote reason-discovery in part through *reaction* towards their views. Principles of restraint, like their counterparts in the market, are apt to distort the dispersal of information: the most reasonable voters may self-censor their views, leading to widespread misperceptions about the real issues and the breadth and depth of consensus.

5.4 The constitution of justification

If a political system is open and encourages the frank exchange of views among citizens that broadcasts personal and local information, a conscientious citizen can sometimes come to reasonable, tentative, conclusions about the state of public justification on some issue and, so, register his or her view through political institutions. However, given the complexity of political positions in a large polity under conditions of reasonable pluralism, this knowledge will always be far more tentative than his or her own local and personal knowledge. That is why the Principle of Politics as Public Reasoning, and its companion idea that political institutions should primarily serve to register the views of citizens, is a poor account of political life: the systemic knowledge of citizens will always be highly fallible. From the perspective of public justification, the best political institutions draw directly on the firmest knowledge possessed by citizens – their own local and personal knowledge – and use that to generate publicly justified outcomes.

This insight is fundamental to the constitutional project of James Madison. 'Justice is the end of government', Madison declared, but he did not think that this end could be secured merely by assemblies that expressed the popular will, or simply by developing a well-educated citizenry.[47] He advocated a constitutional structure that inputs less than perfect and often deeply flawed views about justice and the common

good and outputs laws that are at least closer to justice and the common good. This task of designing political institutions that *generate* justified outcomes has been largely ignored in the explication of contemporary justificatory liberalism[48] (which is all the more surprising since advocates of the doctrine – which has been called 'American Philosophical Liberalism'[49] – seem to have forgotten the great American contribution to liberal political theory). Instead of taking seriously the task of constitutional design as a way to help generate publicly justified *outcomes* in light of highly imperfect citizen inputs, justificatory liberals have spent inordinate time developing ethical constraints on the *activity* of justification, with the apparent hope of so perfecting the inputs (views of citizens) that electoral and legislative institutions could be largely relegated to registering these vastly improved inputs.[50] This is a misguided hope: given the reasonable pluralism and the centrality of convergence, the relevant knowledge of such system-wide justification is simply not available to even enlightened and public-spirited citizens. 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.

In developing a constitutional structure of public justification, justificatory liberals should, then, avoid the idea that the main task of political institutions is to correct, record and refine citizens' views about system-wide justification on issues: we have seen that such global judgments tend to be inaccurate. Rather, the chief aim of institutional design is to draw as far as possible on the local and personal knowledge of citizens; if each reports her or his own judgment and views, the institutions may be able to generate more reliably justified outcomes. Now at the core of the idea of public justification is a unanimity requirement: all members of the public must have conclusive reason to accept a law (§4.2). This does not mean that a unanimity rule would be appropriate in actual polities: not only are there high decision-making costs to such a rule, but we cannot suppose that the views of actual citizens correspond to the reasoning of idealized members of the public (§2.1). Nevertheless, the general shape of the constitutional analysis is strikingly similar to James Buchanan's project of constitutional political economy, which also has an ideal unanimity requirement as a touchstone.[51] In an important sense, both justificatory liberalism and constitutional political economy seek real-world institutions that in some way track a strong Pareto requirement: all must rank a law as an improvement.[52] It may come as a surprise to many that a good deal of the groundwork for the constitutional structure of justificatory liberalism has already been laid by public choice theory.[53]

6 Conclusion

In this article dealing with the attraction of many justificatory liberals to principles of restraint we have traced this response to three errors in explicating the core ideas of the theory. The error of consensus leads to the mistaken claim that all genuine justificatory reasons must be shared by all; so 'sectarian' reasons must be excluded from public justification. The error of symmetry conceives of the constraints on proposals for coercive laws being the same as reasons to evaluate, oppose or block such laws: so, it is thought, 'sectarian' reasons cannot be employed to reject proposed legislation. Lastly, we have pointed to the errors in the persistent idea that publicly justified outcomes must be achieved through a deliberative activity that aims at such outcomes. Under the influence of this idea, the commitment to publicly justified laws leads to a demand that the political debate should exclude bad reasons, and so makes plausible principles of restraint. We have argued that the conditions of reasonable pluralism and convergence justification show this to be unrealistic: it is utopian in the bad sense. Justified political outcomes need not, and often will not, be the result of a refined activity of public reasoning, but of electoral and legislative institutions and procedures that generate outcomes that all members of the public accept, taking as inputs the local and personal knowledge of citizens about their own reasons and concerns.

