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RAWLS' POLITICAL CONSTRUCTIVISM AS A JUDICIAL
HEURISTIC: A RESPONSE TO PROFESSOR ALLEN

*Heidi Li Feldman**

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I. INTRODUCTION

In her Dunwoody Lecture, Professor Anita Allen insightfully calls our attention to the social contract tropes that pepper American case law.¹ She claims that these tropes function ideologically, disguising politics, biases, and raw power in judicial decision-making.² To examine this claim, I distinguish two versions of social contract theory Professor Allen groups together. Metaphors drawn from classical social contract theory—epitomized by the work of John Locke and Jean-Jacques Rousseau may well function as Professor Allen suspects. Tools taken from twentieth century neo-Kantian social contract theory—inaugurated and developed by John Rawls—could have precisely the opposite effect. Rawlsian social contract theory might function critically in case law, forcing judges to shed unconsidered or irrelevant prejudices.

II. CLASSICAL SOCIAL CONTRACT THEORY

Professor Allen describes the essence of classical social contract theory as follows: “Social contract theories provide that rational individuals will

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1. See Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

2. See generally *id.* at 2-11.

agree by contract, compact or covenant to give up the condition of unregulated freedom in exchange for the security of a civil society governed by a just, binding rule of law.”³ According to Professor Allen, social contract theorists regard the social contract as a legitimating device for mediating order and liberty—a fair characterization of Locke’s and Rousseau’s views.

Locke describes “what State all Men are naturally in,” which he describes as “a state of perfect freedom” and a “state also of equality.”⁴ He insists “that all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society.”⁵ Locke proceeds to explain that people leave the state of nature because of its tendency to degenerate into the state of war, “a state of enmity, malice, violence, and mutual destruction.”⁶ “To avoid this state of war . . . is one great reason of men’s putting themselves into society, and quitting the state of nature.”⁷ Locke explains the tradeoff between freedom and safety:

The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.⁸

Writing almost a century later, Rousseau also sees the social contract as a convention for accommodating liberty and safety.⁹

I suppose that men have reached the point where obstacles that are harmful to their maintenance in the state of nature gain the upper hand by their resistance to the forces that each individual can bring to bear to maintain himself in that state. Such being the case, that original state cannot subsist any longer, and the human race would perish if it did not alter its mode of existence.¹⁰

3. *Id.* at 2.

4. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 8 (C.B. Macpherson ed., Hackett Publ’g 1980) (1690).

5. *Id.* at 13-14.

6. *Id.* at 15.

7. *Id.* at 16.

8. *Id.* at 52.

9. See JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in *THE BASIC POLITICAL WRITINGS* 141-147-49 (Donald A. Cress ed. & trans., Hackett Publ’g. 1987).

10. *Id.* at

Rousseau aims to describe a social contract that reconciles the two rather than simply trades one off against the other—this is Rousseau's idea of the general will.¹¹ Rousseau still acknowledges, at least implicitly, that when people gain under a social contract, they also sacrifice their natural liberty.¹² In Rousseau's words, "Once the social compact is violated, each person then regains his first rights and resumes his natural liberty, while losing the conventional liberty for which he renounced it."¹³ If one regains natural liberty upon the dissolution of the social compact, then one must have surrendered that form of liberty originally.

Professor Allen quite rightly says that classical social contract theory portrays a wild, dangerous, free state of nature that is transformed, by the consent of its denizens, into a civil society where the rule of law protects everybody.¹⁴ Professor Allen also suggests:

In its mythic dimension, the social contract invites us to see our rights and duties as more than merely human or local conventions, even though they are recognizably at least that. The state of nature and the social contract unite in a myth that invites us to see our practices and the society that they constitute as justified and just by virtue of inevitable rational choices made against a background of risk and violence not of our own creation.¹⁵

Elsewhere, Professor Allen states: "Invoking the key elements of social contract theory—the state of nature and the social contract—masks judicial and other governmental coercion in a cloak of consensualism and rational self-interest."¹⁶ In short, Professor Allen charges that social contract theory obscures judicial choice and power.¹⁷ This charge does not apply so readily to Rawls' neo-Kantian social contract theory.

III. RAWLS' NEO-KANTIAN SOCIAL CONTRACT THEORY

Rawls quite consciously eschews the tropes that Professor Allen holds most responsible for masking the choice and power available to judges.¹⁸ He replaces the historicist rhetoric of classical social contract theory with

11. *See id.* at 147-48. Rousseau describes the general will as, "Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible whole." *Id.* at 148.

12. *See id.*

13. *Id.*

14. *See Allen, supra* note 1, at 14.

15. *Id.*

16. *Id.*

17. *See id.*

18. *See id.*

self-consciously counter-factual reasoning.¹⁹ He rejects the metaphor of the state of nature in favor of an openly constructed decision heuristic.²⁰ Rather than presenting his theory as a justification for the status quo, he offers it to counteract the ever-present, unavoidable tendency of good-faith social practices to degenerate into overall unjust results.²¹ Thus, if Rawls' theory works as he intends, it is applicable to judicial decision-making. If judges use it properly, it should have the opposite effects of the ones Professor Allen attributes to classical social contract theory. Under the conditions just outlined (admittedly difficult ones to satisfy), Rawls' theory of justice should reveal that social arrangements, including those resulting from judicial decisions, may or may not conform to the requirements of justice. These revelations exert pressure on those responsible for these arrangements to make them live up to these requirements rather than provide excuses for their shortcomings.

Rawls is a Kantian. This shows in his emphasis on moral autonomy.²² Rawls reinterprets the Kantian conception of autonomy, and this

19. JOHN RAWLS, *POLITICAL LIBERALISM* 23 (1993).

20. *See id.* at 24-25.

21. *See id.* at 22-28.

22. Rawls distinguishes the autonomy that is part of Kantian moral constructivism from his own political constructivism, which he calls justice as fairness. *See id.* at 99-101. He suggests that there are four differences.

