

## *Chapter 3*

# **Polycentric Justice**

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Justice, John Rawls famously argued, is the “first virtue” of social institutions. Justice, in this sense, structures social cooperation. More precisely, principles of justice provide a framework for evaluating the social rules that govern society, understood as a “cooperative venture for mutual advantage” (Rawls 1971, 4). As he puts it, “[a] set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares” (4). Principles of justice structure the basic rights, the duties, and the distribution of the benefits and burdens of social life.

Justice is a solution to a fundamental problem in political philosophy. The exercise of political power involves coercion. In a society of free and equal citizens, coercion needs justification to distinguish it from mere force. There are two classic solutions to this problem. Both rely on justifying the use of political power, but they rely on different sources of that justification. One justifies the use of political coercion by referencing an end that the exercise of such power is meant to fulfill. Politics is justified insofar as it achieves or aims at some otherwise valuable or attractive situation for society. This can take many forms, but from Plato to Rawls, one common goal is justice, or a just society. Insofar as political power is used in pursuit of justice, its legitimacy is secure.

Another approach is to see the legitimacy of political power as the result of some procedure. Again, this can take many forms, but agreement and consent are at its core. If everyone in the society agrees or consents to using certain kinds of political power, it is natural to see the exercise of that power as legitimate. Democratic government has this as its basis of legitimacy, but in its most general form, we find the idea of political contractualism. Coercion

can be legitimate and publicly justified if it is in accordance with the rational agreement of those to whom it is meant to apply.

These two solutions to the basic political problem are unified in the work of John Rawls, who uses a contractual mechanism of public justification to authorize a conception of justice. Since Rawls, it has become natural to see these two forms of justification as being tightly linked so that public justification establishes a conception of justice that becomes the ultimate basis of legitimacy and standard of evaluation at the highest political level.

I argue that this link is neither necessary nor natural and that we see the clear tensions between contractualism and justice in the context of polycentric theories of governance. Polycentrism highlights the importance of diversity and experimentation in a political order, which helps us see the incongruity between justice and contractualism (see also the chapter by Paniagua and Pourvand 2024, in this volume). Justice as a global standard of legitimacy and a universal evaluative norm is ill-suited to a polycentric system of governance. While polycentric orders need legitimacy in the traditional sense and higher-level regulative norms, both are better accomplished through contractualism, which is not focused on justifying a universal conception of justice. A polycentric-friendly version of contractualism will justify less-substantive procedural norms and institutional rules instead. The insight to which polycentrism leads us is that contractual public justification can generate a standard of legitimacy *without* relying on justice as a basic norm. Or so I argue.

The argument proceeds as follows. In Section 1, I argue that justice and the justification of political authority have traditionally been linked, especially in contractual theories of justification. Early contract theories directly authorized the sovereign to rule, while later theories indirectly authorized the sovereign to act on the basis of a conception of justice that the contractual theory directly authorizes. This elegant solution to the problem of political legitimacy faces a challenge in the high levels of diversity and pluralism found in modern, liberal societies. It is implausible that a determinate conception of justice could meet their diverse and sometimes conflicting interests and values. I introduce this problem in Section 2. In Sections 3 and 4, I examine how polycentrism highlights this problem and poses a potential solution. Although all the strategies of using polycentrism to solve the problem of diversity are instructive, none are without drawbacks. In Section 5, I argue that the real problem is the strategy of indirect authorization through justice used by modern contractual theories of public justification. I argue, instead, that those concerned with diversity and liberalism should embrace a form of polycentricism that abandons the indirect authorization strategy. The implications and paths forward are discussed in the conclusion.

## 1. JUSTICE AND JUSTIFICATION

The basic political problem is to authorize the use of political power so there is a principled distinction between illegitimate and legitimate coercion. Legitimacy, in this sense, authorizes the rightful exercise of sovereign power. There are two main methods of establishing legitimacy: locating it substantively in some right-making property (e.g., the good, God's will, justice) or imbuing some decision-making procedure with legitimacy, which then confers legitimacy on the outcomes of that procedure. The most general form of the latter approach is a social contract, a general procedure based on an agreement that authorizes legitimate sovereign authority.

We see this clearly in classical social contract theories. The contract's purpose for Hobbes is to authorize and select the sovereign, and justice derives from sovereignty. Of justice in the state of nature, Hobbes writes:

To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall vertues. (Hobbes 1651, 196, XIII)

The third law of nature, regarding justice, is "That Men Performe Their Covenants Made," but this law, being a law of reason and a condition of peace, requires more than just words (Hobbes 1651, 220, XV). Justice can only have force when the sovereign is established in the commonwealth.

Therefore before the names of Just, and Unjust can have place, there must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant; and to make good that Propriety, which by mutuall Contract men acquire, in recompence of the universall Right they abandon: and such power there is none before the erection of a Common-wealth. (Hobbes 1651, 220, XV)

For Locke, the story is somewhat different. Justice has meaning in the state of nature and, in that sense, it can be understood independently of the contract. Nevertheless, its adjudication and enforcement are left to each individual in the state of nature, which makes the expectation of justice being done "very uncertain." Each individual is "constantly exposed to the invasion of others" (Locke 1681, 350, II, 123). The contractual agreement, for Locke, involves, as it does for Hobbes, everyone laying down their natural right to be a judge and executioner of the natural law of justice. Once the sovereign

commonwealth is established, it becomes the umpire that decides matters of justice. He writes:

all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community . . . Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another: but those who have no such common appeal, I mean on earth, are still in the state of nature, each being, where there is no other, judge for himself, and executioner; which is, as I have before shewed it, the perfect state of nature. (Locke 1681, 324, II, 87)

In both Locke and Hobbes, the establishment of the sovereign makes justice, in the political sense, possible. Much the same is true in the other contract theorists of the early modern period. These theories directly authorize a sovereign who defines justice or acts based on it (depending on the theory). However, this approach to authorizing the sovereign procedurally creates a serious problem. The person of the sovereign “is but a man” who can preempt the reason and interests of the members of the Commonwealth. As Locke noted, this makes the sovereign more than just first among equals and seems to irresponsibly empower the sovereign in a way that may endanger those who initially authorized him. Doing so is more foolish than staying in the state of nature. As Locke (1681, sec. 93) notes, “This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.” The solution is to limit sovereignty somehow, which creates puzzles of its own.

