

# Justice, Diversity, and the Well-Ordered Society

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“In suggesting that even under the best conditions... there will be a pluralism not just of reasonable comprehensive doctrines but of liberal political conceptions of justice, Rawls appears to concede that a well-ordered society of justice as fairness is not feasible, at least not as originally conceived.”

- Samuel Freeman, *Justice and the Social Contract*, pp. 256.

## 1. Introduction

In the very first pages of *A Theory of Justice* John Rawls tells us that one “limitation on our discussion is that for the most part I examine the principles of justice that would regulate a well-ordered society.”<sup>1</sup> Though many things about Rawls’s overall project changed over the course of his career, insisting that we theorize about well-ordered societies did not. In his final publication, *Justice as Fairness*, Rawls stipulates that “we are concerned for the most part with the nature and content of justice for a well-ordered society.”<sup>2</sup> Perhaps most strikingly, in the often-overlooked “The Independence of Moral Theory” Rawls tells us that “the comparative study of well-ordered societies is, I believe, *the* central theoretical endeavor of moral theory.”<sup>3</sup>

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<sup>1</sup> Rawls, *A Theory of Justice*, 8.

<sup>2</sup> Rawls, *Justice as Fairness*, 13.

<sup>3</sup> Rawls, “The Independence of Moral Theory,” 294 (emphasis mine).

These remarks, coupled with the epigraph, should be a cause for concern. In the epigraph the great and perhaps most devout of Rawls's students Samuel Freeman admits that once we introduce justice pluralism – the fact that reasonable people can disagree about the nature and requirements of justice, something Rawls eventually admits is inevitable in liberal societies – the prospect of there existing a well-ordered society as Rawls defines it is vanishingly small. One of the cornerstones of Rawls's theory is thus cast aside; and, if we take seriously what Rawls says in “The Independence of Moral Theory,” then it is not even clear we can *do* moral theory anymore, at least as Rawls initially imagines in.

Obviously these tensions are something the followers of Rawls and those theorizing in the liberal tradition more generally must address. Yet this has hardly been done. Though Gerald Gaus and his students have taken the possibility of justice pluralism seriously they have not – and this is more a feature of their particular projects rather than negligence – told us how the fact of justice pluralism can be reconciled with Rawls's original vision of the well-ordered society.<sup>4</sup> And those more traditional Rawlsians who also admit the fact of justice pluralism have not carefully examined what a well-ordered society might look like in the face of such disagreements.<sup>5</sup>

This paper hopes to fill such a gap. It offers new models of what a well-ordered society might look like in the face of justice pluralism (obviously, what constitutes a well-ordered society must be redefined) by taking seriously the reasons why Rawls theorizes about well-ordered societies in the first place. Our guiding question: given the underlying motivations for theorizing about liberal

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<sup>4</sup> For a few examples see Gaus, *The Tyranny of the Ideal*, 150-154; Vallier, “Political Liberalism and the Radical Consequences of Justice Pluralism.”

<sup>5</sup> For instance, see Quong, “Disagreement, Asymmetry, and Liberal Legitimacy”; Quong, *Liberalism without Perfection*, chp. 7.

societies satisfying very specific desiderata (the properties of well-orderedness), is there a way we can develop a new model of the well-ordered society defined by new desiderata consistent with the fact of justice pluralism that is still faithful to those initial motivations? My answer to this question is “yes,” though the new model of the new well-ordered society looks significantly different from what Rawls and his followers initially imagined.

## 2. The Well-Ordered Society and the Problem of Justice Pluralism

The idea of the well-ordered society is continually appealed to at different points throughout Rawls’s expansive published career. Though always fundamentally the same, definitions of the well-ordered society are pitched at different levels of detail given Rawls’s specific purposes. The most thorough definition of the well-ordered society we get is found in the 1974 piece “Reply to Alexander and Musgrave.” Here, Rawls lays out seven conditions characterizing the well-ordered society. They are as follows:<sup>6</sup>

(1) Everyone accepts, and knows that others accept, the same principles (the same conception) of justice.

(2) Basic social institutions and their arrangement into one scheme (the basic structure of society) satisfy, and are with reason believed by everyone to satisfy, these principles.

(3) The public conception of justice is founded on reasonable beliefs that have been established by generally acceptable methods of inquiry.

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<sup>6</sup> Rawls, “Reply to Alexander and Musgrave,” 233-235.

(4) All citizens have, and view themselves as having, a sense of justice (the content of which is defined by the principles of the public conception) that is normally effective (the desire to act on this conception determines their conduct for the most part).

(5) All citizens have, and view themselves as having, fundamental aims and interests (a conception of their good) in the name of which it is legitimate to make claims on one another in the design of their institutions.

(6) All citizens have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be regulated.

and

(7) Basic social institutions generate an effective supporting sense of justice.

In asking whether a well-ordered society is possible given disagreements about justice we focus specifically on conditions (1) and (2). That is – whether in cases of justice pluralism – we can reasonably expect that all citizens endorse the *same* principles and thus conception of justice, and whether we can reasonably expect that society’s institutions satisfy this conception.

It is worth noting here the relationship between conditions (1) and (2) of well-orderedness and Rawls’s notion of *publicity*.<sup>7</sup> Like Rawls’s definition of the well-ordered society, we find reoccurring definitions of publicity that are pitched at different levels of specificity given Rawls’s purposes. The most basic definition of publicity, however, says that “society is effectively regulated by public principles of justice: citizens accept and know that others likewise accept those principles,

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<sup>7</sup> Ibid., 235.

and this knowledge is in turn publicly recognized. Further, the institutions of the basic structure are just (as defined by those principles) and everyone within reason recognizes this.”<sup>8</sup> We shall get into more complex and nuanced accounts of publicity in a bit. But for now we note that these publicity conditions are essentially identical to properties (1) and (2) of well-orderedness: conditions (1) and (2) are satisfied just in case this basic notion of publicity is satisfied. As such, in asking whether a well-ordered society is possible (specifically conditions (1) and (2)) given justice pluralism, we are *also* asking whether the publicity condition can be satisfied given justice pluralism. The equivalence of conditions (1) and (2) and this basic notion of publicity will be important when we begin looking at Rawls’s underlying motivations for theorizing about well-ordered societies in the next section.