The first difference according to Rawls, is that in Kant's doctrine "the ideal of autonomy has a regulative role for all of life." *Id.* at 99. Rawls, however believes that the ideal of autonomy is not well-suited for providing a "public basis of justification." *Id.*

The second difference is that Rawls' political constructivism rejects what he terms Kant's constitutive autonomy. *See id.* at 100. Constitutive autonomy displays the transcendental idealism of Kant's philosophy by saying that the "independent order of values does not constitute itself but is constituted by the activity . . . of practical (human) reason itself." *Id.* at 99. Political constructivism says that "a political view . . . is autonomous if it represents, or displays, the order of political values as based on principles of practical reason in union with the appropriate political conceptions of society and person." *Id.* Rawls terms this doctrinal autonomy. *See id.*

The third difference is that justice as fairness relies on political ideas for its central organization rather than transcendental idealism or other metaphysical doctrines. *See id.* at 100. The fourth difference, according to Rawls, is one of aims. *See id.* His justice as fairness "aims at uncovering a public basis of justification on questions of political justice given the fact of reasonable pluralism." *Id.* Kant's aims are "showing the coherence and unity of reason . . . with itself." *Id.* at 101.

Kant's conception of autonomy is based on freedom from determination as a result of contingent circumstances in favor of determination through reason in the form of the categorical imperative. *See* Ernest J. Weinrib, *Law as Idea of Reason*, in *ESSAYS ON KANT'S POLITICAL PHILOSOPHY* 15, 19-22 (Howard Lloyd Williams ed., 1992). Kant's categorical imperative is expressed as the principle to "[s]o act that the maxim of your action could become a universal law." *See id.* at 20 (quoting Kant's *THE DOCTRINE OF VIRTUE*). Rawls' view of autonomy relies more on the two moral powers possessed by all people, the capacity for a sense of justice and the capacity for a conception of the good. *See* RAWLS, *supra* note 19, at 103-04. For more discussion of the two moral powers, see *infra* text accompanying notes 25-26.

reinterpreted conception becomes the cornerstone of Rawls' theory of justice.²³ According to Rawls, people judge autonomously when they deliberate independently of contextual and mundane influences, and instead exercise two "higher-order moral powers": the capacity for a sense of justice (reasonableness) and a conception of the good (rationality).²⁴ Reasonableness involves participating with others in fair terms of social cooperation; rationality consists in identifying one's own ends and pursuing them effectively.²⁵ When people exercise their rationality within the confines of acting reasonably they achieve moral autonomy.²⁶ More intuitively we might say that we express our moral selves when we achieve the right balance between answering to our own self-given goals and being responsive to others' interests in pursuing their self-given goals.

According to Rawls, a well-ordered society possesses just basic social institutions, which enable individual autonomy.²⁷ In a well-ordered society, basic institutions guarantee that members live on fair terms of social cooperation.²⁸ This leaves each free to pursue his or her rational life plan without unreasonably infringing somebody else's like pursuit.²⁹

Substantively, Rawls' theory of justice aims to specify the fundamental principles that would govern a well-ordered society.³⁰ But to maintain his commitment to our moral autonomy, Rawls must follow a method for choosing these principles that itself respects autonomy.³¹ In other words, he needs a way of deciding on substantive principles of justice that itself respects and exercises our capacities for reasonableness and rationality.³² To address this need, Rawls offers political constructivism, which is derived in part from Kantian moral constructivism.³³

This method directs us to select principles of justice from a perspective made well-known by *A Theory of Justice*.³⁴ Here is a quick review. The original position is a hypothetical choice situation occupied by parties behind the veil of ignorance.³⁵ The veil obscures a large amount of information from the parties, who, nevertheless, select basic principles of

23. See RAWLS, *supra* note 19, at 99-107.

24. *Id.* at 103-04.

25. *See id.*

26. *See id.* at 107-08.

27. *See id.* at 257-59.

28. *See id.* at 35-40.

29. *See id.*

30. *See id.* at 40-43.

31. *See id.* at 72-81.

32. *See id.* at 103-116.

33. *See id.* at 89-129.

34. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). These principles are elaborated in *POLITICAL LIBERALISM*, which is cited in this discussion. See RAWLS, *supra* note 19.

35. See RAWLS, *supra* note 19, at 22-23.

justice that will regulate their actual society.³⁶ The parties know that this is their task.³⁷ They also know general social facts and theory, including the fact that their society enjoys conditions of moderate scarcity rather than extreme poverty.³⁸ They are aware that in actual society they each have particular goals and interests and the capacity to pursue these.³⁹ The parties do not, however, know any specifics about themselves or their actual goals and interests.⁴⁰ They are not aware of the generation to which they belong, the tastes and preferences they have, the substantive values they hold, or the physical and mental abilities they possess.⁴¹ Knowing only that in actual society, they each have some particular set of characteristics and commitments, the parties in the original position choose principles of justice to regulate the society to which they know they will all belong.⁴²

Political constructivism thus specifies a viewpoint from which to decide on basic principles of justice.⁴³ Rawls introduces devices such as the original position and the veil of ignorance to ensure that our chosen principles of justice reflect our moral personalities and powers, rather than other, contingent traits.⁴⁴ The veil of ignorance allows the parties in the original position to see that they are individuals with goals and interests and the ability to pursue these, but prevents them from seeing their actual, particular goals and interests and talents and skills.⁴⁵ This means the parties are motivated to select principles of justice that allow for the exercise of rationality—one of the two higher-order moral powers—but only on terms they are willing to accept without knowing what special advantages or disadvantages they enjoy relative to one another.⁴⁶ They are motivated to choose reasonably, and thereby to exercise this other higher-order moral power.⁴⁷

Applying his own heuristics, Rawls arrives at two principles of justice for the basic structure of society.⁴⁸ These are well-known and I will simply restate them here. The first, lexically prior, principle is the equality principle, which requires equality in the assignment of basic rights and

36. *See id.* at 22-28.