Our focus has been on 'secular' and 'religious' reasons, as so much of the debate has been framed in this way. We hope it is clear that, in the end, the analysis does not depend on making sense of this vexed distinction. Understanding public justification does not require classifying reasons into types – be it secular/religious, public/private, or political/comprehensive. Building on any such categorization seems a dubious enterprise.[54] For purposes of meeting the Public Justification Principle what is important is whether a reason – be it 'secular' or 'religious' – is within the bounds of reasonable pluralism and how it enters into the network of the other such reasons. Moreover, we have stressed that it is an error to take a doctrine of what reasons can enter into the public justification of a law and to infer a doctrine of what reasons are appropriate in political debate. Doctrines that classify reasons into those that can be drawn upon and those that are excluded from the political life of a liberal polity lessen the resources for public justification, for doctrines of exclusion deplete the pool of reasons and information that can enter into the overall network that can justify laws to everyone. To be sure, it has seemed to some that excluding selected types of reasons from public justification and political life does, after all, further the cause of public justification: 'private', 'sectarian', 'religious' or 'comprehensive' reasons will then be unable to block 'secular', 'non-sectarian' proposals.

The true cause of public justification, though, is to formulate laws that respect all as free and equal: this cause is not furthered by allowing some to impose laws on those who do not have sufficient reason to accept them.

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Notes

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1 Christopher J. Eberle applies this term to a family of liberal views, as do we. It includes what is known as 'political liberalism'. See his *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), pp. 11–13.
2 See, for example, Jeremy Waldron, 'Theoretical Foundations of Liberalism', in his *Liberal Rights: Collected Papers, 1981–91* (Cambridge: Cambridge University Press, 1993), pp. 36–7.
3 Immanuel Kant, *Foundations of the Metaphysics of Morals*, ed. and trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), p. 52 [in the Akademie, German-language edition, pp. 433–4].
4 David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1985), p. 191. See also Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), pp. 86ff.
5 Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), p. 9.
6 John Stuart Mill, *Principles of Political Economy* in *The Collected Works of John Stuart Mill*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), vol. 3, p. 938; John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), pp. 44, 112; Stanley Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), p. 87.
7 The idea of a 'requirement' expresses the authoritative nature of law. For a now-classic analysis of political authority, see Richard B. Friedman, 'On the Concept of Authority in Political Philosophy', in Richard E. Flathman (ed.) *Concepts in Social and Political Philosophy* (New York: Macmillan, 1973), pp. 121–46.
8 Although the Public Justification Principle casts its net pretty widely, some public reason accounts might not accept it. Rawlsian accounts seem to restrict the requirement of public justification to just some acts of coercion

(say, concerning matters of basic justice or constitutional essentials): if that is the correct interpretation, Rawlsians restrict the range of *L* to a subset of laws.

9   George Klosko acknowledges that people disagree in their rankings of reasons, but he insists that this is not a barrier to justification. Thus he tells us that it is not 'forbidden that government policy priorities reflect some conceptions more than others. Neutrality requires only that public policies be intended to realize nonsectarian values and that the relevant means be similarly defensible.' See his 'Reasonable Rejection and Neutrality of Justification', in Steven Wall and George Klosko (eds) *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman & Littlefield, 2003), pp. 167–89 (178).

10 Rawls adds: 'within the framework of free institutions of a constitutional regime'. *Political Liberalism*, paperback edn (New York: Columbia University Press, 1996), p. xviii.

11 ibid., p. 36.

12 Eberle, *Religious Conviction in Liberal Politics*, p. 68.

13 Stephen Macedo, 'In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?', in Robert P. George and Christopher Wolfe (eds) *Natural Law and Public Reason* (Washington, DC: Georgetown University Press, 2000), pp. 11–49 (35).

14 What kinds of reasons are these? According to Eberle acceptable public reasons are said to be those that possess some or all of the following properties: intelligibility, accessibility, in-principle accessibility, replicability, criticizability, dialogicality, independent confirmability and provability. Eberle, *Religious Conviction in Liberal Politics*, ch. 8.