In contemporary contract theories, these problems are avoided mainly by authorizing the sovereign indirectly. Instead of justifying a sovereign who defines and provides the normativity for justice, Rawls and later contract theorists use the contractual procedure to justify principles or rules of justice.<sup>1</sup> Justice, identified by modeling justification through agreement, becomes the direct source of sovereignty, which is then understood as the source of political normativity. This approach uses a procedural strategy for authorizing a legitimate sovereign, avoiding the dangers of locating that sovereignty in a person or group by making the sovereign a substantive notion, justice, which is the source of normative political authority.<sup>2</sup> In modern contractualist theories that follow Rawls, justice sets the conditions of cooperation and social stability. The contractors in the original position agree to general principles of justice and only indirectly to a sovereign. Insofar as the political order has a role in Rawls’s theory, it is to implement justice.

## 2. DIVERSITY AND CONTRACTUALISM

This move to indirect authorization effectively fuses justice as a source of normative authority and political contractualism or public justification as a method of authorization. Contractualism becomes a model of public justification that, in turn, authorizes a conception of justice. This combines the substantive and procedural methods of identifying legitimate political power. The appeal is that it seems to capture the advantages of each approach while avoiding their respective difficulties.

However, the problem arises once we allow a diversity of individual evaluative and doxastic perspectives into the contractual model to reflect the underlying pluralism of modern societies. Doing so makes the substantive identification of justice difficult or impossible, since it now requires the agreement of many different types of people with different views and interests. Any substantive conception of justice is unlikely to meet the standard of public justification for a diverse community.

Modern contractualism has used two main strategies to deal with this problem. The first is to restrict the diversity and pluralism of the underlying contractual model to generate a determinate and even unique conception of justice. For instance, Jonathan Quong restricts his conception of public justification to only apply to the “constituency of an ideal liberal democratic society,” i.e., citizens who already accept a liberal conception of justice (2011, 6). He calls this the *internal conception* of public justification. We can see this as narrowing the scope of political contractualism to secure a stable, identifiable conception of justice. Adopting a different tactic, Nic Southwood (2010) restricts diversity by introducing an ideal deliberative framework for his contractual model. Michael Moehler (2018) pursues this approach differently by endorsing a multilevel contract theory. He argues that while deep diversity exists on a lower level, contractors can rise to a higher, instrumental level where they can agree on terms of peace using a bargaining model of a contract. This approach faces fewer problems than the internal conception of liberalism. Still, this entire family of theories, what I elsewhere call the *insulation strategy* for dealing with diversity in the model of public justification, faces similar problems (Thrasher 2023). The main issue is with the stability of the conception of justice. When the scope of diversity is narrowed in the contractual model of justification, the stability of that justification can be undermined by the actual diversity in the real society it is meant to model. Only those who share the reasoning of the contractors in the model will see the political order as justified, leaving whatever portion of those who do not, outside of consensus on justice.

The other approach is to allow considerable diversity in the model of public justification but to give up on the goal of identifying a stable or determinate conception of justice as a global evaluative standard. This strategy has been pursued by several recent theorists in different ways. Gerald Gaus (2011) allows considerable indeterminacy in the contractual model, arguing that social evolutionary dynamics will settle on a stable conception of justice. Ryan Muldoon (2017) allows for maximal diversity in the contractual model, using a Nash bargaining procedure to select the determinate conception of justice. His model is dynamic, though, choosing different conceptions of justice as the underlying views of the constituents of the society change. Elsewhere, I have described these approaches to widening the scope of diversity in the contractual model as the “harnessing strategy” for dealing with diversity (Thrasher 2023). Unlike the *insulation strategy*, mobilizing diversity in the model of public justification does not create obvious stability problems. Instead, it creates problems with the publicity of the conception of justice and its identification. It is difficult to know what the specific substantive conception of justice is justified in each society, since it may be, as in Muldoon’s theory, a moving target.<sup>3</sup> Or, as in Gaus’s theory, the specific set of norms in society that are justified may be a complex amalgam that is difficult or impossible for normal citizens to explicate or identify with.

Both strategies face challenges. Nevertheless, as Rawls noted in *A Theory of Justice*, the solution can’t be to retreat to a purely substantive approach to identifying justice that rejects the need for a rationalizable procedure altogether. Those who have embraced this approach in either its perfectionist (Raz 1986), purely intuitionist (Enoch 2013; Huemer 2013), Kantian (Pallikkathayil 2016), religious (see: Vallier 2023), utilitarian (Hardin 1988; Goodin 1995), or republican (Pettit 1999) form ignore the problems that diversity and pluralism pose for identifying a stable conception of justice or reject the need for doing so. However elegant and compelling such theories may be on a philosophical level, they won’t be satisfying to those who see the project of political philosophy as having to do with diagnosing and finding high-level solutions to the problems of contemporary social life.

### 3. POLYCENTRISM AND CONTRACTUALISM

Diversity poses a problem to the indirect authorization structure of modern contractualism. In the face of such a challenge, one might look to institutional approaches that avoid the thorny problems of establishing a political order from the top down, as political philosophers often seek to do, and instead look to build it from the bottom up. In this context, polycentricity becomes a potentially powerful solution.

