WILLIAMS AND RAWLS IN PHILADELPHIA

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Abstract

In *A Theory of Justice* John Rawls proposes that the two principles of justice should be realized through a four-stage sequence of institutional action that starts with a constitution agreed upon by delegates to a constitutional convention. A largely overlooked aspect of this proposal is that delegates are taken to hold conflicting opinions about justice. Their disagreement is one of the factors that determine their institutional choices. This paper employs Bernard Williams' theory of the political value of liberty to explain and vindicate the role assigned to disagreement at the constitutional convention. Constitutional norms ought to be sensitive to the fact that the functioning of a political order, even one suitably ordered by the most reasonable conception of justice, inevitably involves loss of a precious liberty; the factoring of disagreement into the constitutional convention can fruitfully be understood as a way of modelling this requirement. This exegetical exercise enriches our understanding of the point of constitutions. At the same time it suggests that Rawls may not be as guilty of the cardinal sin of moralism that Williams famously accused him of.

Keywords Bernard Williams – John Rawls – four-stage sequence – constitutional convention – disagreement – liberty – political moralism

Introduction

This paper has a reconciliatory aim. It claims that Bernard Williams and John Rawls are not as far apart as is commonly understood. Now, I know this may sound as heresy. After all, in his later work Williams portrays Rawls as one of the main proponents of political moralism, the approach to political philosophy that Williams emphatically rejects. My point is not that Williams agrees with Rawls, a proposition that we can barely make sense of given the widely divergent starting points and ambitions of the two philosophers. Rather, it is to show that some of the ideas from Williams' account can enrich Rawls', and that the latter has space for this kind of enrichment. Hence, the front along which the rapprochement will be advanced is rather narrow. I shall focus on one of the more 'legal' aspects of Rawls' theory, primarily the claims he makes regarding the constitutional convention stage in Part II of *A Theory of Justice*. At that stage, I shall argue, Rawls' theory comes very close to incorporating insights and themes that are very dear to Williams. Or to put it more weakly, it would greatly benefit from doing so. Specifically, I shall contend that Rawls incorporates in his design of the constitutional convention a pervasive and intractable feature of politics that Williams put front and centre in his writings on political legitimacy, namely the existence of reasonable and deep moral disagreement. In fact, Rawls accounts for disagreement in a way that can be construed to resonate with one of the most compelling components of Williams' political thought, the political value of liberty.

However, it is not only the appeal of Rawls' theory that is enhanced by this rapprochement. After all, as Ronald Moore notes in one of the few commentaries on this aspect of *A Theory of Justice*, Rawls' discussion of the constitutional convention 'has struck many of his commentators as intermediate and hence of less consequence than the conspicuously important themes of contractarian choice and fully applied political choice between which it appears' (Moore 1979, p. 238). Still, the intermediate, too, sometimes contains crucial insights. At the very least, as I shall

try to show, constitutional theory has a lot to learn from these insights. I shall claim that the constitution should be understood to play a key role in securing legitimacy amid deep and reasonable disagreement. Its purpose is not solely to set up an institutional structure that efficiently and reliably implements the correct conception of justice. Additionally, it is to offer a systemic assurance 'that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall' (Dworkin 1998, p. 213); an assurance that extends to those who do not share that conception (within certain limits). I shall have some things to say by way of sketching out how the constitution performs this role. But my chief interest is with the prior question why this role is morally important to begin with. Why should a just society endeavour to take on board those conceptions of justice that are by its own standards false? How far can it go in doing so without diluting its moral authority? It is with questions of this sort that Williams offers us valuable insights.

If it is to be genuine, rapprochement has to do more than re-state the familiar. To some extent, it must stretch the concepts employed by a theory and add something new to our understanding of them. This is particularly so in our case, precisely because the two theories I want to bring into closer contact with one another are at first blush so different and in fact explicitly pitted against each other. So, although I shall spend some time trying to iron out some of the obvious theoretical difficulties, I do not suggest that my Williams-inspired interpretation of Rawls is crease-free. In fact, it raises some challenging questions regarding the primacy of justice in Rawls' account. On the other hand, I hope to show that these questions do not cancel the driving idea behind the rapprochement, namely that Rawls is not deaf to the realist impulse that Williams has so searchingly elaborated.

A 'moral conception'?

In the posthumously published *In the Beginning was the Deed* Williams develops a *realistic* political philosophy, which he sharply contrasts to an approach he labels political moralism. Political moralism comes in two forms, and, for Williams, Rawls epitomizes the so-called structural model of political moralism. According to the structural model 'morality offers constraints on what politics can rightfully do' (Williams 2005, p. 2). What Williams finds troubling about political moralism in general -and about Rawls' version in particular- is that they reduce political theory to 'something like applied moral theory' (Williams 2005, p. 2). By this he means that they have the consequence that political actors 'should think, not only in moral terms, but in the moral terms that belong to the political theory itself' (Williams 2005, p. 3). But according to Williams successful political theories cannot be mere 'moral conceptions' (Williams, 2005, p. 2). They must look beyond 'the terms that belong to the political theory itself' to the basic realities of politics. They must seek to fit those realities rather than aspire to infinitely mould them to bring them closer to their moral predilections. To a certain extent, then, it is politics that should offer constraints on what political theory should look like, not the other way around. At this hurdle Rawls' political moralism fails.

