

Towards Local Political Constructivism: Rawls and the Communitarian Challenge.

Question

Rawls later work exhibits significant departures and developments from the theory of justice outlined in A Theory of Justice. Discuss the move from Kantian constructivism to political constructivism. How does this shift relate to criticisms that have been raised against Rawls' mature formulation of justice as fairness?

Introduction

Rawls' metaphilosophical shift

The distinction between a comprehensive doctrine and a political conception is unfortunately absent from *Theory* and while I believe nearly all the structure and substantive content of justice as fairness... goes over unchanged into that conception as a political one, the understanding of the view as a whole is significantly shifted.

John Rawls, *Political Liberalism*[1]

Fundamental changes in Rawls' *metaphilosophical* attitude towards the relationship between moral theory[2] and epistemology led him, in a series of works beginning with *Justice as Fairness: Political not Metaphysical*[3], to reconsider the legitimacy of the Kantian constructivism[4] formulated in *A Theory of Justice*[5]. In articulating the move from Kantian to political constructivism at the national level, *Political Liberalism*[6] exorcises justice of fairness of metaphysical foundations. In asserting a continuity between epistemology and the legitimacy of political organisation, Kantian constructivism gave credence to the perspective that "[m]oral philosophy is... secondary to metaphysics and the philosophy of mind as well, which are in turn secondary to the theory of meaning and epistemology"[7]. Rawls comes to see, however, that the act of making "epistemology methodologically prior to the rest of philosophy"[8] is problematic in that it establishes moral philosophy *within* the landscape of broader philosophical debate. Kantian constructivism is compelled to justify itself on epistemological[9] grounds as well as political ones, opening itself to the danger that its political credentials might be enveloped by interdisciplinary controversies such as debate over the nature of truth[10]. Political constructivism is therefore an attempt to realise a legitimate mode of political reasoning which is not founded on prior epistemological or metaphysical commitments and therefore cannot be destabilised *externally*[11]. As Rawls comments: Since the history of moral philosophy shows that the notion of moral truth is problematic, we can suspend consideration of it until we have a deeper understanding of moral conceptions. But one thing is certain: people profess and appear to be influenced by moral conceptions. These conceptions themselves can be made the focus of study; so provisionally we may bracket the problem of moral truth and turn to moral theory[.][12]

With this anti-epistemological motivation in the background, Rawls replaces the congruence argument for stability endorsed in *A Theory of Justice* with the notion of "overlapping

consensus”[13]; a post-metaphysical foundation for justice as fairness. This paper will argue that in renouncing all dependence upon epistemology and the question of truth, political constructivism takes up an entirely new relation to the Kantian divide between *cause* and *justification*. Whereas Kantian constructivism sought a categorical justification for the principles of justice[14], political constructivism holds that empirical endorsement confers an adequate level of legitimacy. The legitimacy of justice as fairness is located in the sheer fact that principles of justice are actively *accepted* by all members of a political community – not in the claim that they are imminently grounded in the ahistorical essence of the subject. As such the progression from Kantian constructivism to political constructivism must be seen as a fundamental reconsideration of what constitutes an appropriate claim to legitimacy for justice as fairness.

Method

The critical response to Rawls’ revocation of his Kantian heritage has been varied, with vigorous disagreement persisting over the legitimacy of the move to political constructivism. Amongst those commentators who deny its cogency, some decry political constructivism’s explicit disavowal of Kantian foundations[15] whilst others, agreeing with Rawls that a metaphysical foundation for principles of justice is untenable, dispute Rawls’ presumption that the distance he establishes from the metaphysical commitments of Kantian constructivism is sufficiently large to render political constructivism a “freestanding” theory[16].

The intention of this paper is not to simply revisit defenses suggesting that “Rawls commits none of the theoretical sins with which he has been charged”[17]. Rather in focusing upon the latter – communitarian[18] – criticisms, this paper aims to shape an understanding of political constructivism’s legitimacy which is less indebted to *justification*[19]. I will argue for a more thoroughly *political* emphasis on the basis for political constructivism’s legitimacy, and that communitarian criticisms offer direction for refining the political constructivist vision as specifically *local*[20]. In light of his achievement in interweaving four major lines of communitarian criticism[21] and with a mind to avoiding duplication, I will direct my analysis specifically to those concerns raised by Michael Sandel[22]. Sandel’s two central arguments – political constructivism’s residual metaphysical commitments and the inadequacy of its political foundations – will be presented as emblematic of the more general communitarian concern with the themes of the conception of the person, asocial individualism, universality and neutrality[23].