Paul Aligica and Vlad Tarko define a *polycentric system* as “a social system of many decision centers having limited and autonomous prerogatives and operating under an overarching set of rules” (2012). The key idea is that a polycentric order does not have a single unit with a monopoly on decision-making powers. Decision-making in this context may involve coercion or force depending on the order involved, meaning there is no monopoly on using coercive force in such an order. Nevertheless, polycentric orders are rule-governed orders. The overarching rules of the order structure the powers of the units within it, structuring their autonomy. As Aligica and Tarko articulate:

Polycentricity emerges as a nonhierarchical, institutional, and cultural framework that makes possible the coexistence of multiple centers of decision making with different objectives and values, and that sets up the stage for an evolutionary competition between the complementary ideas and methods of those different decision center. (Aligica and Tarko 2012, 251)

These orders are complex in that there are many combinatorial possibilities for how the multiple units in a polycentric interact and how the agents work within them. Entry and exit within the system and basic rules for changing the structure of the units mean that polycentric systems tend to be both complex and dynamic (Aligica and Tarko 2013).

For our purposes, the distinctiveness of polycentric orders comes from two factors. The first is that the system is composed of decentralized, semi-autonomous units. The second is that an overarching set of rules governs it. These two factors are related. Within a polycentric system, the system’s rules are developed in a process of “co-production” that occurs within and between the units in the system (Aligica and Tarko 2013, 736). This allows flexibility in the rules, the ability to adapt rules to local conditions, and a process for generating internal legitimacy for the rules that makes the enforcement problem easier to solve. As Aligica and Tarko argue, the co-production of rules makes it “likely that the quality of rules increases if the competition between rule creators is increased” (Aligica and Tarko 2013, 736). This process of rule co-production is structured by an overarching set of basic rules and the local social norms within the system.

We can now see how polycentric orders can accommodate and harness evaluative and doxastic diversity. In the social and political context, we can think of the polycentric order as a system of institutions, where institutions are the “rules of the game” constructed by people to organize social interactions (North 1990, 3). We have formal institutions and organizations, and informal institutions and norms within this. Institutions tend to be made, while norms emerge from conventions, although the two often overlap and

interact. In a polycentric system, we shouldn't expect that the institutions within it will share rules or norms. This means that a diversity of different types of institutions, reflecting the different norms and values of different people, can coexist within the same order.

Returning to the idea of an overarching set of rules that structures the order, this set of rules *doesn't need to be* a conception of justice of the sort we find in modern contractualist theories. Further, there doesn't seem to be a need for a universal standard of legitimacy. Instead, legitimacy is generated at the level of the institutional units. Rather than applying one consensus evaluative standard for the entire system, "the polycentric approach is concerned with the possibility of creating valued states of affairs from as many normative perspectives as possible" (Aligica and Tarko 2013, 738).

Although polycentricism incorporates diversity nicely, it raises the question of the ultimate legitimacy of the political order in a new way. Even if the legitimacy of the institutional rules within a polycentric order is determined locally, insofar as some or all involve coercion, there is still the question of whether that exercise of coercion is legitimate. Polycentric orders have no substantive basis for their legitimacy—nor could they—so the direct method of authorizing political power will not work. They also can't rely on the traditional indirect contractual approach, since it is unlikely that such a conception of justice will allow for the autonomy and flexibility of a polycentric order or that the diverse constituents of such an order could agree on any stable conception of justice. Given that neither method for authorizing legitimate authority seems consistent with polycentricism, what reason do citizens have for endorsing and complying with the system's rules?

One answer, pursued in different ways by Müller (2019) and Barrett (2020), is to use the indirect contractual approach to justify a political system that is not based on justice but will reliably tend toward justice. On this view, polycentric orders can be legitimate as they reliably move society toward justice. This is a *directional* justification for polycentricism. For Barrett, the best we can hope for in a complex world is to identify progressive social orders in the sense that they reliably tend toward justice in the long term. Polycentric orders, he claims, are a crucial element of such a progressive social order. A progressive social order is not legitimate because it is itself publicly justified or implements a conception of justice that is publicly justified, but rather because we can expect it to move toward justice. In this sense, the justification of the social order is doubly indirect. Müller's argument is different in that polycentric democracy is the least unjust system available and the most likely to lead to justice. As he describes it, polycentric democracy is "a launching pad towards a realistic utopia" (Müller 2019, 178). This is also a doubly indirect justification for the polycentric order based on its likelihood of reliably aiming at justice.

Another approach, what we might call a *constitutive* justification for polycentricism, argues that the ongoing process of public justification with a polycentric system justifies it and generates the appealing properties like impartiality that we have come to accept from a global conception of justice. We find this approach in the final work of Gerald Gaus (2021). Although his argument is complex, the basic idea is that modern liberal democracies are best understood as open societies composed of multiple levels of different types of polycentric institutional arrangements. However, these polycentric orders must be governed by a system of higher-level rules authorized through a system of public justification. For Gaus, public justification occurs at the level of basic moral rules that structure the norms of society. Public justification ensures that these moral rules are stable since they are stable in the face of discussion and disagreement (Gaus 2021, 51). These moral rules form a kind of moral constitution that orders the basic terms of the social order (Gaus 2013). Within that moral constitution, the crucial feature related to justice is a general principle of impartiality, which Gaus identifies as the core element of the Rawlsian theory of justice (Gaus 2021, 140). He argues that a contractual deliberative model paired with a model of social evolution generates justification for ever more general principles of impartiality. In Gaus's later theory, we have a process for generating justification on a high-level principle of impartiality and basic moral rules through a deliberative, contractual model and social evolution.

### 3. STRATEGIES OF LEGITIMACY

The problem of establishing legitimacy has, as we have seen, a solution in the form of using contractualism to authorize a conception of justice that then supplies the normative authority for political power. This solution, however, is jeopardized by the diversity of modern societies, which makes contractually authorizing a substantive conception of justice difficult (see also the chapter by Paniagua and Pourvand 2024 in this volume). This difficulty is compounded when we introduce polycentricity. We have seen three solutions to this problem.

The first *justice-based* approach we looked at in the first section. Within this approach, there are two strategies. The first, the *insulation* strategy, constrains diversity to generate contractual justification for a conception of justice. The second, the *harnessing* strategy, attempts to use the diversity of society to justify a changing conception of justice. This second strategy effectively gives up on a stable conception of justice, while the first attempts to eliminate diversity to generate a stable conception of justice.

