

Gaus, Hayek, and the place of civil religion in a free society

Kevin Vallier¹

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Abstract In *The Order of Public Reason*, Gerald Gaus uses Hayekian insights to give a contractarian justification for the specific social rules the rules that comprise the social order of a free people. But in doing so, Gaus inadvertently endorses a kind of skepticism about our ability to justify the institutions that comprise our social order as a whole. The disadvantage of a political theory so pervasively skeptical is that, while contractors can arrive at a series of specific solutions to their social problems, they have no way to assure themselves that their moral nature and their moral practices as a whole are sufficiently sound that the rules they endorse are genuinely morally binding. I argue that this problem can be solved in political practice through the adoption of a civil religion. Civil religions provide narratives and social practices that assure members of free orders that their regimes are good or justified on the whole. In this way, we can introduce the idea of civil religion into contractarian political theory as a social technology for sustaining a free social order.

Keywords F.A. Hayek · John Rawls · Gerald Gaus · Civil religion · Public reason

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Yet perhaps most people can conceive of abstract tradition only as a personal Will. If so, will they not be inclined to find this will in “society” in an age in which more overt supernaturalisms are ruled out as superstitions? On that question may rest the survival of our civilization (Hayek 1991: 139).

✉ Kevin Vallier
kvallie@bgsu.edu

¹ Department of Philosophy, Bowling Green State University, 310 Shatzel Hall, Bowling Green, OH 43402, USA

Enlightenment liberalism attempted to justify a government of limited powers based on conception of universal human reason. In contrast to theological justifications for political order prevalent in the pre-Enlightenment world, Enlightenment liberals believed they could justify state power based on reason alone. These early liberals, who include Locke, Kant and Mill, recognized the ubiquity of disagreement about religion and morality, but they held out hope that there existed a shared, rational point of view from which a justification for political order could be derived. This Enlightenment project in political philosophy persisted into the twentieth century, where perhaps the last of the Enlightenment liberals, Ludwig von Mises (2000: 7), held that the essence of liberalism was to base social policy solely in “rational reflection.”

Perhaps the hallmark of late twentieth century political thought is the rejection of a universal, historically unconditioned faculty of human reason. Instead, as the vast choir of postmodernists, conservatives, communitarians, and socialists have proclaimed, reason is the product of the social order, and so cannot aspire to justify state power from a genuinely transcendental, that is purely rational, perspective. In other words, reason alone cannot bear the burden of political justification. Ironically, it was Mises’s greatest student, F. A. Hayek who contributed as much as anyone to this “post-Enlightenment” critique of reason. Throughout his work, Hayek maintained that reason does not stand “outside the cosmos of nature” but is instead “an adaptation to the natural and social surroundings in which man lives.” The human mind is the “product of the social environment in which it has grown up and which it has not made” (Hayek 1973: 17). The right understanding of human reason leads to the realization that individual reasoning will differ from person to person as it is based on “subjective perceptions and beliefs” (Caldwell 2004: 214). Furthermore, individuals can possess at most “a small fraction of the knowledge possessed by all, and that each is therefore ignorant of most of the facts on which the working of society rests” (Hayek 1973: 14).¹ Hayek saw, as did many others, that the idea of a transcendent rational evaluative perspective available to all persons was unrealistic. Liberalism thus requires a post-Enlightenment reformulation.

Post-Enlightenment liberalism does not deny that a rational justification for social order is possible. Instead, it holds that “the main conclusion of Enlightenment liberalism is correct: reason can lead us to converge on public principles securing human freedom” despite the fact that reason is historically conditioned (Gaus 2003: 19). The difference is that post-Enlightenment liberalism *begins* political philosophy with a conception of evaluative reason as historically conditioned, conflicting, and fragmented and then attempts to show that a rational justification for political order is nonetheless within our grasp.

The dominant form of post-Enlightenment liberalism is *public reason* liberalism. Broadly speaking, public reason liberalism combines traditional liberal commitments to basic civic and political freedoms (freedom of religion, freedom of speech, voting rights and private property rights) with the requirement that all coercive laws be justifiable in mutually acceptable terms. Only when each person has sufficient reason to endorse coercive laws can they be legitimate. Public reason liberals call a law *publicly justified* when it satisfies this test. Public reason liberalism is a post-enlightenment political theory because it grounds liberalism in what John Rawls (2005: xvii) called “the fact of reasonable pluralism,” the idea that the free exercise of practical reason will lead to

¹ Hayek develops these two themes in a compact form in his 1937 “Economics and Knowledge” piece. See Hayek 1948, pp. 33–56.

systematic disagreement about what is of ultimate value in life. Mutually acceptable rules and laws must be justifiable to diverse rational perspectives.

The challenge for public reason liberalism, as a post-Enlightenment liberalism, is to show how historically conditioned reason can nonetheless supply a rational justification for political order. Reason is more limited than Enlightenment liberals thought, and yet public reason liberals must demonstrate that laws can still be publicly justified in the light of reasonable pluralism. The difficulty in doing so is especially pressing for Rawlsian public reason liberals (known as “political liberals”), given Rawls’s increasing appreciation of the diversity of social and political reasoning as his career drew to a close.²

In his book, *The Order of Public Reason* (hereafter *OPR*), Gerald Gaus (whose work is the subject of this symposium) argues that mainstream public reason liberalism has failed to adequately address the tension between diverse reasoning and rational agreement. Their theories fall victim to rational *indeterminacy*, as the deliberative models public reason liberals use to identify a justification for political order do not produce agreement on a determinate set of political principles. As Gaus argues, “...unless we employ highly controversial choice procedures, allowing diversity of evaluative standards into the reasoning of Members of the Public renders their choice indeterminate” (Gaus 2011a: 43). If we are to continue the post-Enlightenment liberal project, we must “give up on the hope that we can construct a compelling description of deliberations of members of the ‘realm of ends’ that will lead them to agree on the same rule” (Ibid.) The best we can do is “to identify a (nonempty, nonsingleton) set of *optimal eligible proposals*: the disagreement in our private judgment is extensive but is bounded within a set.” Public reason can limit or restrict our disagreements about which political principles or forms of political order are best, but it cannot eliminate them. In this way, public reason liberalism has failed to show that rational persons can secure agreement despite conflicts between their diverse points of view.

Gaus’s criticisms have an intentionally Hayekian tenor, for *OPR* is fruitfully read as an attempt to bring a Hayekian conception of the person and society to bear on public reason political theory. But Gaus does not employ Hayek merely to criticize. Instead, he believes that Hayek’s work helps us to see that, despite the weaknesses of our reason, we can nonetheless converge on a member of the optimal eligible set (hereafter OES). Reason can select a member of the OES, but only in conjunction with *social evolution*. Where reason fails, spontaneous order can lead a society to implement a member of the eligible set in their social practices such that all persons can come to accept rules that cannot be uniquely vindicated by reason alone. If we are prepared to admit that “moralities are social facts with histories” and that the morality we have is “a matter of chance” then we can allow social forces that go beyond our reason – and that *shape* our reason – to lead us to converge on a member of the OES. As Gaus (547) maintains, channeling Hayek, “Our reason did not produce the social order.... Rather, the requirements of social order shaped our reason.” What reason cannot do, evolution can.

But Gaus’s solution raises a problem of its own. To specify, let us distinguish two justificatory challenges. The first concerns whether a subset of our political practices, laws, and policies can be justified, whereas the second concerns the justificatory status of our moral practice *as such*. *OPR* can be read as an extended attempt to resolve the

² For an examination of Hayek’s views on complexity, see Gaus 2006. For Rawls’s later view, see the especially clear statement in Rawls 1985, p. 225.

first problem, but the second only by extension. Due to Gaus's Hayekian conception of reason, he holds that the objects of moral evaluation are social-moral rules, or moral rules that concern a limited domain of social life. Evaluative reasoning has limited power, so our moral evaluations must be local and focused. To put it another way, moral reasoning primarily evaluates domain-specific rules, in contrast to principles general enough to govern entire social-moral orders. I believe that *OPR* makes considerable progress towards solving the first justificatory problem by taking on Hayek's conceptions of person and society. But the Hayekian strategy makes the second justificatory problem more acute: if our evaluative reason is local and limited, how can we hope to determine whether our moral practice is justified on the whole?