37. *See id.* at 24-28.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 271-75.

46. *See id.*

47. *See id.*

48. *See id.* at 271.

duties.⁴⁹ The second is the difference principle, which allows social and economic inequalities only if they improve the situation of the least well off.⁵⁰ Justice as fairness, Rawls' substantive theory of justice, requires that the basic structure of society conform to these principles.⁵¹

At this juncture, we can begin to appreciate important differences between Rawlsian and classical social contract theory. Rawls avoids the state of nature construct, in part because of its tendency to evoke an actual historical moment when people gathered and consented to governmental power, somehow binding future generations to the same rule.⁵² Instead, the original position is a viewpoint available in principle to any person at any time.⁵³ We step into it mentally and imaginatively, not literally.⁵⁴ We do so to improve our judgment about what justice requires, in an effort to rule out influences to which we might succumb despite their irrelevance to justice.⁵⁵

We engage in analogous processes regularly. For example, a young man choosing friends might decide to consider his companions from the viewpoint of his parents, on the ground that from this perspective certain considerations will weigh more heavily—and others less—than they would from his own. If, for example, the young man knows that he tends to confuse bravado with strength of character and would prefer friends with the latter trait rather than the former, he might ask himself how his parents would interpret a potential cohort's claims to accomplishment—a strategy that makes sense if his parents discriminate successfully between unwarranted boastfulness and authentic fortitude. Adopting the parental viewpoint is not necessarily a denial of choice or responsibility for that choice. In fact, examining his potential friend from another perspective is itself part of the process of choosing pals, a process in which the young man has consciously decided to engage.

But, a critic might charge, if the young man simply defers to the parental perspective, picking his friends accordingly, then has he not ducked responsibility? And why privilege the parental viewpoint, which could very well be authoritarian and coercive?

Certainly it is possible for a young man to unthinkingly accept his parents' perspective on the world and then pass off responsibility for his choices on his parents and their outlook. But if a young man critically evaluates his parents' viewpoint and its appropriateness for judging

49. *See id.*

50. *See id.*

51. *See id.* at 271-75.

52. *See id.*

53. *See id.* at 274-75.

54. *See id.*

55. *See id.*

potential friends, then adopting that viewpoint does not dodge responsible choice. To the contrary, self-consciously adopting the parental viewpoint because he believes it will improve his deliberation testifies to the young man's responsibility.

The analogy to entering the original position to select principles of justice should be clear. Rawls fashions the original position reflectively, always allowing for the possibility that it must be revised in order to function properly.⁵⁶ The original position does not pretend a state of nature that poses, in Professor Allen's words, "a background of risk and violence not of our own creation."⁵⁷ The original position is explicitly a constructed vantage point, developed by us, to assist our critical thinking about justice.⁵⁸ It does not "invite[] us to see our practices and the society they constitute as justified and just by virtue of inevitable rational choices."⁵⁹ This is not to deny that someone could use Rawlsian rhetoric to evade responsibility for her decisions about justice, just as it is not impossible for a young man to borrow his parents' perspective on friendship and thereby avoid responsibility for developing and relying upon his own. The point is that the mere use of another perspective to evaluate options is not itself an evasion of responsibility. If operated as Rawls intends, political constructivism should make us more, not less, critical of our basic social institutions and our intuitions about their justness.⁶⁰

Less well-known than original position, the veil of ignorance, and justice as fairness, but equally important to political constructivism, is Rawls' designation of the subject matter of a theory of justice.⁶¹ According to Rawls, the proper subject of a Kantian theory of justice is the basic structure of society rather than more particular transactions or arrangements.⁶² Although Rawls makes this point in *A Theory of Justice*, he elaborates and explains it in *Political Liberalism*:

An essential feature of the contractarian conception of justice is that the basic structure of society is the first subject of justice. . . . The basic structure is understood as the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation. Thus the political constitution, the legally recognized forms of property, and the organization of the

56. *See id.*

57. Allen, *supra* note 1, at 14.

58. *See* RAWLS, *supra* note 19, at 271-75.

59. Allen, *supra* note 1, at 14.

60. *See* RAWLS, *supra* note 19, at 257-88.

61. *See id.*

62. *See id.* at 257-59.

economy, and the nature of the family, all belong to the basic structure.⁶³

Rawls designates the basic structure as the subject of a contractarian conception not only for convenience. He argues for this choice of subject matter on grounds of principle.

Rawls argues that establishing principles of justice for the basic structure allows individuals and associations to conduct their private affairs with confidence that background justice obtains.⁶⁴ Just institutions can correct for the inevitable tendency of microlevel transactions to erode background justice.⁶⁵ People can rationally pursue their personal ends without constantly monitoring their arrangements for their reasonableness, trusting that larger-scale social institutions will perform this function where necessary.⁶⁶ Rawls calls this “an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions.”⁶⁷ This division of labor is not a trade-off, a sacrifice of liberty for order. Instead, Rawls contemplates a system that maximizes the exercise of both higher order moral powers, reasonableness and rationality.⁶⁸

Rawls also claims priority for principles of justice for fundamental social institutions, because these institutions play a unique role in molding our individual conceptions of the good.⁶⁹ We are born into our society and cannot escape its influence on our eventual identities.⁷⁰ We do not arrive at our goals and interests independently of the sort of society we inhabit. The basic structure of society and our place in our society together shape our very identities. Our chosen ends vary accordingly. Different ends have better and worse chances of being realized. Thus, by influencing who we are and what ends we have, the basic structure of society affects justice at a profound level.

IV. RAWLS' POLITICAL CONSTRUCTIVISM AS A JUDICIAL HEURISTIC

For present purposes, let us assume that the Rawlsian choice position does enable and ensure autonomous choice and that this is good and appropriate when selecting basic principles of justice. And, let us agree that

63. *Id.* at 257-58.