In considering Sandel’s contention with political constructivism I hope to demonstrate that the presumption that substantive conceptions of justice must have a philosophical grounding permeates the entire framework of communitarian discussion. Acknowledging that the mature formulation of justice as fairness renounces the Kantian foundations explicit in *A Theory of Justice*, Sandel’s dispute with Rawls centres around political constructivism’s alleged retention of metaphysical foundations and its inadequacy once those foundations are made unavailable. However in failing to grasp the *political* grounding of the mature Rawlsian project comprehensively, communitarians such as Sandel fail to confront it with criticisms which obtain outside categorical discourse. Sandel’s contention as to why the shift to political liberalism is untenable – that without the Kantian foundations relied upon in *A Theory of Justice* there is no coherence in the strict demarcation between justice and conceptions of the good which underwrites justice as fairness – reveals that his understanding of political constructivism is inappropriately *universal* in light of the availability of the

more local political constructivism gestured towards by Richard Rorty, and, as I argue, endorsed by Rawls.

This analysis will proceed by noting that the fundamental insight of political constructivism is that justice and morality are delineated on the basis of *consensus*, not ontology. Moreover this increased reliance on *empirical* conditions allows communitarian concerns regarding the role of morality in political discussion to be seen in an entirely new light, especially Sandel's belief that justice as fairness is unable to make sense of "certain important aspects of our moral and political experience"[24]. Ultimately I will elaborate the concept of local political constructivism as allowing moral arguments to remain external to issues of justice whilst still possessing some bearing upon them.

I. Drawing a line between justice and morality

i. Communitarianism and the conception of the self

Justice as fairness is for Sandel emblematic of the kind of liberalism that affirms "a plurality of answers"[25]; a vision of governance which instates principles of justice which refrain from promoting any particular ends. In as much as it sees itself as not presupposing any particular conception of the good but rather providing the conditions in which its citizens might pursue a plurality of ends, justice as fairness articulates the concept of *right*, "a moral category given prior to the good and independent of it"[26]. Sandel uses this emphasis on right to characterise the legitimacy of this polity as grounded in a *refusal*; a principled abstention from endorsing any particular social *telos*[27]. This conception of the political, by which the priority of the right over the good is implicated as the core generative principle of justice, is legitimated as a parallel of a certain conception of the subject; as a self with priority over its ends[28].

First and foremost a rationally determined being, this Rawlsian "subject of ends" only ever acquires its preferences and desires contingently – in the course of its particular historical circumstances of socialisation – though its identity as a locus of choice is intrinsic. Thus the self's essential attribute – its capacity for choice – becomes the basis for liberalism's refusal to endorse any particular conception of the good. Whilst in the early formulation of justice as fairness – Kantian constructivism – this vision of the self was grounded in transcendental idealism, political constructivism relies on being able to show that rights can be taken seriously and justice affirmed without endorsing the *Critique of Pure Reason*[29]. Stripped of any metaphysical status, the subject of ends becomes in Sandel's terminology "the unencumbered self"[30]. Sandel directs his critique towards demonstrating that whilst axiomatic to political constructivism, this conception of the self also intrinsically undermines it.

The alleged vulnerability of the unencumbered self is developed out of the motivations behind Rawls' theory of justice. The two principles of justice espoused by justice as fairness – equal liberties for all and the weighting of unavoidable inequality so as to benefit the socially and economically disadvantaged[31] – are the product of the respective rejections of utilitarianism and libertarianism respectively[32]. Whilst the *equality principle* is shaped to mitigate the systematic disavowal of minority perspectives permitted by utilitarianism, the *difference principle* counters the illusory legitimacy Rawls sees libertarians reading into the circumstances of social and natural contingency[33]. Sandel takes up this characterisation of the difference principle's genesis as reactionary, questioning the role that the unencumbered self could play in the original position[34]. Specifically he posits that Rawls invokes a doctrine of asocial individualism: the

unencumbered self lacks the moral resources for commitment to the well-being of one's *entire* community which the difference principle demands[35]. Rawls' difference principle, for Sandel, presupposes a prior moral tie with the community:

What the difference principle requires, but cannot provide, is some way of identifying those *among* whom the assets I bear are properly regarded as common, some way of seeing ourselves as mutually indebted and morally engaged to begin with. But... the constitutive aims and attachments that would save and situate the difference principle are precisely the ones denied to the liberal self; the moral encumbrances and antecedent obligations they imply would undercut the priority of the right.[36]

He extrapolates that such a sense of community, founded in a common identity, is impossible without the acknowledgement that all members of that community endorse certain notions of the good[37]. The difference principle would therefore seem to be a principle of justice which vitiates the Rawlsian condition that justice is formulated out of the notion of the unencumbered self and from behind the veil of ignorance; without appeal to *any* notion of the good. Sandel contends that as a "locus of self-authenticating valid claims" the unencumbered self is unable to underwrite Rawls' egalitarian commitments and is therefore an inappropriate basis upon which to found justice as fairness.

