

WHAT ARE BASIC LIBERTIES?

ABSTRACT

Two moral powers are central to Rawls's approach to specifying the basic liberties: the capacity for a sense of justice and the capacity for a conception of the good. The fundamental case in which the first capacity is exercised is in "the application of the principles of justice to the basic structure and its social policies". The fundamental case in which the second capacity is exercised is in "forming, revising, and rationally pursuing such a conception over a complete life". Rawls distinguishes between two phases of specification. In the first, a list of basic liberties is identified at a high level of abstraction. In the second, the significance of different particular liberties is determined and adjudication over conflicts between them occurs. Rawls's complete account, we argue, defines as basic those liberties that are necessary to the provision of the social conditions essential for the full and informed exercise of the moral powers (first phase) in the two fundamental cases (second phase). We argue that this account excludes certain particular liberties that it should not: e.g., some forms of freedom of movement. We suggest that probability should take over the role assigned to necessity in Rawls's account. On this approach also, however, some particular freedoms rightly regarded by Rawls as basic liberties do not meet the definition. To remedy this, we appeal to the liberal principle of legitimacy and we defend this move.

KEYWORDS basic liberties; basic rights; economic liberties; enabling; freedom of expression; freedom of speech; moral powers; political legitimacy; political satire; Rawls

1. The Basic Structure and the Two Moral Powers

As Philip Pettit points out, we have two ways of talking about freedom or liberty: the singular and the plural.¹ We speak in singular terms when we want to indicate how free a given person is; we use the plural form when we want to discuss which liberties a person possesses. It is also widely assumed that not all liberties are created equal: some are more important than others. How are we to decide, though, as to which liberties are the most important or basic?

Focusing on the account of basic liberties central to John Rawls's theory of justice will enable us to recognize complexities that arise when attempting to answer this question and to respond to them. In response to Herbert Hart's criticism, Rawls writes that there are two stages involved in providing a defensible specification of the basic liberties.² The first phase involves specifying a list of basic liberties under general headings. The second phase involves further specification of this list by determining the significance of different particular liberties that come under the same general heading and adjudicating over conflicts between particular liberties. For example, while in the first phase we can include freedom of movement as a basic liberty, in the second phase we can recognize that certain particular liberties of movement (e.g., going on vacation) are much less important than others (e.g., attending a political rally).³

We aim to show that while Rawls might be able successfully to complete the first phase, he cannot satisfactorily undertake the second phase unless radical changes are made to his account. In pursuing this aim, we will contribute towards the filling of a significant gap in the literature, in which answers to the question of what it is for a liberty to be basic (as

¹ Pettit 2008, p. 201.

² Rawls 2005, p. 290 in response to Hart 1989.

³ After Nickel 1994, p. 780.

against mere lists of putatively basic liberties) do not abound.⁴ Rawls's account of the basic liberties is primarily a "functionalist" approach: it concentrates mainly on the role that the basic liberties play, rather than dwelling, in detail, upon defining what they are. Moreover, his treatment of the second phase of specification of the basic liberties is relatively sparse. In highlighting what we take to be the inadequacies of Rawls's account, and in advancing beyond it, we will focus on the second phase.

Before we proceed to more specific discussion, let us deal with some preliminaries. Rawls's conception of justice as fairness regards citizens as persons engaged in social co-operation who have "the two moral powers", namely the capacity to have a sense of justice and the capacity to have a conception of the good.⁵ The principles of justice concern the design of the basic structure of society, that is, "the way in which the main political and social institutions of a society fit together into one system of social co-operation, and the way they assign basic rights and duties and regulate the division of advantages that arise from social co-operation over time."⁶ The fundamental case in which the capacity for a sense of justice is exercised is in "the application of the principles of justice to the basic structure and its social policies".⁷ The fundamental case in which the capacity for a conception of the good is exercised is in "forming, revising, and rationally pursuing such a conception over a complete life".⁸

⁴ Pettit 2008, pp. 201, 203, also observes that whereas the specification of the basic liberties via lists is common, the question of how the basic liberties are to be defined is "remarkably neglected in the literature".

⁵ Rawls 2001, pp. 18–19.

⁶ *Ibid.*, p. 10.

⁷ *Ibid.*, p. 112.

⁸ *Ibid.*, p. 113.

The two moral powers and their exercise in the two fundamental cases feature importantly, as we shall shortly explain, in the condition that Rawls thinks a liberty must meet if it is to be a “basic” particular liberty. Such a liberty is one that emerges, in turn, from each of the two phases of specification as (what we call) a “core” basic liberty. It is a particular case of the basic liberties identified (under general headings) in the first phase and it is one that is identified, in the second phase, as being of substantial political significance.

In section 2, we discuss Rawls’s “analytical method” of drawing up a list of basic liberties and his own specification, in the first phase, of the basic liberties. We argue that Rawls’s account of this method requires some important clarifications, which we provide. We then discuss Rawls’s own first-phase specification of the basic liberties. It defines as basic those liberties that are *necessary* for the full and informed exercise of the moral powers. We call this the “necessity reading” of how Rawls defines the basic liberties. We distinguish between it and one that uses a different modal notion that also features in Rawls’s discussion, namely *enabling*. After providing a more detailed discussion of enabling than does Rawls, we argue that the notion of enabling is too weak to replace that of necessity in Rawls’s first-phase specification of the basic liberties.

In section 3, we turn to Rawls’s account of the second phase of specification. We take this to have at its core the appeal to the aforementioned fundamental cases. We argue that, coupled with the necessity reading, invoking the two fundamental cases is too strong. This is because it excludes specific particular basic liberties that it should not: e.g., certain forms of freedom of movement. While Rawls’s necessity-based account might work in the first phase, it must be given up once the second phase is reached. We then discuss a new approach that seeks to improve on Rawls’s and to expunge the problems identified earlier. In line with the new approach, for which there is both analytical and some textual warrant, probability takes over the role that was occupied, in the definitions previously discussed, by modality.

In section 4, however, we show that the probabilistic approach introduced in section 3 is also, like the modal approaches previously discussed, extensionally inadequate. We show, by appeal to the case of the freedom to produce and to consume political satire, that it fails to secure as basic some particular liberties rightly so considered by Rawls (namely, in this case, some forms of freedom of political speech and expression).

In section 5, we propose a remedy for this problem. Our proposal adds as a sufficient condition upon a particular liberty's being basic that any restrictions upon it that did not promote, or which were not designed to promote, the weighting of liberties in a scheme of liberty would be restrictions that breached the liberal principle of legitimacy. This is an underlying principle of Rawls's theory of justice, with which his principles of justice were intended fully to cohere. We argue, moreover, that since the legitimacy principle is, like the moral powers, rooted in the fundamental conceptions of the person and of society that are integral to Rawls's theory of justice, this is no *ad hoc* solution.