I am not entirely convinced that political realism, Williams' preferred approach to political philosophy, is radically different from Rawlsian political liberalism.[1] That being said, it is not the same either. For one thing, Williams thinks political realism has the resources to account for how political power is appropriately legitimated in non-liberal societies, whereas presumably this is not the case with Rawls. This fundamental difference will not deter me. That is because I will not go as far as to suggest that Rawls' theory is appropriate for all societies, past and present. What I will ask instead is whether it can incorporate insights from Williams in the liberal societies where it does straightforwardly and expressly apply. After all, Williams's scheme, too, purports to apply to

[1] See relatedly (Larmore 2013).

such societies. According to it, there are policies and political arrangements that do not make sense to members of these societies that did to those living in previous eras, partly as a result of the former's heightened awareness of the fact that political power ought to be legitimated and that it often fails this normative hurdle. So, it seems reasonable to look for a theory that captures what is distinctive about the liberal consciousness despite its limited scope.

Still, what it means for a theory of justice to *apply to* a society is itself a potential source of controversy between Rawls and his opponents. Arguably, a theory might be said to apply to a society just in case that society is justice-apt. It is this notion of application that gives political moralism its bad name. If a society is justice-apt, then it automatically becomes a target for the moralists' ex cathedra prescriptions. Rawls, though, has something slightly different in mind. Although, of course, he seeks to identify moral principles that should govern those societies for which justice is the first virtue, he is also keen to establish that these principles 'define a workable political conception' (Rawls 1971, p. 195).That is why, after his defence of the two principles of justice in *A Theory of Justice*, he proceeds to examine how they can be realized in a set of familiar political institutions. Rawls does this by gradually lifting the veil of ignorance in a four-stage sequence. At each stage agreement is sought for institutional arrangements at an ever-higher level of specificity.

The sequence starts with a constitutional convention where the ground rules for the operation of the political system are laid down. Rawls envisages that by including those rules in the constitution they are placed beyond the reach of ordinary legislative majorities. The decision procedure at the constitutional stage is similar to that governing the original position (where the two principles of justice are agreed upon). Delegates to the constitutional convention are endowed with a sense of justice that motivates them to seek reasonable agreement with others and abide by its terms once

it is reached. They are also understood to know that everyone else is likewise endowed. Although the veil of ignorance is partially lifted at this stage, delegates are only allowed knowledge of 'general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture and so on' (Rawls 1971, p. 197).

It might be argued that by designing the constitutional convention in this way Rawls effectively pleads guilty to Williams' charge. He writes that his aim is 'to characterize a just constitution and not to ascertain which sort of constitution would be adopted or acquiesced in, under more or less realistic (though simplified) assumptions about political life' (Rawls 1971, p. 197), thus again seemingly putting the (moral) cart before the (political) horse. This, however, would be a premature conclusion. It ignores the important constraints under which constitutional delegates are operating and the details of the brief they have been given. Delegates to the constitutional convention are not inspired by a 'fiat Justitia, pereat mundus' spirit. Rather, they seek to select 'from among the procedural arrangements that are both just and feasible those which are most likely to lead to a just and effective legal order' (Rawls 1971, p. 198). It is not simply that they are asked to operationalize the two principles of justice in the context of a given society in all its social, economic and political specificity. Such a task would not be alien to the political moralism that Williams bemoans. After all, the moralist is as interested in his theory's effectiveness as the next moral crusader. Nevertheless, there is a dimension of the delegates' mission that the moralist would likely have less time for: Whereas delegates can count on each other's abiding by the rules they agree to (the constitutional stage belongs to ideal theory and thus assumes strict compliance), they are under no illusion that they are addressing a convention united in its acceptance of a single conception of justice. Rather, one of the factors that determine their choices is the existence of moral disagreement among them. Indeed, 'reconciling conflicting opinions of justice' (Rawls 1971, p. 196) is a key motivation for the four-stage sequence.