15 Macedo, 'In Defense of Liberal Public Reason', p. 22.

16 Audi, *Religious Commitment and Secular Reason*, pp. 86–100; see also Audi's 'Liberal Democracy and the Place of Religious Argument in Politics', in Robert Audi and Nicholas Wolterstorff (eds) *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, MD: Rowman & Littlefield, 1997), pp. 25–33.

17 Rawls, *Political Liberalism*, pp. 247–54.

18 Cf. Nicholas Wolterstorff, 'The Role of Religion in Political Issues', in Audi and Wolterstorff (eds) *Religion in the Public Square*, p. 105.

19 For a classic statement of the view, see Bernard Williams, 'Integrity', in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (New York: Cambridge University Press, 1973), pp. 108–17. Michael Sandel's famous criticism of Rawls is basically the same. See his *Liberalism and the Limits of Justice*, 2nd edn (Cambridge: Cambridge University Press, 1988).

20 Some of the more prominent works include: Eberle, *Religious Conviction in Liberal Politics*; Michael Perry, *Love and Power* (New York: Oxford University Press, 1992), esp. chs 1 and 2; Kent Greenawalt, *Religious Convictions and Political Choice* (New York: Columbia University Press, 1988) and Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995). Examples of the debate in the popular press include: Stephen Carter, *The Culture of Disbelief* (New York: Doubleday, 1993); Maciej Zieba, 'The Liberalism That We Need',

First Things (February 1994): 23–7; Stanley Hauerwas, *A Community of Character* (Notre Dame, IN: University of Notre Dame Press, 1981), pp. 78–9, 82. Not all of these works focus specifically on the privatization objection, but the concerns remain in the vicinity. Common charges against liberalism include that it promotes hostility to truth-claims, and endorses moral subjectivism and relativism. In some way or another, liberalism is thought to require disloyalty to one's religious convictions.

21 For an insightful discussion of such problems, see Eberle, *Religious Conviction in Liberal Politics*, pp. 252ff.

22 It is crucial to distinguish this shareability requirement about what *reasons can justify a law* from the idea that *once a law has been justified*, then we share a reason to act in certain ways – that the law requires it. Sharing reasons to act in this latter sense is the *result* of public justification; the aim of public justification is precisely to achieve consensus on a law, and so to share the reason to act in accord with it, namely that it is publicly justified. On the importance of reasons that are shared in this latter sense, see Gerald Gaus, 'Liberal Neutrality: a Compelling and Radical Principle', in Wall and Klosko (eds) *Perfectionism and Neutrality*, pp. 136–65, esp. pp. 142–5.

23 John Rawls, *A Theory of Justice*, revised edn (Cambridge, MA: Harvard University Press, 1999), p. 120.

24 ibid., pp. 120–1.

25 Fred D'Agostino, *Free Public Reason: Making it Up as We Go* (Oxford: Oxford University Press, 1996), p. 30. For a similar statement of the distinction, see Thomas Nagel, 'Moral Conflict and Political Legitimacy', *Philosophy & Public Affairs* 16 (1987): 215–40 (218).

26 For criticisms of religious reasons as non-public or unshareable see Richard Rorty, 'Religion as a Conversation-Stopper', *Common Knowledge* 3 (1994): 1–6; Abner Greene, 'Uncommon Ground – a Review of *Political Liberalism* by John Rawls and *Life's Dominion* by Ronald Dworkin', 62 *Geo. Wash. L. Rev.* 646 (1994): 659; Stanley Fish, 'Why We Can't All Just Get Along', *First Things* (February 1996): 18–26 (22).

27 Christine Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), p. 135. See also Christine Korsgaard, 'The Reasons We Share', in her *The Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), ch. 10.

28 D'Agostino, *Free Public Reason*, p. 76. D'Agostino cites Waldron here. Cf. Waldron, 'Theoretical Foundations of Liberalism', pp. 36–7.

29 Which is to say the obvious: justificatory liberalism is not an actual consent view of justification.

30 Interestingly, it is under consensus, not convergence, justification that stability becomes an issue. If public justification is restricted to shared reasons, we may find that it rests on a small subset of reasons; when citizens confront their full set of reasons they may find that these narrow, shared reasons are defeated by their other reasons. This, of course, is precisely the problem that motivated Rawls' later work. The way in which citizens' non-shared reasons might defeat the shared reasons modeled in the original position is clearest in *Political Liberalism*, pp. 386ff.