In section 6, we summarize our argument and make some concluding remarks.

2. *The Basic Liberties: Rawls's Characterization*

Rawls lists as basic the following rights and liberties:

freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law.⁹

⁹ *Ibid.*, p. 44. Cf. Rawls 1971, p. 61; Rawls 2005, p. 291. Henceforth, we will use "basic liberties" as shorthand for "basic rights and liberties". In so doing, we emulate Rawls.

There are two Rawlsian routes towards a list of the basic liberties: a historical method, and an analytical method.¹⁰ Proceeding historically, “we survey various democratic regimes and assemble a list of rights and liberties that seem basic and are securely protected in what seem to be [...] the more successful regimes”.¹¹

Proceeding analytically, which is the method with which we are mainly concerned in this article, “we consider what liberties provide the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons”.¹² We regard this as an actual definition of the basic liberties, rather than an adequate general explanation of the analytical method. We take it that a method is to be distinguished from an instantiation of it. Given that the purpose of employing the analytical method is partly to distinguish between those social primary goods that are basic liberties and those that are not, the analytical method would seem to consist in specifying a set of conditions that are, taken together, necessary and sufficient for any social primary good to qualify as a basic liberty. Rawls seems to have confused the method itself with an instance of it (that is, with a determinate specification of these conditions). This particular conception of the analytical method might be one that Rawls would have considered alien, but we do not see how the analytical method, in general, could otherwise viably be specified.¹³

¹⁰ Rawls 2001, p. 45; cf. Rawls 2005, pp. 292–3.

¹¹ Rawls 2001, p. 45. For a summary of the historical method’s disadvantages, see Arnold 2018, §2.

¹² Rawls 2001, p 45.

¹³ Some might want to deny that Rawls intended to provide a definition, as we understand it, of the basic liberties. We agree with Hsieh 2005, p. 118 that Rawls did so intend. We do not see how the task of providing such a definition can, for the Rawlsian liberal, properly be

The analytical method is distinct from the justification of the principles of justice. This can be brought out by considering the contrast with Hart's challenge we mentioned in section 1. According to Hart, Rawls must provide grounds both for the choice, in the original position, of basic liberties and for their priority within the theory of justice. Hart thinks that Rawls must also provide criteria for specifying the basic liberties and adjudicating when they conflict in the constitutional, legislative, and judicial stages. It is clear that there is significant overlap between the Hartian challenges and the two phases of specification outlined in the previous section. Nevertheless, the two are not the same: the analytical method is not, as such, a response to the first Hartian challenge. This is simply because the Hartian challenge demands *justification* of the basic liberties and their priority in the original position: definition is not the same as justification. This has two important consequences. Firstly, the content of the justificatory material in the original position can differ from that which features in the analytical method.¹⁴ Second, the analytical method has nothing to do with the original position and its constraints on argumentation. Specifying the basic liberties is a task

regarded as dispensable. Note also that the historical and analytical methods can work very well together. This is evident in Rawls's discussion of political speech (2005, pp. 340–56).

¹⁴ According to Rawls, three forms of justification are apposite to the basic liberties. The first two concern the moral powers: basic liberties are justified because they are necessary in the pursuit of a good life and/or to develop and apply a sense of justice. The third, however, is instrumental: some liberties are basic because they are needed to protect other basic liberties. In order for one to use this third form of justification, it is necessary that one should already know what at least some of the basic liberties are. The first two forms are used in the original position; the third outside the original position. See Rawls 2005, Lecture VIII, §§ 5–6, 10–12; for further critical discussion see Nickel 1994, esp. pp. 777–9.

that is not given to the parties in the original position at all. Instead, whatever knowledge the parties have of the basic liberties comes via the menu of principles that is given to them.¹⁵

Let us, finally, clarify the role that the appeal to the two fundamental cases plays in Rawls's account of the basic liberties. While Rawls does not mention the two fundamental cases in the sentence that introduces the analytical method, he proceeds to claim that the exercise of these powers in the two fundamental cases "is essential to us as free and equal citizens".¹⁶ Later, when he refers back to his introduction of the analytical method, he does explicitly mention the two fundamental cases.¹⁷ It is clear, then, that appeal to the fundamental cases plays an important role in Rawls's account of basic liberties – but what is this role exactly? There are two candidates: either appeal to the two fundamental cases is part of the first phase of specification or it is only relevant in the second phase. We believe that the latter is the correct interpretation.¹⁸ The appeal to the two fundamental cases serves to help us to specify which particular liberties under an already selected (first-phase) basic liberty, specified at a higher level of abstraction, are of particular political importance (i.e., which are the core areas of that basic liberty).

Our discussion so far paints the following picture. Although Rawls does not pursue it in detail, the analytical method appears to be the right vehicle to provide us with a definition of the basic liberties that can cover both phases of specification. For Rawls a liberty is basic

¹⁵ See also Nickel 1994, p. 766.

¹⁶ Rawls 2001, p. 45; cf. 2005, p. 293 (which does not refer to the two fundamental cases) and 2005, p. 308 (which does). Freeman 2007, p. 55 defines the basic liberties following Rawls 2005, p. 293 and omits mention of the two fundamental cases.

¹⁷ Rawls 2001, p. 112, quoted in the next paragraph of the main text.

¹⁸ Cf. Nickel 1994, pp. 780–1. We think that Rawls 2005, pp. 332–5 clearly shows that the appeal to the two fundamental cases is only relevant in the second phase.

if and only if it is necessary to the provision of “the social conditions essential for the adequate development and the full and informed exercise of [people’s] two moral powers [...] in [at least one of] the two fundamental cases”.¹⁹ On our interpretation, this breaks down into the first and second phases of specification as follows. Necessity to the “adequate development and the full and informed exercise” of the moral powers is Rawls’s first phrase of specification. The supplementation of this with the appeal to the two fundamental cases is his second phase. Evidently, it is not only the *possession* of the two moral powers that is essential to a person’s being a free and equal citizen; it is also the *exercise* of them, in the two fundamental cases.²⁰ The basic liberties pertain to Rawls’s first principle of justice, that: “Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all [...]”.²¹ This is why the exercise of our moral powers in respect of the two fundamental cases is “essential to us as free and equal citizens”²² and no trade-offs are to be made of basic liberties for other social primary goods.²³

¹⁹ Rawls 2001, p. 112; cf.: O’Neill 2008, pp. 35–36; Wells 2018, §1. Following von Platz 2014, p. 41, note 9, the first “and” in the definition should read “and/or”. Presumably, so should the second “and”. Henceforth in our discussion, we make these amendments. Rawls 2005, p. 308 refers to “the social conditions necessary for the development and the full and informed exercise of the two moral powers (particularly in [...] ‘the two fundamental cases’)”. Thus, for Rawls, “essential” and “necessary” are presumably interchangeable terms when defining the basic liberties. We assume so in what follows.