Granted, the political moralist might also take an interest in the pervasiveness of moral disagreement. Even if he is convinced that his conception of justice is correct, he is well aware that his effort to implement it could be thwarted by those who disagree with him. So, he has every reason to anticipate and seek to neutralize their backlash. But it would be a mistake to attribute to Rawls such a Government House understanding of the problem of disagreement. He thinks that disagreement is present not only in the society which we hope to effectively subject to the two principles of justice but also among delegates to that convention itself. He writes that 'although at the stage of the constitutional convention the parties are now committed to the principles of justice, they must make some concession to one another to operate a constitutional regime' (TJ Rawls 1971, p. 354). Why such concession is needed here becomes clear in the ensuing sentence: 'Even with the best intentions, *their opinions of justice are bound to clash*' (Rawls 1971, pp. 354-5). Now, of course people might disagree about all sorts of things, some more consequential than others. Nevertheless, Rawls does not seem to want to say that disagreement among delegates to the constitutional convention should be restricted to, say, merely technical choices of institutional design. Rather, he should be understood as recognizing that their disagreement could run quite deeply, affecting fundamental questions of justice (provided, of course, that it leaves the two principles of justice untouched). After all, it is once two people disagree about moral matters of high importance that the need to make concessions truly arises.

Importantly, disagreement for Rawls is not a downstream problem, a symptom of the messiness of ordinary legislative politics, which a good constitutional designer must try to manage with a view to achieving justice. Its presence gives real bite to the idea that a constitution must be *agreed upon* by delegates to the constitutional convention. Their agreement must be won in the face of their important divisions. After all, just like their counterparts in the original position, they are

equipped with the power to veto proposals. A constitutional arrangement that brushes aside their disagreements is not legitimate, no matter how well it otherwise fares in putting into practice the two principles of justice. In other words, the constitutional convention does not merely address a problem of implementation but of political principle: What will convince those who disagree with each other to live under a single political system? However, that is a problem that the lone philosopher, working out a moral theory of politics in his ivory tower, does not encounter. Arguably, then, posing it is a way of putting politics ahead of morality.

Some scholars stand critically towards Rawls' discussion of moral disagreement. For instance, it has been suggested that the representation of disagreement at the constitutional convention is not adequately motivated. According to this view, as long as we are at the first stage of the four-stage sequence, the veil of ignorance still conceals most things that could conceivably lead delegates to develop divergent opinions such as their position in society, their personal characteristics and life-plans. But if we cannot pin down what kind of disagreement delegates are supposed to overcome, the outcome of the constitutional convention becomes radically indeterminate. Alternatively, the constitutional convention ceases to play a philosophical role that is distinct from that of the original position. As Moore says, 'the parties in the original position might as well have made their constitution as soon as they had chosen their basic political principles' (Moore 1979, p. 241).[2]

Moore's critical reflections on the constitutional convention predate the publication of *Political Liberalism*. There Rawls offers additional theoretical resources that strengthen the case for the existence of moral disagreement among delegates to the convention. He writes that 'the correct

[2] Moore argues that there is a type of disagreement that would survive the restrictions of the veil of ignorance, that is disagreement about the sacrifices in liberty we ought to accept for the sake of maintaining liberty overall (Moore 1979, pp. 253-4). He takes the view that this type of disagreement threatens the integrity of the constitutional convention. It goes beyond the scope of this paper to evaluate this claim.

(and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life' (Rawls 2005, p. 56) is beset by hazards, which he famously calls 'the burdens of judgment'. The burdens of judgment also afflict many of the questions facing delegates to the constitutional convention. For instance, delegates are aware that the concepts featuring in the two principles of justice 'are vague and subject to hard cases' (ibid) which call for 'judgment and interpretation and judgments about interpretation within some range (not sharply specifiable) where reasonable persons may differ' (ibid). Furthermore, it is not only that they may disagree about the weight afforded different relevant considerations; it is also that they know that such differences are often attributable to 'our total experience, our whole course of life up to now; and our total experiences must always differ' (Rawls 2005, p. 57). Since delegates have access to general facts about their society, they must know that such differences are likely to occur 'in a modern society with its numerous offices and positions, its many social groups and their ethnic variety' (ibid).

There is another burden of judgment that the task of the constitutional designer is particularly vulnerable to. Even if we could eliminate any indeterminacy in the elaboration of the two principles of justice, we would still have to make hard choices when it comes to devising a scheme of institutions that will reliably and systematically act in accordance with them. As Rawls remarks, 'any system of institutions has, as it were, a limited social space' (Rawls 2005, p. 57); it 'is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized' (ibid). Similarly, political institutions are not jacks of all trades. Even if we restrict, as we must, their attention to political justice, we do not entrust any one institution the full load of realizing it. Rather, we assign each one more specific political aims, say the creation of general laws or their execution, hoping that their combined operation will track the demands of political justice overall. How do we divide government labour? And how do we

mitigate the costs and risks of each institution privileging one political aim over another? As Rawls again notes, 'we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer' (ibid). This uncertainty, too, gives rise to disagreement. As does the fact that we can imagine different institutional permutations that are meant to accommodate our varied moral goals and commitments, each with its advantages and disadvantages. For instance, we can imagine a system where Parliament is formally sovereign and another where courts have the power to strike down primary legislation that they find unconstitutional. Although delegates share their commitment to the two principles of justice, they may diverge in their judgments about the superior institutional option.