Moreover, Sandel argues that if the notion of the unencumbered self demarcates political discussion as a forum in which individuals' moral convictions must be set aside – as political constructivism requires – then Rawls denies the very commitments which are determinative of political questions. Sandel sees no clarity in any political/moral distinction, since questions with respect to justice largely turn upon the truth of the moral doctrine invoked[38]; "whether it is reasonable to bracket, for political purposes, the comprehensive moral and religious doctrines at stake largely depends on which of those doctrines is true"[39].

ii. *Ontological continuity between the right and the good*

The weight of this critique of the unencumbered self – and the bracketing of moral questions it demands – can only make sense, however, if Sandel has accurately construed its status in political constructivism. I would suggest that Sandel imputes to the notion of the unencumbered self a categorical character not invoked by political constructivism, and as such fails to perspicuously acknowledge the extent to which Rawls breaks from the Kantian attitude that "the moral law needs a *categorical* foundation, not a contingent one"[40]. Sandel relies on the premise that the political constructivist vision of the self resurrects the voluntaristic Kantian conception of the self[41] in form *and* ontological status: painting political constructivism as nothing more than "deontology with a Humean face"[42] still imputes to the unencumbered self an ontological primacy in describing the essence of human beings.

Thus Sandel would be warranted in his claim that the unencumbered self actually compromises the priority of the right over the good only if Rawls were making a categorical claim with respect to the subject. Only then could he assert that "[w]hat is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice; he cannot belong to any community where the self *itself* could be at stake"[43]. However this is exactly what Rawls does *not* do. Rawls does not seek to make any claim about "the kind of community of which we are capable"[44], but rather about the theory of justice appropriate to the kind of community which

we *do* belong to. As Mulhall and Swift note, Sandel overlooks that even in *A Theory of Justice* the original position is only a *conceptual* device for clarifying normative claims; “the constraints of the original position are thus epistemological and moral rather than metaphysical”[45]. By positing an ontological gap between the self and its ends, justice and the good, Sandel constructs a reading of Rawls which sees justice as fairness as embodying “principles that do not presuppose any particular ends”[46] as opposed to principles which circumscribe those ends with respect to which there is *widespread assent*. It is only by alienating justice from the good in this way that Sandel is able to suggest that Rawls relies on an ontological vision of the unencumbered self – “a self understood as prior to and independent of its purposes and ends”[47] – and a distinction between “the values I *have* and the person I *am*”[48]. Members of liberal societies are “self-authenticating sources of valid claims”[49] not in any ontological sense but in the sense that they actively endorse such a self-image and pursue political measures to better facilitate that self-image.

Thus, contra Sandel, Rawls doesn’t draw upon the doctrine of asocial individualism in shaping political constructivism’s conception of the self. Rather, he sees all individuals as imminently implicated in their communities:

[S]ocial life is a condition for our developing the ability to think and speak... No doubt even the concepts that we use to describe our plans and situations... often presuppose a social setting as well as a system of belief and thought that is the outcome of the collective efforts of a long tradition.[50]

Whereas Sandel talks of justice as more than simply another value, as a regulatory framework that orders the interplay of values without taking up a position to them, I take Rawls’ comment that “justice is the first *value* of social institutions”[51] as suggesting that Sandel has overstated the distance of justice from other values. Whilst it is true that Rawls prioritises justice above other values, this by no means suggests that it this establishes some kind of *ontological* hierarchy between the right and the good[52]. The principles of justice simply represent those commitments that have become intrinsic to the liberal identity:

[W]hat justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.[53]

II. Towards local political constructivism

i. The domain of applicability

What imperative remains for moral and religious convictions to be “bracketed” when contemplating questions of justice once the strategy of distinguishing the right and the good on ontological grounds is rejected? To make sense of Sandel’s argument in light of this rejection I would like to draw attention to the importance of defining the relevant community to which questions of justice are posed. I maintain that a distinction can usefully be drawn between questions of political justice – questions concerning the liberties, rights and constraints that attend every member of a community – and questions as to the *boundaries of the community* in which justice is sought. The availability of

this distinction allows the communitarian critique to bring into relief a necessarily local political constructivist vision and also, as I will articulate, highlights the role played by social consensus in endowing political constructivism with legitimacy. The rejection of Kantian constructivism redresses the status of justice as fairness in such a way that the *domain* across which its claims are alleged to obtain also becomes a foundational issue. As such an awareness of community boundaries will be a core aspect of conceptualising political constructivism locally. To see how this is the case Sandel's own examples of how morality is determinative of justice – the contemporary abortion issue and the 1858 abolition debate[54] – can be invoked, clearing the ground for a more perspicuous understanding of Rawls' theory of justice. Specifically, the empirical examples which illustrate Sandel's critique suggest that his criticisms with respect to the clarity of the justice/morality distinction and reasonable dissension rely on an ambiguity over the limits of a community. This ambiguity flags the possibility that delimiting the community to which questions of justice are posed in fact shapes the way those questions can be coherently answered.