²⁰ Rawls 2001, pp. 43, 112; Nickel 1994, p. 773.

²¹ *Ibid.*, p. 42.

²² *Ibid.*, p. 45.

²³ *Ibid.*, pp. 46–7.

Before we criticize this account, we would like to distinguish between it and an alternative reading with which some authors seem to confuse it²⁴ and that might also be thought to save Rawls's account from criticisms that we will offer in the next section. After he gives the above definition, Rawls remarks that "equal political liberties and freedom of thought enable citizens" to judge "the justice of the basic structure of society and its social policies" and that "liberty of conscience and freedom of association enable citizens" to form, to revise, and rationally to pursue "their conceptions of the good".²⁵ This is an interesting modal shift. Rawls's analytical definition appeals to the *essentiality/necessity* of the basic liberties to the full and informed exercise of the moral powers.²⁶ The explanatory remarks just quoted appeal to the weaker claim that the basic liberties *enable* the full and informed exercise of the moral powers.

Let us dwell briefly on the notion of enabling. Where A is an agent, V -ing is an activity, and O is an object or good, O may enable A to V without it being the case that A must have O if A is to V . (For example, your supplying us with a revolver may enable us to rob a bank, but we could still have robbed it even if you had supplied us with a shotgun instead.) Nevertheless, there are also cases in which that A 's having O is necessary to A 's V -ing and also an enabler of A 's V -ing. (For example, our having the use of some ingredients is

²⁴ For example, Nickel 1994, pp. 772–3 claims that what we have to show for a liberty to be basic is that it is a primary good. Relatedly, von Platz 2014, p. 28 observes (without endorsing the view) that one way of rejecting Rawls's argument that not all economic liberties are basic is "to reject the modality of necessity" in the definition of the basic liberties and to appeal, instead, to the claim that "the basic liberties are protections that are conducive to or promote the development and exercise of the two moral powers".

²⁵ Rawls 2001, p. 45.

²⁶ "Essential" is the 2001 term; "necessary" the 2005 (1993) term.

both necessary for, and an enabler of, our making a salad.) In other words, enabling is, relative to some constraint that the enabling waives, and in the absence of other constraints, making possible. (If other constraints are present, then what would otherwise be enabling is only helping to enable.)

Assuming the absence of other constraints, it indeed seems true that the basic liberties are goods that enable the full and informed exercise of the moral powers. Even if, unlike the claim that the basic liberties are necessary to the full and informed exercise of the moral powers, the enabling claim is true, the notion of enabling cannot be the right notion to feature in an extensionally correct definition of the basic liberties.²⁷ This is for a simple reason. All social primary goods enable the full and informed exercise of the moral powers.²⁸ Not all social primary goods are basic liberties, however. Therefore, if enabling were to supplant necessity in the definition of the basic liberties, then the definition obtained would be too permissive to be consistent with Rawlsian liberalism. No doubt, basic liberties, being social primary goods, have an enabling function, but that is true of all social primary goods (among them income, wealth and the social bases of self-respect) and not only of the basic liberties. While enabling is a necessary condition for a social primary good to qualify as a basic liberty (since the basic liberties are among the social primary goods), it is not a necessary and sufficient condition.

²⁷ Cf. von Platz 2014, p. 29 who makes this point in relation to “conduciveness” (though he does so, we think, without arguing for the point).

²⁸ Rawls 2005, p. 307 (our italics) characterizes social primary goods exactly along these lines: “The main idea is that primary goods are singled out by asking which things are generally necessary as social conditions and all-purpose means to *enable* persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers.”

In response to this, however, one could attempt to defend the enabling approach by pointing out that we have overlooked an important complication in Rawls's account of primary goods. After *A Theory of Justice*, Rawls argued that primary goods come in a hierarchy depending on that for which they are necessary. In particular, he made a distinction between three higher-order interests: the first two are interests in the exercise of the two moral powers while the third is an interest in the advancement of one's determinate conception of the good. The basic liberties, Rawls can be interpreted to claim, serve both of the first two sorts of interests, but other social primary goods, such as income and wealth, only serve the third.²⁹ It could then be claimed that the basic liberties, in their enabling role, help satisfy all three higher-order interests, whereas other social primary goods do this only in relation to the third higher-order interest (i.e., in the pursuit of determinate conceptions of the good).³⁰

There are some interpretative issues here that also connect to non-exegetical philosophical questions. Among these, the relationship between a social primary good's status as an enabler and the question of how to define the basic liberties is particularly salient. We think that there is a lack of substantive and detailed argument in support of the enabling approach to defining the basic liberties: such argumentation is provided neither by Rawls nor by others. It sounds rather strong to claim that certain social primary goods do not function even as enablers for the exercise of the two moral powers (and hence that they do not

²⁹ Rawls 2005, pp. 74–5, 106; 2001, pp. 112–5.

³⁰ Davenport's ms, section II interprets Rawls in this way but Pogge 2007, pp. 86–8 disagrees: he holds that the basic liberties are not related to the pursuit of the third fundamental interest. See also footnote 40 on this.

promote persons' corresponding highest-order interests in this particular way).³¹ It is telling that Rawls introduces the distinction between highest-order and higher-order interests while presupposing the necessity reading: nowhere, as far as we can tell, does he make the move from necessity to enabling in this context. We think that making such a move would be mistaken. At least, the burden of proof is on the side of anyone who wishes to make it.³²

3. Defining the Basic Liberties: From Modality to Probability

Let us return, then, to the necessity reading of Rawls's definition of the basic liberties. We have no immediate quarrel with this as an implementation of the first phase of specification, fit to provide a means of identifying the basic liberties at a high level of abstraction.³³ Nevertheless, we think that it generates problems once it is modified, in the second phase of specification, to include the appeal to the two fundamental cases. Here is why.

³¹ Take income and wealth as our test cases. It is hard to see why these primary goods would not enable, in our weak sense, the development and exercise of one's sense of justice and conception of the good understood as overall capacities. Surely, through funding education and, more generally, facilitating social upbringing (socialization), income and wealth can have such effects.

³² This also means that the enabling function cannot reproduce the kind of hierarchy among elements of the list of social primary goods that Rawls needs to account for the priority of the liberty principle over the other principles of justice.

³³ This does not mean that the idea is without its critics even among those who do not want to reject the general Rawlsian picture. For example, Nickel 1994, pp. 783–6 argues for the addition of a third moral power ("the capacity to produce social benefits through one's actions", p. 784).