64. *See id.* at 265-69.

65. *See id.*

66. *See id.*

67. *Id.* at 268-69.

68. *See id.* at 280.

69. *See id.* at 269.

70. *See id.* at 277.

first principles of justice should apply to the basic structure of society and allow that different principles might be suitable for other levels and settings. Finally, let us accept that parties in the original position would select the equality and the difference principles to regulate the basic structure.

The questions still remain: When, if ever, should common law judges rely upon the heuristics of the original position and the veil of ignorance? Is political constructivism right for judges? For Rawls, the answers would depend upon whether the common law belongs to the basic structure of society. Rawls' characterization of the basic structure, however, makes it difficult to place the common law. The institutional division of labor envisioned by Rawls presupposes a divide between large-scale social institutions and small-scale personal arrangements.⁷¹ The phenomenon of the common law threatens to confound this distinction. The common law is a large-scale social institution that emerges from series of court decisions regarding smaller-scale, more personal, arrangements.

From afar, the common law appears as a body of case law that, interpreted all together, regulates private conduct. In our society, this corpus represents much—perhaps even the majority of—state regulation. From this standpoint, the common law appears to be as fundamental as “the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family,” the “major social institutions” Rawls specifically assigns to the basic structure.⁷² Moreover, the common law seems to fit the functional criteria for the basic structure. Like the political constitution and the organization of the economy, common law as a whole “assign[s] fundamental rights and duties and shape[s] the division of advantages that arises through social cooperation.”⁷³ Cumulatively, common law decisions do not simply state and apply rules directly to individuals and associations. Over time and cases, the common law defines the playing field upon which individuals conduct their lives. Common law doctrine creates default rules that advantage certain parties rather than others. It carves exceptions to these rules, permitting redress to some parties but not others. Individuals and associations can, and generally do, take common law doctrines into account when striking bargains or resolving disputes. Even in the absence of litigation, the common law's assignment of rights and duties affects the distribution of the advantages of social cooperation.⁷⁴

Looking more closely, the role of the common law becomes less clear. Under scrutiny, the corpus dissolves into a series of discrete trial court verdicts and appellate decisions. The common law is not a unified system.

71. *See id.* at 257-59.

72. *Id.* at 258.

73. *Id.*

74. *Cf. id.*

It operates doctrine by doctrine across different fields of law in a myriad of factual settings. At this level, we wonder, does each trial court verdict and appellate decision belong to the basic structure? If not, does any particular subset of the series?

Apart from careful analysis, it just seems absurd to place each and every trial court verdict or each and every appellate decision on par with the political constitution, the legally recognized forms of property, the organization of the economy, and the nature of the family.⁷⁵ Examined functionally, it still makes little sense to include each individual verdict and appellate review in the basic structure. Singly, trial verdicts and the vast majority of appellate decisions do not assign fundamental rights and duties nor do they shape the division of advantages that arise through social cooperation.⁷⁶

Rawls contrasts the institutions that assign basic rights and duties and distribute the benefits of social cooperation with rules that apply directly to individuals and associations and their transactions.⁷⁷ Common law appears to fit both categories. Common law seems, paradoxically, to fall both inside and outside the basic structure of society.

Finer-grained examination of some specific common law cases reveals an alternative approach to dissolving the paradox and placing the common law within Rawls' taxonomy. Court decisions themselves may be divided, on substantive grounds, into some with relatively limited, microlevel effects and others with large-scale, systematic effects. When judges resolve cases of the second kind—call them basic structure cases—political constructivism could guard against the influence of inappropriate prejudices and allow judges to honestly yet fairly exercise their very real power.

V. EXAMPLES FROM THE SUPREME COURT OF MISSOURI

In 1969, the Supreme Court of Missouri decided *Keener v. Dayton Electric Manufacturing Co.*⁷⁸ The court joined the many other jurisdictions that adopted strict liability in tort for products-related injuries in the late 1960s, advancing the then-prevailing justifications for this switch from a negligence standard in such cases.⁷⁹ Quoting the seminal case of *Greenman v. Yuba Power Products, Inc.*,⁸⁰ the court wrote: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such

75. *Cf. id.*

76. *Cf. id.*

77. *See id.* at 275-78.

78. 445 S.W.2d 362 (Mo. 1969).

79. *See id.* at 364.

80. 377 P.2d 897 (Cal. 1963).

products on the market rather than by the injured persons who are powerless to protect themselves.”⁸¹ In keeping with this reasoning, the Missouri court also adopted a very narrow affirmative defense to a products liability claim.⁸² The defense, labeled by the court “contributory fault,” requires the defendant to prove that a plaintiff voluntarily and unreasonably encountered the danger posed by the product.⁸³ Early decisions following *Keener* construed the knowledge requirement quite narrowly, requiring the defendant to establish that the plaintiff discovered the exact defect that caused the injury and proceeded to unreasonably use the product.⁸⁴ Later decisions relaxed this interpretation, requiring only that the plaintiff have known of the type of danger created by the defective product.⁸⁵ On either reading, “contributory fault” is a narrower defense than contributory negligence, the traditional affirmative defense in a negligence action. Contributory negligence is a purely objective standard, in that it compares the plaintiff’s conduct to the conduct of a hypothetical reasonable person.⁸⁶ If the plaintiff’s conduct differs from the hypothetical conduct of this character, the defendant prevails, regardless of whether the plaintiff was or was not actually aware of the danger she faced.⁸⁷ Contributory fault is a more subjective standard, in that it looks to the plaintiff’s actual knowledge.⁸⁸ The defendant escapes liability only if the plaintiff really knew of the danger at hand and then unreasonably proceeded anyway.⁸⁹

In 1983, the Missouri supreme court replaced contributory negligence with comparative negligence in negligence actions in *Gustafson v. Benda*.⁹⁰ The Missouri supreme court decided its next major case involving strict products liability, *Lippard v. Houdaille Industries, Inc.*, in 1986.⁹¹ There, the court held that comparative fault principles did not govern strict products liability actions in Missouri.⁹² The precise question before the *Lippard* court was whether a plaintiff’s culpable conduct would continue to completely preclude recovery in products liability suits, particularly now

81. *Keener*, 445 S.W.2d at 364 (quoting *Greenman*, 377 P.2d at 901).