The second type of solution embodied in *justice-aiming* theories argues that diversity is ineliminable and, instead, attempts to indirectly justify a diverse, polycentric order on its likelihood of progressively achieving justice. In so doing, they give up on the need for contractual public justification as a source of legitimacy. Rather than rely on an independent justification module for their conception of justice, they posit a notion of justice at which they argue, the polycentric order will reliably aim. The appeal of this notion of justice indirectly justifies the polycentric order.

The third type of solution is Gaus's *constitutive* approach, which goes the other direction. It relies on public justification and diversity while relegating justice to a high-level principle of impartiality and background moral rules. This is not to say that Gaus jettisons justice as a central evaluative principle completely, but the notion of a publicly justified conception of justice is not meant to govern the lower-level institutions of the polycentric order directly; instead, it serves as a basic guiding principle of the society. With the third procedural approach, the idea of justice is becoming more ephemeral. We might wonder why it is there and whether we need it.

Of these, the justice-preserving *insulation* strategy is the most straightforward. Still, at least in its traditional form, it is also the most problematic since it considerably narrows the scope of liberal justification and, thereby, opens itself up to serious problems with stability. The Gaussian *constitutive* solution is the most subtle, attempting to preserve some version of justice in the background while leaving little to do with the actual functioning of the society. The *justice-aiming* approach is probably the best of both worlds in some sense. Still, its plausibility largely depends on what we think about a) its reliability claims, and b) its necessarily vague conception of justice doing much of the work in the background. This approach is probably right because generating a contractual consensus on a direction of justice is easier than a specific conception. Still, in so doing, it may also lose the normative legitimacy that a stable conception of justice confers. In any case, each of these approaches has its costs.

Brian Kogelmann (2017) proposes a more straightforward solution to this problem, which he calls the *polycentric model*. This is a polycentric model of a Rawlsian "well-ordered society." A well-ordered society, for Rawls, is a society governed by a conception of justice that is publicly justified and recognized as justified, ensures social unity, and supports political autonomy. In the well-ordered society under full justification:

citizens are in a position to know and to accept the pervasive influence of the basic structure that shapes their conception of themselves, their character and their ends . . . that citizens should be in this position is a condition of their

realizing their freedom as fully autonomous, politically speaking. It means that in their public political life nothing needs be hidden. (Rawls 1996, 68, 4.2)

Kogelmann represents diversity directly in his version of the well-ordered society by modeling citizens as having multiple conceptions of justice, none of which can be uniquely publicly justified. In his polycentric model, each constituency for a particular conception of justice  $J = \{j_1, j_2, \dots, j_n\}$  has its territorial community where that conception of justice authorizes the political order. Crucially, there is a constraint that all these conceptions of justice are liberal. He writes:

[T]hough there are disagreements about justice in the polycentric model, and each differing conception of justice in  $J$  gets its own separate governance unit to regulate, all such conceptions are still liberal conceptions—there are no pockets of illiberal peoples in our polycentric order. (Kogelmann 2017, 679)

This model has no overarching conception of justice to unify society. Nevertheless, each sub-community does have a unifying conception of justice to organize it. Quite rightly, Kogelmann (2017, 680) compares this approach to Nozick's (1974) model of a meta-utopia in the third part of *Anarchy, State, and Utopia* and Chandran Kukathas's (2003) model of a decentralized society.

In contrast to the *insulation*, *harnessing*, *justice-aiming*, and *constitutive* approaches we have already seen, we can think of this as a *decentralized* approach to reconciling justice, public justification, and diversity. It is decentralized and separated in that each community's conception of justice organizes it, but not any other community. It also partakes in an *insulation* strategy as it insulates itself from the possibility of any of these communities being illiberal. This reconciles justice, in the Rawlsian sense, with diversity in the contractual justification by limiting the output of decentralized public justification only to conceptions of justice acceptable to a larger, virtual public justification for the polycentric order. As such, we can see that what we have here is a virtual model of public justification that outputs a disjunctive conception of justice  $J = j_1 \sqcup j_2 \sqcup \dots \sqcup j_n$ . In many ways, this is similar to Gaus's *constitutive* approach, wherein a permissible, "eligible" set of conceptions of justice and then into an "optimal eligible" set before having some conception of justice chosen by a historical evolutionary process (Gaus 2011, 20; 2021, 19). In Kogelmann's *decentralized* model, this later step is skipped, and each sub-community implements its preferred element from a kind of "optimal eligible" set of conceptions of justice through a polycentric mechanism.

This *decentralized* approach has the advantage of capturing the appealing features of Rawls's theory of justice while not having to either completely insulate the contractual model from diversity or use some non-rational

mechanism of selection to pick from a diverse set of different conceptions of justice. Regardless, it is not without drawbacks. Alex Schaefer (2022) raises concerns about the polycentric order's exit possibilities. While citizens have a right to exit in the *decentralized* order, there is no guarantee there is anywhere to exit if they possess an extreme minority view. This is a problem with Kogelmann's model, since it undermines the political autonomy component of a well-ordered society. As Schaefer argues:

The issue here is a consequence of Kogelmann's strict requirement of full autonomy: citizens must live under their *favourite* conception of justice, according to their *independently derived* rankings. Consequently, just as in the unifying model, citizens will fail to realize their full autonomy. (2022, 5) [emphasis in original]

Schaefer proposes an amendment to the decentralized model to solve this problem. He argues that if we model society-wide public justification as involving agents that are reasonable, in the sense that they see themselves as reciprocal cooperators and who include the other conceptions of justice in their rankings, "the choices and values of other agents with whom they interact factor into their practical reasoning" (2022, 8). He models this as every agent in the contractual model  $A = a_1, a_2, a_3, \dots, a_j$  having a personal ranking of conceptions of justice that involves the intersection of the "eligible" set of options  $i$ - $n$  $J_i$  (Schaefer 2022, 7). If no individuals have rankings of justice that are a part of that larger intersecting set, exit options and full political autonomy should be preserved.