To sharpen the distinction, consider the claim made by Paul Weithman (2010: 14) that Rawls's transition from *A Theory of Justice* to *Political Liberalism* was driven in part by the desire to provide a "naturalistic theodicy" that will vindicate "our hope in the possibility of a world that is more just and that can aptly be called 'good.'" That is, a key aim of political liberalism is to show that our *world* can be just and aptly called "good." A theorist as Hayekian as Gaus can offer no such theodicy, or so I shall maintain. Instead, the Gaussian leaves those concerned about the second justificatory problem with existential anxiety. For Gaus (2011a: 192), the "worry gnaws" that we have "simply landed in a confused practice that we cannot reason ourselves out of." In other words, our evaluative processes might be so corrupt that, while we can engage in local evaluations of our social-moral practices, we cannot trust those moral practices or our associated moral nature, both of which allow us to make these evaluations in the first place. In *OPR*, Gaus downgrades the ambitions of public reason, in the end showing that it cannot satisfy what is, for many members of the public, a pressing intellectual need: to know that their way of life, in the broad sense, is morally sound. In this way, Gaus resolves the problem of *local* legitimacy by sharpening the problem of *global* legitimacy.

I believe the problem of global legitimacy can be solved, even given the limitations Gaus places on moral reasoning. To do so, I argue we must identify *devices of global public reason*, forms of reasoning that allow us to make broad, general judgments about the justificatory status of our moral practice and our moral nature. Given the limitations of human reason, these devices of global public reason may sometimes be *agents* capable of making global evaluations and communicating them to us: in short, *supernatural* entities. To put it another way, many members of the public must solve the problem of global legitimacy via *political theology* and *civil religion*, accounts of how supernatural entities provide members of the public with indirect evidence that their moral practice is justified in the main. The price of post-Enlightenment reason is to open liberal political theory to supernatural forms of civil religion, social practices liberals view with great hostility and concern. Thus my incendiary conjecture: a great many members of an order of public reason cannot solve the problem of global legitimacy without appeal to a higher power.

In Section 1, I set up the problem of global legitimacy by showing how Rawls and Hayek's post-enlightenment liberalisms create problems for the other. In Section 2, I will explain how *OPR* can be understood as an attempt to synthesize their views to resolve both sets of concerns. Section 3 shows how Gaus's conception of public reason gives rise to the problem of global legitimacy and rejects Gaus's brief attempt to address it. Section 4 explains how civil religion might be able to resolve the problem

of global legitimacy. Section 5 concludes that resolving the problem of global legitimacy should lead public reason liberals to remain open to a robust role for civil religion in the formation and maintenance of a publicly justified polity.

1 Rawls and Hayek – dueling post-enlightenment liberalism

OPR has many themes, and readers will disagree about which are most fundamental. I read *OPR* as an attempt to synthesize Rawlsian and Hayekian post-enlightenment liberalism, thereby resolving problems these views pose for the other. Hayek provides reason to doubt that Rawls's political theory can justify determinate principles of justice, whereas Rawls provides reason to doubt that Hayek has an adequate evaluative method, a way to ensure that the social order is legitimate. Briefly, Rawls is too confident in moral reasoning, Hayek too skeptical. *OPR* provides a resolution to both problems, and it is this resolution I want to assess.

Let's begin with Rawls. Rawls (1971: vii) saw his work as an attempt to “generalize and carry to a higher order of abstraction the traditional theory of the social contract” and to provide a theory of justice that is “superior ... to the dominant utilitarianism of the tradition.” Rawls thought that the problem of identifying principles of justice for political institutions could be solved by converting it into a deliberative problem: “the question of justification is settled by working out a problem of deliberation: we have to ascertain which principles it would be rational to adopt given the contractual situation” (17). As readers well know, the deliberative situation is the original position model, which outputs justice as fairness and its two principles of justice. Fortunately, we need not review these details. Instead, I wish to draw readers' attention to the reasons that Rawls recast his views between *Theory* and *Political Liberalism* in order to demonstrate the post-Enlightenment character of the later Rawls's political theory.

To understand the transition, recall that in *Theory* Rawls thought that the problem of political justification had two stages. The first stage is the original position. The less familiar second stage is an attempt to show that justice as fairness possesses *inherent stability* (498). Inherent stability is achieved when each person in a well-ordered society endorses justice as fairness as regulative of her behavior because she sees compliance with the demands of justice as fairness as a proper part of her good in accord with her “full deliberative rationality” (421). Rawls grew dissatisfied with his account of inherent stability because it assumed that citizens of a well-ordered society would agree on a common conception of the person and personal good. But a well-ordered society would tend to undermine inherent stability because members of the public would develop reasonable, but distinct conceptions of the person and diverse conceptions of the good. Thus, Rawls 2005: xv-xvi) claims that “the account of stability in part III of *Theory* is not consistent with the view as a whole” because “a modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines” Due to reasonable pluralism, members of a well-ordered society will not accept justice as fairness as regulative of their actions based on the social factors Rawls identified in *Theory*.

Rawls constructed political liberalism to show that justice as fairness can be adopted from a plurality of reasonable points of view. In other words, the stability of justice as

fairness rests on the formation of an “overlapping consensus” of reasonable comprehensive doctrines (133–172). Thus, in *Political Liberalism*, the two-stages of Rawlsian political justification are clear: first we develop a “political conception of justice” and then we check to see if the political conception can become the object of an overlapping consensus of reasonable comprehensive doctrines. If it can, then free and equal persons can treat each other justly in a legitimate and rightfully stable fashion. Political liberalism is a post-Enlightenment liberalism, then, because it bases the legitimacy and justice of the social order on the recognition that the free exercise of practical reason leads to systematic disagreement about matters of ultimate import. The problem of political liberalism is to determine how people who reasonably disagree can still live under institutions whose coercive power is justifiable from multiple points of view.

As he was recasting his theory as a political liberalism, Rawls began to worry that reasonable pluralism engenders a second problem: reasonable pluralism about justice. He admitted that members of a well-ordered society would agree only on a family of liberal political conceptions of justice that share some common features. The burdens of judgment, the features of practical reason that lead to reasonable pluralism about the good, should “lead us to recognize that there are different and incompatible liberal political conceptions” (xlvi). Thus, for Rawls a society can be just, legitimate and stable for the right reasons if it is based on political conceptions of justice *other than* justice as fairness. Instead, a political order need only be regulated by “one of a family of reasonable liberal conceptions of justice (or a mix thereof)” (xlvi). Rawls still maintained that, for him, justice as fairness is the “most reasonable” conception of justice, but he admits that there are other reasonable views (xlvi). This is no small point. Rawls was so concerned by reasonable pluralism about justice that he claims that showing “how a well-ordered liberal political society is to be formulated given ... a family of reasonable liberal political conceptions of justice” is “another aim” of *Political Liberalism*.

In sum, the fact of reasonable pluralism forces two changes on Rawls: the admission that stability cannot be based on a shared “comprehensive doctrine” and that justice as fairness is not the only reasonable liberal conception of justice. Gaus will press reasonable pluralism further still, but let us motivate further concern with reasonable pluralism by drawing on Hayek’s critique of Enlightenment reason. This critique poses a severe threat to Rawls, as it threatens our capacity to select a discrete, manageable, publicizeable set of overarching principles of justice.

Hayek (2007: 102) argued as early as 1944 that at least one of Rawls’s burdens of judgment, disagreement about the weight of moral values, will lead to reasonable pluralism. As Hayek notes in *The Road to Serfdom*, even the “scales of value” of rational and moral persons “are inevitably different and often inconsistent with each other.” But we can productively read Hayek as developing his own, more radical, account of the burdens of judgment. Hayek (1952: 16) understands the mind as a system of rules that organize subjective percepts in cognitively unique ways. The mind itself is “a particular order of a set of events taking place in some organism and in some manner related to but not identical with, the physical order of events in the environment.” The result of this structure is that different minds will map the world differently such that their knowledge of the world is inevitably subjective, limited and dispersed. Hayek’s famous “abuse of reason” project rests on these ideas, since social scientific inquiry must begin,

...from what men think and mean to do: from the fact that the individuals which compose society are guided in their actions by a classification of things or events according to a system of sense qualities and of concepts which has a common structure ... and that the concrete knowledge which different individuals possess will differ in important respects (Hayek 1979: 57).