82. *See id.* at 365.

83. *See id.*

84. *See Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 787 n.6 (Mo. 1977) (en banc); *Williams v. Ford Motor Co.*, 454 S.W.2d 611, 619 (Mo. Ct. App. 1970).

85. *See Ensor v. Hodgeson*, 615 S.W.2d 519, 525-26 (Mo. Ct. App. 1981); *Uder v. Missouri Farmers Ass’n, Inc.* 668 S.W.2d 82, 89 (Mo. Ct. App. 1983); *Wild v. Consolidated Aluminum Corp.*, 752 S.W.2d 335, 339-40 (Mo. Ct. App. 1988).

86. *See Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 513 (Mo. 1986).

87. *See id.*

88. *See Keener*, 445 S.W.2d at 365-66.

89. *See id.*

90. *See* 661 S.W.2d 11, 16 (Mo. 1983).

91. 715 S.W.2d 491 (Mo. 1986).

92. *See id.* at 491.

that such conduct no longer barred a plaintiff's recovery in negligence cases.⁹³ The court held that neither contributory negligence nor its successor, comparative negligence, applies in strict products liability.⁹⁴ In a companion case, *Barnes v. Tools & Machinery Builders, Inc.*, the court reiterated the distinction between contributory fault and contributory negligence, deeming it error to introduce negligence concepts into a jury instruction on contributory fault.⁹⁵

Lippard is a five to two decision, with three separate concurrences and two dissenting opinions.⁹⁶ *Barnes* is also a five to two decision, with a separate concurrence and one dissenting opinion.⁹⁷ A very basic question provokes all this discussion: If neither the victim nor the injurer is entirely free from blame for an accident, should the costs of the injury be divided between them, or should they be totally borne by either the plaintiff or the defendant?

This question has attracted judicial and legislative attention in both negligence and strict products liability cases. In Missouri, the supreme court rejected contributory negligence—a complete bar to a negligent plaintiff's recovery—in favor of comparative negligence—comparative apportionment of damages between a negligent plaintiff and a negligent in *Gustafson v. Benda*.⁹⁸

To appreciate the crisscrossing opinions in *Lippard* and *Barnes*, it helps to know the debate in *Gustafson v. Benda*. Two themes run through the *Gustafson* opinions: the fairness of apportioning damages between a culpable plaintiff and a culpable defendant; and the appropriateness of judicial, rather than legislative, adoption of comparative negligence.⁹⁹

Writing for four of the five member majority, Judge Welliver argues that it was better to clearly shift to comparative negligence rather than try to achieve apportionment of damages between negligent plaintiffs and defendants through artificial tinkering with older doctrines.¹⁰⁰ “[T]here must be a better way to attain *fairness* and justice than to continue to indulge in fictions in the application of a bundle of antiquated and fairly inflexible rules of tort law.”¹⁰¹ Judge Welliver argues from the outset that fairness drives the move toward comparative negligence.¹⁰² The connection between

93. See *id.* at 492-93.

94. See *id.* at 493 (“If the defective product is a legal cause of injury, then even a negligent plaintiff should be able to recover.”).

95. See 715 S.W.2d 518, 521 (Mo. 1986).

96. See *Lippard*, 715 S.W.2d at 494.

97. See *Barnes*, 715 S.W.2d at 523.

98. See *Gustafson*, 661 S.W.2d at 14.

99. See *id.* at 13.

100. See *id.*

101. *Id.* (emphasis added).

102. See *id.* at 15.

fairness and division of damages between culpable parties is one of the *Gustafson* themes that recurs in *Lippard* and *Barnes*.

The other major theme from *Gustafson* that recurs in the later products decisions is whether a move to comparative principles should be undertaken by the judiciary or the legislature.¹⁰³ In *Gustafson*, Judge Welliver explains that the Supreme Court had stated its preference for comparative negligence in a number of decisions starting in 1977 and in these decisions had asked the Missouri legislature to address the issue.¹⁰⁴ The legislature's ensuing silence justifies judicial adoption of comparative negligence, according to Judge Welliver.¹⁰⁵

Judge Billings' brief concurrence echoes both of Judge Welliver's arguments.

Because I believe pure comparative fault is more equitable and just than the ancient and harsh, all or nothing, rule of contributory negligence, and the mathematical gymnastics employed in last clear chance and humanitarian [Missouri doctrines ameliorating contributory negligence] cases, I concur. Historically, contributory negligence, last clear chance, and humanitarian negligence, were born by judicial decisions. By judicial decision we bury them.¹⁰⁶

This is the entire concurrence. Briefly but fulsomely, Judge Billings underscores the fairness of comparative negligence and the propriety of its adoption by the judiciary.

The two dissenting judges, Chief Justice Rendlen and Judge Gunn, do not deny the superior fairness of comparative negligence.¹⁰⁷ Although they write separately, these judges both maintain that the legislature, not the judiciary, should adopt comparative negligence, if it is to be adopted.¹⁰⁸

Lippard and *Barnes* revisit the two animating themes of *Gustafson*. Writing for the majority in *Lippard*, Judge Blackmar—who was not on the *Gustafson* court—distinguishes *Gustafson* because “[i]t involved only negligence concepts, and could not be an appropriate vehicle for determining rules of products liability law.”¹⁰⁹ He rejects comparative fault

103. *See id.* at 14-15.