It is pertinent to ask whether the presence of the basic liberties is a necessary condition for the full and informed exercise of the moral powers in the two fundamental cases. A positive answer to that question is not, if we are to be charitable to Rawls, to be construed as suggesting that, for each individual citizen in a given society, the full and informed exercise of the moral powers in the two fundamental cases is possible only if all citizens possess the basic liberties.³⁴ Highly-developed moral and political sensibilities, including the capacity for a sense of justice and the capacity to have a conception of the good, may be present and exercised, even to a relatively high degree, in populations living under regimes in which the basic liberties recognized by Rawls are not afforded equally to all citizens: e.g., in the United Kingdom before universal suffrage, or in contemporary Cuba. Living under such a regime lessens the likelihood that people will be able, in a full and informed way, to exercise their moral powers in the two fundamental cases but it would not necessarily make it impossible for them to do so. Indeed, the possibility of progress from such a regime to a society that more closely approximates to being, in Rawls's sense, a well-ordered society, rests upon the ability of a body of citizens having and exercising these powers. While governmental refusal to afford equal basic liberties may place limits upon these two moral powers and their exercise in the two fundamental cases, it need not make these powers and their exercise in the two fundamental cases impossible for each and every citizen.³⁵

Recall that for Rawls a liberty is basic if and only if it is necessary to the provision of “the social conditions essential for the adequate development” and/or “the full” and/or “informed exercise of [people’s] two moral powers [...] in [at least one of] the two

³⁴ After Melenovsky & Bernstein 2015, p. 50.

³⁵ Cf. Arnold 2018, §3.

fundamental cases”.³⁶ Our interpretation of this remark is that a liberty is basic if and only if it is necessary to the provision of the social conditions that must be in place in order for it to be the case that *every citizen* naturally capable of doing so is not hindered, by arrangements relating to the basic structure of society and its laws, from being able to exercise the moral powers in a full and informed way in the two fundamental cases. Nevertheless, the appeal to necessity remains too strong. While the connection between the basic liberties and Rawls’s conception of citizenship in a well-ordered society is indeed a necessary one, some particular basic liberties are, as Samuel Arnold has argued, only contingently connected with the full and informed exercise of the moral powers in the two fundamental cases. Arnold illustrates this point using various counter-examples to the necessity claim that are intended to establish that universal full and informed exercise of the moral powers in the two fundamental cases can be compatible with laws that deprive citizens of core liberal freedoms.³⁷ Here, we summarize just one of these counter-examples. For Rawls, “the liberty and integrity of the person” is “violated [...] by denial of freedom of movement”;³⁸ thus, freedom of movement is a basic liberty. Arnold’s discussion suggests, however, that if a law were enacted that restricted people’s freedom of movement to within their metropolitan areas, this would not make it impossible that every citizen should possess, and exercise in a full and informed way, the moral powers in the two fundamental cases.³⁹ While we think it is very *unlikely* that, under such conditions, every citizen could be so fortunate as to be able to do this, we agree with Arnold that it does not seem to be *impossible*.

³⁶ Rawls 2001, p. 112.

³⁷ Arnold 2018, §4.2. (Arnold appears to think that he is still working within the first phase, which we think is a mistake.)

³⁸ Rawls 2005, p. 335.

³⁹ Cf. Pogge 2007, p. 87.

If, in the second phase, the basic liberties were to be specified as those liberties that are necessary for the full and informed exercise of the moral powers in the two fundamental cases then we think that this would fail to secure as basic some particular liberties that are genuinely basic (and at least some of which feature in Rawls's list of the basic liberties). While one response to this might be to revise the list of liberties to fit the definition, we think that this would concede too much. Some of the particular liberties that would thereby be omitted from being considered basic (such as the specific kind of freedom of movement that is restricted in Arnold's imaginary example) seem too important, on liberal grounds, to be sacrificed like that. Moreover, revision of the list in light of the definition might result in an outcome that would compromise the credentials of the first principle of justice as part of a distinctively liberal theory of justice: for the list could be very sparse indeed, if populated at all. Therefore, we think it better to find another definition that secures as basic the liberties in the list, rather than to amend the list to fit what in our view would be an unnecessarily, and undesirably, restrictive definition.

A possible move towards a new definition might be to give up the appeal to the two fundamental cases (second phase) but to retain the necessity reading (first phase). An obvious problem with this suggestion is that it is not clear as to what might replace the appeal to the two fundamental cases.⁴⁰ Also, even if we find an answer to this question, another problem

⁴⁰ Nickel 1994, pp. 782–3 briefly considers such an alternative but in a rudimentary form that makes it hard to evaluate. His proposal concerns only a possible replacement of the second fundamental case (and the second moral power) with what he calls “all-permeating choices”. It is unclear whether this proposal would be able to accommodate the soon-to-be-presented case of freedom of political satire. Pogge 2007, pp. 87–8 considers invoking the third higher-order interest as a means of determining the significance of basic liberties but argues, against this suggestion, that Rawls does not and should not hold that this fundamental interest is

presents itself. Let us not forget that we are in the second phase here. We are not only looking for a way of further specifying the basic liberties identified in the first phase; we are also trying to work out a method of adjudication. This requires an account of the significance of liberties. Rawls is aware of this need and proposes that:

a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed exercise of the moral powers in one (or both) of the two fundamental cases.⁴¹

For simplicity, let us set aside the reference to the two fundamental cases. Adding them to the present discussion would make no philosophical difference to our points. The idea would then be that the weightings of particular basic liberties, within “a fully adequate scheme” of basic liberties, once a list of basic liberties (specified at a high level of abstraction) is already in place, can be guided by measuring how necessary or essential they are to the full and informed exercise of the two moral powers. This idea, however, is bizarre. Rawls, when providing his modal definition of the basic liberties, does not appeal to degrees of essentiality served by the basic liberties. The main reason for this is that since the third fundamental interest concerns citizens’ concrete conceptions of the good, our assessment of significance would be held hostage to particularities and would differ from citizen to citizen. This would make it all but impossible to provide clear guidelines for adjudication.

⁴¹ Rawls 2001, p. 113; cf. Rawls 2005, p. 335. O’Neill 2008, pp. 33–5 seems to interpret this remark as having been intended to provide a criterion for deciding upon whether a given liberty is basic in the first phase. It is clear from the quoted text, however, as well as from the surrounding context, that this is not the case and we are in the second phase here. See also Rawls 2005, pp. 290, 331–40, 359.

or necessity. In the remark about degrees of significance, he does so. A liberty, however, cannot both be essential (or necessary) for the adequate development and/or the full and/or informed exercise of the moral powers and not so essential (or necessary) to this. Degrees of significance cannot, consistently with Rawls's attempt to define the basic liberties, be spelled out in terms of degrees of essentiality (or necessity). Distinguishing between the two phases of specification does not help resolve this problem.

