Modus Vivendi, Consensus, and (Realist) Liberal Legitimacy

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Abstract: A polity is grounded in a modus vivendi (MV) when its main features can be presented as the outcome of a virtually unrestricted bargaining process. Is MV compatible with the consensus-based account of liberal legitimacy, i.e. the view that political authority is well grounded only if the citizenry have in some sense freely consented to its exercise? I show that the attraction of MV for consensus theorists lies mainly in the thought that a MV can be presented as legitimated through a realist account of public justification. Yet I argue that, because of persistent ethical diversity, that realism problematically conflicts with the liberal commitments that underpin the very ideas of consensus and public justification. Thus, despite the interest it has recently attracted from critics of political liberalism and deliberative democracy, MV is not an option for those wishing to ground liberal political authority in some form of consensus. So if realist and agonistic critiques are on target, then the fact that modus vivendi is not an option casts some serious doubt on the viability of the consensus view of liberal legitimacy.

Key words: consensus, legitimacy, liberalism, modus vivendi, realism.

A framework for the exercise of political power is grounded in a modus vivendi when its main features can be hypothetically presented as designed and adjusted over time through a virtually unrestricted bargaining process between the competing individuals and groups that make up the society. In this paper, I consider whether a political framework[1] grounded in a modus vivendi could or should be appealing to theorists who subscribe to the consensus view of liberal legitimacy, i.e. to the view that liberal political power is well grounded and properly exercised only if it is in some appropriate sense acceptable to those subject to it. I argue that – *pace* a number of theorists – the idea of modus vivendi is not a viable account of the hypothetical agreement at the core of the consensus view. Moreover, I contend that the genuine appeal of modus vivendi to consensus theorists is symptomatic of a deep structural flaw in the consensus view of liberal legitimacy.

Crudely put, the attraction of the modus vivendi-approach for liberal consensus theorists can be understood as lying mainly in the idea that the agreement it envisages may be seen as more legitimate than the heavily moralized idea of an overlapping consensus of reasonable doctrines, in so far as it allows the consenting parties to resort to their actual values and commitments and to express them without restrictions. In the parlance of contemporary consensus theories of legitimacy, then, we may say that modus vivendi could be presented as enjoying legitimacy through public justification.

In this paper I discuss exactly how one may construe a conception of public justification that can present a modus vivendi – based political framework as legitimate – a move that aspires to retain the voluntarisic elements of the consensus view alongside

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1] By "political framework" I mean what Rawls refers to as "the basic structure of society": "constitutional essentials and basic questions of justice" (1993, 10).

a more realistic understanding of what constitutes a political consensus. However, I will argue that those desiderata cannot ultimately be reconciled: despite the pressing need to accommodate realist instances within liberal legitimacy theory, the idea of modus vivendi does not offer a viable *internal* corrective for consensus-based accounts of the foundations of liberalism. So the interest that modus vivendi has recently attracted from liberal realists, agonistic deliberative democrats and other critics of political liberalism is misplaced: modus vivendi is not an option for those wishing to ground liberal-democratic political authority in some form of consensus.

The paper is in four sections. Section I provides some background and anticipates some of my conclusions, in order to clarify the place of my argument in the wider context of current debates on the foundations of liberalism. I then provide a new, detailed account of the idea of modus vivendi, and of how it can be deployed to construe to what I will call a 'realistic' conception of public justification (section II). I argue that, however, modus vivendi is unable to satisfy the desiderata of a liberal theory of public justification, and hence is not a promising option for liberal consensus theorists (section III). These points lead to some more general remarks about the significance of my critique of the modus vivendi-based account of liberal consensus for the overall prospects of the consensus view of liberal legitimacy (section IV).

I. LIBERAL REALISM, AGONISM, AND MODUS VIVENDI

The consensus view of liberal legitimacy is familiar, but a brief characterization of it will be necessary to set the stage. The paradigmatic advocate of the view is, of course, John Rawls. In *Political Liberalism* he writes:

> Our exercise of political power is *fully proper* only when it is exercised in accordance with a constitution the essentials of which all citizens *as free and equal* may reasonably be expected to *endorse* in the light of principles and ideas acceptable to their common human reason. This is the liberal principle of legitimacy. (1993, 137, emphasis added)

The basic idea is that a well-grounded political framework need not just embody liberal values; for political power to be properly exercised we also need a freely developed consensus. That consensus is established through the ideas of public reason and public justification:[2] publicly justified principles are acceptable to reasonable citizens (on an adequate characterization of reasonableness), and thus can be presented as enjoying the free hypothetical consent of the citizenry, which in turns confers legitimacy upon liberal political arrangements.[3] That is the sort of (hypothetical) consent relation I discuss here.

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[2] In line with much of the literature, I will use "public reason" and "public justification" interchangeably (unless otherwise specified); to be more precise one may say that the use of public reason is a necessary condition for achieving public justification. The idea of public reason is, of course, rooted in a Kantian approach to political theory. This point has been insightfully articulated by Onora O'Neill (1986).

[3] Other prominent proponents of a similar approach are Gerald Gaus (1996), Charles Larmore

Finally, by "free consent" – as opposed to consent simpliciter – I understand a form of consent that is based on the exercise of the consenting individuals' personal autonomy. "Personal autonomy" should be understood as an umbrella term here: rather than in its original Kantian sense,[4] I use the term as a placeholder for all the typical foundational commitments of contemporary liberalism (a conception of persons as free and equal, a notion of human flourishing, etc.). Those commitments explain how a consensus can carry normative force, and are thus used by different theorists to motivate their adherence to the consensus view of liberal legitimacy.