104. *See id.* (noting that the court had “remained quiescent more than five years while waiting for the legislature to act.”).

105. *See id.* at 15.

106. *Id.* at 28 (Billings, J., concurring).

107. *See id.* at 28-29 (Rendlen, C.J., dissenting); *id.* at 29 (Gunn, J., dissenting).

108. *See id.* at 28-29 (Rendlen, C.J., dissenting) (arguing that legislative inaction means legislative opposition to comparative negligence); *id.* at 29 (Gunn, J., dissenting) (arguing that judicial adoption of comparative negligence violates separation of powers).

109. *See Lippard*, 715 S.W.2d at 492.

in products cases because “[t]he purpose of products liability law, essentially, is to socialize the losses caused by defective products.”¹¹⁰ For Judge Blackmar this answers the defendant’s contention “that the rule of comparative fault is a fair one in products liability cases just as in negligence cases.”¹¹¹ Judge Blackmar does not say whether socializing losses caused by defective products is a matter of fairness or some other objective, such as economic efficiency. He simply argues that having the plaintiff shoulder any of the costs of products-related injuries defeats the goal of spreading these costs across the society of consumers.¹¹²

Although he addresses the fairness issue obliquely, Judge Blackmar squarely confronts the allocation of powers question:

If there is dissatisfaction with our conclusion, the state and national legislatures may be addressed. A legislature is far more capable than we are of determining whether there are problems in the products liability area, requiring changes in the law. We adhere to the view that distributors of “defective products unreasonably dangerous” should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness.¹¹³

Judge Welliver, the majority opinion writer in *Gustafson*, dissents in *Lippard*.¹¹⁴ This is not particularly surprising, since Judge Welliver so adamantly defends comparative fault in the earlier case.¹¹⁵ More unusual is the emotional, portentous tone of Judge Welliver’s *Lippard* dissent. Not only does Judge Welliver maintain that *Gustafson* controls the issue in *Lippard*, he insists that “principles of fairness . . . demand the application of comparative fault in strict products liability.”¹¹⁶ Judge Welliver accuses the majority of “covert[ly] overruling” *Gustafson*, thereby “disregard[ing] the long-standing principles of justice and fairness which *Gustafson* embodied.”¹¹⁷ Judge Welliver concludes his opinion with an “EPILOGUE—TO GUSTAFSON.”¹¹⁸ This extraordinary document begins:

110. *Id.*

111. *Id.* at 493.

112. *See id.* at 494.

113. *Id.*

114. *See id.* at 491 (Welliver, J., dissenting).

115. *See Gustafson*, 661 S.W.2d at 13.

116. *Lippard*, 715 S.W.2d at 502 (Welliver, J., dissenting).

117. *Id.* at 503 (Welliver, J., dissenting).

118. *Id.* (Welliver, J., dissenting).

The fair, just, young *Gustafson* lies mortally wounded and dying behind the curtain which has now been drawn on this day's performance. You, dear audience of readers, have read the eloquent words of each of the performers, words which are now yours to judge as legal scholarship, legalese or perhaps just legal gobbledy-gook. But, pray thee not conclude that our brothers below speak with more enlightenment than we.¹¹⁹

Judge Welliver proceeds to sarcastically describe results reached by the Missouri Supreme Court since Judges Blackmar, Billings, Rendlen, Higgins, and Gunn joined it¹²⁰ (although by the time of *Lippard*, Judge Gunn had become a federal district court judge).¹²¹ The epilogue then implores the Missouri General Assembly to "deliver [us] from the Sargasso Sea of the crisis of tort" by enacting tort reforms such as introducing comparative fault in products cases and abrogating joint and several liability.¹²² Judge Welliver concludes, "With these small acts . . . the General Assembly can bestow upon you the fairest and most just tort system of any state in America."¹²³ Thus, Judge Welliver melodramatically links the questions of fairness and legislative action in tort law. (Incidentally, Judge Welliver gets the last laugh. In 1987, the Missouri General Assembly enacted V.A.M.S. § 537.765, adopting comparative fault in products liability cases.)¹²⁴

Two concurring judges in *Lippard* write separately, primarily to chastise Judge Welliver for his invective.¹²⁵ Judge Robertson, who concurs in the result and was not a member of the *Gustafson* court, also writes separately.¹²⁶ Judge Robertson argues that the court should never have adopted comparative fault, even in negligence cases, because it should have left that decision to the legislature.¹²⁷ While *stare decisis* convinces him not to overrule *Gustafson*,¹²⁸ he believes the court should refrain from extending comparative principles to products cases.¹²⁹

119. *Id.* (Welliver, J., dissenting).

120. *See id.* at 503-505 (Welliver, J., dissenting).

121. *See id.* at 505, n.8 (Welliver, J., dissenting).

122. *Id.* at 505 (Welliver, J., dissenting).

123. *Id.* (Welliver, J., dissenting).

124. *See* MO. REV. STAT. § 537.765 (1997).

125. *See Lippard*, 715 S.W.2d at 494-95 (Billings, J., concurring); *id.* at 495-96 (Rendlen, J., concurring).

126. *See id.* at 496-97 (Robertson, J., concurring in result).

127. *See id.* at 497 (Robertson, J., concurring in result).

128. *See id.* (Robertson, J., concurring in result).

129. *See id.* (Robertson, J., concurring in result).