Sandel characterises the contemporary debate over abortion as already presuming an answer to the substantive question of whether it is moral to terminate a fetus, using this as a basis for suggesting that moral questions can never be effectively “bracketed”[55]. He argues that the debate is only possible on the presumption that both proponents and opponents of abortion express potentially valid views; that neither position is precluded *prima facie*[56]. As such, Sandel infers, contemplating abortion as a live[57] issue requires an endorsement of the view that abortion is not immoral – otherwise the issue would not even occur as two-sided[58]:

The more confident we are that fetuses are, in the relevant moral sense, different from babies, the more confident we can be in affirming a political conception of justice that sets aside the controversy about the moral status of fetuses.[59]

Sandel assumes, though, that the argument falls into the scope of justice as fairness; that it concerns contrasting conceptions of the right. I would contend that the contrasting positions between “pro-life” and “pro-choice” advocates represent not a dispute with respect to principles of justice or even how justice ought to be administered, but rather diverging conceptions of what constitutes the morally relevant community *to which principles of justice ought to be applied*. The debate is not over what constitutes an appropriate juridical principle but over whether that principle is at all applicable, for what principle of justice could actually be in dispute? The juridical principle which “pro-life” advocates rely on is that murder itself is wrong, and their claim that abortion is wrong turns upon characterising the termination of a fetus as murder[60]. Presuming that “pro-choice” advocates would also endorse the impermissibility of murder[61], the dispute is recast not as one over the appropriate principles of justice but instead over where the boundaries of the protected community should be drawn: the pro-life camp contemplates justice with respect to a community which *includes* fetuses, whereas the pro-choice camp presumes that the boundaries of community lie short of that particular inclusion. There are not two different conceptions of justice, but two separate *communities* in play. Similarly, Sandel looks to the 1858 debate between Abraham Lincoln and Stephen Douglas over the morality of slavery for evidence that moral convictions might have a substantive role to play in political discussion[62]. I would suggest that, once again, it is possible to recast the disagreement as one with respect to who should be included within the democratic community as opposed to the “whether to bracket a moral controversy for the sake of political agreement”[63]; that the debate can be presented as one about the ambit of the community that

ascribes its paradigmatic members the protection of certain rights. What must be kept in view is that a political question only has weight as a question for a particular community; the debate between Lincoln and Douglas is not one with respect to the application of justice at all, just who it *extends* to. Sandel fails to escape the stricture of his own cultural perspective in not realising that in 1858 African-Americans were not fully considered humans in the relevant moral sense[64]. The conception of justice is therefore not at stake in the case of abolition – what *is* in dispute is the relevant conception of the community. The juridical principle involved between Lincoln and Douglas is common; that it is impermissible to enslave a member of one's community since to do so would be to offend their capacity to pursue their desired ends, thereby affronting the primacy of the unencumbered self. On this there is no disagreement. The dispute arises only when one asks 'are African-Americans part of the justice community?'. Arguing against slavery is not to advocate the adjustment of principles of justice[65], but a redefinition of the political community so as to include previously excluded individuals; a question of *who* ought to enjoy the protections that justice affords, not a question over justice per se.

ii. Consensus as the arbiter of justice

Ultimately the point that I seek to make with this distinction is that defining the ambit of a particular community is both a practice distinct from settling questions of justice for that community and a necessary consequence of the disavowal of Kantian constructivism. If justice is consolidated politically and without any ahistorical justificatory claim, then it must always be considered *with respect to a particular community* and never in universal terms. Thus having demonstrated the importance of designating a finite community in regard to issues of justice, I would now like to examine how the ontological continuity between morality and justice demands a different basis upon which "the priority of the right over the good" can be asserted. In light of the way political constructivism repositions Rawls' relationship to Kant, political constructivism adopts consensus as the basis of its legitimacy. Identifying the foundational role of consensus undercuts communitarian critique of the fact of reasonable pluralism whilst also restricting the applicability of justice as fairness, thus giving warrant to an understanding of political constructivism as local. In arguing that it is consensus with respect to the right that legitimates the distinction between justice and morality I would like to endorse the approach Richard Rorty[66] takes to Rawls in characterising politics as *prior to philosophy*.