In order to understand the relevance of the problem at stake in this paper within the contemporary debates on the foundations of liberalism we may start from the idea that the liberal political framework is best grounded simply as a morally neutral medium for the adjudication of disputes between competing interests and conceptions of the good – a thought that seems to lie at the heart of many critiques of Rawlsian approaches to liberal legitimacy. In fact many theorists defend modus vivendi-like accounts of the foundations of political authority as a reaction to what they regard as an excessive distance between Rawls' heavily moralised prescriptions for the conduct of political deliberation and the actual political practice of most contemporary liberal democracies.[5] These complaints register a certain dissatisfaction with the restrictions Rawls places on the deliberative process in order to safeguard the liberal normative commitments of freedom, equality and autonomy; in other words, they accuse Rawls of 'rigging' the deliberative process to ensure a liberal-friendly outcome. This worry has been poignantly formulated by Thomas Nagel:

> Part of the problem is that liberals ask of everyone a certain restraint in calling for the use of state power to further specific, controversial moral or religious conceptions – but the results of that restraint appear with suspicious frequency to favor precisely the controversial moral conceptions that liberals usually hold. (1987, 216)

That is what one may call the 'agonistic' or 'radical democratic' critique of political liberalism and other similar accounts of deliberative democracy.[6] For instance, while remaining committed to a view that grounds liberal democratic legitimacy in the participation and allegiance of the governed, Chantal Mouffe writes:

> If both Rawls and Habermas, albeit in different ways, aim at reaching a form of rational consensus instead of a simple modus-vivendi or a mere agreement, it is because they

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(1996, 121-151), Stephen Macedo (1991), and Lawrence Solum (1993).

4] The other important source for the value of autonomy in the liberal tradition is, of course, J.S. Mill, though he tends to use terms such as "individuality" and "spontaneity".

5] For example, defenders of 'procedural' (liberal) democracy often use similar arguments in their attacks on 'deliberative' democrats such as Rawls. See Cohen (1996).

6] See, for instance, Mouffe 2000.

believe that, by procuring stable grounds for liberal democracy, such a consensus will contribute to securing the future of liberal democratic institutions. (2000, 9)

Yet, she argues, they are mistaken because securing allegiance to a liberal democratic polity "is not a matter of *rational justification* but of availability of democratic forms of individuality and subjectivity. By privileging rationality, both the aggregative and the deliberative perspective leave aside a central element, which is the crucial role, played by passions and emotions in securing allegiance to democratic values." (2000, 10) However my argument will show how Mouffe's agonistic position misses the point that the moral and epistemic restrictions placed by Rawlsian political liberals on the deliberative process do not just aim "to establish a close link between liberal values and democracy", but they also – and more importantly – aim to safeguard the very values that motivated the adherence to a consensus or allegiance-based account of legitimacy. So in a way Mouffe is right in criticising Rawls (and Habermas) because "their move consists in reformulating the democratic principle of popular sovereignty in such a way as to eliminate the dangers it could pose to liberal values" (2000, 3). That (serious) problem may be solved by adopting a looser, modus vivendi-like approach to public deliberation (as Mouffe in fact recommends); yet, as we will see, doing so would also jeopardize the voluntarism that underpins any consensus-based account of the legitimacy of a liberal polity – hardly an overall improvement.

Similar lines of argument can be found in the debates about the role of religious arguments in political deliberation:[7] critics of Rawls often argue that democracy cannot fully deploy its normative efficacy if we place (normative) constraints[8] on political activity to the extent that some individuals and groups will be prevented from deliberating about certain policy matters by referring only to values which, according to their conception of the good, are directly and sometimes pre-eminently relevant to an assessment of the issues at stake. Summarising and elaborating on some such views, Philip Quinn writes:

> So I am skeptical about there being any assured real (as opposed to merely possible) costs associated with being guided by Perry's inclusivist ideal rather than the Rawlsian ideal of public reason. And if there are none, the inclusivist ideal is more attractive than its rival because, being less restrictive, it allows all citizens to express themselves and their deepest values more fully in the political sphere [...] Adams suggests that "Rawls underemphasizes the combative aspects of a democratic polity and tends to overestimate the level of theoretical agreement in political ethics needed for an attainably just society." I concur. Of course we let ourselves in for something more like debate than like dialogue on many issues if we adopt the inclusivist ideal, but I consider that no bad thing when there is disagreement in a pluralistic democracy. (1995, 35)[9]

7] For an extensive introduction to these debates, see Audi 2000.

8] I use the term "normative constraints" to indicate that Rawls does not support political constraints such as restrictions of free speech, even though he does say that unreasonable citizens should be "contained" (1993, 64n; cf. Quong 2004).

9] Also see Perry (1993).

Quinn and Perry's claims clearly resonate with the realist idea that we should keep normative theory closer to actual politics.[10] And it seems plausible to interpret those claims as relying at least in part on the normative force of a process of deliberation that allows for the unconstrained will of the citizenry to be instantiated in the political framework – a way of claiming that the liberal political framework is legitimate because it is the object of a consensus.[11] Those liberals may or may not explicitly or unambiguously defend a modus vivendi account of consensus-based legitimacy. But I maintain that some of their criticisms of political liberalism commit them to such a view: in sections 2 and 3 below I will argue that there is no middle ground between modus vivendi and the Rawlsian view, as any significant attempt to lighten the moral restrictions Rawls places on the hypothetical deliberation process turns the consensus into a modus vivendi, which defeats the purpose of invoking a consensus in the first place.[12]

More generally, the appeal of modus vivendi as an alternative to mainstream consensus-based liberal legitimacy resonates with 'realist' political theorists such as John Gray, John Horton, Glen Newey, and Bernard Williams, many of whom explicitly embrace the idea of modus vivendi, and all of whom lament the conceptually unsustainable precedence afforded to morality over power dynamics by contemporary liberal legitimacy theory – the foremost example of this problem being, of course, Rawlsian political liberalism: [13]

> This points to a feature of real political stability which, I believe, has been seriously neglected by Rawls and other deliberative democrats who seem to think that a law or policy will necessarily be more acceptable to its opponents if it is the outcome of process of political deliberation conducted in accordance with public reason. [However] In some circumstances it is more important that the outcome be seen on all sides as a rough and ready compromise in which allthe parties have been given something and each has made concessions. Rawls regards this kind of process as 'political in the wrong way'. [...] However, a *modus vivendi* need not be an arrangement entirely devoid of a moral dimension. It does not have to be understood, as Rawls presents it, exclusively as an unstable balance of forces (Rawls, 1996: 432-3); rather it is a mix of morality and power. (Horton 2003, 22)

10] Cf. Newey (2001, 22-30).