The previous paragraphs sought to show, against Rawls' critics, that at the constitutional convention important disagreements are likely to arise. But perhaps the problem concerns not whether disagreement exists at the constitutional convention at all but how much of it is allowed. Recall that according to Rawls delegates to the constitutional convention 'are guided by the two principles [of justice]' (Rawls 1971, p. 357) and this is public knowledge. Obviously, this constraint drastically narrows the range of views that are represented at the constitutional convention and invites the charge that whatever agreement is procured at that stage is a sham; there was very little to disagree about to begin with. This is an important objection, and we cannot hope to respond to it adequately unless we have a clearer picture of why disagreement should be modelled at the constitutional convention. It is to this task that we turn in the following sections.

Double-mindedness and the aim of constitutional law

Earlier I sketched an interpretation of justice as fairness according to which moral disagreement shapes the four-stage sequence from the get-go. Of course, even if this interpretation is convincing

as a matter of Rawlsian exegesis, it must still be philosophically defended. What would be wrong with ignoring disagreement at the constitutional stage? What is the moral basis for making our constitutional arrangements sensitive to that fact? It does not go without saying that they ought to be sensitive in this way. After all, some citizens may simply be mistaken in their beliefs about the two principles of justice and their institutional realization. Arguably, the mere fact that these beliefs are being sincerely -and even reasonably- held does not give us reason to adopt a stance of epistemic abstinence towards our own view (Raz 1990). For one thing, such abstinence does not seem to be grounded in the respect we owe our fellow-citizens. We respect them by extending to them the treatment they are entitled to under the most reasonable conception of justice, not by deferring to their mistake. The political moralist's reformist impulse owes a lot to this argument.

In this section I shall claim that we can use Williams' account of liberty as a political value to pivot towards an approach more respectful of disagreement. Famously, Williams constructs a conception of the political value of liberty that pays due attention to the fact that a political system contains 'conflicting interests, passions and interpretations' (Williams 2005, p. 125). This is not simply the value of being free to do whatever you want without any external constraints. Williams rightly thinks that such freedom is pointless in the political condition. But neither is it the value of being free to do only the things that you are entitled to do in a legitimate polity. Rather, Wiliams thinks there is value in having a concept of liberty that encompasses what I would be free to do were state policies animated by a different conception of justice, the one, perhaps, that I affirm but not a majority of my fellow-citizens, provided that I do so sincerely.[3]

[3] Williams also claims that my complaint against state policies ought to be 'socially presentable' (Williams 2005, p. 120), by which he means that it is consistent with 'accepting a legitimate political order for the general regulation of the society' (ibid). An anarchist who rejects all political order fails this condition.

This type of liberty does not furnish moral trump cards against actual state policy. However, it encourages a certain 'double-mindedness' in our attitudes towards our political community. We can submit to the legitimate policies of our political community and still 'reasonably resent' that things are the way they are (Williams 2005, 123). To illustrate political double-mindedness, Williams revisits the age-old puzzle whether equality and liberty can conflict. He attacks the view, exemplified in the theory of Rousseau and Ronald Dworkin, that such conflicts are impossible, because we do not have a claim in liberty to do something that equality condemns. It would follow from this view that we do not have grounds to complain that our liberty has been restricted, say, as a result of a higher tax rate, if the restriction serves to implement what equality truly requires[4]. As we suffered no loss of liberty, it would be irrational to feel resentment under these circumstances. Needless to say, moralism shines through this understanding of political conflict, and Williams reserves some particularly pointed remarks in his discussion of it. Hinting at Dworkin's court-centric conception of political legitimacy, he writes that our relation to our fellow-citizens who disagree with us 'is not that of offering them instruction in reading a document which we believe we can read better than they can' (Williams 2005, 125-6), as when a constitutional court decides a case on the basis of what it takes to be the correct interpretation of the constitutional text. What, then, is his alternative?

For a moral pluralist like Isaiah Berlin conflicts between equality and liberty are endemic, since the content of each is worked out independently of the other. By contrast, Williams does not endorse pluralism -at any rate, not for the purposes of this argument. He is willing to concede to Dworkin that the correct interpretation of equality adjusts the content of liberty. The loss of liberty that he speaks of can also be suffered by citizens who sincerely but mistakenly believe that the higher tax

[4] Provided, perhaps, that the higher tax rate complies with further moral criteria, eg it does not apply retrospectively or the taxpayer has received fair notice.

rates are an unjust infringement of their liberty. Whether they are mistaken or not, they experience the imposition of those rates as a morally regrettable cost of their participation in a legitimate political order. By bearing that cost they help sustain the political order. Even though the victorious side is under no duty to compromise on the political platform on which it ran and won, it should still acknowledge the loss of liberty for those who disagree and appreciate what we collectively purchase with it.