Rawls' democratic commitment to tolerant and open discussion amongst a plurality of perspectives compels him to allow a "fact of reasonable pluralism"[67] with respect to the good but not the right[68]. As Sandel espouses the communitarian position, however, this move is unjustified without an identifiable basis for asserting the priority of the right over the good[69]:

Political liberalism must assume not only that the exercise of human reason under conditions of freedom will produce disagreements about the good life, but also that the exercise of human reason under conditions of freedom will *not* produce disagreements about justice. The "fact of reasonable pluralism" about morality and religion only creates an asymmetry between the right and the good when coupled with the further assumption that there is no comparable "fact of reasonable pluralism" about justice.[70]

Sandel suggests two possible implications for political constructivism which might arise from admitting a parity between issues of justice and those of morality. On the one hand, in as much as Rawls' characterisation of modern democratic societies as embodying a fact of reasonable pluralism

with respect to the good is coherent, a corollary reasonable pluralism can be asserted with respect to conceptions of justice[71]. Sandel identifies a set of instances where democratic societies host disagreement with respect to justice itself, suggesting rightly that if reasonable plurality with respect to justice can be shown to exist then there is no basis for affirming the priority of the right over the good[72]. How then can Rawls argue that just as there is no reasonable pluralism with respect to distributive justice, that the “spirit of toleration does not extend to our disagreements about justice”[73]? On the other hand, if reflective equilibrium is capable of settling principles of justice in a non-arbitrary manner – and Sandel thinks that Rawls shows this to be possible[74] – then what reason is there to think that reflective equilibrium could not also settle opinions with respect to morality itself? In that it fails to appreciate any basis upon which a principle can be said to be one of justice as opposed to morality, this question indicates that Sandel erroneously presumes that the only *possible* distinction between the right and the good must be ontological.

In *The Priority of Democracy to Philosophy*[75] Rorty suggests the availability of another determinative basis for this distinction, one which reflects political constructivism’s emphasis on *cause over justification*; their endorsement by the relevant community[76]. Rorty argues in that political constructivism “applies the principle of toleration to philosophy itself”[77] it proposes the use of only settled convictions which actually prevail in the community as the basis for deriving a coherent conception of justice: justice is a formulation of the community’s intersubjective commitments rather than a set of antecedently identifiable principles[78]. Rorty notes that offsetting the perceived need for a *philosophical* basis for politics means that reflective equilibrium becomes the sole criterion of deliberation and rejects the communitarian presumption that categorical commitments – to a determinative vision of the self, for instance – are required at all for political theory[79]. Rorty puts this inversion of philosophy and politics thus:

[T]he philosopher of liberal democracy may wish to develop a theory of the human self that comports with the institutions he or she admires. But such a philosopher is not thereby justifying these institutions by reference to more fundamental premises, but the reverse: He or she is putting politics first and tailoring a philosophy to suit. Communitarians, by contrast, often speak as though political institutions were no better than their philosophical foundations.[80]

Communitarians, Rorty argues, fail to fully comprehend that political constructivism claims its legitimacy as a *systemisation* of liberal democratic societies’ attitude towards justice as opposed to an ontological claim for all conceivable communities[81]. Rorty points out that Sandel fails to appreciate that in disengaging the question of political tolerance from truth and relying instead upon intersubjective reflective equilibrium as sufficient, Rawls makes truth – and thereby the issue of human nature – irrelevant to politics altogether:

Unlike Jefferson’s, Rawls’s argument against fanaticism is not that it threatens truth about the characteristics of an antecedent metaphysical and moral order by threatening free discussion, but *simply* that it threatens freedom, and thus threatens justice. Truth about the existence or nature of that order drops out.[82]

In approaching political constructivism as an attempt to posit an Archimedean point outside history Sandel loses sight of the significant role played by the political commitments that liberal democratic communities actually possess; the “settled social habits that allow much latitude for further choices”[83]. The unencumbered self is not, as Sandel presumes, a theory of human nature but a thoroughgoing *political* vision invoked to expedite the pursuit of liberal commitments. This is

indicated further by the fact that, as Rorty notes, Rawls does not use political constructivism to develop an argument as to *why* liberal views should be endorsed, but to illustrate the kind of self-image which, when pragmatically endorsed, might allow just outcomes to be realised[84].