Consequently, solving social problems is limited by insuperable complexity, given that “the number of separate variables which in any particular social phenomenon will determine the result of a given change will as a rule be far too large for any human mind to master and manipulate them effectively” (73). Human cooperation can only proceed on the basis of “common acceptance of formal rules” that themselves have not been rationally constructed (163).

Hayek’s critique of reason heaps more reasonable pluralism on the Rawlsian plate. Hayek’s emphasis on the diverse and dispersed nature of moral reasoning gives us sufficient reason to doubt that we could even agree on a set of reasonable liberal political conceptions of justice. After all, given that persons’ moral perspectives are radically situated in their environment, it is hard to see why their theories of justice should not vary much more widely than Rawlsians suggest. Further, we have strong reason to doubt that we could properly publicize the institutionalization of a single set of principles because there are powerful barriers blocking our ability to determine what others’ reasons are. Given the diversity of personal perspectives, reasons for action will be specific to each agent’s unique epistemic circumstances. Even knowledge of persons’ reasons will be difficult to acquire, much less whether the totality of their reasons favor one set of principles of justice over another.

If Hayek’s theory of mind and society is correct, the prospects for Rawls’s post-Enlightenment liberalism are dim. The success of political liberalism depends on delineating a family of reasonable liberal political conceptions and making sure that the conception a well-ordered society converges on can become the object of “full publicity” (Rawls 2005: 67). Under radically situated and subjective cognitive conditions, members of the public will likely be unable to complete either task, even if they are as careful, knowledgeable, and moral citizens of a well-ordered society.

We may now put Hayek in the hot seat. A common worry about Hayek’s political theory is that his skeptical, evolutionary epistemology is in tension with the political reforms he defends. John Gray (1984: 139) brings this tension out as a conflict between the “rationalist” and “skeptical” aspects of Hayek’s thought. On the one hand, Hayek thought we could critique social policy, but on the other hand, he emphasized the limits of our knowledge. In Gray’s terms, there is an uncertainty in Hayek’s thought “as to the relations of tacit knowledge with theoretical insight in political life.” This tension is present in Hayek’s moral theory. As I understand him, Hayek, like Rawls, endorsed a sort of Kantian contractarian test for the legitimacy of a social rule or law (Gray 1984: 56–78; Sugden 1993: 411–422). In other words, those legal rules are legitimate that “command general assent” (Hayek 1978: 15) and that survive Kant’s test, which we employ by “asking whether we can ‘want’ or ‘will’ that such a rule be generally applied” (28). Hayek believed that the consistent application of the test of Kantian assent will “amount to a test of compatibility [of a rule] with the whole system of accepted rules.” In other words, while the Kantian contractarian test cannot assess the

system of moral rules as a whole, it can bring them into alignment and organize them into a hierarchy if used iteratively by testing each rule in sequence (24, 29).

The problem for Hayek's test, as any Rawlsian will point out, is that it is indeterminate. Rawls recognized early in his career that a simple Kantian test like Hayek's would generate indeterminacy. Consider Rawls's argument for the veil of ignorance:

The restrictions on particular information in the original position are, then, of fundamental importance. Without them we would not be able to work out any definite theory of justice at all. We would have to be content with the vague formula stating that justice is what would be agreed to without being able to say much, if anything, about the substance of the agreement itself (Rawls 1971: 121).

Hayek (1978: 132) gestures at informational restrictions, such as his significant but seemingly throwaway remark that "the most desirable order of society [is] one which we would choose if we knew that our initial position in it would be decided purely by chance." But he merely gestures. Accordingly, we have no method of generating determinate recommendations with the Kantian test, as too many alternatives will pass it. The problem is compounded by Hayek's emphasis on tacit knowledge, since the information needed to determine whether a rule is acceptable or superior to another rule is hard to come by.

The Rawlsian critique of Hayek, then, is that his emphasis on dispersed, tacit knowledge renders his own test indeterminate; Hayekian reason cannot tell us which rules are justified. All Hayek can do is to provide us with a method of rejecting a certain subset of moral rules. He has not told us which rules are best or that can justifiably be imposed on all persons. Granted, the Hayekian will appeal to the principles defended, say, in *The Constitution of Liberty* and volume 3 of *Law, Legislation and Liberty*. But the Rawlsian will claim that Hayek has only provided us with rules that work best, not rules that are morally justified. Hayek may give us reason to think that certain political practices will bring about more welfare than others, but he has given us a poor test of which political practices have a bona fide moral justification that make these practices authoritative.

Hayek and Rawls pose problems for the other. Hayek compounds the sources of reasonable pluralism, demonstrating that Rawls's political liberalism cannot overcome critical epistemic hurdles. Rawls would likely counter that Hayek's test is too formal and indeterminate to evaluate whether social rules are justified or not. Both Rawls and Hayek want an evaluative test for our moral and legal practices, but neither has succeeded. It appears that we need a new Kantian test, which *OPR* provides.

2 Gaus's synthesis – fragmenting public reason and testing rules

OPR's key claim is that impartial Kantian reason alone cannot generate a uniquely justified set of rules or principles, due to the depth and breadth of evaluative pluralism. We must "give up on the hope that we can construct a compelling description of members of the 'realm of ends' that will lead them to agree on the same rule" (Gaus 2011a: 43). Instead, we must allow extensive disagreement in individual judgment by acknowledging a "(nonempty, nonsingleton) set of optimal eligible proposals."

Impartial reason can only bound private judgment. So Gaus begins *OPR* by acknowledging the problem that plagues both Rawlsian and Hayekian political theory, namely that impartial Kantian reason can only set boundaries on a set of eligible proposals and nothing more.

The bulk of *OPR* is devoted to resolving this problem. In order to do so, Gaus draws on non-Kantian moral philosophy, specifically the line of moral thought that extends “from Hobbes through Ferguson, Hume, and Smith to F.A. Hayek and contemporary game theorists” which holds that “moralities are social facts with histories” (44). This tradition claims that morality is the path dependent result of cultural evolution. Because Kantian impartial reason is indeterminate, social evolution is required to bring about convergence on a member of the set of proposals bounded by Kantian moral reasoning, for reason lacks “within it the resources to determine our morality” (424). The Kantian tradition is still critical, however, for it provides an important tool for determining which proposals are justified. Without some test of public justification, “the evolutionary view cannot distinguish authoritarian from non-authoritarian evolved positive moralities” (46). In this way, Gaus is able to articulate the challenge posed by the intersection of Rawlsian and Hayekian thought, namely to “evaluate our evolved rules from the perspective of public reason: we must seek to determine whether the outcome of the social evolutionary process is within the optimal eligible set” (424).

To explain Gaus’s solution in adequate detail, I will now identify eight key features of the account and elucidate how they fit together. These features are: (i) social morality, (ii) rule-following punishers, (iii) the fragmentation of public reason, (iv) moderately idealized reasoning, (v) the optimal eligible set, (vi) the abstract deliberative model, (vii) the non-selectionist, increasing returns account of social-moral evolution and (viii) the testing conception.

(i) Unlike most public reason liberals, Gaus (2) holds that *social morality* must be justified, not just laws.³ A social morality is “the set of social-moral rules that require or prohibit action, and so grounds moral imperatives that we direct to each other to engage in, or refrain from, certain lines of conduct.” Social morality has several distinguishing characteristics. It structures social interaction and so helps persons coordinate their behaviors and cooperate for mutual gain. While social morality restrains our aims via social punishment and ostracism, it ultimately extends our ability to achieve our goals. Persons do not comply with the rules that comprise social morality – “social-moral” rules – for merely instrumental reasons but rather because they are seen as genuine moral imperatives. Finally, social-moral rules require an individual to defer to the judgment of others who enforce the rules when her private judgment conflicts with theirs.

I believe Gaus focuses on social morality for two reasons. First, laws and moral norms share critical features and so raise similar justificatory problems.⁴ Both law and morality impose demands on individuals that they may well be better off without. The problems of moral and political justification, then, arise for the same reason – norms might restrict individual liberty without cause. The second reason for focusing on social morality is new to Gaus’s work. In *OPR*, Gaus notes that the problem with Hobbesian

³ On Gaus’s view, many laws can be understood as a subset of social-moral rules.