This amendment should be compatible with Kogelmann's *decentralized* approach and largely solve the exit problem. Another, perhaps more serious issue concerns how this approach, even in its amended form, insulates the contractual model from illiberal conceptions of justice. In one sense, Kogelmann's decentralized model is an exercise in fusing polycentricity into an otherwise Rawlsian approach. As far as it goes, there is no problem using the restricted Rawlsian assumptions to do so. However, it poses a problem for using it as a general solution to the problem of contractual legitimacy in a diverse society since it will replicate the fragility of other approaches that use an *insulation* strategy.

We can put the point a little more precisely by thinking of the contractual legitimacy problem as being one of generating a disjunctive or intersecting "eligible" set of conceptions of justice. Polycentricity is merely a way of implementing a series of related communities, given those options. We still have a global norm in the form of justice, albeit a complicated intersecting one. Presumably, the institutions within each community would be bound by its norms of justice, and even more complicated norms of justice would bind

some that crossed the boundaries of a given community. What we have, then, is a multiplicity of monocentric orders governed by justice that are linked together. Following the model's assumptions, each community should be stable despite insulation, assuming that sorting people into their preferred communities is effective. However, the problems with the *insulation* strategy concerning stability will be replicated in each community over time as new people immigrate and emigrate, as new ideas emerge, and as the values and beliefs of the people change. Diversity, which was cordoned off through decentralization, will predictably *reemerge*, and we can expect the system to be dynamically unstable. Despite its complications, the decentralized model is still *justice-centric* in the Rawlsian way. This emphasis on justice as an authorizing and governing norm makes reconciliation between justice, justification, and diversity virtually impossible.

#### 4. CONTRACTUALISM AND A POLYCENTRIC CONSTITUTION

We have seen that polycentricity highlights the problems diversity poses for contractual models of legitimacy that rely on justice (Paniagua and Pourvand 2024). All the proposed solutions come with attendant problems. Further, polycentric orders can't completely avoid the fundamental political problem of distinguishing between legitimate and illegitimate uses of coercion. We are left with a dilemma. Either embrace some form of contractual justification that authorizes a conception of justice, which limits diversity and, therefore, polycentricity in some way, or give up on a universal standard of political legitimacy that applies to the society as a whole and embrace polycentricity without a clear standard of normative legitimacy. Neither of these options is particularly attractive.

As I suggested at the outset, the link between contractualism as a method of justification and justice as the output of that justification seems natural. I want to suggest that this link isn't necessary. We can directly generate a standard of legitimacy through contractual public justification without relying on justice as a universal normative authority.

Aligica and Tarko (2013, 738) note that polycentric orders are "concerned with the possibility of creating valued states of affairs from as many normative perspectives as possible." Having a universal conception of justice for a society or a contractual model that limits the normative perspectives will constrain these possibilities. Again, this creates a tension between polycentricity and contractual theories that authorize justice. Gaus, as we have seen, wants to allow for considerable polycentricity as well as endorse the important role that justice plays in a society at a higher level. The question here,

which Gaus attempts to answer in the third part of *The Open Society and Its Complexities*, is how to keep things separated: how to keep the spontaneous order and dynamism of the polycentric structure of what he calls the meso and micro level without having the rules of the macro-order unify everything into a monocentric uniformity. This is the inherent danger of a universal or macro norm of justice that constrains the possibilities for experimentation in the system it governs. In this way, even Gaus's *constitutive* approach employs an *insulation* strategy. Gaus's concern seems to be what he calls "Hayek's troubling" claim that the basic terms of the open society can't be rationally justified. But, in Gaus's later *constitutive* work, justice doesn't take the role that it did previously. Rather than being a global norm, it seems to set the moral preconditions of any cooperative, complex society.

The cause of this tension is the role that justice is expected to play. As we have seen, in modern contractual theories, justice is that standard by which political power is judged legitimate. It functions as a super-norm that structures all the lower political rules and norms in society. This is, of course, not the only way to think about justice. Michael Walzer (1983) defends a contextual theory of justice, in which what counts as justice depends on the social "sphere" one is in, in the relevant case. David Schmidtz (2006) argues for a pluralistic conception of justice where justice has at least four elements. Chad van Schoelandt (2020) defends a "functionalist" theory of justice that seems to involve some pluralistic and contextual elements. There are many other logical and actual possibilities (see: Van Schoelandt and Gaus 2018).

The point is that justice does not need to play the normative authorization role in modern contractual theory to be important and valuable. For instance, Geoffrey Brennan and James Buchanan argue that justice in conduct should only be thought of as action by some set of recognized rules. They argue that justice as giving each what they deserve only makes sense in the context of a system of rules. They claim, "[t]he mere presence of rules is sufficient to establish the relevance of desert, and hence the possibility of just and unjust conduct by participants" (Brennan and Buchanan 1985, 110). This may seem too strong, but they couple this idea of justice-within-rules with an idea of justice-between-rules. The rules of institutions are assumed to be agreed to by those within the institution, even while those same people may prefer a different institutional structure.

Why should we assume that the institutional rules are the basis of some consensus as Brennan and Buchanan do? Institutions that had rules that diverged substantially from the values and beliefs of those within them would be fundamentally unstable. The rules will either be ignored or changed. As Elinor Ostrom and her collaborators have shown, the juridical rules may differ from the *de facto* rights in many instances, and it is a theoretical and

practical error to read off the *de facto* rights and norms from the explicit rules of an institution (Ostrom 1990; Schlager and Ostrom 1992). Where there is a mismatch between the existing norms and rights and the public rules and rights, it is natural to want to align the institutional rules with the existing norms and rights. Gaus and Barrett (2020) argue that there is (and should be) a deep connection between institutional rules and legal structures and the social and moral norms that support them. This point can be correct without it. It is also true that the rules are in some sense optimal or even thought to be optimal by most of the participants in the institution. Anyone working in a university will be familiar with thinking that any number of university rules could be better, without thinking that either breaking the rules is justified or that the entire university is corrupt and unjust.