What hinges on whether conditions (1) and (2) are possible given justice pluralism comes down to what is meant by the term “accept” present in condition (1). Suppose that what we mean by “accept” – and this, I think, is what Rawls always meant by the term – is that all citizens think the governing political conception of justice is indeed the best political conception of justice available to us. By condition (2), we also suppose that it is this political conception that governs the basic structure. Call this the *traditional model* of the well-ordered society. Clearly the traditional model is not possible given the fact of justice pluralism. As Rawls notes when discussing the scope of the burdens of judgment: “in any actual political society a number of differing liberal political conceptions of justice compete with one another in society’s political debate.”<sup>9</sup> As a result, “citizens will of course differ as to which conceptions of political justice they think the most reasonable.”<sup>10</sup>

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<sup>8</sup> Rawls, *Political Liberalism*, 66.

<sup>9</sup> *Ibid.*, xlvi.

<sup>10</sup> Rawls, “The Idea of Public Reason Revisited,” 578.

Once we accept the fact that persons will disagree about which conception of justice is best, then the traditional model is no longer on the table: society simply cannot be well-ordered in this sense, for there is no one conception of justice all accept as required by (1). Moreover, since condition (2) refers to the political conception given our interpretation of “accept” in (1), it is also clear that (2) is no longer possible: since there is no one conception all agree is the best conception, it is trivial that society’s institutions cannot satisfy this conception’s normative requirements. These problems with the traditional model in the face of justice pluralism are, I think, the motivation behind Freeman’s remarks in the epigraph.

In response to the impossibility of the traditional model in the face of justice pluralism we can offer a new model of the well-ordered society by changing how we interpret the word “accept” in condition (1), and then likewise adjusting (2) to fit this new definition. Here, we suppose there is some political conception of justice that governs society’s basic institutions. As an example, if this one conception of justice is justice as fairness, then society’s institutions uphold the basic liberties, and maximize the welfare of those least advantaged under conditions of fair equality of opportunity. Moreover, we also suppose that this conception of justice forms the basis of public reasoning: it is the conception those involved in public debate appeal to, and also the conception that informs citizens’ voting decisions. To “accept” such a political conception of justice, citizens must simply view this political conception of justice as a member of the family of liberal conceptions. Though citizens might not think it is the *most reasonable* conception of justice, they must think that it is at the very least *a* reasonable conception of justice.

To illustrate this, turn to Table 1. Though Althea, Bertha, and Cassidy all rank the family of liberal conceptions differently (here, the family consists of  $j_1$ - $j_3$ ) due to justice pluralism, one and only one conception (say,  $j_1$ ) regulates political life. Insofar as Althea, Bertha, and Cassidy all grant that  $j_1$

is a member of the family (let us suppose they do), then we say that all “accept”  $j_1$ . Given our new interpretation of (1), it is possible for (1) to be satisfied given disagreements about justice. We can likewise change how we understand (2), so that (2) now requires that society’s basic institutions all satisfy one conception of justice that all believe is at the very least reasonable. Call this model of society given the fact of justice pluralism the *unifying model* of the well-ordered society, for despite the fact that there are disagreements about justice, society is still unified around one and only one political conception of justice. Even in the face of justice pluralism, the unifying model is still possible.

<b>Althea</b>	<b>Bertha</b>	<b>Cassidy</b>
$j_1$	$j_2$	$j_3$
$j_2$	$j_1$	$j_1$
$j_3$	$j_3$	$j_2$

Table 1

There is another model of what a well-ordered society might look like in the face of justice pluralism. Indeed, I think this model is what Rawls had in mind when he penned “The Idea of Public Reason Revisited.” On this model, we give up on one unifying conception of justice to govern society’s laws and institutions, as well as its conception of public reasoning. Instead, we merely hold that all citizens endorse *some* conception of justice from the liberal family, and from there, engage in public reasoning and voting using the conception they think of as best. In Rawls’s words, citizens are only required to “explain to other citizens their reasons for supporting fundamental political positions *in terms of the political conceptions of justice they regard as most reasonable.*”<sup>11</sup>

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<sup>11</sup> Ibid., 576 (emphasis mine).

Returning again to Table 1, Althea engages in public life using  $j_1$  as a framework of thought, Bertha  $j_2$ , and Cassidy  $j_3$ . Call this the *deliberative model* of the well-ordered society.

The deliberative model clearly abandons condition (2) in a way that the unifying model does not. With the unifying model, society is organized around one and only one political conception of justice. This is not so for the deliberative model. For, if citizens are allowed to employ their most preferred political conception when engaging in politics, it is difficult to imagine the result of such a politics yielding a society whose institutions are organized around one and only one political conception. Rather, what is likely to be the case is something more along these lines: some of society's laws and institutions might be required by political conception  $j_2$  even though  $j_1$  requires something different; a different set of society's laws and institutions might be sanctioned by  $j_3$  even though  $j_2$  regards such laws as unjust, etc. Each one of our basic institutions likely satisfies *some* political conception of justice, though it is highly unlikely *all* institutions satisfy the *same* political conception.

Let us briefly take stock of where we are. The traditional model of the well-ordered society is not possible given justice pluralism. We can change slightly what we mean by conditions (1) and (2), in which the unifying model is then up for grabs: there is one unifying political conception all agree is at the very least reasonable, and society's institutions satisfy this conception. Or, we can thoroughly abandon both conditions (1) and (2) and endorse the deliberative model: there is no unifying political conception of justice, and citizens must simply reason and vote from the conception they believe is most reasonable. Given our two competing models, we might ask: which is best? Which model of the well-ordered society ought we adopt given that we cannot have the traditional model due to the fact of justice pluralism?