11] Of course not all arguments in favour of the appeal to religion in political deliberation rest on the consensus view of legitimacy. For example, for David Hollenbach the use of religious arguments in the public sphere should not be curtailed because doing so would jeopardize a nation's "civic unity", and, ultimately, "the common good" (1993, 890).

12] Though it is of course possible to argue for fewer restrictions than Rawls envisages on the grounds that the use of religious reasons does not constitute a violation of fellow citizens' autonomy: see Eberle 2002, Gaus and Vallier 2009. But those arguments do not concern us here, as they accept Rawls' moralized conception of consensus and just disagree on the interpretation of some of the values underpinning it.

13] For an overview of the realist stream in recent political theory (including a discussion of these theorists' contribution to it) see Galston 2010. Also see Gray 2000, Horton 2003, Newey 2001, and Williams 2005.

So, by analyzing how the idea of modus vivendi can be deployed (as an alternative to Rawls' "overlapping consensus") to correct what is often considered a weakness of the legalism and moralism of political liberalism, I will provide a new angle from which to systematize and make sense of those critiques.

Of course, some proponents of modus vivendi will not be interested in deploying that idea to ground liberalism; rather, they will see it as an *external* corrective to the liberal moralism.[14] In other words, they will ground political authority by replacing liberal legitimacy theory with an account of modus vivendi, perhaps because they maintain that prudence should take precedence over morality when assessing the normative status of political authority. My argument does not directly engage with that position – nonetheless it clarifies the differences between those two takes on the idea of modus vivendi.

II. MODUS VIVENDI AND PUBLIC JUSTIFICATION

The idea of modus vivendi has come to the fore through Rawls' discussion of it in *Political Liberalism*. The rough characterization of modus vivendi I offered at the outset of the paper is roughly equivalent to Rawls' widely known definition of modus vivendi: "A consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self- or group interests." (1993, 147) Rawls contrasts prudentially-motivated modus vivendi with the idea of an overlapping consensus, which is an agreement underpinned by moral (primarily, but also by epistemic) reasons that are in line with an appropriately specified conception of liberal citizenship. To spell out this point, I propose a more precise characterization of modus vivendi as an agreement establishing a stable political framework in which at least one – but typically most – of the parties (i.e. a sizeable minority) participate for non-moral and non-epistemic reasons, i.e. (typically) prudential reasons, or for reasons that are not compatible with a liberal conception of citizenship.[15]

That characterization of modus vivendi could strike some as rather different from what is perhaps the most articulate such characterization in the literature, namely the one recently proposed by Gerald Gaus:

Agreement X is a modus vivendi between agents A and B if and only if:

1) X promotes the interests, values, goals etc. of both A and B;

2) X gives neither A nor B everything they would like;

3) The distribution of the gains of the compromise (how close X is to A or B's maximum reasonable expectation) crucially depends on the relative power of A and B;

4) For both A and B, the continued conformity by each to X depends on its continued evaluation that X is the best deal it can get, or at least that the effort to get a better deal is not worth the costs. (2003, 59)

14] As I will discuss in section 4, John Horton's latest work arguably falls within this camp.

15] This type of motivation for accepting a settlement should not be confused with that of somebody who accepts a political framework for liberal moral reasons – respect for others as free and equal citizens, say – without morally endorsing its contents.

However, the differences lie more in the definiens than in the definiendum, as both definitions pick out roughly the same sort of agreements; the differences, then, are given by the fact that while Gaus focuses more on the goods and interests promoted by a modus vivendi agreement and on its being affected by the differences in bargaining power between the parties, I focus on the reasons the parties have to subscribe to a modus vivendi.[16] The focus on motivation is important if, like Rawls, we are interested in the view that the agreement (rather than the values and interests it promotes) confers legitimacy.

To present the idea of modus vivendi less abstractly, we may simply think of a number of parties with different preferences: they reach a modus vivendi whenever they reach an agreement (leading to a stable political framework) without constraints on the sort of reasons that can motivate the parties to accept the terms of the agreement. The idea is that a modus vivendi maximizes the satisfaction of the preferences of each party, subject to the constraints given by the relative bargaining power of the parties. It is also important to note that the political framework should satisfy the condition of political stability (understood in the ordinary sense – a condition of social peace enabling reliably regulated social cooperation – rather than in the morally laden, Rawlsian sense of 'stability for the right reasons'): if this constraint were not in place, on my definition just about any political arrangement could be characterized as a modus vivendi (thus making "modus vivendi" almost synonymous with "the course of history"), for any given situation, including one of anarchy, could be presented as the outcome of hypothetical bargaining between the parties involved in it.[17]

Now how exactly can modus vivendi connect to the idea of public justification? The term 'consensus' employed in Rawls' definition suggests an answer to that question. Public justification is the liberal consensus theorist's response to what one may call the challenge of persistent ethical diversity: under the conditions of freedom brought about by the political frameworks naturally favoured by consensus theorists, citizens develop an extensive array of diverse and diverging conceptions of the good. What is more, this diversity is persistent to the extent that it becomes virtually impossible to identify, or hope to identify in the foreseeable future, a justificatory account of the basic structure of society

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16] An actual (yet not crucial) difference is that for Gaus all parties to a modus vivendi participate in the agreement for non-moral reasons, whereas I maintain that it is enough that at least one party do so. The thought is that if one agrees to a settlement for moral reasons but those reasons are not reciprocated, then we have something less than what would count as a Rawlsian overlapping consensus, or even as a constitutional consensus (because even the latter requires the parties to consider the institutions and principles agreed upon as good in themselves: Rawls 2003, 158ff. I return to the idea of a constitutional consensus in section 2.).