Moreover, there is an obvious analytical shortcoming with Rawls's remark about degrees of significance. While significance admits of degrees, this is not true of necessity (or essentiality). There might well be various notions of necessity that differ in strength.⁴² Nevertheless, when we are working with a single notion of necessity there are no degrees within it. While the significance of a liberty is a scalar property of the liberty, its necessity (or otherwise) as an institutional means of protecting the full and informed exercise of the moral powers is a binary property of the liberty. That is to say, either a liberty is so necessary or it is not. If it is not, then it is only contingently connected with the full and informed exercise of the moral powers.

Thus, supposing that it is a given that some particular liberties are more significant than others, but that the division is not simply between those that are significant and those that are not, the proper way to cash this out cannot be in terms of degrees of necessity of the liberties in question to the full and informed exercise of the moral powers. Rather, if differences in degrees of significance of particular liberties are to be correlated with other gradated differences, then the appropriate appeal should be to the extent to which it is *probable* that, in the absence of a given particular liberty's taking on the functional role of a basic liberty, the full or informed exercise of (at least one of) the moral powers will be significantly impeded, stunted or atrophy.

⁴² See, e.g., Hale 1997.

Now this observation relates, as we have already noted, not to how an appropriate list of basic liberties is to be drawn-up in the first phase but, rather, to the question of how, in the second phase, particular basic liberties are to be ranked in a fully adequate scheme of liberties. Given that we have substituted necessity with probability and that we have argued against the only modal alternative to necessity, namely enabling, the change that we are proposing to Rawls's account is somewhat radical. We are in effect putting forward a new definition of the basic liberties that covers both phases of specification. In defining what it is for a liberty to be basic, instead of appealing, as Rawls does, to a purported modal relationship between the basic liberties and the full and informed exercise of the moral powers in the two fundamental cases, we introduce the idea of mitigating against risk, above a certain threshold, to the full and informed exercise of the two moral powers. Accordingly, let us consider the suggestion that *a liberty is basic if and only if the likelihood is above a certain threshold that, in its absence, and partly due to social conditions, the possession and/or the full and informed exercise of one or both of the moral powers will be stunted or atrophy.*

Let us spell out how this suggestion contrasts, in ways that we think amount to improvements, with Rawls's own account. On Rawls's account, the first phase of specification appeals to the supposed necessity of the basic liberties to the full and informed exercise of the moral powers. In the second phase, and so as to identify the core areas of the basic liberties, he introduces the appeal to the two fundamental cases. Finally, his account of how adjudication between the resultant particular liberties works, within an overall scheme of liberties, uses the notion of degrees of necessity (essentiality). Our proposal differs in the following respects. We replace the modal notion in Rawls's account, necessity, with the non-modal notion of probability. Thus, a basic liberty is a liberty in the absence of which the risk

to the full and informed exercise of the moral powers rises above a certain threshold.⁴³ This collapses the distinction between the initial identification (in Rawls's first phrase) of the basic liberties and their further specification (in his second phase) and, on our account, both of these tasks fall into the first phase of specification. The remaining task (in the second phase, on both Rawls's account and according to our new suggestion) concerns weighting of, and the adjudication between, the particular basic liberties within an overall scheme of liberties. Here our idea is simple. Adjudication proceeds using probability assessment above the specified threshold of risk. That is, we compare (ordinally or cardinally) the different risk levels to each other so as to measure the relative significance of different particular basic liberties.⁴⁴ If the absence of a certain liberty would pose a higher risk to the full and informed exercise of the moral powers than another, then the first of these liberties is more significant than the second.

We take it that our appeal to probability, in place of necessity, is no *ad hoc* move to save a Rawlsian (or at least, Rawls-inspired) account of the basic liberties. If, in an account of the basic liberties, one wishes to retain Rawls's appeal to the moral powers then this appears to be the only way to proceed: at least, it seems to be the only real and plausible proposal on

⁴³ See Pogge 2007, p. 84, for an appeal to the notion of a threshold in another, closely related, context.

⁴⁴ The appeal to the two fundamental cases could easily be reintroduced here. Instead of further probability assessment, we could say this: a particular liberty is more or less significant depending on how likely it is that, in its absence, the full and informed exercise of one or both of the moral powers, *in one or both fundamental cases*, will be stunted or atrophy. However, in light of the problems already mentioned and of other problems discussed by Nickel 1994, pp. 781–2, we proceed without including mention of the fundamental cases.

the table. Arnold's imaginary example provides a good illustration. His objection to Rawls's account withers away when necessity is supplanted, along the lines we suggest, with the appeal to a probability threshold. As we said in our discussion of his example, we think that it is very unlikely that, under the conditions described by Arnold, every citizen could be so fortunate as to possess, and exercise in a full and informed way, the two moral powers. On our suggested approach to specifying the basic liberties, freedom of movement outside one's own metropolitan area would probably qualify, in the second phase, as a significant basic liberty apt for constitutional protection.

Of course, this also shows that a lot depends on how and where the threshold is set. We admit that we cannot go into the technical details of this question. Instead, allow us to explain why it is neither crucial nor desirable that this question should be settled here and now. Note that both stages of the specification process take place outside the original position. (Recall here the contrast with the Hartian challenge we discussed in section 2.) They happen in the constitutional, legislative, and policy stages and it is particularly pertinent to note that this is true of the second phase. Now, according to some in the literature, these stages see institutions, such as those constitutive of the basic structure of society, as determining moral content by doing, among other things, just the kind of specification job we need to make the above probabilistic approach work.⁴⁵ Rawls's own discussion of the "four-stage sequence" further underlines this idea. It shows that specification and adjudication take place in an institutional setting (he uses mainly US Supreme Court examples) and that the constitutional, legislative and executive stages interact: they feed material into each other with the theorist going back and forth between them (as would be expected in a process of

⁴⁵ See Miklósi 2008 and Miklós 2011. See also Scheffler 2006 for interpretative work on the Rawlsian idea of division of labour.

reflective equilibrium).⁴⁶ To apply this framework to our case, what would happen, we surmise, is not so much that participants in these stages would literally discuss a threshold (although that too can happen, e.g., in the work of the courts) but that they would come up with guidelines designed to reflect the abstract account given by the theorists (us), hand over their “results” to the theorists (who could then apply them in the theory), and then repeat this process, going back and forth between the theorists and the other participants.⁴⁷ The emerging picture, then, is that of a process for setting the threshold that harmonizes with Rawls’s ideas about the role of institutions with respect to justice.