It might be thought that the unifying model more closely resembles the traditional model, so it is to be preferred to the deliberative model. But this is not obvious. A more thorough investigation is required. In carrying out this investigation we begin by asking: why insist on society being well-ordered in the traditional sense in the first place? Why take the traditional model of the well-ordered society as a cornerstone in our theorizing, as Rawls so clearly did? If we can come up with an answer – or, as we shall see, many answers to this question – then we have a set of underlying desiderata we can employ to adjudicate between the unifying model and the deliberative model. The next section offers a careful reading of Rawls that lays out just what these desiderata are.

### 3. Reasons for Well-Orderedness

#### 3.1 *Normatively Attractive.*

In *A Theory of Justice* we see no clear justification for insisting society be well-ordered in the sense of conditions (1)-(7). In the essays immediately following *Theory*, though, we begin to see Rawls offer what is probably the most obvious justification: the traditional model of the well-ordered society is normatively attractive and we are, after all, trying to model an ideally just society that also takes seriously the constraints of theorizing about a realistic utopia. Consider this passage:

Thus, to formulate a theory of justice, we must specify its underlying conception in a particular though still abstract way. Justice as fairness does this *by bringing together certain general features of any society that is seems one would, on due reflection, wish to live in and want to shape our interests and character.* The notion of a well-ordered society is the result: it embodies these

features in a definite way and indicates how to describe the original position, which is introduced in the next section.<sup>12</sup>

Now clearly there is something desirable about the traditional model of the well-ordered society. Society is governed by one political conception of justice, and, moreover, all citizens think this conception of justice is best. Thus, when citizens look around they can sincerely affirm that justice is being done around them; and, moreover, they can sincerely affirm to their fellow citizens that they do indeed live in a just society. Intuitively, this seems like an attractive ideal.

Now here it might be thought it is obvious that the unifying model is more attractive than the deliberative model, because (as we noted above) it more closely resembles the traditional model. I do not think this is so, however. In fact, I think the opposite is true. To show this we begin by noting that, with the unifying model, some citizens will live in a regime that is not governed by what they deem to be the best or most reasonable conception of justice. Returning to Table 1, suppose that our governing conception of justice on the unifying model is  $j_1$ . Here, Althea gets to live in the regime she thinks is best; yet both Bertha and Cassidy must live in a regime they think is suboptimal compared to what they think the most reasonable conception of justice requires.

Now of course this will be so on the deliberative model as well. For on the deliberative model there is no single conception of justice that organizes society's basic institutions; trivially, then, no citizen gets to live in the regime they think is best. But what is unique about the unifying model is that Bertha and Cassidy, on this new model of the well-ordered society, will be *persistent*

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<sup>12</sup> Rawls, "Reply to Alexander and Musgrave," 232-233 (emphasis mine). For similar remarks see also Rawls, "A Kantian Conception of Equality," 254-255; Rawls, "Kantian Constructivism in Moral Theory," 325.

*losers* in such a society. On the unifying model, Bertha and Cassidy must live in a society they deem to be unjust *in perpetuity*, all the while knowing Althea gets to live in her most preferred society *forever and ever*. This is not an easy fact for many to accept. We can and do frequently tolerate deviations from our ideal points. It is a harder thing to tolerate, however, knowing that we will *never* get what we think is ideal, all the while knowing that some of our fellow citizens *always* get their most preferred outcome.

Not only is this hard to accept, it seems manifestly unfair. I take it as a pre-theoretical intuition about the concept of fairness that (i) if parties to a conflict both advance reasonable claims yet both cannot agree on a best solution, and (ii) if the conflict will continue over time, that fairness requires parties take turns at getting their way insofar as this is actually feasible. To take a simple example: if Althea most prefers to eat Chinese food, and Bertha most prefers Italian, and if both will continually get dinner with one another night after night, then clearly the fair solution is that they switch off: Chinese on Mondays, Italian on Tuesdays, and so on and so forth. What would clearly be unfair is if Althea continually gets her way and the pair eat Chinese night after night. But note, this is precisely what the unifying model requires: Althea always gets to live under her most preferred regime, while Bertha and Cassidy never do.

The deliberative model does not result in this, however. Instead, since there is no one unifying conception of justice, and since citizens can vote and argue from the conception each thinks is best, the likely result is citizens taking turns at being winners and losers in the political process. One vote might yield the result favored by political conception  $j_1$ , making Althea the winner; another vote might yield the result favored by political conception  $j_2$ , allowing Bertha to have her moment; and finally, a third vote might yield the result favored by  $j_3$ , giving Cassidy her chance at being queen for the day. On the deliberative model the problem of persistent losers

vanishes. On the unifying model, however, some citizens may never get their way, and must accept being second-class citizen forever, at least when it comes to their preferences over political conceptions of justice. For this reason I do not think the unifying model is normatively attractive. Absent the possibility everyone getting their first choice, there is something intuitively fair about taking turns at being winners and losers when engaged in repeated interactions. As such, there *does* seem something normatively attractive about the deliberative model, as it allows for and indeed makes likely this possibility.

### 3.2 *Public Scrutiny.*

We saw in §2 that properties (1) and (2) of well-orderedness are equivalent to the basic definition of Rawls's publicity condition. In seeking justifications for theorizing about the traditional model of the well-ordered society, we can thus also look to justifications for including the publicity condition in Rawls's theoretical apparatus. One such justification was given by Rawls in the mid-1970's and continued to be offered up through *Political Liberalism*. Consider the following passage:

Another reason for the full publicity condition (and indeed for any of its levels) is that it seems particularly appropriate for a conception of political and social justice. No doubt, publicity is less compelling for other moral notions. But the principles of justice apply to the political constitution and the basic institutions of society, which normally include, even under favorable conditions, some machinery of legal coercion, if only to guarantee the stability of social cooperation. Moreover, these institutions can have decisive long-term social effects and importantly shape the character and aims of the members of society, the kinds of persons they are and want to be. *It seem fitting, then, that the fundamental terms of social cooperation between free and equal moral persons should answer the requirements of full publicity. For if*

*institutions rely on coercive sanctions, however seldom necessary and however scrupulously applied, and influence people's deepest aspirations, the grounds and tendency of these institutions should stand up to public scrutiny.*<sup>13</sup>

Now I admit I find this passage a bit mysterious, but I think the crux is as follows: coercive institutions are, generally speaking, inherently suspect. Because of this, when citizens live under coercive institutions they must be provided some kind of reason or story as to why these institutions require the sorts of behavior they do in fact require. That is, coercive institutions, due to their suspect nature, must live up to some kind of public scrutiny.