Williams elaborates the political value of liberty not so much from the perspective of those who lose it as of those who must respect it. But the former point of view is crucial, too. Double-mindedness of the sort Williams has in mind enables those on the losing side of political struggle to maintain a degree of distance from their political predicament. It is one thing to be told that they have no moral warrant to complain unless their complaint is grounded in the correct conception of justice and quite another that their sincere and responsible complaints merit the attention of the state regardless. The latter attitude diminishes the grip of politics on them. It thereby makes political defeat less oppressive and sustains the hope for political change. At the same time, though, it makes allegiance to their political community rather precarious, as it grants them more political and moral space to ask themselves at every turn: What's in it for me as things stand now?

How can we 'not only sympathize but agree with our fellow citizen who does not share [the politically victorious conception] of equality, resents what is being done to him in its name, and says that he has lost some of his liberty' (Williams 2005, p. 126)? And how can we shore up his bond to our joint political endeavour? Naturally, we can achieve this by fostering certain attitudes towards our fellow citizens and discouraging others, for example, empathy and not vindictiveness. But we can also achieve this by offering them terms of political co-existence that acknowledge the

loss of liberty they have suffered and soften the blow. Much of that work, I submit, should be done at the level of constitutional design. It is entirely appropriate that the constitutional convention be infused by this kind of political moderation. Once a polity is up and running, political decisions will be made according to the constitutionally prescribed procedures. In these procedures inhere grave risks. Political majorities may be swayed to pursue misguided policies to the full extent of their constitutional authority, 'if not from a lack of knowledge and judgment, then as a result of partial and self-interested views' (Rawls 1971, p. 354). So, before the force of the state is unleashed upon a population, we do well to alleviate those risks for the sake of making participation in a political community more palatable to all the various factions in society, thus reducing the 'strains of commitment' on those who do not hold the reins of power. The advantage of doing so at that stage is that constitutional entrenchment of a term of cooperation furnishes an assurance that it will not change when everyone has been reeled in, mid-sea so to speak. Clearly, I am more likely to pledge my allegiance to a regime and endure whatever cost I incur from its ordinary operation -within limits- when I am confident that certain particularly nasty surprises are off the table. Conversely, without this sort of confidence the 'stakes of politics' (Rawls 2003, p. 228) would be inordinately high. If the vanquished are placed at the mercy of their ideological opponents, then the most rational strategy for them is to defect.[5]

The line of reasoning of the previous paragraphs vindicates Rawls' choice to represent disagreement over justice at the stage where the constitution is drafted and adopted: That is when we can win dissenters over by easing their burden of political membership in a durable and reliable way. If that is so, then we should expect to see the same concern animate the more specific design choices contained in Rawls' constitutional proposal. That proposal, while better known for its

[5] In **REDACTED** I argue that the point of constitutional law is enhance the legitimacy of a political regime by providing assurances of the sort mentioned in the text.

analysis of civil disobedience and toleration of the intolerant, covers a wide range of topics, and I cannot do all of them justice here. I shall therefore limit myself to one illustration.

One of the main features of Rawls' constitutional proposal is the primacy it assigns the first principle of equal liberty over the difference principle. That principle, he writes, is 'the primary standard for the constitutional convention' (Rawls 1971, p. 199). Rawls cites a reason for this primacy that is at first blush surprising. It has to do with the relative epistemic accessibility of the two principles: 'The application of the difference principle in a precise way normally requires more information than we can expect to have and, in any case, more than the application of the first principle' (Rawls 1971, p. 199). Rawls returns to this reason in his account of 'constitutional essentials' in *Political Liberalism*. He introduces this notion to denote those matters about which 'there is the greatest urgency for citizens to reach practical agreement' (Rawls 2005, p. 227).[6] Constitutional essentials largely replicate the primacy of the first principle that Rawls had defended in *A Theory of Justice*. Crucially, he counts among them 'equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law' (ibid). The constitutional essentials include 'some principle of opportunity…for example, a principle requiring at least freedom of movement and free choice of occupation' (Rawls 2005, p. 228) but *exclude any more stringent requirements of distributive justice flowing from the difference principle*.

In what sense do constitutional essentials, thus specified, enjoy the 'greatest urgency'? What makes Rawls think that 'so long as there is firm agreement on the constitutional essentials and established political procedures are reasonably regarded as fair, willing political and social cooperation between

[6] Larry Sager takes them to be those requirements of political justice that are 'more or less nonnegotiable' (Sager 2004, 150).