This conception of justice is compatible with polycentric governance since justice results from action in accordance with institutional rules that will likely vary between institutions. As Aligica and Tarko argue, in polycentric orders, diversity of values doesn't have "to be funneled into a single normative position"; they don't require us to normalize or harmonize justice across institutions (2013, 739). Justice in accordance with institutional rules can be understood as an *institutional* conception of justice. Polycentricity and diversity are compatible with an institutional conception of justice insofar as there are many different institutions with different types of rules that individuals see themselves as having reasons to work within or endorse.

Is there any sense in which an institutional conception of justice can play the indirect authorization role of justice in contractual theories? Can it function as the source of normative authority and legitimacy? Not in the traditional sense. If justice is determined by acting in accordance with institutional rules, then the legitimacy depends on the rules and the institutions that make them rather than the legitimacy of the rules depending on justice.<sup>4</sup> Since the indirect authorization strategy will not work with this conception of justice, we need to think differently about the relationship between justice and the contractual procedure for generating legitimacy. As we saw in Section 1, direct authorization in traditional social contract theories authorized a sovereign who defined and instituted justice. A polycentric order does not have a sovereign in the Hobbesian sense, so this direct approach won't work either. However, polycentric orders have an overarching set of rules that structure the order as a whole and the relations between units within a polycentric order. Perhaps that set of rules can be authorized by the contractual procedure and play the role that justice or the sovereign did in other theories.

Let's return to the idea of a polycentric institutional order to see what such an overarching set of rules would look like. Aligica describes a polycentric order of self-governance as having two key characteristics:

At its core is, first, the idea of a meta-level institutional framework of “the rules of the game” constituting social arenas through systems of overarching rules. Second is the notion that social actors interact via voluntary exchanges and voluntary associations within those general rules. (Aligica 2018, 197)

We have two sets of rules, one *within* institutions where people act directly to achieve their direct outcomes, and another *between* institutions. We can divide these two levels into the constitutional and institutional levels. An institutional conception of justice will suffice at the institutional level, but we can’t rely on institutional rules to structure the constitutional level. We also have the problem of the authorization or legitimacy of the constitutional level rules. We can use a contractual model to consider what kinds of constitutional rules would be agreed to.

As I have argued elsewhere (Thrasher 2020; 2023), the contractual model of public justification is a multipurpose tool of public authorization; it need not aim only at justice. Instead, it can target a basic constitutional structure or set of rules directly authorizing them. We can think of it as a test of legitimacy that can be, in principle, applied at any level. In his later work, Gauthier (1997) describes political contractarianism as a test of normative legitimacy, though he doesn’t develop this idea in detail. In some of his work, Gaus (2011, 276–77) also argues that public justification is a test directly applied to rules of social morality and laws. So, there is a precedent for decoupling contractualism as a method of justification from justice as its target.<sup>5</sup> If this is done in the context of a polycentric order, the source of legitimacy becomes the justified constitutional rules rather than a conception of justice that the constitution then implements.

The exact constitutional rules will vary depending on the details of the polycentric order. Minimally, any constitutional set of rules will require some “rule of recognition” in the sense described by H.L.A. Hart (1961). This basic rule is what Hans Kelsen (1934) called a *grundnorm*, or what Ehrenberg (2020) calls a “basic validity rule”; not a traditional rule, but rather a test or criteria for identifying valid secondary and primary rules. Hart is concerned with a system of law, but a basic rule of recognition can also be used at the constitutional level. The contractual test of legitimacy can be used to authorize a basic rule of recognition and associated rules of change and adjudication. These are the basic requirements for a constitutional order that can serve as a system of overarching meta-rules that govern the complex polycentric order within it.

Although a constitutional order of rules will be morally important, it is not dependent on moral authorization. Again, this distinguishes it from contemporary contractual theories focusing on justice as the fount of legitimacy. Justice in a polycentric society will be largely determined by the constitutional

structure and the institutions it makes possible. However, the constitutional order does not implement some prior notions of justice. Given the abstraction and generality of the basic secondary rules of society, there is good reason to think that any contractual model of justification would employ a robust “veil of uncertainty” since the link between general secondary rules and outcomes will not be direct or foreseeable (Brennan and Buchanan 1985, 33–36). Our model agents in the contractual model will come with their various moral, religious, and practical worldviews. Since they are not directly choosing a conception of justice or moral constitution to govern them, diversity among these views should not make agreement on a basic set of constitutional rules impossible or create the need for robust insulation that we see in contemporary, justice-centric, contractual theories.

In this sense, public justification of a constitutional order in a polycentric system is best seen in a realist light. Normative and moral concerns are relevant to the choice of basic rules, but those considerations come into play within the contractual test. This form of realism allows for normative considerations to count but does not require a unified moral or normative standard (Hankins and Thrasher 2022). Contractual public justification in this framework doesn’t happen in a vacuum; existing norms and conventions of society will be crucial inputs in the contractual model.

## CONCLUSION

Polycentric governance poses unique problems for contemporary political theory in ways that neither the political philosophers nor the polycentric theorists have fully reckoned with. I have tried to isolate the main problem as I see it and show how many of the proposed solutions seem inadequate for the task. The problem arises from the *justificatory strategy* that contemporary political contractualist theories have taken to solve the fundamental question of legitimacy in a free society. Their solution, as we saw, was to use a tool for authorizing a sovereign—the social contract—and use it to authorize justice, which would then play the role of the sovereign. Justice becomes the main tool of legitimacy, and contractualism becomes the method for identifying justice. The problem that polycentricity highlights is that the more diversity and dynamism there is in a society, the harder it is to see how a contractual model can identify any clear and stable conception of justice. The dilemma becomes either reducing diversity and dynamism to secure a clear conception of justice, or rejecting the justice-based approach to legitimacy.