Why does well-orderedness in the traditional sense imply that our coercive institutions can survive public scrutiny? It might be thought that this is so because by hypothesis all accept these institutions in the way initially defined (as best or most reasonable), but I do not think this is what Rawls is after. Rather, I think what makes it such that institutions in the traditional model of the well-ordered society survive public scrutiny is the requirement of condition (2), that institutions “satisfy, *and are with reason believed by everyone to satisfy*, these principles.” To see this, consider an example. Suppose Althea agrees with the current tax rate – we will say she “accepts” it as the best possible tax rate that could be implemented – but has no idea why it is imposed (suppose the reason it is imposed is to maximize the welfare of the least advantage). When Althea asks herself why she pays the taxes she does – that is, when she scrutinizes the coercive institutions under which she lives – she cannot tell herself a story about why that particular law is in place. Even though she accepts the institutions of her society as optimal, they do not survive public scrutiny. But now suppose Althea disagrees with the current tax policy – she does not “accept” it in that she can think of tax

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<sup>13</sup> Rawls, “Kantian Constructivism in Moral Theory,” 326 (emphasis mine). See also Rawls, “The Independence of Moral Theory,” 293; Rawls, *Political Liberalism*, 68.

policies that would be better – yet she is given a justification for why she must pay it: it will help maximize the welfare of those least advantaged, and that is one of our society’s overall social goals. Here, though Althea does not accept the tax rate as just, the law *does* survive her scrutiny: she can tell herself a story as to why she is in fact paying it.

Clearly the traditional model satisfies this public scrutiny requirement. And since the public scrutiny requirement does not require all citizens accept the governing political conception of justice as best or most reasonable, it seems the unifying model does as well. To see this, suppose Althea’s most preferred political conception is  $j_1$ , but on the unifying model the governing conception is  $j_2$ . Even though  $j_2$  imposes coercive restrictions on Althea’s behavior that she does not necessarily endorse or accept in the robust way defined by the traditional model, she can still tell herself a story as to why these restrictions on her behavior are being imposed: “our society’s governing conception of justice  $j_2$  requires a certain set of laws to bring about what  $j_2$  says justice requires, which is why the current scheme of coercive laws and sanctions are being imposed on me.” So on the unifying model it is still the case that the demands of coercive institutions can live up to public scrutiny, even though persons might not accept or endorse these institutions in the robust sense defined by the traditional model.

The deliberative model cannot say this, however. Here, when Althea looks at the set of coercive institutions that impose restrictions on her behavior, she cannot tell herself a simple story as to why they look the way they do and require what they require. She cannot say: “the political conception of justice in my society demands these restrictions on my behavior,” because by hypothesis no such political conception actually exists. Instead, our institutional order is a hodgepodge: some institutions might be approbated by  $j_1$ , whereas these same institutions might be condemned by  $j_2$ .

Now perhaps Althea can tell a story about each institution by appealing to a different political conception of justice: “our tax policy looks the way it does because a coalition of  $j_2$  and  $j_3$  demanded it; our immigration policy looks the way it does because a coalition of  $j_1$  and  $j_3$  demanded it,” etc. But this is no simple story. If such a story could be even be told (politics in plural societies is, after all, a messy business), it would seem implausibly demanding that Althea be able to tell herself such a story just so the coercive institutions she lives under are capable of standing up to public scrutiny. Yet this is not so for the unifying conception. Because society is organized around one and only one political conception of justice, Althea has access to a simple set of reasons explaining why the laws and institutions she lives under require what they do. For this reason, we conclude that the unifying model satisfies Rawls’s public scrutiny requirement, though the deliberative model does not.

### 3.3 *Social Unity.*

Another reason for theorizing about well-ordered societies is that such societies realize the good of social unity. Writes Rawls:

A well-ordered society, as thus specified, is not, then, a private society; for in a well-ordered society of justice as fairness citizens do have final ends in common. While it is true that they do not affirm the same comprehensive doctrine, they do affirm the same political conception of justice; and this means that they share one very basic political end, and one that has high priority: namely, the end of supporting just institutions and of giving one another justice accordingly, not to mention many other ends they must share and realize

through their political arrangements... Together with other assumptions made, these shared final ends provide the basis for the good of a well-ordered society.<sup>14</sup>

The basic idea here is that (i) social unity is a good thing; (ii) social unity requires having shared ends and projects with one's fellow citizens; and (iii) in the traditional model of the well-ordered society there is such a shared end, for citizens all work to bring about the same political conception of justice so that their society may be just. Thus, the good of social unity is realized in the traditional model of the well-ordered society, which is a desirable thing.

Now it might be thought that the unifying model cannot embody social unity because persons do not all share the same end – by hypothesis they do not all agree that the governing conception of justice is best. This is too quick, however. Imagine a battalion of Marines charged to overtake an enemy territory – say, the city of Fallujah. Now some among the battalion may not think this is the best decision: they might think the city not that important, that there are other more important cities to take, or that the whole overall war is deeply misguided. But still, when they are finally charged to overtake Fallujah they set these worries aside and works towards completion of the mission. In this case, I think there intuitively *is* a shared end, and that there *is* a degree of social unity among the soldiers. Shared ends, then, do not require that each person sharing the end think that end is unequivocally the best project to participate in; only that they do indeed participate in the project when push comes to shove.