17] By identifying modus vivendi ex post the stability constraint also addresses Gaus' point that modus vivendi cannot count as a publicly justified agreement because its persistence is subject to private judgments on the shifting balance of power (2003, 63-64). That is because a measure of stability (in the ordinary rather than the Rawlsian sense) is built into my definition of modus vivendi. At any rate consensus theorists' claims about the superior stability of their envisaged consensus have been convincingly undermined by Sterling Lynch (2009).

that is (directly) acceptable to all – or even most – of the citizens' private[18] normative standpoints. The project of public justification, then, aims to overcome the challenge of diversity without renouncing the goal of consensus; it does that by offering an alternative standpoint, a public standpoint that enables us to reach some kind of consensus about what the basic structure of society should look like. The idea is to construe public reason in such a way that it can be shown that citizens have reason(s), from the standpoint of their private outlooks, to adopt a public outlook when deliberating about the basic structure of society. Of course, divergences arise among public reason theorists as to what kind of reasons there might be for adopting the public standpoint: roughly, on what I call an *idealistic* conception of public justification they will be mostly moral and epistemological reasons, whereas on a *realistic* conception they will be predominantly pragmatic and prudential – hence the connection with realist and agonist accounts of liberal democracy.

So modus vivendi can be understood as a consensus-based account of the foundations of political power if we construe a conception of public justification that produced the sorts of agreements described by the definition of modus vivendi offered above. I say that it can be understood as a version of the consensus view, rather than saying that it *is* a version of that view, because one can of course also defend a modus vivendi-grounded political framework on the basis of considerations other than the foundational role of the relation of consent between government and governed. The idea here would still be that the basic structure of society should be shaped by a consensus; the difference, however, is that this arrangement is not required in order to characterize a particular relation between government and governed, but rather because those political arrangements safeguard and promote certain goods (e.g. social peace, stability, human rights understood as interests, and so on).[19] This may well be a promising line of argument, but exploring it would be beyond our scope here. What we need to show, on the other hand, is how a modus vivendi account of political legitimacy can be connected to a version of the realistic conception of public justification.

To answer that question, let us put the points we have just seen in Hobbesian terms (for, as shown by David Gauthier's work on public reason, those terms are especially appropriate when presenting a realistic account of public reason[20]): the use of private reason in deliberation about the political framework leads to social conflict (a point famously stressed by Hobbes: crudely, left to their own devices, people conflict), making

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18] "Non-public" would be more a more accurate term, as "private" here does not refer to the private sphere of the early liberal theorists (most notably Constant): it is not the domain of life where the state has no right of interference. Rather, it is the cultural background that is exclusive to particular citizens or groups of citizens.

19] E.g. Haldane 1996, Neal 1993.

20] See Gauthier 1995 and Ridge 1998. For a historical overview see Ivison 1997. The controversy between Gauthier, Ridge, and Gaus revolves primarily around the issue of how exactly we can distinguish between public and private reasoning – an issue with no direct bearing on this paper's main argument. Gauthier and Ridge do not discuss the implications of their views for liberal legitimacy theory; however both their positions could be subsumed under my general account of realist public reason.

it impossible to identify stable terms of political cooperation and peaceful coexistence. In societies with persistent ethical diversity the justification of the political framework will have to be a public one, i.e. one which is able to transcend the divergences of citizens' private conceptions of what values should inform the design of a political framework. Hence the Hobbesian spirit of the realistic conception of public reason: public reason is just a way of reasoning we adopt for the purposes of agreeing on how to live together in a political system. The content of the ideal of public reason, i.e. the rules for the adjudication of political controversies, does not really matter much, as long as it enables peaceful political coexistence. Anything goes, as long as it secures agreement and stability. In other words, on this strategy we are taking citizens as they really are, in the sense that we construe public reason on the basis of general normative commitments that are *actually* available to the citizens.

To better identify the defining traits of the realistic conception of public reason, contrast it with a more idealistic, Kantian, one. The idea here would be to take a standpoint that ought to be accepted by all. Private standpoints are not like that (because of our moral and epistemological idiosyncrasies), thus we should strive to find a public one. This is true both at the epistemological level (e.g. "use reasons that are intelligible to others/ comply with epistemological standards that are acceptable to others") and at the moral level ("make on others only claims that can be justified to them"). Often the two levels are combined in a set of mixed epistemological and moral criteria.[21] In contrast to the realistic strategy, the idealistic strategy takes citizens as they would be, were they committed to certain (moral and/or epistemological) values, i.e. it takes citizens as they should be: public reason is construed on the basis of normative commitments the citizens *should* have, regardless of whether they are actually available to them.[22]

Of course, the realistic and the idealistic conceptions of public reason as I have just presented them are pure types; the actual conceptions found in the literature often try to include elements of each type. But what this taxonomy shows is how each pure type embodies one crucial desideratum for the project of establishing free hypothetical consent through public justification: the realistic conception embodies the pragmatic desideratum, whereas the idealistic conception embodies the moralistic desideratum. The *pragmatic* desideratum requires that hypothetical consent to a publicly justified set

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21] In Fred D'Agostino and Gerald Gaus' language, this is "the epistemological-moral view" of public reason (1998, xiii).