I have argued that the second option is plausible and especially well-suited for polycentric systems. Political contractualism as a method of justification can be unmoored from justice and used to evaluate basic constitutional rules

that structure the polycentric order directly. In this approach, contractual public justification can serve as the basis of a realist political contractualist theory that outputs constitutional secondary rules rather than justice or rules of morality. This makes the task of justification less fraught and more robust in the face of diversity. Different kinds of societies will authorize different constitutional orders, given their histories, conventions, and norms. Since the rules for changing the constitutional structure are embedded in the basic secondary rules, there is no expectation that a constitutional order should be static. Rather, the process of self-governance within those rules should be dynamic and allow for change in the face of changing circumstances.

The proposal here is a considerable departure from the alternatives on offer (see also Paniagua and Pourvand 2024). It rejects a form of ideal theory in favor of realism and deprioritizes justice as the goal of all social institutions. Public justification in the form of contractual agreement is still central, but it takes on a different form with a different goal than in other theories. The move to direct rather than indirect political authorization makes it possible to move to an institutional conception of justice, but it also raises other issues. The main appeal of this approach is that it incorporates diversity into its model of public justification and governance by assuming polycentricity. This shows that the importance of polycentricity in political philosophy cannot be ignored. It is not merely an institutional structure that can be used as a module in, for instance, justice-centric political theories. As I have tried to show, the appeal and necessity of polycentricity as a governance structure reframe the entire political project at the highest level.

## NOTES

1. Rawls, Gauthier, and their followers do this most clearly, but it is common in most contractual theories. Elsewhere, I have argued that the attempt to justify a unique, determinate conception of justice creates serious problems for both rational choice, bargaining contract theories (Thrasher 2014), as well as Rawlsian theories (Thrasher 2019a). James Buchanan develops a contract theory that focuses on the justification of rules, not a determinate conception of justice (Buchanan and Tullock 1962; Buchanan 1975; Brennan and Buchanan 1985) and largely avoids this problem. His contractual theory is different from Rawls's in many respects, though, especially in its emphasis on the role of democracy and individualism (on this point, see Thrasher 2019b).

2. Robert Nozick (1974) uses a different procedural approach in the first part of *Anarchy, State, and Utopia*. Although similar in overall form to modern contractual theories, Nozick's approach is methodologically and substantively different. We can see his thought experiment of the creation of a minimal state without violating anyone's rights as both a possible proof of such a society and as a standard of legitimacy

or justice from which to judge our own. Although both Nozick's model and contractual theories are counterfactual, they differ in that modern contractual theories are concerned with assessing the reasons we have now for endorsing and complying with social rules and use a counterfactual model to test those. For more on the counterfactual status of contract theories, see D'Agostino, Gaus, and Thrasher, (2021).

3. Whether it is a drawback for justice to be a moving target is open to dispute. Muldoon (2017) sees his dynamic conception of justice as a benefit, not a drawback, of his theory. Alex Schaefer (2023) has argued that focusing on determinate conceptions of justice is a vestige of using fixed-point theorems in economics, and a dynamic conception of justice is preferable. This may be correct; the point here is just that no dynamic theory has reckoned with the problem of publicity. Perhaps, as Brian Kogelmann (2021) argues, publicity is overrated. In any case, it is a lacuna in contemporary dynamic accounts of justice.

4. It is important to note that I am speaking here of "social" justice used to evaluate institutions, not justice as it is treated in the criminal law or as applied to individuals. Individuals will, of course, continue to have and use those conceptions of justice.

5. An earlier precedent can be found in the work of James Buchanan, specifically in the model of constitutional choice developed in *The Calculus of Consent* (Buchanan and Tullock 1962). On the relation of this work to the kind of contractualism discussed here, see (Thrasher and Gaus 2017).

## REFERENCES

- Aligica, Paul. 2018. *Public Entrepreneurship, Citizenship, and Self-Governance*. Cambridge, United Kingdom: Cambridge University Press.
- Aligica, Paul, and Vlad Tarko. 2012. "Polycentricity: From Polanyi to Ostrom, and Beyond." *Governance* 25 (2): 237–62. <https://doi.org/10.1111/j.1468-0491.2011.01550.x>.
- . 2013. "Co-Production, Polycentricity, and Value Heterogeneity: The Ostroms' Public Choice Institutionalism Revisited." *American Political Science Review* 107 (4): 726–41.
- Barrett, Jacob. 2020. "Social Reform in a Complex World." *Journal of Ethics and Social Philosophy* 17 (2): 103–32.
- Barrett, Jacob, and Gerald F. Gaus. 2020. "Laws, Norms, and Public Justification: The Limits of Law as an Instrument of Reform." In *Public Reason and Courts*, edited by Matthias Kumm, Silje A. Langvatn, and Wojciech Sadurski, 201–28. Studies on International Courts and Tribunals. Cambridge: Cambridge University Press. <https://doi.org/10.1017/9781108766579.009>.
- Brennan, Geoffrey, and James Buchanan. 1985. *The Reason of Rules. The Collected Works of James M. Buchanan*. Indianapolis: Liberty Fund Inc.
- Buchanan, James. 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. Vol. 7. The Collected Works of James M. Buchanan. Indianapolis: Liberty Fund.