For this reason I think the unifying model does manifest social unity, and thus realizes this distinctive good. For though all citizens do not think the governing political conception of justice is best, they all work towards making sure society's institutions satisfy this conception by using the

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<sup>14</sup> Rawls, *Political Liberalism*, 202. See also Rawls, "The Priority of Right and Ideas of the Good," 466.



governing conception as a framework for public reasoning and political decision-making. Though Althea, Bertha, and Cassidy all disagree about which conception of justice is best, they all employ the governing conception when reasoning publicly, and they all vote based on this conception when participating in the democratic process in order that the governing conception may be realized. This, I think, constitutes a shared end, and is sufficient for us to conclude that the unifying model does realize the good of social unity, just as the traditional model does.

But I do not think this is so in the deliberative model. In the deliberative model each citizen reasons from what they take to be the most reasonable political conception of justice. Here, politics looks more like a competition versus a shared enterprise. Instead of Althea, Bertha, and Cassidy all trying to make sure one governing conception is implemented, Althea tries her best to implement  $j_1$ , Bertha tries her best to implement  $j_2$ , and Cassidy tries her best to implement  $j_3$ . There is thus no shared end or goal in the deliberative model as there is in the unifying model. For this reason the unifying model exhibits the good of social unity, whereas the deliberative model does not.

### 3.4 *Full Autonomy.*

The final reason Rawls introduces the publicity condition has to do with the ability of citizens to realize their full autonomy: “Clearly, the satisfaction of the full publicity condition is necessary for the achievement of full autonomy for citizens generally.”<sup>15</sup> To see why this is so, we need to first further explicate the publicity condition, as well as further explicate what Rawls means by full autonomy.

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<sup>15</sup> Rawls, *Political Liberalism*, 78. See also “Kantian Constructivism and Moral Theory,” 320.

So far we have understood publicity as requiring that citizens know and accept the same political conception of justice, as well as requiring that society's institutions satisfy, and are publicly known to satisfy, this conception. This requirement, however, is only the first level of publicity; there are two more. A society satisfies the second level of publicity when members of society not only know and accept the same political conception of justice, but also adopt the "general beliefs about human nature and the way political and social institutions generally work, and indeed all such beliefs relevant to political justice."<sup>16</sup> More concretely, the second level of publicity is satisfied when those facts about social theory we attribute to deliberators in our justificatory decision procedure are also believed by all citizens.

The third level of publicity is satisfied when citizens know and accept the full justification of the political conception of justice, or such justification must be made available to citizens if they wish to know it. For this third level of publicity to be satisfied citizens must know and accept the method of political constructivism, how the original position decision procedure is set up, why the original position includes the features it does, etc., or, at the very least, it must be that citizens could come to learn such facts if they wished.

Now for a brief explication of full autonomy. For Rawls, "full autonomy is realized by citizens when they act from principles of justice that specify the fair terms of cooperation they would give themselves when fairly represented as free and equal persons."<sup>17</sup> What Rawls is getting at here is the idea of autonomy present in Kant's practical philosophy.<sup>18</sup> For Kant, persons are fully autonomous when they act in accordance with categorical imperatives that they would rationally give

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<sup>16</sup> Rawls, *Political Liberalism*, 66.

<sup>17</sup> *Ibid.*, 77.

<sup>18</sup> For more detail see Rawls, *A Theory of Justice*, §40.

themselves: they do not merely comply with such imperatives, but act *from* them as self-legislators. Rawls is after something very similar. It is not good enough that persons comply with the principles of justice governing society and the laws and institutions these principles require. It must also be the case that they would give themselves these principles were they to stand in the original position. If they would not, then they do not act autonomously when they follow the rules and institutions of their society.

It now becomes clear why the second and third levels of publicity must be satisfied for persons to realize their full autonomy. If citizens believe different things than what deliberators in our constructivist procedure believe, or if they do not accept some of the constraints we place on deliberators in the original position (say, they reject the use of maximin reasoning), then they likely would not give themselves Rawls's justice as fairness were they to step into the original position. Because they have different beliefs or accept different constraints, they may give themselves different principles of justice, which then likely require different laws and institutions than what justice as fairness requires. But if this is true then, when persons act in accordance with the principles of justice and the laws and institutions they require, they merely comply with them, but do not act *from* them as just. They do bear the relationship of self-legislators to such requirements.

Clearly full autonomy is realized in the traditional model of the well-ordered society. But what about the unifying and deliberative models? Begin with the unifying model. Here, we must note that the reason why persons disagree about justice in the first place is because they endorse different constructivist procedures when they derive their own most preferred conception of justice – if they even employ a constructivist procedure at all, that is.<sup>19</sup> To take an example, Althea might endorse  $j_1$  and Bertha might endorse  $j_2$  because they attribute to deliberators in their respective

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<sup>19</sup> Rawls, *Political Liberalism*, 226-227.

original positions different social scientific facts about how social and political institutions operate. This difference leads Althea to endorse  $j_1$  as the output of her original position decision procedure, and Bertha to endorse  $j_2$  as the output of hers.

It is an *implication*, then, of justice pluralism that the second and third levels of publicity will not be satisfied, along with the first (if we understand “accept” in the robust way as the traditional model does). Citizens will have different commitments and beliefs and specify procedures for deriving justice differently; this is why they disagree about justice in the first place. When citizens thus comply with the governing conception of justice – say,  $j_1$  on the unifying model – then only a proper subset of them will realize their full autonomy (those who derive  $j_1$  from their original position procedure). Those who do not endorse  $j_1$  as best by hypothesis would not give themselves  $j_1$  were they to step into their own versions of the original position. Bertha, were she to step into the original position, would give herself  $j_2$  given her beliefs and commitments, and Cassidy would give herself  $j_3$ . When Bertha and Cassidy thus act in accordance with  $j_1$  they do not act *from*  $j_1$  as Rawls requires. For this reason the unifying conception does not satisfy Rawls’s requirement of full autonomy.