Judge Donnelly dissents.¹³⁰ He does not discuss the allocation of power issues at all, concentrating entirely on arguments from precedent and from fairness.¹³¹ Judge Donnelly argues that both considerations favor adoption of comparative fault in products liability cases.¹³² Notably, Judge Donnelly concludes his opinion with quotation from *A Theory of Justice*, writing, “In my view, a court should strive for fairness ‘in assigning rights and duties and in defining the appropriate division of social advantages.’”¹³³

In *Barnes*, the court’s opinion—again penned by Judge Blackmar—reiterates that comparative negligence does not enter into products liability cases.¹³⁴ Judge Donnelly, again in dissent, again quotes Rawls.¹³⁵ The lengthy quotation describes the original position and its relation to justice as fairness.¹³⁶ Judge Donnelly then quickly claims that *Lippard* “fails Rawls’ test of fairness.”¹³⁷

According to *Lippard*, A and B, if in Rawls’ “original position,” would say, each to the other: “If you become a manufacturer and sell a defective product which injures me, you, not I, will be responsible for my damages—even those I cause.” I cannot agree. In my view, A and B, if in Rawls’ “original position,” would say, each to the other: “If you become a manufacturer and sell a defective product which injures me, each of us shall bear responsibility in proportion to his fault.”¹³⁸

Professor Allen refers to Judge Donnelly’s dissent in *Barnes* when she mentions “the Missouri judge who used John Rawls’ *A Theory of Justice* as an unlikely framework for crafting a dissenting opinion in a products liability case.”¹³⁹ While Judge Donnelly’s application of Rawls’ heuristic is both hasty and conclusory, the *Gustafson-Barnes* line of cases suggests that political constructivism is not so unlikely a framework for deciding how to allocate losses arising from accidental injuries.

In *Gustafson*, *Lippard*, and *Barnes* the justices write as though they are deciding issues of basic fairness. At least two members of the Supreme Court of Missouri explicitly note the systemic distributional effects of

130. See *id.* at 497-500 (Donnelly, J., dissenting).

131. See *id.* at 499-500 (Donnelly, J., dissenting).

132. See *id.* (Donnelly, J., dissenting).

133. *Id.* at 500 (Donnelly, J., dissenting) (quoting RAWLS, *supra* note 34, at 10).

134. See *Barnes*, 715 S.W.2d at 521.

135. See *id.* at 523-24 (Donnelly, J., dissenting).

136. See *id.* (Donnelly, J., dissenting) (quoting RAWLS, *supra* note 34, at 11-12).

137. *Id.* at 524 (Donnelly, J., dissenting).

138. *Id.* (Donnelly, J., dissenting).

139. See Allen, *supra* note 1, at 18.

adopting or rejecting comparative fault in products cases. Judge Blackmar indicates that comparative fault would undermine the distributional goal of socializing losses from injuries caused by defective products.¹⁴⁰ Justice Welliver calls for comparative fault to decrease the prices of products.¹⁴¹

VI. CONCLUSION—A FRAMEWORK FOR JUDICIAL USE OF RAWLS' SOCIAL CONTRACT THEORY

Of course, just because the justices think choosing comparative negligence or comparative fault raises considerations of basic fairness, it does not automatically follow that either of these doctrines occupy the basic structure of society in Rawls' sense. I maintain, however, that in a modern consumer society—such as ours—principles for allocating the costs of accidents caused by defective products are indeed encompassed by the basic structure as Rawls understands it. The market in products is a major mechanism for distributing wealth, both in the form of profits from sales and in the form of the goods themselves.¹⁴² The products carry with them risk of injury due to defectiveness. Those injuries that materialize impose costs on a subgroup of consumers, regardless of whether any, all, or some of the consumers use defective products carelessly. Since virtually everybody in our society consumes some products, strict products liability spreads the costs of these injuries more or less evenly across society's members. Incorporating comparative fault into strict products liability alters this roughly even distribution by allocating more of the costs to consumers whose carelessness combined with a product defect to cause them injury.

Having careless plaintiffs shoulder part of the costs of the injuries they suffer due to defective products deviates from the rough equality achieved by strict products liability minus comparative fault. On a strict and thorough Rawlsian view, the next step for a judge deciding such a case would be to check the results against the two principles of justice that comprise justice as fairness, the principles Rawls argues would be chosen by occupants of the original position. First, a judge would have to decide which of the two principles—the equality principle or the difference principle—applies. In a case deciding whether to incorporate comparative fault into strict products liability, a judge would have to decide whether receiving total compensation for an injury caused by a defective product is a basic right; or, correlatively, whether one has a basic duty to compensate completely for

140. See *Lippard*, 715 S.W.2d, at 493-94.

141. See *id.* at 505 (Welliver, J., dissenting).

142. My observations about the distributional effects of the consumer products market are far from original. Guido Calabresi's landmark *COST OF ACCIDENTS* focused precisely on these effects and the role of tort in regulating them. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

an injury caused by a defective product one has manufactured. Personally, I am not sure how to decide these questions; I do not know what makes a duty or a right basic in a Rawlsian—or any other—sense. Presumably, judges would be equally uncertain about the status of rights and duties of plaintiffs and defendants in products liability actions.

If the rights and duties of injured plaintiffs and the makers of defective products are not basic, a Rawlsian judge should consider whether the distributional effects of contributory fault conform to the difference principle. This means deciding whether adding contributory fault to strict products liability makes the worst off better off.¹⁴³ To resolve this, a judge must identify the worst off—another murky project. If careless people with the misfortune to experience injury by a defective product are the worst off, comparative fault in strict products liability flunks the test of the difference principle. If the worst off are impoverished consumers who pay more for products because manufacturers must compensate in full even wealthy careless consumers, then comparative fault passes. These hypotheses raise a thicket of difficult empirical and normative questions.

Notwithstanding the difficulty of applying justice as fairness to choice of legal doctrines, the Rawlsian method might still be worthwhile for judges, focusing them on the right sorts of questions, even if they are tough ones to answer confidently, let alone correctly. If we accept the equality principle and the difference principle as substantively correct principles of justice, and if we decide that at least some judicial results clearly affect the basic structure of society, justice as fairness directs judges to focus their debates, arguments, and ultimate justifications on equality and improving the conditions of the worst off. This result seems at least promising and at best sound.