free and equal citizens can normally be maintained' (Rawls 2005, p. 229)? Is it because constitutional essentials reflect paramount considerations from the perspective of the best conception of justice? But it is far from obvious that, say, free choice of occupation should be ranked higher than material equality. It makes more sense to zero in on the political role that entrenchment of these principles can perform, especially in terms of getting those who might disagree with me on board in the political project. Hence, it pays to be constitutionally austere: By restricting our attention to principles whose satisfaction 'is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice' (ibid), -freedom of movement rather than material equality- we facilitate widespread recognition that the constitution is indeed being honoured. By promoting the 'relative transparency of application of the constitutional essentials' (Michelman 2002, p. 404), constitutional austerity strengthens the bond to the political community. As Frank Michelman puts it, it enables me 'to see what the regime actually *is* that my fellow citizens are abiding by so that I can check whether *that* regime, the one actually in force, does in fact meet the test of universal and rational acceptability' (Michelman 2002, p.405). This consideration outweighs any reasons constitutional delegates might have in favour of a constitutional mandate upon the legislature to uphold the difference principle. Given the uncertainty that surrounds that principle, there is a risk that decisions made in the name of such a mandate might be seen by dissenting citizens as usurpations of the constitution and thus erode their faith in it.

Clearly there is much more that needs to be said to connect Rawls' constitutional proposal and Williams' liberty. But even in this brief outline we can observe that Rawls is as sensitive to the 'political' dimension of his project as Williams. Needless to say, there remains a marked difference in tenor between the two theories. Williams talks about the feeling of resentment caused by legitimate policies in those who do not endorse the philosophy that underlies them, whereas Rawls

foregrounds the need for 'civility' (Rawls 1971, p. 355) among citizens who share the same polity but are divided by ideological differences. But 'civility' might just be Rawls-speak for 'the attitude of someone who has overcome resentment and other assorted feelings'. After all, civility is supposed to impose 'a due acceptance of the defects of institutions and a certain restraint in taking advantage of them' (Rawls 1971, p. 355). So, it allows that I can still regard as defective what I must duly accept. Resentment would be entirely appropriate under such circumstances. What is more, Williams acknowledges that resentment is a symptom or mark of the political value of liberty, 'a helpful reminder or indicator of what values are involved' (Williams 2005, 123), not the valuable thing itself. Finally, Rawls comes very close to adopting Williams' voice when he writes that [i]n choosing a constitution…and in adopting some form of majority rule, the parties accept the risks of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative procedure' (Rawls 1971, p. 354). This passage shows awareness that participation in a political community involves a gamble, putting, as it does, one's fate in the hands of others. This is a far cry from the world of the political moralist, who sees politics only as the arena for realizing his moral theory.

The force and scope of political disagreement

Having furnished a moral basis for the accommodation of disagreement at the constitutional convention in the previous section we can now return to the problem that we had identified in our exposition of the constitutional convention. I had noted that delegates to the convention accept, and act from, the two principles of justice -these principles have been settled in the original position and their bindingness cannot be revisited. Although, as I explained, this constraint on the delegates' task is compatible with disagreement about what the principles require, it arguably undercuts the utility of the settlement they produce, because it does not offer an adequate response to the *political question*: How can political power be legitimated in the face of pervasive and *bona fide*

moral disagreement? Presumably, the constitutional convention has nothing to offer to those who dispute the two principles of justice themselves, or, to use the terminology of *Political Liberalism*, disagreements those who do not hold 'reasonable' conceptions of justice. As Andrew Mason has put the point: 'Even if the notion of a just constitutional order is specified in a way that allows for the existence of disagreement over conceptions of justice, it cannot be invoked as part of an adequate answer to the political question, for that question arises to a significant extent from the fact that we disagree over what is to count as a just constitutional order' (Mason 2010, p. 669). In this sense, then, Rawls' account is not sufficiently 'realistic'. Given the radical disagreements it suppresses, the ones it accommodates look more like family brawls. Once again, political moralism seems to gain the upper hand.

For contemporary political realists the most persuasive answer to the political question lies in non-ideal theory. Rather than look for the best conception of justice and stubbornly assume that it will be adhered to in the real world, you start from the real world and you try to identify a criterion of legitimacy that takes into view the full scope of societal disagreement. For instance, Mason thinks that this criterion is 'a moral standard which is widely shared in a particular polity' (Mason 2010, p. 668). Such a standard will typically refer to a certain procedure that in the eyes of many people and for a variety of reasons produces legitimate decisions. This will be a highly contingent matter. Monarchical rule might do the trick in one society, while it may be perceived as tyranny in another. It is suggested that such a conception of legitimacy is more 'inclusive' than Rawls' because it appeals to all citizens and not only those who hold reasonable conceptions of justice, and in this respect it removes the idealizing filter that colours the latter. Surely, a regime whose procedures resonate with widely shared judgments of legitimacy in the society it purports to govern will be more stable.