Consider now the deliberative model. On the deliberative model, there is no one political conception of justice governing society’s laws and institutions. Instead, all different political conceptions might have a say: certain laws are approbated by  $j_1$ , others by  $j_2$ , etc. So, when Althea complies with those laws sanctioned by  $j_1$  we can say that she realizes her full autonomy for these laws specifically – she would give herself such laws when in the original position. But what happens when Althea complies with laws *not* sanctioned by  $j_1$  but rather some other political conception? What happens when she complies with laws  $j_1$  deems unjust? When this occurs Althea does *not* realize her full autonomy when she complies with such laws; they would not be the object of choice

were she to occupy the original position. Because this is the case, citizens once again do not realize their full autonomy – there will always be some laws and institutions citizens would not give themselves. Both the unifying and deliberative models, then, fail to satisfy this final reason Rawls insists on full publicity being satisfied and hence well-orderedness.

#### 4. A New Model of the Well-Ordered Society

Let us take stock. We have seen that, when examining those reasons Rawls has for insisting on theorizing about well-ordered societies in the first place, both the unifying model and the deliberative model have their own respective successes and failures. These wins and losses are tallied in Table 2. How ought we proceed from here? Perhaps go with the unifying model, because it has more successes than the deliberative model does. This assumes, however, that each desiderata is equally important, something that is not obvious.

	Normatively Attractive	Public Scrutiny	Social Unity	Full Autonomy
Unifying Model	✘	✔	✔	✘
Deliberative Model	✔	✘	✘	✘

Table 2

Fortunately, such a hard choice need not be made. We now introduce a new model of the well-ordered society that dominates both the unifying model and the deliberative model, for it satisfies *all* the desiderata laid down by Rawls in §3. The new model is normatively attractive, lives up to public scrutiny, embodies social unity, and allows citizens to realize their full autonomy.

Moreover, it does this while being consistent with the fact of justice pluralism. The model is called the *polycentric model*, and will be introduced over the course of this section. Though Gaus has recently endorsed polycentricity as an integral part of the Open Society, his reasons for introducing polycentricity are much different from our own, though both of us see polycentricity as a response to increasing levels of diversity and the project of specifying how free and equal moral persons can live better together.<sup>20</sup>

Though originally introduced by Michael Polanyi, polycentricity perhaps received its clearest exposition in a piece by Vincent Ostrom, Charles M. Tiebout, and Robert Warren examining metropolitan governance.<sup>21</sup> The authors begin by noting that metropolitan governance usually consists of “overlapping jurisdictions” of authority, “duplication of functions” concerning the provision of public goods and services, and “many centers of decision making that are formally independent of each other.”<sup>22</sup> This is opposed to monocentric or “gargantuan” approaches to governance, where authority, decision-making, and the provision of public goods and services are limited to one single governance unit, such that this one single unit’s jurisdiction does not overlap or compete with any other unit’s jurisdiction. We can think of polycentricity as embracing decentralization, whereas monocentric governance endorses centralization.

In a polycentric governance system there are two different ways governance units may compete with one another: through *horizontal competition* and *vertical competition*. By horizontal competition I mean competing governance units that are fragmented but do not overlap:

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<sup>20</sup> Gaus, *The Tyranny of the Ideal*, 184-187.

<sup>21</sup> Polanyi, *The Logic of Liberty*; for more on the development of polycentricity see further Aligica and Tarko, “Polycentricity: From Polanyi to Ostrom and Beyond.”

<sup>22</sup> Ostrom et al., “The Organization of Government in Metropolitan Areas,” 831.

government  $g_1$  in location  $l_1$  provides good  $x$ , as does government  $g_2$  in location  $l_2$ , where  $l_1$  and  $l_2$  are disjoint. In such a case, competition between  $g_1$  and  $g_2$  is induced by citizens who “vote with their feet” in deciding whether  $g_1$  or  $g_2$  better supplies good  $x$ . By vertical competition, I mean competing governance units that *do* overlap: think here of how policing is provided at the township, county, state, and federal level. Competition is again induced here because citizens can decide through the political process which of the overlapping governance units better provides good  $x$ : if they think state government does better at providing policing than town and county government, then they can express this in the voting booth, at town council meetings, through supporting certain candidates, etc. For our purposes, we will mostly be concerned with polycentric governance units that exhibit high degrees of horizontal competition: where spatially disjoint units of governance compete when it comes to public goods provision.

Let us try to make more precise exactly what polycentric governance structures consist of. Following Paul Dragos Aligica and Vlad Tarko, we can say that polycentric orders consist of three necessary features:<sup>23</sup>

*Multiplicity of Decision Centers*, where we see units of governance subject to fragmentation and overlap and thus horizontal and vertical competition.

*Overarching System of Rules*, which defines the limits of the polycentric governance system and how fragmented and overlapping governance units relate to and interact with one another.

*Spontaneous Order*, which is the result of the polycentric order, generated by competition among competing governance units.

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<sup>23</sup> Aligica and Tarko, “Co-Production, Polycentricity, and Value Heterogeneity,” 737; Aligica, *Institutional Diversity and Political Economy*, 58.

The multiplicity of decision centers is what induces the horizontal and vertical competition discussed above. The overarching system of rules not only serves to define what is and is not part of a polycentric order, but also how different units of governance within the order must relate to and interact with one another. And finally, the spontaneous order element characterizes the resulting states of affairs produced by polycentric orders: they are the result of human action, but not of human design.

How does polycentricity relate to liberal societies faced with justice pluralism? To better understand, consider why polycentricity is oftentimes more desirable than gargantuan approaches to governance. Public goods are those goods that must be provided by some kind of coercive force; if left to the market, public goods will be underprovided resulting in an inefficient outcome. Yet oftentimes, persons have conflicting and diverse preferences over not only how much of a public good is provided, but also what public goods are even provided in the first place. Some find public schools important whereas others do not; some might think it acceptable to pick up the garbage twice a month, whereas others might like it done twice a week; and some think public libraries are desirable, whereas others scoff at the idea and would rather have large sports arenas built.