⁴ Prior to *OPR*, *Value and Justification* details his most extensive effort. See Pt. II, A Theory of Moral Justification, pp. 251–378.

and Lockean solutions to the problem of moral justification is that they are “inherently political” and so “politicize the resolutions of all moral disputes” (24). This implies an unattractive form of statism where state authority invades all domains where the content of social morality is disputed. Notably, Gaus admits that his “Lockean-inspired account in *Justificatory Liberalism*” falls victim to the same error (24, ft. 48). So the focus on social morality is critical to avoid politicizing all moral conflicts.

(ii) The second distinguishing feature of Gaussian public reason is its conception of persons as “rule-following punishers” (103). Rule-following punishers are agents who “unconditionally follow cooperative rules and punish those who do not” (108). In this way, rule-following punishers have two characteristic traits: rule-following and punishing. Rule-following is critical to *OPR*’s argument as Gaus must show that agents have categorical, non-instrumental reasons to comply with social-moral rules. Otherwise, he cannot explain how agents can rationally adopt evolved social rules. Towards this end, Gaus appeals to recent work in moral psychology to show that only agents who follow rules of social morality for non-instrumental reasons can cooperate with one another over time.⁵ He then argues that, contrary to conventional wisdom, rule-following is not practically irrational (131–163). He also argues that rational agents can comply with rules that lack purely rational origins; that is, they can rationally follow rules inherited from social evolution. Importantly, Gaus follows Hayek here: “Hayek was entirely right that we are as much rule following as we are purpose pursuing creatures” (181).

The second trait of the rule-following punisher is punishment, which is required to maintain compliance with social-moral rules. Without punishment, rule following will break down due to uncooperative cheaters and confusion among rule-followers.⁶ For Gaus, punishment is driven by the moral emotions – agents’ sentiments of resentment, indignation, and guilt. The combination of agents’ moral emotions with their belief that the social-moral rules they comply with are justified ensures that they will punish rule-violators and so keep justified social-moral rules in equilibrium.

(iii) The next key feature of *OPR*’s main line of argument I call the *fragmentation of public reason*, following Hayek’s work on the fragmentation of knowledge (Hayek 1948: 33–56). The fragmentation of public reason refers to a key contrast between Gaus and Rawls. The Rawlsian account of public justification appeals to coarse-grained concepts, like a political conception of justice and an overlapping consensus of reasonable comprehensive doctrines (Rawls 2005: xxxix). Political conceptions and comprehensive doctrines are sprawling complexes of norms and rules. Gaus *fractures* these two ideas into much smaller ones – sets of social-moral rules and sets of diverse, *intra*-personally related reasons.

Gaus fragments political conceptions into rules in part because he thinks that only rules can solve the problem of indeterminacy. Political conceptions are composed of principles, which are more general in scope than rules. Evaluating social practices

⁵ Demonstrating the conclusion that only rule-following punishers can solve the problems raised by the need for public justification is arguably the most extensive task in the book, extending from pp. 53–182, first with the demonstration that instrumental reasoners cannot rationally and stably cooperate, and second with the argument that rule-following punishers can.

⁶ For Gaus, the appropriate conception of punishment is moralized—it begins by evoking negative sentiments like resentment and guilt, though at the legal level coercive sanctions will be applied. Developing an appropriately cognitive and moralized conception of punishment is a critical aim of Chapter 4.

based on principles requires sophisticated philosophical judgment, whereas rule-based evaluation does not. For this reason, principles cannot serve as the primary basis of moral evaluation (though they can help; see p. 296). Gaus also focuses on rules because he thinks humans have evolved to be rule-following punishers. This means that a great many of our actions are driven by following rules, far more than those actions based on principles. Accordingly, our ordinary forms of moral evaluation concern rules rather than principles. In this way rules, not principles, provide “mutually understood guides for social life” available to all normal agents, not merely moral experts (272).

The move from doctrines to reasons follows suit. First, comprehensive doctrines are complex relations of a great many reasons for action. As a result, applying them to the ordinary evaluation of social-moral rules will be exceedingly complicated. Second, many citizens do not have comprehensive doctrines, in part due to the cognitive demands of complying with them. Consequently, public reason liberalism needs a more fine-grained unit of justification for rules, namely reasons. On Rawls’s view, comprehensive doctrines must endorse political conceptions. For Gaus, in contrast, our reasons must endorse social-moral rules.

The fragmentation of public reason has two important consequences. First, on the Gaussian view, an agent’s sufficient reasons to endorse a law may vary considerably, relating to one another in oblique ways. The normative force of many sufficient reasons, for instance, might hold entirely independently from one another. What’s more, sufficient reasons will vary considerably across persons given their diverse points of view and rational commitments. Gaus does not restrict justificatory reasons to the set of shared reasons, as most public reason liberals do. Instead, while real moral agents share some evaluative standards, their reasons can and do differ dramatically (283–7). In consequence, far more reasons can figure into the public justification of rules and laws than on Rawls’s view.

The second consequence of fragmented public reason, one critical for this paper, is that public justification no longer focuses on evaluating a small number of principles of justice or even a single, unified body of institutional rules. Gaussian public justification is a local affair: we ask whether each person has sufficient reasons to endorse particular rules. And since justification is local, it is also decentralized and dispersed. The dispersion of public justification means that “the selection of a specific morality” is “a many-person problem” such that the problem of public justification is “not mutual authority but *dispersed* authority” (47).⁷ Following Hayek, Gaussian moral evaluation is diverse and dispersed, subjective and fragmented.

(iv) A further diversifying element is Gaus’s conception of idealization. Public reason liberals frequently idealize in order to account for citizens’ reasons; they upgrade citizens’ rational and informational capacities in order to model what their reasons are (Rawls 1971: 16–17, 119–121). They almost always *radically* idealize by assuming that members of the public are fully rational and fully informed in order to ensure, among other things, that members agree on which proposals are justified. Gaus thinks that such homogenizing radical idealization is both incoherent and inappropriate for a political theory rooted in the recognition of diversity (Gaus 2011a: 235–244). He prefers a more moderate conception of idealization where the standards of appropriate reasoning and information are based on bounded rationality (246). An agent has a

⁷ Emphasis added.

sufficient reason R if and only if a “respectable amount” of good reasoning would lead the agent to affirm R as undefeated (250). A respectable amount of reasoning is determined by the degree of reasoning that members of the public expect of one another, a modest standard often determined contextually.

(v) We have now identified the source of indeterminacy in *OPR*: diverse, boundedly rational reasoners will come to affirm distinct and conflicting moral rules and will not be able to agree which rules are best for governing their common social life. For Gaus, the main problem we face is not that the set of justifiable rules is null, such that for each relevant rule there is some member of the public that has sufficient reason to reject it. The problem is rather that members of the public will both identify several rules as better than no rule at all to govern some matters *and* disagree about which rule is best. We are left with an “eligible” set of rules, rules that are both undefeated but that members of the public rank differently. Gaus employs a number of theoretical devices we can use to narrow the eligible set, some of which we will review below. For now we need merely stress that Gaus defines the “optimal eligible set” (OES) as a set of all undefeated, *undominated* social-moral rules that might govern our actions in a particular context. That is, the OES excludes members of the eligible set that are defeated or Pareto inferior to some other subset of eligible rules.

(vi) In Part II of *OPR*, Gaus employs three conceptual devices to narrow indeterminacy to the OES: the abstract deliberative model that maps out the order of public justification, an account of social evolution that will generate social convergence on a member of the OES and a “testing conception” of public justification that limits the determination of whether a presently practiced rule is in the OES to cases where the rule has become morally controversial. Let us begin our account of Part II by explaining the idea of the abstract deliberative model.

The abstract deliberative model holds that diverse members of the public determine what is publicly justified in a series of steps or in an *order* that proceeds from more abstract determinations to more concrete ones. The determination proceeds according to the Basic Principle of Public Justification, the master principle of Part II:

A moral imperative “ $\Phi!$ ” in context C, based on rule L, is an authoritative requirement of social morality only if each normal moral agent has sufficient reasons to (a) internalize rule L, (b) hold that L requires Φ -type acts in circumstances C and (c) moral agents generally conform to L (263).