Important though this objection to Rawls may be, it is not, I believe, Williams'. On Mason's version the objection supposes that actual endorsement of a standard is (close to) a necessary condition of legitimacy. When a regime lacks that feature, it is not legitimate. But this is not the role that Williams assigns to disagreement. While he insists that a story must be capable of being told that legitimates a political regime to everyone subject to its purported authority, he equally insists that this need not be a story that is as a matter of fact endorsed by those to whom it is addressed: '[W]hen it is said that government must have "something to say" to each person or group over whom it claims authority…it cannot be implied that this is something that this person or group will necessarily accept. This cannot be so: they may be anarchists, or utterly unreasonable, or bandits, or merely enemies' (Williams 2005, pp. 135-6, internal reference omitted).[7]

Once again we have found a point of contact between Rawls and Williams. Surely, when Rawls excludes from his purview disagreements over the soundness of the two principles or 'unreasonable' conceptions of justice, he does not mean that his account does not purport to say anything to *those who* disagree over the soundness of the two principles or hold an 'unreasonable' conception of justice. Rather, he thinks that a political regime that is based on a 'reasonable' conception of justice is legitimate towards them, too. If you think there is something wrong with this picture, it may be because you, like Mason, hold an understanding of legitimacy that is tied to (some form of actual) consent. But then you are no longer speaking on Williams' behalf.

[7] See also (Sleat 2013, p. 325). Contrary to Mason, Sleat argues that what matters for legitimacy is not actual endorsement. Instead, '[j]udgements about the legitimacy of a political order, or the use of political power, are assessments of the degree of congruence, or lack of it, between that order and the beliefs, values and normative expectations that its subjects have of political authority' (Sleat 2013, p. 328) Sleat acknowledges that on this understanding judgments of legitimacy will not convince all those who share the same beliefs, values and normative expectations. Different people will be 'led to different judgements regarding the legitimacy of the political order, of its right to rule' (ibid). In this type of situation we have to make do with insisting 'that the political order makes some sense or that it can be represented as congruent with a plausible interpretation of the key beliefs, values and principles within that society' (ibid).

The discussion in this section has so far focused on the *moral force* of reasonable disagreement. Does disagreement with a principle or policy trump citing that principle or policy as justification for the use of state power against those who reject it? I have suggested that Williams here sides with Rawls against those, realists and others, who take consent to be the litmus test for the legitimacy of state power. But perhaps their views come apart regarding what they count as *important* reasonable disagreement, disagreement that a normative theory of politics must account for. In other words, they might diverge over the *scope* of reasonable disagreement. This is the suggestion that I will take up now.[8]

No doubt, our political disagreements are extremely varied. We disagree about principles of justice and their ordering but also about how best to implement them in the context of a specific society. We also have more mundane disagreements about which societal interests should be given preference in, say, economic policy. Whereas some disagreements of the latter type engage or even derive from our upstream disputes about first principles, not all of them do. This makes them no less persistent, pervasive or consequential. Arguably Rawls' theory cannot account for or help resolve non-justice-related disagreements. Mind you, this is not because delegates do not have access to information about the distribution of interests in the society to which the constitution will apply. Quite the opposite, Rawls contends that devising a just and effective constitution 'requires a knowledge of the beliefs and interests that men in the society are liable to have and of the tactics that they will find it rational to use given the circumstances. Provided that [delegates] have no information about particular individuals including themselves, the idea of the original position is not affected' (Rawls 1971, p. 198). So the problem lies elsewhere. It has to do with the fact that non-justice-related disagreements do not seem to be part of the delegates' brief. Delegates

[8] I am grateful to Veronique Munoz-Darde for urging me to address this objection.

are not supposed to negotiate which interests should be promoted or sacrificed, except insofar as these interests touch upon justice.

There is a quick rejoinder to this objection: Not all political disagreements need be resolved at the constitutional convention stage. Rawls is perfectly entitled to assign run-of-the-mill political struggles about the allocation of benefits and burdens to the legislative stage in the four stage-sequence, where decisions about such matters can be made in light of all the relevant information. In fact, we could go even further. We could say that, given the relative immunity to change of constitutionally entrenched choices, it would be unwise to resolve non-justice related disagreements at the constitutional convention. The reason is not only that efficiency requires that we have the flexibility to change our minds about the correct mix of state policy in light of changing circumstances, whereas entrenchment would tie our hands.[9] It is also that, if interests were to enter the constitutional convention in the way that the objection envisages, they would turn constitutional entrenchment into a highly valued political prize. As a result, they would corrupt constitutional politics. We want deliberation regarding the content of constitutional norms to be driven not by a desire for partisan advantage but as much as possible by a commitment to finding a settlement that is capable of being widely accepted and adhered to in the long run.