4. The Probabilistic Approach and the Achievement of Extensional Adequacy

When discussing Rawls’s modal definition of the basic liberties, in terms of their supposed necessity to the full and adequate possession and exercise of the moral powers in the two fundamental cases, we agreed with Arnold that some of the core areas of basic liberties in Rawls’s list of the basic liberties are not necessary in this way. Thus, the definition, if it was designed (as we take it to have been designed) to capture the list, is extensionally inadequate; it fails in the second phase of specification. Unfortunately, the probabilistic approach we have discussed as an alternative to modal definitions is vulnerable to counter-examples that show it to be extensionally inadequate as well and in the same way: it also fails in the second phase of specification. One such counter-example is the freedom to produce or to consume political satire, which we will henceforth call “freedom of political satire”.

⁴⁶ Rawls 1971, §31; 2005, pp. 334–56.

⁴⁷ This is what Rawls does when he “translates” his own proposal into an account of the thinking of the Supreme Court about free political speech. Rawls 2005, pp. 340–56.

The case of freedom of political satire results in a dilemma for the probabilistic approach. Suppose, for the sake of argument, that any satirical content can be conveyed non-satirically. (This would be the case, for example, if the content of political satire can exhaustively be expressed, as, for example, some philosophers hold that the content of a metaphorical sentence can exhaustively be expressed, in literal language.⁴⁸) It follows that freedom of political satire is not, on the probabilistic approach, a core area of the related basic liberty (namely freedom of speech) because the equivalence of expressions of satire (whatsoever their format, so including mere images) to literal language means that a ban on political satire would not, of itself, make it likely that the full and informed exercise of the moral powers (in the two fundamental cases) would be stunted or atrophy. Suppose, on the other hand, that political satire can include content that is not literally expressible. The case of a law banning political satire can then be contrasted with Rawls's discussion of the repression of (we presume, non-satirical) "subversive advocacy". He writes:

As Kalven observes, revolutionaries don't simply shout: 'Revolt! Revolt!' They give reasons. To suppress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed public use of reason in judging the justice of the basic structure and its social policies. And thus the basic liberty of freedom of thought is violated.⁴⁹

We take it that a piece of political satire, since, for example, it can consist of an image alone, can include rhetorical elements that outstrip reasons. Since reasons can be stated in literal language, while (on this horn of the dilemma) not all satirical content can so be stated, a law

⁴⁸ For an introductory discussion of metaphor, see Lycan 2000, Chapter 14.

⁴⁹ Rawls 2005, p. 346.

against political satire cannot be criticized (on this horn of the dilemma) for being a restriction on the free and informed public use of reason; for (on this horn of the dilemma) it is not. Given that the probabilistic approach to defining the basic liberties preserves, from Rawls's modal definition, the end relative to which the basic liberties are to be defined, namely, the full and informed exercise of the moral powers, the probabilistic approach is unable to secure freedom of political satire as a basic liberty. The case is telling, for it shows that Rawls's focus on the rational and the reasonable spawns an account of justice in which its letter, in the form of Rawls's definition of the basic liberties, does not live up to its spirit as a liberal theory protective of the full range of freedoms cherished by high liberals and included, whether explicitly or implicitly, in Rawls's list of the basic liberties.⁵⁰ The outcome of this dilemma is that whether or not the content of political satire can be exhaustively stated using literal language, the end relative to which Rawls defines the basic liberties is too narrow to admit freedom of political satire as a basic liberty.

It is important to be clear on exactly what is going on here. We are in the second phase of specification. We take freedom of political satire to be a core area of freedom of (political) speech (and, more widely, of expression), which in turn is a core area of the group of basic liberties that Rawls calls "political liberties". Rawls seems to agree.⁵¹ We think that the status of the freedom of political satire as a core basic liberty is clear. In many repressive regimes, and even in particularly sensitive cases in non-repressive regimes (e.g., the *Jyllands-Posten* Mohammed cartoons), the most effective method of social critique is sometimes through highly abstract satirical pieces: indeed, sometimes this is the only legally or

⁵⁰ For discussion, with further references, of the differences between high liberalism and other forms of liberalism, see Freeman 2011 and Arnold 2018.

⁵¹ Rawls 2001, p. 113; 2005, pp. 341–4; Nickel 1994, pp. 771–2.

politically available method.⁵² We take it, then, that we are justified in regarding freedom of political satire as coming under the explicitly listed political liberties, which we arrive at during the constitutional or later stages in the second phase of specification.

This second phrase is, in the case of free political speech, better understood as concerning how legitimate *limits* on free political speech, rather than *entitlements* to free political speech, are to be discerned.⁵³ Now suppose that a state enacts a law forbidding political satire. This law is a content restriction on freedom of expression that neither promotes nor is intended to promote the overall balance of basic liberties and it restricts the right of citizens to criticize the basic structure and its social policies.⁵⁴ The state that enacts it is therefore one in which citizens are not properly afforded freedom of political expression as a matter of basic liberty. Of itself, and for the reasons given previously, the law against political satire does not rule out the possibility that every citizen in the state can fully and adequately possess and exercise the moral powers. If there be citizens among whose

⁵² For more on satire and its importance, in a particular historical setting, see Condren 2002. On the growing importance of political satire, see Holland & Levy 2018.

⁵³ We consider an emphasis on the discernment of limits to free political speech to be prevalent in Rawls 2005, pp. 340–56.

⁵⁴ Rawls distinguishes between the *regulation* of speech, which does not affect the content of what may be said (e.g., the convention that only one person speaks at a time in a formal debate), and the *restriction* of speech, which does (e.g., the banning of job advertisements that are racist or sexist). See *ibid.*, pp. 295–6, 348, 364–5 and Rawls 2001, p. 111. For further details on freedom of speech and expression, see Rawls 1971, p. 222–5; Rawls 2005, pp. 340–56; Rawls 2001, pp. 111–14, 149–50; Freeman 2007, pp. 46, 51–3, 57, 66–72, 79, 210–11, 412. Rawls regards freedom of speech as a requirement of the first principle of justice. See, e.g., Rawls 1971, p. 225.

conceptions of the good producing or consuming political satire is included, this is a purely contingent matter. In any case, appealing to the case of such citizens would be an example of what Melenovsky and Bernstein call an “argument from particular interests”, to which they rightly object that the “fact that a way of life is important to an individual is not sufficient to show that we should [on Rawlsian grounds] protect the liberties that are useful - or even necessary— to pursuing that way of life”.⁵⁵ Thus, like the definition in terms of necessity, a probabilistic definition along the lines we have outlined would not adequately protect citizens from somewhat arbitrary, and certainly illiberal, restrictions upon freedoms that perform the functional role of being basic liberties in Rawls’s theory of justice and which are either explicitly included among his list of such freedoms or apt to be regarded, we think, as core cases of freedoms that are in the list.