I suggest that Rorty's approach can be developed by viewing the inversion of philosophy and politics as placing a new emphasis on *cause* over justification[85]. Political constructivism's legitimacy is not bound up in a claim to truth, but the degree to which its principles of justice invite endorsement from the community in question[86]. Construed as an effort to circumscribe the vision of justice amenable to all members of the liberal democratic community, political constructivism elevate the principles of justice above conceptions of the good only on the basis that they are sedimented by consensus. It is on this basis that political constructivism draws a line between those principles that would inspire widespread consensus and those over which disagreement would persist. The former are formulated collectively as a theory of justice, whereas the latter form the realm of the good. On this view Sandel fails to appreciate that Rawls' principles of justice represent nothing more than a coincidence of conceptions of the good with respect to norms of political organisation. United in an "overlapping consensus"[87] – one which "includes all the opposing philosophical and religious doctrines likely to persist and gain adherents in a more or less just constitutional democratic society"[88] – citizens set apart principles of justice which are ontological homogenous with those convictions which remain in the realm of the good. In overlooking the possibility of this entirely non-ontological basis for distinguishing between principles of justice and morality, Sandel characterises all substantive convictions as positions with respect to the good, with justice playing a neutral role[89]. With MacIntyre, he interprets the principles of justice as simply regulatory, reducing society to "a cooperative venture for the pursuit of individual advantage"[90]. I would suggest that where Sandel sees justice negatively, as a *refusal* to pursue any particular conception of the good, a more considered reading of political constructivism construes justice positively; as substantive principles endorsed as good by a particular community. Rawls himself gives credence to this view that the principles of justice are a summation of citizens' convictions when he comments:

[I]n the well-ordered society of justice as fairness citizens share... the aim of ensuring that the political and social institutions are just, of giving justice to persons generally, as what citizens need for themselves and want for one another. It is not true, then, that on a liberal view citizens have no fundamental common aims. Nor is it true that the aim of political justice is not an important part of their noninstitutional or moral identity.[91]

Thus the role of justice as fairness is not to accommodate an ontological vision of the self as a choice-maker but to articulate the principles of justice which liberal democratic societies *do* choose. Therefore although I would agree with Sandel that "[t]o imagine a person incapable of constitutive attachments... is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth"[92], Rawls' self is not such a person but a *posited* identity for communities with specifically liberal commitments.

The benefit of identifying that it is consensus alone which specifically delineates justice from morality is that it gives warrant to terming political constructivism a local conception. Political constructivism can be deemed local in that it claims relevance only within those communities which possess a united commitment to liberal principles of justice: as a systemisation of the political beliefs of the liberal democratic community, it makes no claim to encapsulating the political life of communities outside that range. Whilst the claim that political constructivism is not a universal notion is not itself

new, what *is* new is the idea that by identifying consensus as the sole legitimating principle of political constructivism, a new role might be found for moral doctrines. This is what I would like to argue in the final part of this paper.

III. Relocating morality prior to community

Characterising justice by appeal to empirical consensus allows not only a clear answer to the problem of stability to emerge, but also conceptual space to be cleared so that an influential role might be played by moral argument which is in keeping with the priority of the right over the good. Moreover, I believe that such allowing such an influence is in keeping with Rawls' own attitude to comprehensive moral and religious doctrines. Sandel himself notes that despite their impermissibility in political discourse, Rawls does not dismiss moral doctrines equivocally. Rather, their use must simply be restricted so as to ensure an efficacious public life[93]. I would suggest that political constructivism as a local, consensus-founded theory in fact offers the most appropriate response to Sandel's argument that the exclusion of comprehensive moral and religious doctrines from public life would severely impinge upon meaningful political discourse. Whilst Sandel's claim that the natural consequence of moral bracketing is that "fundamentalists rush in where liberals fear to tread... creat[ing] a moral void"[94] may be arguable, it would seem that at the very least political debate would be significantly distorted in that those principles which *motivate* citizens' convictions would often be unavailable as political arguments[95].

Where else then, could moral doctrines obtain purchase? Once political constructivism is understood as generating the norms of political discussion out of the consensus which holds amongst a specific citizenry, as this paper has argued for, the question of who citizenry is extended to can be held apart from principles of justice themselves. Seeing as the determination of this citizenry is antecedent to entering the original position, comprehensive moral doctrines are not precluded from exerting influence over how its boundaries are drawn. Indeed, as I have demonstrated with respect to Sandel's own examples, the location of community boundaries is integral to the outcomes of justice as fairness. Under a local political constructivism it is conceivable that moral argument might hold sway in determining how a community qualifies its membership *prior* to its deliberation over how to administer justice to that community once defined: providing that a moral doctrine is capable of influencing the way a community identifies itself it might have bearing on the outcomes of justice without being invoked *within* political discussion. Although the local political constructivist can say with Rawls that – given their divisive quality – it is impermissible to defer to moral arguments in political debate[96], they also acknowledge the possibility that moral arguments could have import for that which is necessarily *prior*, circumscribing the community to which principles of justice will be applied. Therefore in giving morality a role which influences political debate but is not *part* of that debate, a local political constructivism allows communitarian concerns with respect to the disenfranchisement of political discussion to be averted[97]. To briefly revisit the abolition debate, when Sandel claims that Lincoln's argument against Douglas denounces the bracketing of moral questions in political issues I think he has overstated his case[98]: saying with Lincoln that one's ability to defend a conception of political justice depends upon the answers to constitutive moral questions need not commit one to the view that moral questions could only be encountered at the same point as political ones. Sandel suggested that although "the conception of citizenship implicit in our political culture might explain how political liberalism can oppose slavery today"[99] it can't make sense of coherent liberal