The quick rejoinder seems to me largely sound. But perhaps it does not quite capture the full force of the objection. Perhaps there are some non-justice-related disagreements that are not run-of-the-mill. Consider, for instance, disagreements about whether to accede to the claims of the Quebecois or the Scots for a measure of political autonomy. At first blush, these claims implicate

[9] Presumably, this consideration does not apply with the same force to questions of justice. Justice typically has a permanence that interests and their ranking lack in most cases. And although, of course, delegates may have a reason to amend the constitution to make it more effective in light of changing circumstances, this reason competes with the very strong reasons in favour of constitutional 'obduracy' (Sager 2006, 164). So entrenchment has a better fit with justice.

an interest in having a certain kind of political identity. Those who make them typically seek constitutional protection. The reason is the same as the more general one rehearsed earlier for constitutionalising certain political norms. Presumably, the Quebecois and Scots are only prepared to pledge their allegiance to the broader political society in exchange for a robust guarantee that their autonomy will not be stripped away by an unsympathetic legislative majority in the future. Or, if that is putting it too strongly, we could say instead that the legitimacy of the broader political society towards the Quebecois and Scots increases when such a guarantee is extended to them. For them, then, the Rawlsian solution of deferring disagreements about interests to the legislative stage is inadequate. It is because they do not trust the ordinary political process to guard their interest in self-government in the long run that they demand a constitutional guarantee from the get-go.

Mindful of the fragility of the political bond, political realists like Williams would likely insist that this blind-spot in Rawls' theory is serious. In fact, in light of the momentousness of certain non-justice-related disagreements, they would likely question Rawls' privileging of questions of justice in the design of the constitutional convention. They would argue that the stability of political orders is contingent upon a host of other factors alongside justice. Accordingly, constitutions have a broader role to play in mediating the challenges facing political orders. Because of this broader role, constitutional politics in the real world ends up being a much rowdier affair, where settlements are forged as much under the pressure of lofty ideals as by pragmatic compromises between powerful factions, sometimes rightly so. Political realists would thus contend that the lopsided description of the constitutional convention offered by Rawls is a telltale sign of his lingering moralism.

In response, I shall offer three arguments. First, we cannot exclude the possibility that claims of constitutionally guaranteed political autonomy like those of the Scots and Quebecois are ultimately grounded in justice. In this picture, political autonomy is seen as a more effective and reliable means for securing justice for particular social groups. Thus understood, claims for constitutional protection have the right shape for being considered by delegates to the constitutional convention. The latter should in principle be open to any constitutional form that is 'best calculated to lead to just and effective legislation' (Rawls 1971, p. 197), even if it has this effect indirectly.

Clearly, such a re-description will not be available or convincing in the case of other claims of constitutional protection. This is not necessarily an embarrassment for Rawls. He does not pretend to offer a complete theory of political legitimacy. Neither does he try to airbrush the reality of constitutional politics. His goal is limited. He seeks to translate the principles of justice into concrete political arrangements and more specifically, into the set of fundamental norms structuring a polity. How this should be done is arguably independent of how other political imperatives should also be institutionally realized. I do not see why Rawls would exclude such imperatives from the constitution, provided that they operate within the (more or less broad) space defined by requirements of justice.

There is a final reason why non-justice-related disagreements do not pose a serious threat to the interpretation put forward here. Recall that the aim of this article is not to recast Rawls as a full-blown political realist; rather it is to show how he can appropriate an idea from the political realist arsenal, the political value of liberty, for a specific purpose. But claims for constitutional protection that are not advanced in the name of justice do not characteristically engage the political value of liberty, as Williams understands it. As we have seen, losses of this kind of liberty are felt when those who suffer them complain that they are condemned by justice.

Conclusion

Undoubtedly, disagreement over political matters is pervasive and intractable; as Jeremy Waldron has famously put it, it should be counted among the circumstances of politics (Waldron 1999, pp. 149-163) and should therefore be relevant to legitimacy. But how is it relevant?. Many theorists have suggested that the intractability of disagreement gives an edge to proceduralist or radically thinned down understandings of political legitimacy. They argue that, because we disagree about substantive questions of justice and public policy, we cannot cite our conceptions of justice and proper policy as our reason for turning them into law. However, we can agree on fair procedures for settling our substantive disagreements; legitimate decisions are the outcome of such procedures.

Rawls, as I have shown in this article, points to an alternative. He shares the view that successful political theories must be capable of addressing reasonable disagreement. However, he rejects the suggestion that doing so requires giving up on our substantive moral commitments, either completely or even significantly. Rather, he proposes that the moral significance of disagreement can be factored into the design of the constitution. Delegates to the constitutional convention cannot question the validity of the two principles of justice; their task is to design a constitution that realizes them. But because it is accepted that they may have conflicting interpretations of them, they must incorporate into the constitution guarantees to ensure that someone who opposes state policies will still willingly submit to them. These guarantees serve an important value, the political value of liberty as defined by Williams. Clearly, all our political practices should be responsive to this value. Still, as I have claimed, we have particularly strong reason to infuse our constitutions with an awareness of the sacrifices we demand from those who disagree with us, even when we are confident we are pursuing the path of justice. Rawls makes room for these

sacrifices in his theory and strives to compensate for them in his constitutional proposal. Maybe he is not such a moralist after all.

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