This principle, hereafter BPPJ, governs the deliberation of members of the public who determine when practiced rules and proposals have moral authority. The determination is made when deliberators select a moral rule based on a consultation of their diverse evaluative standards (271, 276).

The proposals members consider must meet a number of requirements that we can characterize as generic features of all bona fide moral rules: rules must be general, weakly public, deontic requirements that are reversible and promote the common good (294–303). Evaluations are also comparative since members of the public must choose a rule from a list of alternatives.⁸ Gaus then argues that members of the public will agree on certain basic rights by taking the perspective of agency (337–341). That is,

⁸ Members must also determine whether rules impose excessive moralization costs. *Ibid.*, pp. 310–321.

they will endorse a number of rights by reasoning as bare agents, stripped of their individuating characteristics. In doing so, members will adopt a presumption in favor of liberty, respect for autarky or self-directed action, rights not to be coerced or deceived, freedom of thought, rights against harm and rights to assistance (341–359). Next in the order of justification are jurisdictional rights, rights that devolve collective choices to individual members of the public. Privacy rights and private property rights are the quintessential jurisdictional rights (374–386). In sum, constraints on the OES follow an order from the more abstract (formal features of rules) through the relatively abstract (the abstract rights of agency) to the more concrete (jurisdictional rights).

(vii) Once the OES has been delineated, *reason runs out*. In other words, reasoning alone cannot select a member of the OES as best and authoritative. For this reason, Gaus appeals to social evolution to show how a society can converge on a member of the OES. The conception of social evolution Gaus employs is related to but distinct from Hayek's more "selectionist" account. On Hayek's view, evolution proceeds via "a mechanism according to which certain social traits are selected in a competitive environmental over others," such that the social rules we have "evolved because the groups who practiced them were more successful and displaced others" (419: Hayek 1973: 18). Gaus denies that a rule's evolution demonstrates that the rule has some good-making features, though he does embrace a related "evidential" claim where the fact that a rule is practiced is some evidence that it could be justified or that it performs some positive social function (Gaus 2011a: 423). Gaus also argues that a rule in the OES acquires additional good-making properties insofar as it is actually practiced, since the rule actually effectively coordinates our behavior. The result, one that will disturb Rawlsians and please Hayekians, is that a social-moral rule can be justified based on a contingent, path-dependent and generally unplanned social process (409–416).

(viii) The final piece of the Gaussian public justification is the "testing conception," a method of evaluation based on the recognition that our cognitive capacity for evaluating our moral practices is necessarily limited. Moral evaluation for Gaus, again following Hayek, must begin from our actual social practices and then "test" those practices via the Deliberative Model (425). In other words, public justification does not begin by asking whether our entire set of coercive institutions embodies a commitment to general principles of justice. Rather, we test rules in accord with Gaussian public justification only when challenges or concerns about the rules arise. Note the striking resemblance between the testing conception and Hayek's idea of immanent moral criticism. We do not construct our morality from scratch nor do we settle on abstract principles via a controversial deliberative model like Rawls's. Instead, the question for the member of the public is this: is our social practice P in the OES or not? If P passes the test of the deliberative model, then it is in the OES and can become (or already is) an authoritative part of our social morality. In virtue of passing the test, the rule treats all as free and equal, and persons have the moral authority to demand that others comply with it. In this way, societies can justify their institutional rules and solve the problem of indeterminacy.

3 Gaus's gnawing worry – the question of global legitimacy

Gaus's reconciliation of Rawlsian and Hayekian political thought is elegant, if complex. But I shall now argue that it raises the *problem of global legitimacy*. The problem

of global legitimacy holds that members of the public lack sufficient reason to endorse their moral practice *as a whole*, even if they can evaluate the social-moral rules that comprise their shared moral life.

To develop the problem, let us analyze Gaus's reply to a related concern that arises when he contrasts "internal versus external justifications of our moral practice." An internal justification of our moral practice involves appealing to the standards implicit in our practices to reform and revise social-moral rules. An external justification, in contrast, requires stepping "outside" of our moral practice and asking whether it is justified as a whole. Gaus draws the distinction in order to demonstrate that we should understand idealization in terms of the appropriateness conditions of the moral emotions.⁹ But the demonstration must confront an objection: using the moral emotions to identify a form of moral justification only "shows the nature of a certain sort of practice.... But it does not show that this moral practice is correct." In other words, if the structure of public justification is determined by facts about our moral practices, it may seem that we must determine whether our practices are themselves correct. In this way, an "internal justification" might require an "external justification." To vindicate a particular conception of public justification, we may have to "consider its justifiability from a detached, objective point of view" (Gaus 2011a: 191).

When faced with a similar problem, P.F. Strawson (1974: 25) claimed that providing an external justification for our moral practice is impossible: "As a whole, it neither calls for, nor permits, an external 'rational' justification." Gaus does not make so strong a claim; instead, he denies that an external justification is required to validate Gaussian public reason as a sound method of determining whether our social-moral rules have moral authority. Gaus (2011a: 191):

We are embedded in certain sorts of practices, with certain beliefs and emotions. They form part of the reasons from which we must judge, criticize, and propose changes. A practice such as social morality is deeply embedded in our view of the world.... If the presuppositions of our moral practices are so deep a part of the way we see the world, then to renounce the practice would be to renounce most of what we care for and value. But how could we have reason to do *that*?

I interpret Gaus as follows. The motivation to take an external evaluative perspective is that our moral practice may be confused or flawed. Gaus replies that to regard our moral practice as flawed requires a readiness to give it up. And we could only be prepared to give it up if we have reason to reject most of what we value. But our evaluative commitments are often quite deep, so it is implausible to think we have reason to reject them. Since we have no reason to reject our value commitments, we have no reason to suspect our moral practice, and so no reason to take an external evaluative perspective. Public justification can proceed unimpeded by global or external evaluations.

The key premise in Gaus's attempt to block the demand for external justification is the claim that to renounce our moral practice would require renouncing "most of what we care for and value." Gaus (192) defends the premise by arguing that "a practice such as social morality is deeply embedded in our view of the world; it affects our

⁹ As is illustrated in the proceeding part of Chapter IV.

understanding of interpersonal relations, including love and friendship, and so of what sort of life is worth living.”¹⁰ Unfortunately, he says little more and then proceeds to state the problem in a different way:

How could we survey all that matters to us and come to the conclusion that our reasons lead us to give it up, by renouncing the view of the world on which our reasons depends? Where would *that* reason come from?¹¹

The argument now seems to be that we have no need to take an external perspective to ratify our internal justification of our moral practice because it is hard to see how we could have a reason to give up “all that matters to us.” This argument also rests on a dependence claim, specifically that to have reason to doubt that our moral practice has an external justification, means that we could plausibly come to the conclusion that we must give up “all that matters to us” or be prepared to renounce our “view of the world.”

I am not sure why Gaus thinks we should accept this dependence claim, especially given its severity. Surely we can ask whether our moral practice is justified even if we are not prepared to give up all we value or all that matters to us. Even if rejecting our moral practice would ultimately entail giving up much of what we value, we cannot rationally quiet questions about external justification by acknowledging that some answers to the question may have costs. As we shall see, the demand for an external justification may amount to much less, such as a demand for reassurance that our moral practice will yield reliable, valid moral judgments. Even if we lack such reassurance, we need not take the dramatic step of fundamentally altering our worldview or reevaluating all of our values.

Critically, Gaus admits that we want to discover external justifications despite the fact that a failure to find one could force us to fundamentally alter our view of the world. Gaus:

Still, the worry gnaws: have we simply landed in a confused practice that we cannot reason ourselves out of? That may be a recipe for despair rather than contented resignation, much less justification. We not only wish to know where we have landed but to have some reassurance that it is a destination worth arriving at, and not the result of being marooned with no help of rescue.

Despite having no reason to give up all we value, we may still wonder whether our moral practice is sufficiently legitimate or valid. We may still rationally worry that we are stuck in a “confused” moral practice; we need some sort of “reassurance” that we are not “marooned.” Thus, Gaus fully acknowledges that the problem of external justification still concerns us. Let us call Gaus’s *gnawing worry* the worry that our

¹⁰ Here Gaus points to his defense of the poverty of what he calls the “pure liberty” view on the grounds that it deprives persons of bonds of friendship and love. But Gaus nowhere to my knowledge connects the renunciation of the pure liberty view to the renunciation of social morality. Reconstructing the connection would take us too far afield. See the argument in Gaus 1990, chapter VI. I suspect he has section 17.3.3 in mind.