- Buchanan, James, and Gordon Tullock. 1962. *The Calculus of Consent: Logical Foundations of Constitutional Democracy. The Collected Works of James M. Buchanan*. Indianapolis, IN: Liberty Fund.
- D'Agostino, Fred, Gerald Gaus, and John Thrasher. 2021. "Contemporary Approaches to the Social Contract." *Stanford Encyclopedia of Philosophy*. 2021. <https://plato.stanford.edu/entries/contractarianism-contemporary/>.
- Ehrenberg, Kenneth M. 2020. "The Institutionality of Legal Validity." *Philosophy and Phenomenological Research* 100 (2): 277–301. <https://doi.org/10.1111/phpr.12536>.
- Enoch, David. 2013. "The Disorder of Public Reason: A Critical Study of Gerald Gaus's *The Order of Public Reason*." *Ethics* 124 (1): 141–76.
- Gaus, Gerald. 2011. *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*. Cambridge University Press.
- . 2013. "Moral Constitutions." *Harvard Review of Philosophy* XIX: 4–22.
- . 2021. *The Open Society and Its Complexities*. Oxford: Oxford University Press.
- Gauthier, David. 1997. "Political Contractarianism." *Journal of Political Philosophy* 5 (2): 132–48. <https://doi.org/10.1111/1467-9760.00027>.
- Goodin, Robert E. 1995. *Utilitarianism as a Public Philosophy*. Cambridge University Press.
- Hankins, Keith, and John Thrasher. 2022. "Hume's Politics and Four Dimensions of Realism." *Journal of Politics* 84 (2): 1007–20. <https://doi.org/10.1086/716946>.
- Hardin, Russell. 1988. *Morality within the Limits of Reason*. University of Chicago Press.
- Hart, H. L. A. 1961. *The Concept of Law*. Clarendon Press.
- Hobbes, Thomas. 1651. *Leviathan*, Edited by Noel Malcolm. Clarendon Edition of the Works of Thomas Hobbes. Oxford: Oxford University Press.
- Huemer, Michael. 2013. *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey*. Basingstoke: Palgrave Macmillan.
- Kelsen, Hans. 1934. *Pure Theory of Law*. Clark, N.J. The Lawbook Exchange, Ltd.
- Kogelmann, Brian. 2017. "Justice, Diversity, and the Well-Ordered Society." *Philosophical Quarterly* (1950–) 67 (269): 663–84.
- . 2021. *Secret Government: The Pathologies of Publicity*. Cambridge, UK; New York, USA: Cambridge University Press.
- Kukathas, Chandran. 2003. *The Liberal Archipelago*. Oxford University Press.
- Locke, John. 1681. *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press.
- Moehler, Michael. 2018. *Minimal Morality: A Multilevel Social Contract Theory*. Oxford: Oxford University Press.
- Muldoon, Ryan. 2017. *Social Contract Theory for a Diverse World: Beyond Tolerance*. Routledge.
- Müller, Julian. 2019. *Political Pluralism, Disagreement and Justice: The Case for Polycentric Democracy*. New York: Routledge. <https://www.routledge.com/Political-Pluralism-Disagreement-and-Justice-The-Case-for-Polycentric/Muller/p/book/9780367728892>.

- North, Douglass C. 1990. *Institutions, Institutional Change and Economic Performance*. Reprinted. Cambridge: Cambridge University Press.
- Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge University Press.
- Pallikkathayil, Japa. 2016. “Neither Perfectionism nor Political Liberalism.” *Philosophy & Public Affairs* 44 (3): 171–96. <https://doi.org/10.1111/papa.12077>.
- Paniagua, Pablo, and Kaveh Pourvand. 2024. “Whither stability? Polycentric democracy and social order.” In *Polycentric Governance and the Good Society: A Normative and Philosophical Investigation*, edited by David Thunder and Pablo Paniagua. New York: Rowman & Littlefield.
- Pettit, Philip. 1999. *Republicanism: A Theory of Freedom and Government*. Oxford; New York: Oxford University Press.
- Quong, Jonathan. 2011. *Liberalism without Perfection*. New York: Oxford University Press.
- Rawls, John. 1971. *A Theory of Justice*. Revised. Belknap Press.
- . 1996. *Political Liberalism*. Paperback. New York: Columbia University Press.
- Raz, Joseph. 1986. *The Morality of Freedom*. Oxford: Clarendon Press.
- Schaefer, Alexander. 2022. “Reasonable But Non-Liberal: Another Route to Polycentrism.” *The Philosophical Quarterly* 72 (1): 218–28. <https://doi.org/10.1093/pq/pqab043>.
- . 2023. “Is Justice a Fixed Point?” *American Journal of Political Science* 67 (2): 277–90. <https://doi.org/10.1111/ajps.12631>.
- Schlager, Edella, and Elinor Ostrom. 1992. “Property-Rights Regimes and Natural Resources: A Conceptual Analysis.” *Land Economics* 68 (3): 249–62. <https://doi.org/10.2307/3146375>.
- Schmidtz, David. 2006. *The Elements of Justice*. Cambridge: Cambridge University Press.
- Southwood, Nicholas. 2010. *Contractualism and the Foundations of Morality*. Oxford University Press, USA.
- Thrasher, John. 2014. “Uniqueness and Symmetry in Bargaining Theories of Justice.” *Philosophical Studies* 167 (3): 683–99.
- . 2019a. “Constructivism, Representation, and Stability: Path-Dependence in Public Reason Theories of Justice.” *Synthese* 196 (1): 429–50. <https://doi.org/10.1007/s11229-017-1488-7>.
- . 2019b. “Democracy Unchained: Contractualism, Individualism, and Independence in Buchanan’s Democratic Theory.” *Homo Oeconomicus* 36 (1): 25–40. <https://doi.org/10.1007/s41412-019-00085-6>.
- . 2020. “Agreeing to Disagree: Diversity, Political Contractualism, and the Open Society.” *Journal of Politics* 82 (3): 1142–55.
- . 2023. “Contract, Consensus, and Diversity.” In *New Approaches to the Social Contract*, edited by Michael Moehler and John Thrasher. <AQ1>

- Thrasher, John, and Gerald Gaus. 2017. "On the Calculus of Consent." In *Oxford Handbook on Classics in Political Theory*, edited by Jacob Levy. Oxford: Oxford University Press.
- Vallier, Kevin. 2023. *All the Kingdoms of the World: On Radical Religious Alternatives to Liberalism*. Oxford, New York: Oxford University Press.
- Van Schoelandt, Chad. 2020. "Functionalist Justice and Coordination." *Social Theory and Practice* 46 (2): 417–40.
- Van Schoelandt, Chad, and Gerald Gaus. 2018. "Political and Distributive Justice." In *The Oxford Handbook of Distributive Justice*, edited by Serena Olsaretti. Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199645121.013.34>.
- Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.