22] Note that those reasons are not primarily the reasons that may be deployed when debating the design of the political framework. Rather, they are the reasons a citizen may appeal to when deciding to accept an agreement about the design of the political framework. As a further point one may note that, if we do not place any restrictions on the reasons one may have for accepting an agreement, one may very well also not restrict the types of reasons and arguments that may be deployed when deliberating about the political framework. The connection between these two levels of unrestrictedness of available reasons is not a logical one, nonetheless it appears to be supported by strong pragmatic reasons: if we want the full bargaining power of the parties to influence the deliberative process, we have reason to allow them to defend their positions in the way they deem to be more effective.

of principles regulating the political framework be a concrete possibility – something feasible given the citizenry's actual motives, beliefs, and desires. On the other hand, the *moralistic* desideratum stresses that, for consent to retain its legitimating force, it should be given without violations of the personal autonomy of the consenting individuals.

That shows how the idea of modus vivendi connects with the realistic conception of public reason (and how it cannot connect with the moralistic conception). The (Hobbesian) idea here is to construct public reason in such a way that it requires us to transcend or bracket elements in our private system of values, in our private reason, to the extent where we can find enough common ground (probably through our 'self- or group interests') to come to a settlement guaranteeing peaceful political coexistence. The medium – indeed any medium – that enables the citizens to take the standpoint leading to such a consensus is indeed the Hobbesian public reason. There are no restraints on this process of transition from private to public reason. The consensus is still hypothetical (actual consent is chimerical, as most contemporary consensus theorists recognize), but it is just, as it were, one layer of hypotheticalness, in the sense that the consenting individuals are not the actual citizens but their counterparts (because the actual citizens will typically not be directly asked for their express agreement), yet they are not idealized to the point where the sources of their normative commitments may be fundamentally different from those of the actual citizens. So, if a modus vivendi over liberal institutions can be found, hardly anybody will be excluded from the consensus.

These considerations also show in what sense we can say that constructing public reason through a modus vivendi is a way of responding to the pragmatic desideratum of theories of public reason: the thought is that a modus vivendi-based agreement will ensure that the hypothetical consent secured by the agreement will be the consent of the actual members of the society, not of their epistemically and/or morally idealized counterparts. However, the achievement of meeting the pragmatic desideratum comes at a rather high cost, as I shall argue in the next section.

III. AGREEMENT, AUTONOMY AND (LIBERAL) LEGITIMACY

In this section I will discuss what I regard as a serious problem affecting the modus vivendi-based approach to public reason. As we have seen, the approach obviously has advantages, and indeed not just advantages: it addresses a vital concern of the consensus theory of liberal legitimacy, namely the need for pragmatism. However, in a nutshell, the serious problem is that the sort of consensus reached through a modus vivendi is incompatible with a crucial desideratum of the consensus view of legitimacy, i.e. grounding political power in a way which is respectful of personal autonomy. On the modus vivendi approach to public justification, all that counts is the fact of stable agreement to a set of rules regulating the political framework. But then any concern for how that agreement came about (at gunpoint, under the effect of propaganda, and analogous situations) becomes secondary, if not entirely irrelevant. Now that, of course, is a problem because

liberal consensus theorists are – with good reason – interested in *free* consent (i.e. consent which preserves the consenting individual's personal autonomy), not just any kind of consent.[23]

But the problem is that the modus vivendi strategy is introduced precisely because, under conditions of persistent ethical diversity, there is no agreement of that kind. That is to say, it is introduced in order to address the pragmatic desideratum. The modus vivendi strategy tries to produce that agreement by relaxing the standards of what is legitimate, i.e. what counts as freely consented to, but that does not seem a good move for someone committed to the consensus view of liberal legitimacy. As we have seen, the appeal of the consensus view lies in the fact that it allows the grounding of political power in a way which is respectful of personal autonomy (hence the natural link with liberalism) – an idea which has been well expressed by Jeremy Waldron: "If the rule is one that the citizen has agreed to, surely little that is important in relation to liberty is lost if it is subsequently enforced against him." (1987, 133) But surely if it is not guaranteed that consent results from of a free (albeit hypothetical) choice, its appeal for liberal consensus theorists quickly melts away.

So it seems that, while the combination of modus vivendi and the realistic approach to public reason could prima facie appeal to those realist or agonistic consensus theorists who want to "take people as they are", it is the very pragmatism of this approach which, in a context of persistent ethical diversity such as that characterizing modern liberal societies, condemns it to sanctioning outcomes or procedures those same theorists cannot consider up to the standards of liberal legitimacy.

To further clarify that point it is worth noting how, in my reading of *Political Liberalism*, Rawls' rejection of modus vivendi is motivated by considerations similar to the ones I offer here: modus vivendi does not guarantee a legitimate political framework because it may sanction agreements that violate citizens' personal autonomy. This interpretation may appear somewhat controversial. In fact, many commentators[24] have thought that Rawls' argument against modus vivendi is a pragmatic one (something along the lines of "modus vivendi is the product of a contingent balance of power between competing parties, therefore it is bound to collapse sooner or later"); but in my view it is not – there might be a minor pragmatic side to the argument, but surely it is not its crux. Rather, it is a moral argument, because Rawls uses "stability" in a moral sense (he talks of "stability for

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23] The point here is not the truism that unrestricted bargaining does not necessarily yield liberalism; rather, the point is that even when it does yield liberalism it yields a liberalism that cannot be considered legitimate qua object of a consensus. But that argument does not amount to a defense of mainstream consensus theories of liberal legitimacy: as I will argue, the issues identified by realists and agonists are very pressing, and if they cannot be met then we should seriously question the viability of consensus-based accounts of liberal legitimacy.