¹¹ Emphasis in original.

moral practice lacks an external moral justification. The gnawing worry will feed into the problem of global legitimacy.

If members of the public need some method of quieting their gnawing worry about the legitimacy of their moral practice, then we are naturally led to ask how we might go about doing so. The *question* of global legitimacy is whether members of the public have an adequate method of assuaging their gnawing worry due to limitations on their evaluative faculties. If they cannot assuage their gnawing worry, they may lack sufficient reason to embrace their moral practice *even if* they are not prepared to give up most of what they value or all that matters to them. Members of the public may simply acquiesce in a practice they regard as both flawed and inescapable. Further, members of the public may see reason to endorse some parts of their nature, but not others. Or they may identify reason to suppress the exercise of their normal moral agency under certain circumstances.

Gaus (193) claims that we can quiet our gnawing worry once we grasp that “our current moral practice is made intelligible and sensible once we understand that human society depends on a social morality based on Rule-Following Punishers.” The only way that our social-moral order could have evolved is if we “care about the moral actions of others, care about making demands on them and hold that we have standing to make these demands,” for “human society would not even be possible without this framework.” If we ask whether our moral practices are justified as a whole, we will find that the entire framework is necessary. And this should reassure us.

A careful reading of Gaus reveals that this response is inadequate. By Gaus’s own lights, we cannot justify our moral practice by showing that it is necessary for social life. In Chapter II of *OPR*, Gaus argues that while the “instrumentalists” are right that social morality is necessary for human cooperation and social life, the authority and justification of social morality cannot depend on an appeal to those benefits alone. This is why Gaus claims that the Kantians are right to “insist that our moral relations can never be reduced to their instrumental benefit.” If that is so, how can members of the public assure themselves that they have not landed in a confused practice by reflecting on the benefits of the social-moral order as a whole? After all, Gaus wants us to comply with moral rules for non-instrumental reasons. Recognizing the instrumental benefit of our moral rules cannot morally require us to comply with them. Similarly, recognizing the instrumental benefit of the system of moral rules cannot morally require us to comply with or trust it. In sum, then, Gaus does not provide us with an adequate salvo for our gnawing worry while admitting that we want one.

Gaus could reply that his concern about instrumentalist justifications for social-moral rules does not “scale up” to concerns about an instrumentalist justification for the authority of our moral practice. If we can show that members of the public individually have no reason to defect from our moral practice given their psychological make-up, persons still have reason to endorse moral rules for non-instrumental reasons; they have sufficient reason to cooperate with others on moral terms. In response, it seems to me that a purely instrumentalist justification of our moral practice will pollute our non-instrumentalist rationale for complying with social-moral rules. If our moral practice is justified on purely instrumental grounds, realizing this could undermine our judgment that we have non-instrumental reasons to comply with social-moral rules. Our deontological moral practice will lack the proper underpinning.

I believe that Gaus's "gnawing worry" points to a genuine problem, but the text is not pellucid. To grasp the real issue, we must answer four questions:

- (1) What needs endorsing?
- (2) What sort of endorsement is required?
- (3) Who endorses?
- (4) What are the alternatives to endorsement?

Let's answer these questions in sequence.

(i) Ordinarily, the object of endorsement in public reason liberalism is a unit of coercion such as a law or policy. But the problem of global legitimacy concerns whether we have reason to endorse our moral practice as a whole. Gaus's understanding of our moral practice has two characteristic features: (a) the features of persons that generate the practice—our moral emotions and cognitive capacities, and (b) the product of those features—justified social-moral rules. To endorse our practice is to endorse (a) and (b) and probably (b) because of (a). To endorse the features of persons that generate our moral practice is to endorse our nature as evolved, rule-following, morally emotional, moderately idealized agents, or to simplify, our nature as *normal moral agents*. No amount of rule evaluation can tell us whether to endorse our normal moral agency, since we will have no reason to believe that our practice of rule evaluation is valid if the nature that produces them is fundamentally flawed or corrupt. In other words, rule evaluation cannot tell us whether to endorse our moral nature because our methods of evaluation depend on our potentially corrupt nature. I will assume, then, that if we have reason to endorse our normal moral agency, then we will probably have reason to endorse the product of exercising normal moral agency — social-moral rules. This is so because our normal moral agency provides us with a method of evaluating the validity of our extant set of social practices. Perhaps the exercise of our normal moral agency can generate a deeply conflicted set of social-moral rules, but as long as we have a trustworthy method of resolving contradictions as they arise we can assuage our gnawing worry about the validity of our moral practice.

(ii) What sort of endorsement are we after? Not local endorsement, in the technical Gaussian sense of whether we have sufficient reason to endorse extant social-moral rules. Instead, we are looking for some "pro-status" to assign to our normal moral agency sufficient to quiet our gnawing worries. But what is this pro-status? Is it that our nature is good? Is it that our normal moral agency tracks what is mind-independently right?

The requisite form of assurance will likely depend on our broader commitments about the nature of moral reality beyond our particular social-moral practice. In other words, we could evaluate our normal moral agency based on whether it reliably generates social-moral rules that comport with this broader moral reality. Consider, for instance, a traditional theistic natural law perspective. On this view, we can quiet our gnawing worry if we have reason to believe that the practices characteristic of normal moral agents generate norms compatible with natural law. The secular Kantian could quiet her gnawing worry if she has reason to think that the regular exercise of normal moral agency generates norms that conform to the three variations of the categorical imperative. On the other hand, we might evaluate our normal moral agency based on whether our nature is good or pure as such. The Aristotelian virtue ethicist might

employ this form of evaluation. On standard Aristotelian views, we have reason to endorse our normal moral agency if the virtuous or fully actualized person would possess, develop, and exercise normal moral agency. The Aristotelian virtue ethicist thereby evaluates her normal moral agency by measuring it against her conception of the virtuous agent. In sum, we can rationally endorse our status as normal moral agents if we determine that our agency or the norms it characteristically produces match some independent or higher normative standard. Fortunately for the public reason liberal, a pluralistic society will be able to appeal to wide range of standards, so we need give no one answer here.

(iii) Who must endorse our status as normal moral agents? Two answers suggest themselves: real-world participants in social morality or members of the public. I agree with Gaus that we must ultimately address justifications to real agents by way of the deliberation of members of the public. Gaus: “the question for the deliberative model is whether the hypothetical agreement of your surrogate tracks your reasons – the reasons *you have* – to endorse (and internalize) a moral rule (265).” We wish to determine the reasons that *we have* to endorse our status as normal moral agents, and we can get traction on this problem by asking whether members of the public have reason to endorse the same.¹²

We may characterize the justificatory public, those who ask the question of global legitimacy, as follows. Many members of the Gaussian public will not be satisfied with a piecemeal test of their system of social-moral rules because they will wonder whether the evaluative process itself might be corrupt. Members will likely share this uneasiness in light of the high universal tendency of societies to inquire into whether their natures and practices are good, righteous, or blessed. Consequently, we can fairly assume that a great many advanced moral reasoners will seek such an answer, one that Gaussian public reason currently does not provide.

(iv) Our final question concerns the alternatives to global endorsement. *OPR* suggests a stark contrast: either we accept our nature as normal moral agents or we must be prepared to “renounce our view of the world” or give up “all that matters to us.” This claim is extreme. We could decide we lack sufficient reason to endorse our status as normal moral agents without concluding that we have sufficient reason to reject it. We might endorse only some aspects of our nature as moral agents. Alternatively, we could hold that we have reasons to suppress the expression of our normal moral agency in some cases and not in others.

The most historically common alternative to endorsing our nature as moral agents is to *seek reformation* of our natures and to repair our relationship with a reality greater than the social-moral order in which we live. Rarely if ever do societies, upon believing that their form of life has become corrupt, propose abandoning their moral nature entirely. But they frequently seek redemption and reformation through theology, liturgy, ceremony, symbol, and song.¹³ In these cases, political and religious leaders function as divine representatives, providing assurance of divine approval. Further, these leaders typically develop political theologies, explanations of how their social institutions and

¹² Note that Rawls had a detailed account of why we should endorse our nature as moral persons, specifically our sense of justice, in *TJ*, so our question is not without precedent. See Rawls 1971, pp. 496–505.