arguments of the past in support of slavery[100]. The reason for this is not, as Sandel presumes, that moral argument ubiquitously infiltrates political debate, but rather that in combination with an indeterminate number of other factors it successfully redefined the relevant community limits. The communitarian preference to give niche moral and religious perspectives purchase in the arena of political debate only arises because of a tendency to conflate the intuitive notion that morality has *import* for justice with the idea that it must be considered *within* questions of justice. By suggesting that the role of moral questioning lies outside of scope of answering the political questions of a particular community, I hope to have demonstrated that the local political constructivist vision illuminates a way in which the intuition that “morality matters” might be seen as cotenable with the stricture that moral doctrines have no purchase in matters of justice. Moreover, I hope to have done so in a manner consistent with the framework of justice as fairness itself.

IV. Philosophical Import

My hope is that in identifying that the justice/morality distinction is shaped by the empirical aggregation of social consensus around some principles but not others, justice as fairness’ claim to legitimacy has been brought into clearer relief. Specifically, in positing that it is conferred legitimacy as a theory of justice only for a community with antecedently determined boundaries, I hope to have suggested good reason for ascribing political constructivism a necessarily local applicability. Whilst keeping in mind this constraint on political constructivism’s domain of relevance helps prevent it being invoked inappropriately, what this paper has argued is that if the original position is only entered into once the domain of the relevant community has been settled, then questions as to the appropriate definition of that community fall *outside* the scope of Rawls’ theory. The definition of the ambit of the community in question would therefore seem to be a variable which escapes the strictures which justice as fairness otherwise imposes on political discourse.

This insight allows two interrelated ramifications for justice as fairness to be extrapolated. Firstly, much political debate would seem prone to classification as disagreement over the ambit of community membership rather than the principles of justice. This suggests that, in restricting itself to questions of justice, political constructivism fails to give an exhaustive account of those considerations which bear relevance for political life. The second realisation follows from the first: if redefining the community is an efficacious strategy for shaping the outcomes of justice and necessarily prior to entering the original position, then it is an activity which has no need for bracketing comprehensive doctrines. In fact the sense of community identification would seem to be simply a question of empirical fact which might be influenced causally in any number of ways. As such there is no proviso against comprehensive moral or religious doctrines causally influencing *who* a community feels compelled to extend its protection to[101]. This paper has examined how developing an adequate response to communitarian criticisms of political constructivism might emphasise justice as fairness’ *local* quality. What I think emerges from this discussion is an appreciation that the communitarian debate with Rawls is – for the most part – much more nuanced than simply a diametric opposition over an identifiable set of issues. The full weight of the communitarian argument cannot be dismissed simply as a failure to perspicuously comprehend the mature Rawlsian position, but rather offers significant imperative for reconsidering one’s own understanding of Rawls. I have argued for a vision of Rawls which is in many ways amenable to the stronger communitarian challenges discussed; circumscribing its capability as a theory of justice and pointing out its limits whilst retaining firm belief in its vitality as a political tool.

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[1] John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993 at 177.

[2] I use the term as Rawls does in "Kantian Constructivism in Moral Theory", considering it to include political theory, including justice as fairness: John Rawls, "Kantian Constructivism in Moral Theory" in *Collected Papers*, Samuel Freeman, ed, Harvard University Press, Cambridge, 1999 at 303.

[3] John Rawls "Justice as Fairness: Political not Metaphysical", *Philosophy & Public Affairs*, 14, 1985, 223-251.

[4] Although Rawls did not use the term "Kantian constructivism" for his original formulation of the theory of justice as fairness until 1980 in "Kantian Constructivism in Moral Theory", I will use the term

throughout in the same way that Rawls does – to denote the vision of justice as fairness espoused in *A Theory of Justice*: Rawls, “Kantian Constructivism in Moral Theory” at 303.

[5] John Rawls, *A Theory of Justice*, Oxford University Press, London, 1971.

[6] Rawls, *Political Liberalism*.

[7] John Rawls, “The Independence of Moral Theory” in *Collected Papers*, Samuel Freeman, ed, Harvard University Press, Cambridge, 1999 at 287.

[8] *Id* at 287.