24] See, for example, Scott Hershowitz (2000, 222): "Rawls's reason for requiring stability for the right reasons as opposed to accepting a modus vivendi rests on his belief that a modus vivendi cannot provide enduring stability".

the right reasons", i.e. a situation in which citizens are motivated to comply with the norms regulating the political framework by appropriate considerations of political morality that do not infringe on their "status as free and equal citizens" – or, in my terminology, on their personal autonomy). Rawls, as a liberal consensus theorist, is not interested in mere agreement. He is interested in an agreement between free and equal citizens, which cannot take place at gunpoint or in any circumstances curtailing the autonomy of the consenting parties. So, if my reading of *Political Liberalism* and my critique of modus vivendi-based accounts of liberal legitimacy by consensus are correct, it follows that Rawls is right in maintaining that nothing short of an overlapping consensus is needed to meet the desiderata of the consensus view of liberal legitimacy. But that should by no means be taken as a defence of Rawlsian liberal legitimacy theory against other, broader uses of the idea of modus vivendi. The point here is that those who wish to embrace modus vivendi to reject Rawls' moralism and legalism should also abandon the measure of (hypothetical) voluntarism that is constitutive of the consensus view of liberal legitimacy.

As anticipated in the introductory section, in a number of debates within liberal-democratic theory the claim is often advanced that Rawls' account of what counts as a free consensus is needlessly restrictive and too morally laden. To have a closer look at a good example of this kind of position, and one of the most explicitly worked out ones, let us consider Claudia Mills' critique of Rawlsian political liberalism. Mills is explicitly committed to both liberalism and to the view that the source of political legitimacy is an agreement or a consensus between those subjected to the exercise of political power. Yet she also takes issue with the sort of moral demands Rawls places on what counts as a free consensus (i.e. as the proper form of endorsement of the principles characterizing the political framework):

> I argue that if we look at what Rawls wants for liberalism compared to what he thinks we get from a modus vivendi, we will find that he can get what he wants more easily than he thinks. In fact, Rawls himself provides a persuasive story for how the kind of endorsement he wants for liberalism can grow out of a modus vivendi, without any invocation of an overlapping consensus. Where he goes wrong, I argue, is in overestimating the importance to stability of a shared allegiance to principles and in underestimating the importance of a shared history of living together. (2000, 192)

One of the problems here has to do with our earlier discussion of 'stability for the right reasons': like many other critics of political liberalism, Mills does not fully acknowledge the moral dimension of the Rawlsian notion of stability. It is certainly possible that principles that make peaceful coexistence possible will in a sense be endorsed by the citizenry ("Our endorsement of the rules was based first and foremost on the pragmatic consideration that *they worked*. [...] We then value the principles in large part because they make it possible for us to live together" (2000, 201-2)), yet it is not the sort of endorsement that should be considered appealing by those committed to the consensus view. To be fair, Mills is aware of the fact that her position abandons the voluntarism that characterises the consensus view:

> It may be that Rawls downplays allegiance to history, culture, and place and lays stress instead on shared allegiance to principles because he believes that the latter can be *voluntary* in a way that the former cannot and that social contract theories as a group seek to establish the way in which our consent to governmental authority is *free*. (2000, 202)[25]

Nonetheless she maintains that stability can make up for that loss: "But while history, culture and place do not fit well with the voluntarism typical of social contract theorists, they do serve well to establish the kind of stability Rawls claims to be seeking." (2000, 203) Except that, as we have seen, that is not the stability Rawls seeks. More importantly, Rawls has good cause to seek "stability for the right reasons", for if the agreement tasked with grounding legitimacy is not a free one why would one think that it had any (or enough) normative force? If liberals commit to the view that citizens' consent is the source of legitimacy it must be because they think that consent can be based on the exercise of the citizens' freedom and autonomy – hence the inescapable need for the sort of restrictions Rawls places on what counts as consent. And, as we shall see below, invoking the substantive virtues of stability cannot make up for a lack of voluntarism within a consensus-based account of legitimacy.

At this point it is worth considering some lines of reply to the argument I advanced so far. Could a modus vivendi consensus theorist not reply that all her theory needs in order to become immune to my criticism is a simple and innocuous restriction on the deliberative processes sanctioned by modus vivendi, such as a rule prohibiting the use of coercion? Surely, she may argue, one does not need thick and controversial moral notions in order to have a deliberative process respectful of the citizens' personal autonomy. However, it is my contention that this line of reply is not satisfactory because, if we consider carefully enough what is needed in order to cash out such a restriction in a way that will prove strong enough in order to safeguard the citizens' personal autonomy now and in the foreseeable future (as required by the moralistic desideratum of the consensus-based view of liberal legitimacy), we will come to realize that we need a set of normative commitments of comparable weight (i.e. moral 'thickness') to those embodied – for example – by Rawls' notion of "reasonableness". Rawls does not explicitly make this claim or provide an argument for it, but it is possible to supply one by noting that is not enough, for the moralistic desideratum to be satisfied, that free consent be *possible* – it has to be *guaranteed*. It may very well be the case that in some societies, as a matter of fact, conditions are such that a free consent-friendly modus vivendi is possible for the time being. But on the consensus view of liberal legitimacy the citizens' personal autonomy cannot be left hostage to the circumstances (e.g. a critical increase in the popularity of intolerant ethical outlooks, and the like). A good theory of liberal legitimacy needs strong constraints in order to make sure not only that our deliberation procedure guarantees free consent given

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25] Rawls does offer a *causal* story of how an overlapping consensus may arise from a constitutional consensus (1993, 158ff), but that story is irrelevant to the *normative* status of the overlapping consensus.

the present level of ethical diversity, but also that it will continue to do so in the foreseeable future. Successful normative legitimation should be immune from contingent shifts in political leverage. The idea is that if we look at a liberal, freely consented to, regime *now* and conclude that it is legitimate because it is a modus vivendi, we will be at a loss of arguments to denounce it as illegitimate if at some point *in the future* changes in the equilibrium of power or the level of diversity within it (say) will yield changes in the design of the political framework to the extent that the basic structure of that society will stop enjoying the free consent of the citizenry. But if we do have to go down this path of thick procedural constraints, surely the inclusiveness of modus vivendi (and hence its ability to satisfy the pragmatic desideratum) will be lost.