¹³ Bellah 2011 overviews a great many examples in his analysis of mythic religion and its relationship to ancient monarchy.

practices have or could acquire divine sanction, and civil religions, doctrines that explain how reformation is conferred and practices that bring them about. Reformation is thus a live third option for members of the public who are considering whether to endorse or reject their normal agency.

I suspect Gaus will reply that to seriously consider rejection or reformation we need strong reason to doubt whether our normal moral agency has the relevant pro-status. On Gaus's view, we naturally *do* accept our normal moral agency and, given how much of our social life depends on our commitment to public justification, it is hard to see how we could have reason to give it up. Thus, the question of external justification, if coherent, will not normally arise. Yet while most real-world persons do not wonder whether they should endorse their status as normal moral agents, persons across recorded history have wondered whether their practices and natures are corrupt and somehow at odds with moral and divine reality. For instance, religious societies like the ancient Israelites wanted to know whether their forms of life had God's favor. The Israelites even had a social technology, the Torah, based on a covenant made with God; they could evaluate their status before God by evaluating the extent to which their behavior conforms to the Law. Enormous religious sub-populations may ask the same questions in relatively non-religious societies, as will a number of secular citizens who cannot silence their gnawing worries on their own. The question of global legitimacy, then, provides a philosophical articulation of a society's felt uneasiness when it wants to know whether its form of life is fundamentally good, righteous, sanctified, etc.¹⁴

We may now characterize the problem of global legitimacy. Many members of the public will want to know whether they have sufficient reason to assign their normal moral agency a pro-status specified by their particular views about a broader moral or divine reality. In lieu of such reason, they will wonder whether they should seek reformation or despair in their corruption. With this characterization in hand, let us explore how such a problem might be solved.

4 Human and divine evaluations of our moral practice

We can pose questions of global legitimacy for a wide range of political philosophical systems. But the question is especially pressing for Gaus because he recognizes both Hayekian and Rawlsian burdens of judgment. Public reason is supposed to give diverse persons a method of evaluating their moral practices as just or unjust, legitimate or illegitimate, and justified or unjustified. For Gaus, we can only approach such an evaluation piece-by-piece. The weight of the burdens of judgment limits our evaluative capacities by demonstrating that we have no "Archimedean point from which to stand outside of cultural evolution and evaluate its outcomes" (422). The cognitive faculties of members of the public, Gaus insists, cannot provide us with an evaluative point of view to judge the general results of our moral practice.

¹⁴ Keith Hankins points out that answering the question of global legitimacy may only require assurance that our practice isn't especially bad or abhorrent, not whether it is fundamentally good or righteous, such that assurance may not be a significant concern, but many members of the public will want more than the minimal amount of information required to assuage their worry, but rather a compelling, enduring answer to their concerns.

These cognitive limitations raise the problem of global legitimacy because they provide reason to doubt whether we have sufficient reason to endorse our normal moral agency. But there are two ways in which we might doubt that we have such reason. The first view, that we have already assessed, evaluates our moral agency in terms of its outputs: does our normal moral agency normally lead us to endorse laws that are in some broad sense good, just, true, or in possession of some other important pro-status? On this view, Gaus faces the problem of global legitimacy due to his claim that our evaluative capacities are too limited to survey our moral practice as a whole and render a verdict about its reliability.

However, we might also evaluate our normal moral agency according to a standard of virtue for the operation of our agency. On the virtue-based evaluation, the problem of global legitimacy arises when we attempt to identify whether we are virtuously exercising our moral agency in an exemplary fashion, such that it contributes to our personal flourishing and is compatible with our other personal aims. To illustrate, consider Rosalind Hursthouse's (1999: 264) virtue ethical concern that our evolved human nature may not be capable of eudemonia due to the possession of an "intrinsically flawed nature." Whether our nature is harmonious enough for eudemonia is a "highly contingent" fact, for "if things have been otherwise, ethics would not exist, or would be unimaginably different." It is striking that Hursthouse (265) encourages her atheist readers to follow theists in emphasizing the "virtue of hope" that human drives and evaluative faculties will fit together in such a way as to make flourishing possible. Our question is whether the atheist has any *reason* to hope; theists presumably do, as they believe that human nature is the creation of a good God. In lieu of theism, Hursthouse argues that hope is justified as a "necessary condition of our practice," that is, as an assumption that makes ethical inquiry possible. But some members of the public have the gnawing worry that their nature is corrupt precisely because theistically unguided cultural evolution suggests that flourishing might not be possible, at least not for most ordinary humans. Some members of the public appear to lack reason to believe that their nature hangs together in accord with an independent standard of personal unity and personal good.

Whether we understand the problem of global legitimacy in terms of outputs or a virtue-standard, we can solve it via political *theology*, an explanation of the relationship between the moral-political order and *divine reality*. *Civil religion*, a set of doctrines and practices capable of realizing societal reformation, connects our ordinary evaluation of our moral practice with an overall evaluative perspective, an evaluation, perhaps literally, from a God's eye point of view. The problem of global legitimacy can be solved if members can appeal to intellectual forces powerful enough to make the rational evaluations that we cannot, that are able and willing to communicate that evaluation to members of the public, and that are prepared to *alter* or *improve* that evaluation contingent upon ritual and repentance. Members of the public can quiet Gaus's gnawing worry if they can justifiably trust that they have sufficient reason to endorse their normal moral agency based on their conception of the divine and the associated practices of procuring divine forgiveness and favor.

Political theological approaches to the problem of global legitimacy are united by their capacity to provide members of the public with *indirect evidence* that they should endorse their nature as normal moral agents and the practices that flow from that nature. Direct evidence that we have sufficient reason to endorse our normal moral agency

means access to the reasons that make endorsement rational. Indirect evidence consists in information that such reasons exist, even if we do not know what those reasons are. With indirect evidence, members of the public may not know *why* their moral natures and normal moral practices deserve endorsement, but they will know *that* they deserve endorsement. While our cognitive faculties may be too limited to assess whether our moral practice lines up with an external standard, they may be strong enough to determine whether a supernatural force has made such a judgment.

Political theologies and civil religions can provide evidence in two different ways, depending on the sort of political theology we have in mind. Theistic civil religions (poly and mono) provide indirect evidence in the form of *testimony*. Public methods of divining the will of the gods tell us whether our moral practice pleases the gods. For contemporary orders of public reason, appeals to divine approval of our social practices would give us evidence that the gods have surveyed our nature and practices and judged them good. Idealist and pantheistic political theologies provide *procedural* or *teleological* evidence. If a society can divine its role in the order of nature and can determine, at least to some small degree, the direction in which their society is headed, then they may have reason to think that their society is on the right path and thus that they are an integral and increasingly perfect part of that order (consider American progressives' invocation of moving toward "a more perfect union"). Thus, insofar as members are part of the process of development and perfection, they can rest assured that their apparently imperfect order either congrues with the developing will of the universe.

I have only sketched the generic solution to the problem of global legitimacy, as I have no space to consider specific solutions here. But I think we can illustrate a concrete case with a prominent example from the American Civil War. In his Second Inaugural Address, Abraham Lincoln argued that the Civil War was the result of God's decision to punish the American people for the practice of chattel slavery. This explanation was meant to legitimize the pressing moral need to end slavery no matter the price and to argue that allowing the Southern states to secede would be to abandon God's project of creating, in tandem with the American people, a just society. Of course, Gaussian public reason can easily show that slavery is unjust. But Lincoln demonstrates that many Americans wanted something more, to understand the point of their national suffering in light of deep moral corruption. Lincoln pointed the way to national atonement by bringing the nation in line with the will of God. Consider Lincoln's famous words:

The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn

with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord are true and righteous altogether.”¹⁵

The Civil War was God’s way of punishing a people who tolerated grave injustice and creating a new union that abolished slavery entirely. Lincoln does not suggest that our moral natures must be given up, but he exhorts the people to reform via suffering. Now consider how the Second Inaugural ends:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a justice and lasting peace among ourselves and with all nations.