[9] Rawls also sees Kantian constructivism as obliged to respond to semantic and metaphysical challenges. I have chosen to only identify its epistemological vulnerability since I agree with Rawls that questions of semantics and metaphysics are rightly viewed by the philosophical tradition as secondary to epistemology: “It is thought first that other philosophical questions cannot be satisfactorily resolved until the problems of epistemology, or nowadays the theory of meaning, are already settled; and the second that these prior questions can be investigated independently: their answers neither rest upon nor require any conclusions from other parts of philosophy. Moral philosophy is then viewed as secondary to metaphysics and the philosophy of mind as well, which are in turn secondary to the theory of meaning and epistemology. Thus in addition ethics awaits an answer to such problems as those of the freedom of the will and personal identity”. Rawls “The Independence of Moral Theory” at 287.

[10] *Id* at 288.

[11] Mulhall and Swift note that in seeking a specifically *political* conception of liberalism Rawls makes a distinctive and innovative move for liberal political theory: Stephen Mulhall and Adam Swift, “Rawls and Communitarianism” in Freeman, Samuel, ed, *The Cambridge Companion to Rawls*, Cambridge University Press, Cambridge, 2003 at 464.

[12] Rawls, “The Independence of Moral Theory” at 288.

[13] Rawls, *Political Liberalism*.

[14] Although there is consensus on this point from most commentators, Brian Barry argues that contrary to Rawls’ own view, Kantian constructivism does not rely upon a comprehensive doctrine: Brian Barry, “John Rawls and the Search for Stability”, *Ethics*, 105 (4), 1995, 874-915.

[15] Onora O’Neill and Kenneth Bayes are two such commentators: Onora O’Neill, *Constructions of Reason: Explorations of Kant’s Practical Philosophy*, Cambridge University Press, Cambridge, 1989; Onora O’Neill, “Constructivism in Rawls and Kant,” in Samuel Freeman, ed, *The Cambridge Companion to Rawls*, Cambridge University Press, Cambridge, 2003, 347-68; Kenneth Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls, and Habermas*, State University Press, Albany, 1992.

[16] I specifically have Rawls’ communitarian critics such as Charles Taylor, Alasdair MacIntyre and Michael Sandel in mind here.

[17] Mulhall and Swift, “Rawls and Communitarianism” at 461.

[18] As Mulhall and Swift note, Taylor, MacIntyre and Sandel all aver the label “communitarian”: *Id* at 485 n 2. However, in keeping with the use of the term in the related literature, I will use it to refer to the themes which they commonly espouse.

[19] I use this term here in the Kantian sense, in contrast to *cause*.

[20] Although I argue that communitarianism helps sharpen an understanding of justice as fairness, bringing it into clear relief, I do not intend to assess the degree to which the communitarian response

to Kantian constructivism motivated Rawls' endorsement of political constructivism. I see this question as to the genesis of *Political Liberalism* as outside the ambit of this paper.

[21] I agree with Mulhall and Swift's identification of the conception of the person, asocial individualism, universality and neutrality as the central concerns of communitarian responses to Rawls: Mulhall and Swift, "Rawls and Communitarianism" at 464. Given the significant overlap between these four themes though, for the purposes of this paper I feel that it is efficacious to restrict discussion to the conception of the person and the strength of political constructivism's exclusively political legitimacy.

[22] In addition to his engagement with the Rawls' mature political constructivist position, Sandel is also appropriate because he of his engagement with Richard Rorty, whose work on Rawls will feature in my discussion.

[23] Mulhall and Swift, "Rawls and Communitarianism" at 464.

[24] Michael Sandel, "Political Liberalism", *Public Philosophy: essays on morality in politics*, Harvard University Press, Cambridge, 2005 at 215.

[25] Michael Sandel, "The Procedural Republic and the Unencumbered Self", *Public Philosophy: essays on morality in politics*, Harvard University Press, Cambridge, 2005 at 156.

[26] Id at 157.

[27] Ibid.

[28] Id at 161.

[29] Ibid.

[30] Id at 162

[31] Rawls, *A Theory of Justice*.

[32] Sandel, "The Procedural Republic" at 164

[33] Rawls sees it important that the egalitarian liberalism of justice as fairness be insulated from those criticisms which gravitate to the libertarianism of theorists such as Friedrich von Hayek and Robert Nozick: Mulhall and Swift, "Rawls and Communitarianism" at 462.

[34] Sandel, Michael, *Liberalism and the Limits of Justice*, 2nd Edition, Cambridge University Press, Cambridge, 1998, Chapter One.

[35] Sandel, "The Procedural Republic" at 166. Charles Taylor and Alasdair MacIntyre make similar arguments around the idea of asocial individualism, contending that individuals are socially constituted and therefore cannot be coherently posited as loci of choice: Charles Taylor, *Sources of the Self: The Making of Modern Identity*, Cambridge University Press, Cambridge, 1989 and Alasdair MacIntyre, *After Virtue*, Notre Dame, South Bend, 1981.