But we may have doubts about the equality and difference principles, and we may not agree that any judicial decisions involve the basic structure of society. Does this mean judges must jettison political constructivism? Not if we conclude that political constructivism provides a useful heuristic for some or all common law decisions, even if these should not be ultimately assessed according to the substantive principles of justice as fairness. If political constructivism facilitates clear thinking about fairness, then it may be useful for judicial decisions that implicate matters of fundamental fairness broadly defined—that is, fairness in more colloquial and less Rawlsian terms.

The Supreme Court of Missouri saw the choice between products liability with or without a contributory fault defense as a matter of broad fairness.¹⁴⁴ Yet for the most part the Missouri judges made conclusory

143. *See supra* text accompanying note 50.

144. *See supra* text accompanying notes 78-89.

statements about the fairness of their preferred option or the unfairness of its rival, rather than engaging in systematic analysis that would explain or justify these conclusions. Employed carefully, political constructivism could have helped. Imagine if each of the judges had tried to reason about the decision from the perspective of the original position; and if each had articulated why he thought that parties behind the veil of ignorance would have agreed on one version of products liability rather than the other. This could have prevented judges from simply hurling undefended assertions about fairness at one another and permitted them to systematically critique one another's reasoning.

Consider again Judge Donnelly's opinion in *Barnes*. On the line I am pursuing now, the problem with the opinion is not that it uses an "unlikely framework" for deciding the question at issue. The problem is that Judge Donnelly really only mentions the framework rather than uses it, and to the extent he does use it, he does so incorrectly. If judges routinely argued according to the political constructivist method, other opinion writers could have pointed this out and pushed him either to defend his conclusion within the political constructivist method or to change his mind about the outcome.

Judge Donnelly asserts that in the original position "A" and "B" would have one of two exchanges. Either one would say to the other, "If you become a manufacturer and sell a defective product which injures me, you, not I, will be responsible for my damages—even those I cause."¹⁴⁵ Alternatively, one would say to the other, "If you become a manufacturer and sell a defective product which injures me, each of us shall bear responsibility in proportion to his fault."¹⁴⁶ Without further explanation, Judge Donnelly states that in the original position, A and B would have the second exchange, not the first.¹⁴⁷

Judge Donnelly misconstrues the original position. All parties to society occupy it, not just two individuals. The parties are not engaged in a series of dyadic bargains with one another. Instead they are deciding which general principles they can all accept, given that they know only general facts about their society and human nature, but know nothing of their personal circumstances, talents, and ends. If the parties' task is to design a products liability regime, they must choose between principles such as, "The costs of all injuries from defective products shall be paid by the manufacturers of such products" or "Manufacturers shall pay all the costs of injuries from defective products they have produced unless the user's own carelessness caused the injury." Because parties in the original position have general knowledge of society and human nature, they can infer that

145. *Barnes* 715 S.W.2d at 524 (Donnelly, J., dissenting).

146. *Id.* (Donnelly, J., dissenting).

147. *See id.* (Donnelly, J., dissenting).

manufacturers will pass along to consumers the costs of compensating losses caused by defective products. They can infer that the choice of principles involves a choice between (a) somewhat more expensive goods for everybody and compensation for anybody injured by a defective product and (b) somewhat less expensive goods for everybody and zero compensation for careless users injured by defective products.

Precisely how the parties would compare the merits of these options is open to debate. If, stripped of the sort of information hidden by the veil of ignorance, people tend to be risk averse about suffering severe personal injury and going without compensation, the parties will be more likely to agree on (a). If people in this situation tend to fear having to pay more for products or going without those that would be priced out of the market without a contributory fault defense, and are willing to take their chances of being the severely injured but uncompensated victim of a defective product, they will probably agree on (b). What one cannot do from behind the veil of ignorance is base his or her choice on whether he or she is rich or poor, has or does not have other sources of help in case of injury than payment from the manufacturer, is especially careful or careless, is an accident victim or a manufacturer, likes corporations or dislikes tort plaintiffs, and so forth. These are precisely the sort of facts the veil hides. Judges imagining themselves in the original position face a hard decision—that is, the nonobvious choice between (a) and (b) – but if their judgment rests explicitly or implicitly on the sort of facts hidden by the veil, it cannot be sustained. Judges will have to test their own intuitions about the sort of risks parties in the original position would or would not be likely to undertake and try to persuade one another accordingly.

Let me reiterate. Such debate would not be automatically resolvable. Judges would still exercise judgment. But the political constructivist heuristics make it harder to introduce controversial or irrelevant biases into the process. This should address Professor Allen's major concern about judicial use of social contract tropes—that they comprise “a myth that invites us to see our practices and the society they constitute as justified and just by virtue of inevitable rational choices made against a background of risk and violence not of our own creation” and “masks judicial and other governmental coercion . . .” political constructivist judicial opinions demonstrate—rather than obscure—the exercise of judicial choice.¹⁴⁸ Moreover, by proscribing personal reasons, political constructivist arguments force judges and their audiences to notice the centrality of general social facts to these arguments. For example, political constructivist arguments about a products liability regime highlight the current role of the market in distributing consumer goods and compensation for injury. If

148. Allen, *supra* note 1, at 15.

judges or their audience do not like the options such a market creates for people in the original position, they may be motivated to push for changes in the social arrangements that define these options rather than radically different ones.

This point returns us to the other major theme in *Gustafson*, *Lippard*, and *Barnes*—the distinctive roles of the judiciary and the legislature. Judicial modifications of the products liability regime do affect the distribution of goods and compensation. But only the legislature can enact sweeping measures that would thoroughly alter the consumer products market or the availability of compensation in case of personal injury. The legislature could junk the tort system in favor of complete social insurance. It could regulate product safety comprehensively and enforce its regulations with fines that would finance a compensation fund for those hurt by illegally dangerous products. A society with these institutions instead of ours would present different issues of fairness. Political constructivism, however, could be equally helpful to judges analyzing and settling them.