To reinforce that point, recall how Rawls maintains that only the consent of reasonable citizens is needed in order to secure legitimacy. In this way he restricts the deliberative process, ensuring that it will be conducted in a way that is respectful of the citizens' personal autonomy, for reasonable citizens are indeed "persons engaged in social cooperation among equals", and they "desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept" (1993, 48-50). In my view, this sort of restriction makes it rather unlikely that political liberalism will satisfy any sensible formulation of the pragmatic desideratum of the consensus theory of liberal legitimacy, for it is far from clear that the boundaries of reasonableness are not set arbitrarily – but that is not our concern here.[26] We should instead note that Rawls' restrictions on the deliberative process are deliberately engineered to be as 'thin' as is compatible with ensuring the safeguard of citizens' personal autonomy (hence, in short, the well-known distinction between moral and political values, and the scope restrictions on the bindingness of his prescriptions, which only apply to public discourse on the basic structure). That shows that, as I have been arguing, should the modus vivendi consensus theorist try to ensure the autonomy-friendliness of the deliberative process, she would have to put in place rather severe restrictions; and as a result of those restrictions the modus vivendi would indeed morph into an arrangement not very different from Rawls' overlapping consensus.

Here one might object that modus vivendi could at least be seen from a historical point of view as an instrument for eventually bringing about the sort of consensus envisaged by the liberal legitimacy view.[27] If we cannot have the overlapping consensus

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26] I explore this point in Rossi 2008. In a nutshell, Rawls presents the challenge of liberal legitimacy by asking "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" (1993, xx) He replies that it is possible, as we only need the consensus of reasonable citizens, who in turn are characterized as committed to seeking fair terms of cooperation between free and equal citizens, i.e. as liberals (1993, 48-54). But grounding the legitimacy of a liberal consensus in the normative force of reciprocity and other liberal values makes the consensus redundant. Yet the voluntarism of the consensus was supposed to remove the need for a substantive defense of those liberal normative commitments, which now appear groundless or arbitrary.

27] This point could be presented as a modified version of Mills' argument from "shared history"

right now, the objection goes, let us support a modus vivendi, as it will eventually lead to the emergence of a liberal overlapping consensus between free and equal citizens.[28] In other words, modus vivendi may not be legitimate as such, but it is the path to legitimacy. In light of our analysis we could respond in at least two ways. First, this objection is somewhat off the mark: we are after all considering simply whether modus vivendi arrangements could count as legitimate according to the consensus view of liberal legitimacy, not how legitimate political arrangements might arise. Second, and more importantly, it is far from clear whether any modus vivendi is likely evolve into a form of hypothetical agreement of the sort sanctioned by the consensus view of liberal legitimacy. With regard to this, Richard H. Dees convincingly showed that "the story that Rawls tells about the emergence of overlapping consensus from modus vivendi] is sketchy, but its unspoken optimism belies the deep problems that such a transformation involves." More specifically, Dees argues that for the transformation to take place the parties to the conflict need to come to regard toleration as a value *per se*; historical examples, however, show how that is by no means guaranteed to happen, or indeed even likely: "whether toleration can be justified in a way that the parties to such deep conflicts can accept will depend crucially on contextual features" (1999, 667-68),[29] which are difficult to pick out. Thus, if consensus theorists want to defend modus vivendi as the path to legitimacy, they cannot do it abstractly: they face the arduous task of providing a case-by-case account of how, in a given context, it is likely that the modus vivendi will evolve into a consensus between free and equal citizens.

I conclude this section by considering another line of reply that could tempt those wishing to combine modus vivendi and the consensus view of liberal legitimacy. At least, they may argue, securing a political settlement produces stability, social peace, and so on.[30] What is more, they may add, at least in some circumstances these values are to be prioritized. This claim may be read in two ways: one the one hand one may argue that peace and stability are goals that actual citizens desire (simply because peace is necessary for the pursuit of most other goals one may have), thus securing them through a modus vivendi amounts to obtaining a consensus. But that argument is still open to the earlier critique that it does not safeguard the foundational commitments (such as autonomy) that underpin the recourse to the consensus view. On the other hand the argument could rest on the intrinsic appeal of peace and stability. However that would be a departure from the concerns of the consensus view, for it grounds political power entirely on the value of stability, leaving no role to play for consent. The same would be true in the case of appeal to

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we discussed above.

28] This is envisaged by Rawls in his discussion of the transition from a constitutional consensus to an overlapping consensus (1993, 158-68).

29] So Dees shows that the crucial – and very difficult – step is the one from modus vivendi to constitutional consensus (i.e. when toleration starts to be seen as good in itself). That is why I do not discuss constitutional consensus here: once we secure it, we can agree with Rawls that we are on the path to an overlapping consensus (1993, 164ff.).