31 For a subtle treatment that also stresses the difficulties of this approach,

see Russell Hardin, *Indeterminacy and Society* (Princeton, NJ: Princeton University Press, 2003), ch. 3.

32 Rawls, 'The Idea of Public Reason Revisited', in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 2001), pp. 573–615 (p. 591).

33 It is plausible to conclude that, after we correct the third error, the minimalist proviso only has significant force for legislators (and not for citizens), since they are relatively decisive in political decision-making. On this see Gerald F. Gaus, 'The Place of Religious Belief in Public Reason Liberalism', in Maria Dimova-Cookson and Peter Stirk (eds) *Multiculturalism and Moral Conflict* (London: Routledge, 2009).

34 John Stuart Mill, *On Liberty* in *The Collected Works of John Stuart Mill*, vol. 18, p. 285.

35 On the idea of a defeater reason, see Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996), pp. 66ff.

36 Macedo, 'In Defense of Liberal Public Reason', p. 35.

37 John Rawls, 'The Idea of Public Reason Revisited', pp. 593–4.

38 ibid., p. 594.

39 Joshua Cohen, 'Deliberation and Democratic Legitimacy', in Alan Hamlin and Philip Pettit (eds) *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell, 1989), pp. 17–34 (21).

40 Rawls declares himself to be a 'deliberative democrat' in 'The Idea of Public Reason Revisited', pp. 579–80. For the relation of Rawls' and Cohen's justificatory liberalism to deliberative democracy, see Gerald Gaus, *Contemporary Theories of Liberalism* (London: Sage, 2003), pp. 197–200.

41 Jon Elster, 'The Market and Forum', in James Bohman and William Rehg (eds) *Deliberative Democracy* (Cambridge, MA: MIT Press, 1997), pp. 3–34.

42 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner (Indianapolis, IN: Liberty Press, 1981), vol. 1, pp. 455–6.

43 See F. A. Hayek, *Law, Legislation and Liberty*, vol. 1, *Rules and Order* (Chicago, IL: University of Chicago Press, 1973), p. 99.

44 F. A. Hayek 'The Use of Knowledge in Society', *American Economic Review* 35 (September 1945): 519–30 (522).

45 ibid., p. 527.

46 Randy E. Barnett has explored the relevance of Hayek's account of local and personal knowledge to the legal order in *The Structure of Liberty: Justice and the Rule of Law* (New York: Oxford University Press, 1998), part I.

47 James Madison, *Federalist 51* in *The Federalist Papers* (New York: New American Library, 1961).

48 A notable exception to this broad claim is Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1991), especially ch. 4. See also Gaus, *Justificatory Liberalism*, part III.

49 Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Oxford University Press, 1996), ch. 6.

50 Although Rawls focuses on 'constitutional essentials', almost all of his

work is devoted to explicating equal basic rights and liberties that must be constitutionally protected; very little effort is expended on designing institutional frameworks for making publicly justified choices. It is not too misleading to say that Rawlsian constitutionalism is that of Jefferson and the Bill of Rights, not Madison. The only sustained institutional focus in Rawlsian justificatory liberalism is on the Supreme Court as the 'exemplar of public reason' – and that is because it is an exemplar of public reason*ing*. See *Political Liberalism*, pp. 227–40. In *A Theory of Justice* (p. 315) Rawls does directly confront the question of constitutional design for just outcomes: 'Thus we arrive at the problem of trying to formulate an ideal constitution of public deliberation in matters of justice, a set of rules well-designed to bring to bear the greater knowledge and reasoning powers of the group so as to approximate if not reach the correct judgment.' He then adds: 'I shall not, however, pursue this question.'

51 For the classic analysis see James E. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, MI: University of Michigan Press, 1965), parts II and III. See also Buchanan's 'The Relevance of Pareto Optimality', in *The Collected Works of James Buchanan* (Indianapolis, IN: Liberty Fund, 1999), pp. 225–7.

52 None of this is to say, of course, that justificatory liberalism should accept a self-interest axiom: the meaning of a Pareto improvement will be very different in the two theories.

53 Though perhaps it should not be surprising: Buchanan's admiration for Rawls' work is legendary. The hostility seems the other way around: justificatory liberals, and especially followers of Rawls, are typically hostile to, though often fairly ignorant of, public choice analysis.

54 See further Gaus, *Contemporary Theories of Liberalism*, ch. 7.