Notice the phrase, “with firmness in the right as God gives us *to see the right*.”¹⁶ The putative fact that a good, living God exists who has an interest in ordering human affairs in accord with justice played a critical role in legitimizing the new American union following the Civil War. God allows people to see what it means to be righteous that we would have otherwise missed because of corruption. By trusting in God’s evaluation of our moral practice, we can bring our normal moral agency back into alignment with ultimate moral reality. Historian Mark Noll (2000: 426) has argued that Lincoln’s address ranks “among the small handful of semi-sacred texts by which Americans conceive their place in the world.” Yes, *their place in the world*, their relationship to an eternal moral order. Lincoln’s speech went beyond condemning slavery as incompatible with our moral practices, but pointed to a *transcendent Archimedean point* from which the conduct of the American people needed to be judged.

I use Lincoln’s Second Inaugural to illustrate how a civil religion (in this case, classical theism with strong Judeo-Christian undertones) can solve the problem of global legitimacy. And indeed, civil religion is the historically most common solution. Most societies have had and continue to have some kind of civil religion, beliefs, and practices that explain when the normal moral agency of members of the public is aligned with transcendent moral principles and divine reality. I do not mean to claim that civil religion is the *only* way to solve the problem of global legitimacy. And I certainly do not mean to imply that there is only one civil religion that can do the job. In a publicly justified polity there will be reasonable pluralism not merely among civil religions but about the validity of civil religion as such. My point is instead that civil religions can play a constructive role in making sense of our moral practice from a broader moral point of view.

5 Conclusion

The aim of post-Enlightenment liberal political theory is to demonstrate that a free social order can rest on reason, rather than mere force, despite the fact that the free

¹⁵ <http://www.bartleby.com/124/pres32.html>

¹⁶ Emphasis mine.

exercise of reason leads to widespread disagreement about matters of ultimate import. Both Rawls and Hayek recognized this challenge in their own way. Gaus fruitfully combines their insights by emphasizing that practical reasoning is bounded, fragmented, and historically and evolutionarily conditioned. But Gaus's historically conditioned conception of normal moral agency raises a challenge of its own. While Gaus has provided us with a method of determining whether particular rules and laws are publicly justified, he deliberately eschews solving the problem of global legitimacy, for since "our reason is itself the product of social evolution, it does not give us an Archimedean point from which to stand outside of cultural evolution and evaluate its outcomes" (Gaus 2011a: 422). And yet many members of liberal democratic societies wish to alleviate what Gaus calls the "gnawing worry" that we have "simply landed in a confused practice that we cannot reason ourselves out of."

The great conservative political philosopher Michael Oakeshott once said, "[P]olitical philosophy ... is the consideration of the relation between civil association and eternity" (Oakeshott 1991: 291). Perhaps a critical but sublimated theme of *OPR* is to reject Oakeshott's view by completely detaching the salvific from political philosophy proper. The justification of our social-moral life simply cannot explain to members of the public "whether it is worthwhile for human beings to live on the earth" (Rawls 2002: 128). As Weithman (2010: 369) puts it, Rawls's political liberalism is meant to help us to understand and affirm the "very puzzling judgment that God is said to have passed upon the world," namely that it deserves to exist at all. Gaussian public reason does not wade into these waters.

And yet our transcendent longings are an enduring feature of human social life, and so a desire for transcendent answers is a key component of the normal moral agency of members of the public. In this paper, I have asked how to reconcile these longings with the admission that reason is limited and conditioned in the ways that Hayek and Gaus demonstrate. One powerful solution, I have suggested, is that citizens can appeal to civil religion to legitimize an order of public reason in their own eyes. Civil religion can postulate supernatural entities capable of providing members of the public with *indirect evidence* that their social order is either legitimate or increasing in legitimacy over time because this indirect evidence gives us reason to endorse or normal moral agency and its associated moral practice.

Allow me to end on a more general point. I have argued elsewhere (sometimes with Gaus) that public reason cannot justify restricting religious discourse and religiously motivated political action (Gaus and Vallier 2009; Vallier 2012; Vallier 2014). The Hayekian themes in Gaussian public reason further buttress this point, given their emphasis on diverse reasoning. But by reviewing Hayekian lines of inquiry in *OPR*, I can now identify an additional role for religion in the political liberal polity: publicly augmenting the legitimacy of a social-moral order. Traditional liberals are apt to find my appeal to *supernatural* civil religion off-putting, if not outrageous.¹⁷ Theocracy undoubtedly lurks around the corner! But if we can calm this fear, we can appreciate the positive function that civil religion can play in liberal democratic cultures.

The role of religion in resisting revolutionary communism in Eastern Europe powerfully illustrates my point. If we are honest about the atrocities of the twentieth century, we should wish that their once dominant theistic civil religion and associated

¹⁷ Though, famously many social democratic liberals see the need for a secular civil religion, which was a prominent feature of John Dewey's political thought, so the idea should not be so foreign. See Dewey 2013.

religious institutions had much more political influence, as they formed perhaps the only force potent enough to stop the totalitarianism and mass murder wrought by revolutionary communists. After all, religious commitment had an important role in ending totalitarianism in some of these countries. The revival of Catholic identity in Poland in the late 1980s was a critical element in the Solidarity movement that ended communist control. It is no wonder that Soviet and Eastern Europeans vigorously and viciously crippled or destroyed their native religious institutions. They knew religion was a threat to their power and a force for personal liberty, even if Western liberals are unwilling to admit it.

Interestingly, *Hayek* (1991: 136–7) was willing to admit this, despite the fact that he was not religious. As he noted in *The Fatal Conceit*, in a remarkable passage worth reproducing in full:

We owe it partly to mystical and religious beliefs, and, I believe, particularly to the main monotheistic ones, that beneficial traditions have been preserved and transmitted at least long enough to enable those groups following them to grow, and to have the opportunity to spread by natural or cultural selection. This means that, like it or not, we owe the persistence of certain practices, and the civilisation that resulted from them, in part to support from beliefs which are not true - or verifiable or testable - in the same sense as are scientific statements, and which are certainly not the result of rational argumentation.

The main monotheistic religions preserved beneficial rules and transmitted them to future generations, allowing those rules to evolve into the basis of a free moral order. And so, the institutions of a free society passed through a religious phase that they may not have been able to exit. Hayek himself admitted that “the premature loss of what we regard as nonfactual beliefs would have deprived mankind of a powerful support in the long development of the extended order we now enjoy” and that if we *lose* these beliefs, even if they are false, we will face “great difficulties.” And as the epigraph of this article suggests, we may need some religious belief, and the public culture and ideas affirmed by people of faith, to sustain loyalty to the abstract rules of a free moral order, precisely the sort of order that Gaus so brilliantly explicates. Hayek worries that people must conceive of abstract tradition as having some theological basis if they are not to succumb to the forms of constructivist rationalism characteristic of socialist thought. A benefit, I hope, of this article is that we can now see precisely how public, civil religious commitment can establish this loyalty to abstract order—by giving people a public practice by which they can affirm the basic decency of the fundamental goodness and justice of their moral agency and the moral rules generated by their shared moral practice.¹⁸ Civil religion provides an external justification of our moral practice (Gaus 2011a: 193).

¹⁸ Importantly, we have some evidence that free secular orders can be stable, as demonstrated by the North Atlantic democracies (as opposed to forcibly secularized Eastern European and Russian Federation states). However, these orders have been largely secular for only half a century, and generally have not faced the sort of moral crisis that civil religion may help ameliorate, with the potential exception of Germany. Notably, there is evidence to suggest that the extensive social democratic states that govern these orders take on the functions of a deity in promoting social cooperation. See Norenzayan 2013, 170–192.

Gaus heralds the rise of a non-ideological political philosophy where philosophers come to appreciate that “morality is a social device and not simply a report of their private intuitions and elaborate constructions” (Gaus 2011b: 101). A genuinely non-ideological political philosophy must also see civil religions as potentially useful social devices. Instead of shunning supernaturalist civil religion, political philosophers must figure out when and how it can play a constructive role in the formation, maintenance, reformation, and improvement of our shared social-moral order. Civil religion and public religious practice might prove essential to maintaining such an order. In Hayek’s final work, he thought the question of whether a free moral order can survive the loss of a religious public culture was one on which “*the survival of our civilization*” might depend (Hayek 1991: 139).¹⁹

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¹⁹ Emphasis mine.

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