5. The Appeal to the Principle of Legitimacy

We are not ready to conclude that the search for an analytical definition of the basic liberties is a lost cause, to be abandoned in favour of the historical method or of just citing a list of freedoms that are to play the functional role of basic liberties. Nevertheless, Rawls’s analytical definition, even when diluted along the lines suggested by the probabilistic approach discussed in the previous section, appears to be inconsistent with a combination that is a desideratum of Rawlsian liberalism. The combination is of the inclusion of politically significant liberties (and thus, freedom of expression) in the list of the basic liberties with the functional role that the basic liberties are intended to play as inalienable freedoms.⁵⁶ The case of freedom of political satire shows, since it is a particular case of freedom of expression, that

⁵⁵ Melenovsky & Bernstein 2015, p. 53. This also connects with why the basic liberties are not to be tied to the pursuit of the third fundamental interest (see footnote 40).

⁵⁶ On inalienability, see Freeman 2007, p. 51.

not everything in the list meets the definition and that the definition does not have the result that every listed freedom is inalienable. Therefore, if freedom of expression is indeed properly to be considered a basic liberty, the end relative to which Rawls defines the basic liberties is too narrow.

Given the extensional inadequacy of every approach that we have so far discussed, how are we to make progress in specifying the basic liberties via an analytical definition? We have already acknowledged, in our discussion of Arnold's imaginary example, that a revisionary approach might be adopted: it is a theoretical possibility that some of the freedoms included in Rawls's list of the basic liberties were included incorrectly. This is especially so with particular liberties that are not explicitly included, such as freedom of political satire, that (if genuinely basic) would emerge as basic only in the second phase of specification. Nonetheless, for the same reasons we mentioned when discussing Arnold's example, we prefer, instead, to attempt to retain the freedoms on the list (and their particular instances). We take it to be a liberal desideratum that the concept of *basic liberty* should encompass those liberties that feature in Rawls's lists (and their particular instances). Also, all and only those freedoms should be included that are fit to perform the functional role of basic liberties, in that they are inalienable aspects of the status of each citizen as a free and equal person.

The situation can be resolved, we believe, by employing in the very definition of the basic liberties an underlying principle of Rawls's political theory of justice, namely "the liberal principle of legitimacy" which states that "political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human

reason”.⁵⁷ The freedom to produce or consume political satire is not one without which universal full and informed exercise of the moral powers is impossible. A law banning political satire, however, would be one that breached the principle of legitimacy. It is not because the suppression of political satire would pose a significant risk to the reasonableness or the rationality of citizens that freedom of political satire is properly to be regarded as a basic liberty. Rather, it is because such suppression is inconsistent with the principle of legitimacy given that political satire contributes, among other things, and through its rhetorical content, towards citizens’ evaluations of the justice of the basic structure and its social policies.⁵⁸ To explain further, there are two broad scenarios in which the principle of legitimacy is violated. In the first, citizens can assess, but cannot endorse, the relevant constitutional essentials. In the second, citizens are unable to endorse, because they cannot even assess, those essentials. That is, the process of assessment that makes endorsement possible is not available to the citizens. It is the latter scenario that we have in mind here. Freedom of political satire has the essential function of enabling such assessment. Notice, however, that the second sort of scenario can also feed into the first. When reasonable people are considering whether to endorse the constitutional essentials, it should be an appealing

⁵⁷ Rawls 2001, p. 41; cf. 2005, p. 137. For a brief discussion, see Wenar 2017, §3.1. There is a lot more to say about how exactly Rawls’s account of legitimacy is to be understood. See further Song 2012; Rossi 2014; Patton 2015; Langvatn 2016.

⁵⁸ Think, for example, of how political satire was employed, by brave comedians, even in the darkest days of communist reign in Eastern Europe. One interpretation of what was going on is that these comedians were attempting to point to the *legitimacy deficits* of these repressive regimes without explicitly saying so or, in fact, without using words at all (in order to avoid censorship and persecution, among other things). See Sergő 2018 (in Hungarian) on Hungarian political satire in films.

thought that restricting freedom of political satire could stifle the ability of citizens to exercise judgement about the justice of the constitutional essentials themselves.⁵⁹

We conclude that there is a mismatch between the principle of legitimacy and the analytical approaches to defining the basic liberties so far discussed: the latter will not secure all the political protections entailed by the former. We propose, therefore, that the correct approach to providing an analytical definition of the basic liberties will be along the following, disjunctive, lines. An entitlement is a basic right or liberty if and only if at least one of the following conditions holds:

- (i) the likelihood is above a certain threshold that, in its absence, and partly due to social conditions, the possession and/or the full and informed exercise of one or both of the moral powers will be stunted or atrophy;
- (ii) any legal restriction upon it that did not promote the weighting of liberties in a scheme of liberty would breach the principle of legitimacy.

The adoption of this approach, rather than the abandonment of the project of providing an analytical definition or wielding the knife on Rawls's lists of basic liberties, is vindicated by the fact that the principle of legitimacy underlies Rawls's theory of justice. Rawls's intentions in listing the basic liberties presumably included due observance of that principle.

⁵⁹ Is there a threat of circularity looming here (insofar as the constitutional essentials also include the basic liberties), of a kind similar to the sort described earlier (footnote 14)? We think not. Although for Rawls the constitutional essentials include the basic rights and liberties, they also include many other things such as the general structure of government and the political process as well as a minimum level of well-being (Rawls 2005, p. 227). In addition, not all basic liberties can play the perform we describe in the main text.

Is invoking legitimacy here not merely an *ad hoc* move to save the theory? We don't think so: the move is well-motivated on independent grounds. Rawls's writings clearly show that the principle of legitimacy is rooted in the fundamental ideas of the person (citizen) and of society, the exact two foundational reference points for the moral powers as well.⁶⁰ That is, our definition, although disjunctive, is united in that the concepts in each disjunct that are most salient to the theory of justice have the very same foundations. There is also the perhaps more contentious matter that Rawls connects legitimacy and justice in the following way: for the state (e.g.) to be legitimate, it cannot be too unjust. A sufficient level of justice is required.⁶¹ Samuel Freeman interprets this as claiming that nothing can be legitimate if it violates the basic liberties.⁶² Thus, again, there is no *ad hoc* move involved in our proposal: if Freeman is right, we are just incorporating notions into our disjunction that already belonged together.