The attractiveness of polycentricity lies in the fact that the separate and autonomous governance units can provide different public goods and different levels of supply of these goods to fit diverse preferences. Governance unit  $g_1$  in location  $l_1$  might provide public goods  $x, y$ , and  $z$ , whereas governance unit  $g_2$  in location  $l_2$  might provide public goods  $w, y$ , and  $v$ . Those who think  $x$  and  $z$  are important will choose to vote with their feet and live in  $l_1$  under  $g_1$ ; those who think  $w$  and  $v$  are important will choose to vote with their feet and live in  $l_2$  under  $g_2$ . Compare this to a gargantuan approach to governance where the same public goods at the same supply are provided for an entire population even though those in this one jurisdiction have heterogeneous preferences.



In a polycentric system, however, fragmenting and dispersing governance units allows for different kinds of preferences over public goods to be satisfied.

In many ways, conflicting political conceptions of justice can be cashed out in terms of conflicting preferences over public goods. The reason why is that political conceptions of justice ultimately bottom out in terms of their institutional prescriptions: they require different kinds of legislatures and judiciaries, different kinds of redistributive and welfare policies, different kinds of regulations on economic systems, etc. Competing and fractured governance institutions can accommodate these diverse preferences. Just as Nebraska adopts a unicameral legislature whereas all other states adopt bicameralism, just as Louisiana adopts a civil law tradition versus the common law, and just as states choose to enact different welfare policies and different schooling systems, so too can different governance units in the polycentric model of the well-ordered society create an institutional framework that caters to different political conceptions of justice. Althea and other  $j_1$ 'ers can live in a governance unit characterized by  $j_1$ , Bertha and other  $j_2$ 'ers in a governance unit characterized by  $j_2$ , and Cassidy and other  $j_3$ 'ers in a governance unit characterized by  $j_3$ .

Note that these governance units are all part of the same overall society and thus, following Tarko and Aligica's definition of polycentricity above, will be subject to general rules detailing how they must interact and relate to one another. These general rules we can think of as analogous to the United States Constitution, and the different governance units analogous to the separate states. In general, the thinner and less restrictive these general rules are the more and more autonomy and prerogative is granted to the individual governance units. This allows these governance units to mirror more closely the distinct political conceptions of justice they provide public goods for.

Though perhaps new to most in the public reason and political liberalism tradition, the notion of polycentricity being an ideal has been advocated by notable political philosophers. Robert

Nozick's framework for utopia, I think, mirrors closely what an ideal polycentric order looks like. According to Nozick's vision, "There will not be one kind of community existing, and one kind of life led in utopia. Utopia will consist of utopias, of many different kinds of divergent communities in which people lead different kinds of lives under different institutions."<sup>24</sup> Chandran Kukathas's vision of a liberal order given in *The Liberal Archipelago* also resembles closely polycentricism. Kukathas offers a vision of "a society of societies which is neither the creation nor the object of control of any single authority; though it is a form of order in which authorities function under laws which are themselves beyond the reach of any singular power."<sup>25</sup>

So we have the polycentric model of the well-ordered society, distinct from both the unifying model and the deliberative model. Like the deliberative model, there is no overarching conception of justice governing society as a whole. But like the unifying model, there is some form of unification in that there are pockets of governance jurisdictions that *are* unified around one and only one political conception of justice. We can thus think of the polycentric model as a hybrid of the two. But though we have a new model of the well-ordered society, what should make us think that it is better than the unifying and deliberative models? The next section shows that the polycentric model satisfies *all* of Rawls's reasons for introducing the idea of well-orderedness in the first place. By a strict dominance argument, then, the polycentric model is the preferred model for a society faced with justice pluralism.

## 5. The Superiority of the Polycentric Model

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<sup>24</sup> Nozick, *Anarchy, State, and Utopia*, 311-312.

<sup>25</sup> Kukathas, *The Liberal Archipelago*, 3.

### 5.1 *Normatively Attractive.*

We saw the problem with the unifying model is that it allowed persons to be persistent losers in such a society: some must always live with never getting their way, whereas others always get what they deem best. This seemed unfair. The deliberative model circumnavigated this problem by allowing persons to tradeoff between being winners or losers: because politics allows for citizens to argue and vote from their most preferred political conception of justice, it is unlikely one and only one political conception will continually carry the day.

The polycentric model does better than this, however. Instead of allowing persons to take turns at being winners and losers, the polycentric model allows persons to be *persistent winners*. Because society is divided into separate governance units divided along the lines of competing political conceptions of justice, citizens can vote with their feet and move to the community that accords with the political conception they deem most reasonable. Once in such community, the laws and institutions of that governance unit will by and large resemble what they think is best: within that particular governance unit, everyone gets what they deem optimal from the standpoint of what they think justice requires.

Now recall our pre-theoretical intuition concerning the requirements of fairness: (i) when parties to a conflict both advance reasonable claims yet both cannot agree on a best solution, and (ii) when the conflict will continue over time, fairness requires parties take turns at getting their way insofar as this is actually feasible. The deliberative model satisfies this by allowing citizens to take turns at being winners and losers. The polycentric model, however, negates (i) as a live possibility. Instead of being at a political stalemate concerning conflicting preferences over political conceptions of justice and the public goods they demand as is the case in the deliberative model, the polycentric

model divides society into multiple units of governance where all different kinds of heterogeneous preferences can be satisfied.

The attractiveness of the polycentric model is thus more akin to the traditional model rather than the deliberative one. The traditional model, recall, was attractive because it is a society where all citizens can sincerely say they live in a society they deem to be just, as well as affirm to their fellow citizen that justice is being done around them. This is so in the polycentric model, except the relevant governance units are simply smaller than the gargantuan society of the traditional model. But still, within the fractured governance units of the polycentric model citizens can sincerely affirm to themselves and their fellow citizens that justice is being done around them. For this reason the polycentric model, we conclude, is normatively attractive.