30] For this line of argument see Dauenhauer 2000, Haldane 1996, Horton 2006, Neal 1993.

the argument that the possibility of an agreement is likely to track the appropriateness of certain set of rules in a given context, and so on. On those views, then, modus vivendi would ground the exercise of political power through substantive considerations of justification rather than relational considerations of consent: political power would be grounded solely in the fact that the political framework possesses certain valuable features (stability and the like), rather than also in a hypothetical relation of consent obtaining between the government and the governed. Such a substantive justification-based approach might very well be worthwhile in its own right, but it does not help the cause of the consensus view of liberal legitimacy.[31]

IV. CONSENSUS, REALISM, AND LIBERAL LEGITIMACY

The analysis of the idea of modus vivendi I carried out here focuses on its prospects as the core of an account of how a political framework could satisfy the desiderata of the consensus view of liberal legitimacy, which is dominant in contemporary liberal theory. This way of looking at modus vivendi may perplex some: after all, many proponents of modus vivendi as an account of the normative foundations of liberalism do not – at least explicitly or intentionally – present their view as a consensus-based account of legitimacy. However, as I have shown, the language usually adopted by these theorists often does imply, or at least allude to, a commitment to the consensus view. Conversely, some realist or agonistic versions of the consensus view do not explicitly propose a modus vivendi, but I maintain that at least some of those views can be subsumed under my account of realist public justification. Yet we have seen that, while a modus vivendi-based theory of legitimacy certainly does satisfy the pragmatic desideratum of the consensus view, it does so at the cost of jeopardizing the moralistic desideratum: given a level of persistent ethical diversity such as that characterizing most contemporary liberal societies, we cannot have a genuinely inclusive hypothetical consensus on the political framework while at the same time ensuring that everybody's consent will be free in any normatively salient sense. And that is why liberal consensus theorists – or perhaps all consensus theorists – should not rest any hopes on the idea of modus vivendi.

But there is a broader and more important issue – which however can only be briefly canvassed here – that these considerations draw attention to. Even though modus vivendi cannot deliver what consensus theorists need, the issue it tries to address (i.e., to put it crudely, the need to achieve a broad hypothetical consensus grounded in reasons actually available to the citizenry) is a genuine concern for the consensus view of liberal legitimacy (embodied, in fact, by the pragmatic desideratum, which echoes the concerns of agonistic and realist critics of Rawlsian liberalism). And it is far from clear that it is

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31] So, to return to the earlier discussion of Mills' position, if one is interested in grounding liberal legitimacy in a form of consensus adducing such substantive considerations to make up for a lack of voluntarism will not do.

possible to address this issue adequately without falling short of the equally important goal of ensuring that the consensus will be respectful of the citizens' personal autonomy. Perhaps viability concerns such as those briefly hinted at here have recently led a theorist like John Horton (2009) to retain the ideas of modus vivendi and of a consensus-based account of legitimacy at the expense of the commitment to liberalism (which, on his view, would only be legitimate subject to favourable background conditions). Exploring this interesting new view would take us beyond the scope of this paper; yet the analysis offered here would caution against grounding the exercise of political power in a sort of agreement if one is not also prepared to ensure that the agreement is a freely and autonomously undertaken one. As seen above, Waldron pointed out that voluntarism can preserve freedom despite the exercise of political power; one does not need to invoke pragmatic contradiction arguments to also see that voluntarism does not in and by itself ground the exercise of political power unless it also safeguards freedom and autonomy.[32] The problem, however, is that under conditions of pluralism the safeguard of autonomy has to takes the form of restrictions (such as Rawls' criterion of reasonableness) on what should count as a normatively justificatory consensus – and those restrictions are, in turn, difficult to justify in light of the initial commitment to a measure of voluntarism.[33]

These considerations suggest a working hypothesis for a critique of the consensus view of liberal legitimacy: have consensus theorists set themselves an impossible task, given the persistent ethical diversity that characterizes liberal polities? If pluralism creates an irreconcilable drift between the moralistic and the pragmatic desideratum, then the prospects of the consensus view of legitimacy as a viable model for the construction of a political framework, rather than a mere regulative ideal, are rather bleak. A related and somewhat less pessimistic line of inquiry may simply seek to establish what – if any – are the empirical conditions under which the consensus view will be feasible. However, on the consensus theorists' own account of the connection between liberal institutions and persistent diversity, those conditions seem unlikely to obtain in modern liberal democracies. Thus the critical hypothesis I just sketched may be supplemented with the observation that the consensus view may owe its deficiencies to its historical roots, in the sense that it is only designed to accommodate the relatively low level of diversity found in early modern European societies.

The demise of the consensus view of liberal legitimacy, however, need not coincide with the demise of liberalism. To sketch an even broader research agenda, I would suggest that if modern persistent pluralism makes liberal moral commitments incompatible with the voluntarism of the consensus view, then perhaps liberals would be better off abandoning the idea that legitimacy requires a somewhat voluntaristic consensus. The

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32] One may say, though, that voluntarism grounds power in so far as it is instrumental to effective social cooperation, or peaceful coexistence, and the like (and that might be another way of reading of Horton's position). That is a plausible view, but it is a departure from the consensus view of legitimacy, as the normative work would be done by the substantive values of social cooperation and peace.

33] This point could be considered an instance of "the paradox of positive liberty". See Carter 2008.

liberal tradition features many teleological exponents,[34] and thus clearly not univocal as to the need of such a consensus. Securing a free consensus on liberal values requires very demanding procedural restrictions. Indeed, such a consensus-based approach is not merely problematic in its own right; it is also detrimental to liberalism, in so far as it strips liberal values of their justificatory force by turning them into seemingly arbitrary constraints on a consensus-based legitimation process, while neglecting the crucial task of making a direct, substantive case for those normative commitments. In fact, the consensus' view attitude to substantive justification of liberal political practice is more than just neglect – it is a proscription, insofar as any attempt at explicit justification of the normative commitments informing the procedural restrictions would expose their partiality and controversiality, which the consensus view is bound to deny. Thus a shift away from the consensus view would arguably reinforce our ability to make the case for liberalism.[35]

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34] Some of the obvious names here would be Hume, Mill and Joseph Raz.

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