A second objection to our proposal is that condition (ii) renders condition (i) redundant because every liberty that meets (ii) also meets (i) but, as the case of freedom of political satire shows, not vice versa.⁶³ We do not consider condition (i) redundant, for the following

⁶⁰ See Rawls 2005, pp. xliv, 19, 52, 137, 217; Freeman 2007, pp. 374–5. Tomasi 2012a, pp. 66–7 makes a similar move to ours (although he seems to apply the principle, with insufficient justification, in the first phase of specification and, in so doing, to overburden it.)

⁶¹ See Rawls 2005, pp. 393, 427–8.

⁶² See Freeman 2007, pp. 376–7.

⁶³ Although we speak exclusively of freedom of political satire here, we think that the considerations we offer in the text are also applicable to other basic liberties since they too can fulfil the function of enabling assessment of the justice of relevant constitutional essentials. Thus, we note that (i) is plausibly required to secure as basic such crucial liberal

reason. The right to vote in general elections is an entitlement that citizens can exercise. Legislation that stipulates fixed-term parliaments puts a restriction on the exercise of that right, and not to promote the overall weighting of liberties in a scheme of liberty. However, such legislation does not breach the principle of legitimacy. Thus, while condition (i) and not condition (ii) secures the right of universal suffrage, (ii) and not (i) secures freedom of political satire.

A third objection to our proposal is that, in dampening down the bump in the carpet concerning freedom of political expression, more specifically, concerning freedom of political satire, we have caused another bump to appear. Rawls thinks that the right to advertise, while a form of freedom of speech (and, we would add, expression), is not a basic liberty because, in the case of “market-strategic advertising”, the right to advertise “can be restricted by contract, and therefore [...] is not inalienable”.⁶⁴ Does our lowering of the bar on what it is to be a basic liberty not, in admitting freedom of political satire, also have the undesirable result, for Rawls, that the right to engage in market-strategic advertising also turns out to be a basic liberty? We answer that it does not. Restrictions on market-strategic advertising, even if these are legally imposed (as opposed to just being contractually agreed), can be consistent with the principle of legitimacy. This is because reasonable and rational people may agree with Rawls that market-strategic advertising can be socially wasteful. Also, market-strategic advertising, unlike freedom of political satire, is *unrelated* to the exercise of the moral powers. It is necessary to the satisfaction of condition (ii) that the liberty in question should be related to the full and informed exercise of the moral powers. The reason why freedom of political satire is basic is because, as we have already said, while it does not

rights as the rights to a fair trial and to equality before the law. These rights do not seem to be secured as basic by (ii).

⁶⁴ Rawls 2005, pp. 364–5.

meet condition (i), laws imposing content restrictions on political satire breach the inalienable right of citizens to engage in judgements about the justice of the basic structure and its social policies. (This is not, of course, because political satire is necessary for such judgements, or even because these judgements are unlikely to be made in a full and informed way without freedom of political satire.)

6. A summary of our proposal and its significance

We began by noting that the question as to which liberties are basic is significantly under-theorized in the literature. This is despite its clear significance for liberal political theories. We hope now to have cleared some of the ground for discussion by providing a workable approach to the definition of the basic liberties.

We have emphasized that any theory of the basic liberties must distinguish between two phases of specification: in the first, a highly abstract list of liberties is drawn up under general headings; in the second, this list is further specified into core areas of these liberties and adjudication (involving judgements about the significance of particular liberties within an overall scheme of liberties) is provided. It seems to us that much of the existing literature tends to entangle these two phases, insufficiently distinguishing between them. In a sense it is not hard to understand why: strictly speaking, both the first and the second phase are needed to give us an account of the basic liberties. Although the first phase gives us a defensible list, this list is at too high a level of abstraction; it is really only the particular liberties identified in the second phase that matter in “real life”.

In the framework provided by this distinction, we gave an account of Rawls’s analytical definition of the basic liberties as centring on a necessary connection between the basic liberties and the exercise of the two moral powers (first phase) and the appeal to the two fundamental cases (second phase). We then argued that Rawls’s appeal, in his definition of

the basic liberties, to a modal relationship should be replaced instead by the appeal to a probability threshold. Using the case of freedom of political satire, we argued that even a probabilistic definition would be extensionally inadequate. We remedied this by disjoining probabilistic considerations with a clause that makes direct appeal to the liberal principle of legitimacy. It is this that constitutes our final proposal for the purposes of this paper.

While the modification to Rawls's approach to defining the basic liberties that we propose is motivated by purely analytical considerations, the weakening of the concept of basic liberty that it involves renders Rawls's theory of justice more inclusive, in terms of the rights and liberties that fall under the concept, than does the letter of Rawls's own definition. The case of the freedom of political satire, to which our argument has appealed, is but one among many. For example, even if, as Martin O'Neill suggests, an element of workplace democracy is not *necessary* to the full and informed exercise of the moral powers in the two fundamental cases⁶⁵ this does not (on our approach), settle the question of whether a right to some such element of democracy is basic. Rather, a pertinent question is whether, without such a right, the risk falls above a certain threshold that some individuals will, due to the lack of the right, lack the full and informed exercise of one or both of the moral powers.⁶⁶ The same applies to the case of the *laissez-faire* economic freedoms. The question to ask about each of these freedoms, provided that the lack thereof would not necessarily breach the principle of legitimacy,⁶⁷ is whether its lack would raise above the threshold risk to the full and informed exercise of the moral powers.

⁶⁵ O'Neill 2008, pp. 41–42.

⁶⁶ Ibid., p. 36 notes this risk but does not question the adequacy of Rawls's definition of the basic liberties. On the basic liberties and workplace democracy, see further REDACTED.

⁶⁷ This is exactly what Tomasi 2012a, 2012b argues: he thinks that a much wider range of economic liberties will come in through the legitimacy principle. For critical discussion and

Take, for example, freedom of contract. In countries with laws relating to maximum working hours, such as Norway and the countries belonging to the European Union, this restriction on freedom of contract is not (unlike, for example, restrictions on free speech that disallow the incitement to violence) for the sake of the promotion of some other basic liberty. It is almost as implausible to suggest that such a restriction puts in jeopardy the full and informed exercise of the moral powers as to suggest that such freedom is necessary for the full and informed exercise of the moral powers.⁶⁸ Each freedom, including *laissez-faire* economic freedoms, must be approached on an individual basis regarding the question of whether it is, by the lights of a probabilistic but disjunctive definition, a basic liberty.

Acknowledgments. REDACTED.

further references on economic liberties, see Arnold 2018, Melenovsky & Bernstein 2015, Patten 2014, von Platz 2014 and Wells 2018.

⁶⁸ For related discussion, see Melenovsky & Bernstein 2015, pp. 52–4.

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