## 5.2 *Public Scrutiny.*

Recall the public scrutiny requirement: because coercive laws are inherently suspect they must stand up to some kind of public scrutiny. The unifying model achieved this: when coercive laws are imposed on the citizenry, those subject to these laws can turn to the political conception governing their society to explain why they are being coerced in the relevant way. The deliberative model was unable to do this. Because there is no one unifying conception, there is no simple story citizens can tell themselves about the laws and institutions regulating their lives.

Like the unifying model, the polycentric model is also able to live up to Rawls's ideal of public scrutiny. This is because different governance units are regulated by different though unifying political conceptions of justice. Thus, citizens *within* those units – when the coercive laws of those units are being imposed on them – can look to the political conception regulating that pocket of

society and tell themselves a story about the restrictions being imposed on them. Althea and all the other  $j_1$ 'ers living in location  $l_1$  can look to political conception  $j_1$  to explain the coercive laws and institutions under which they live, Bertha and all the other  $j_2$ 'ers can do the same in their own governance unit, etc. Here, even though society as a whole is not regulated by one and only one political conception of justice, because different governance units *are* unified around distinct political conceptions the laws and institutions of these distinct governance units stand up to public scrutiny when questioned by those subject to them. We conclude that the polycentric model satisfies the public scrutiny requirement.

### 5.3 *Social Unity.*

Recall why the unifying model embodied the good of social unity: even though citizens disagree about whether the governing political conception of justice is the most reasonable conception, when push comes to shove all try to bring about this governing conception when they engage in the democratic process. This was not so for the deliberative model: politics here is more akin to a competition, where different persons try to get their favored political conception to win out.

Now it is true that competition plays an important role in polycentric orders. Different governance units compete with one another for citizens to increase their tax base. On a macro level, then, it appears there is no unifying or shared end: distinct governance units within a polycentric system compete with one another in the way that citizens in the deliberative model compete with one another in the democratic political process.

But in asking whether the polycentric model embodies social unity, look to what happens *within* governance units, at the micro level. Since governance units are carved up by competing political conceptions of justice, those within governance units work to make sure that unit's conception is realized when participating in the local political process. Like the unifying model in this respect, Althea and all the  $j_1$ 'ers do what they can to make sure  $j_1$  is realized in  $l_1$ , as is the case for Bertha and the  $j_2$ 'ers in  $l_2$  and Cassidy and the  $j_3$ 'ers in  $l_3$ .

Arguably, social unity is embodied to a stronger degree in the polycentric model when compared to the unifying model. In the unifying model, all share the end of bringing about the governing political conception of justice even though some think it is not the best conception. This was okay, we noted. Just as some Marines might not think the current mission is the best thing to do at the moment, there is social unity when the mission is pursued anyways. But surely there is a *greater* degree of social unity when all think the mission *is* the best possible thing to do at the time. If one accepts this, then the polycentric model yields a higher degree of social unity than the unifying model, for each person in the relevant governance unit thinks the conception of justice governing that unit is best. If they did not, then they would move to the unit governed by the conception they do think is most reasonable. In this way, the polycentric model's account of social unity more closely resembles the traditional model's account when compared to the unifying model's account.

Regardless, we conclude that the polycentric model realizes the good of social unity.

#### 5.4 *Full Autonomy.*

Recall why both the unifying model and deliberative model failed to satisfy Rawls's requirement of full autonomy. In the unifying model, some citizens would not give themselves the governing political conception of justice if they were placed in the original position. And on

deliberative model, there is no one unifying political conception of justice citizens could even give themselves when placed in the original position. For this reason, in both models when citizens act in accordance with the laws and institutions of society, they merely comply with these rules, but do not act from these rules as just in the robust Kantian sense.

But consider now the polycentric model. Here, citizens sort themselves into communities each governed by their most favored political conception of justice. These communities – their laws and institutions – are regulated by these different political conceptions. Because this is the case, if citizens do indeed sort themselves into communities regulated by their most preferred political conceptions of justice then they will realize their full autonomy when they comply with their governance unit's laws and institutions. When Althea and other  $j_1$ 'ers comply with the laws and institutions of their unit, they act from these laws and institutions as just, because they would give themselves such laws were they to step into the original position. We can say the same of Bertha and the rest of the  $j_2$ 'ers in  $l_2$ , as well as Cassidy and the rest of the  $j_3$ 'ers in  $l_3$ . Because each lives in a community governed by their most preferred political conception of justice, each would give themselves the laws and institutions regulating that community when standing in the original position. This ensures that citizens realize their full autonomy in the polycentric model. The polycentric model thus realizes all those ideals Rawls enumerates when introducing the idea of the well-ordered society, all the while remaining consistent with the fact of justice pluralism. This is displayed in Table 3.

	Normatively Attractive	Public Scrutiny	Social Unity	Full Autonomy
Unifying Model	x	✓	✓	x
Deliberative Model	✓	x	x	x
Polycentric Model	✓	✓	✓	✓

Table 3

## 6. Conclusion

The well-ordered society as Rawls initially imagined it is impossible given justice pluralism. Yet the reasons Rawls insists on theorizing about well-ordered societies in the first place are compelling. As such, we need a new model of what society might look like that is (i) compatible with justice pluralism and (ii) capable of realizing those ideals Rawls had for insisting on theorizing about well-ordered societies in the first place.

We began by taking a look at two close iterations of the traditional model of the well-ordered society: the unifying model and the deliberative model. Both, we saw, fell flat. We then introduced a new model that admittedly is quite a stretch from what Rawls initially imagined: the polycentric model. Indeed, this model of the well-ordered society resembles much more closely Nozick's vision of utopia than Rawls's original vision of justice as fairness. It was shown that the polycentric model dominates both the unifying model and the deliberative model. For this reason it should be preferred to these models. This, however, does not mean the political liberal project in the face of justice pluralism is anywhere near complete. The sketch offered of the polycentric model was entirely brief, and much further investigation into its inner-workings and other positive as well as



negative properties is required before we may consider it an ideal political liberals should strive in pursuit of.

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