

ROBERT S. TAYLOR

Rawls's Defense of the Priority of Liberty: A Kantian Reconstruction

I. INTRODUCTION

The First Priority Rule (the Priority of Liberty) of John Rawls's Justice as Fairness reads: "the principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty."¹ The basic liberties are those commonly protected by constitutional regimes, including "freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person . . . ; the right to hold personal property and freedom from arbitrary arrest and seizure. . . ." (p. 53). The Priority of Liberty treats these liberties as paramount and prohibits their sacrifice for the sake of efficiency, utilitarian and perfectionist ideals, or even other principles within Justice as Fairness (e.g., Fair Equality of Opportunity and the Difference Principle).

The Priority of Liberty has always played a central role in Rawls's political theory. Rawls himself notes that "the force of justice as fairness would appear to arise from two things: the requirement that all inequalities be justified to the least advantaged, and the priority of liberty. This pair of constraints distinguishes it from intuitionism and teleological theories" (p. 220). As we shall see, its importance in his work has if anything increased over time. Part of the reason for this greater prominence is Rawls's growing ambivalence about the other distinctive elements of

I wish to thank John Tomasi, David Estlund, Loren King, Carla Yumatle, Robert Adcock, Simon Stow, Sharon Stanley, James Harney, Yvonne Chiu, and the other participants at both the Brown University Political Philosophy Workshop and the UC-Berkeley Political Theory Lunch for their helpful comments and suggestions. I also wish to thank the Editors of *Philosophy & Public Affairs* for their invaluable assistance.

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1999), p. 266, henceforth TJ. All references to *Theory* are to the Revised Edition unless otherwise indicated.

his political theory, especially the lexical Priority of Fair Equality of Opportunity and the Difference Principle.² In the absence of the former element, the Priority of Liberty would be the only thing preventing the special conception of justice from collapsing into the general conception, where all social primary goods (and presumably the interests they support) are lumped together. Rawls is deeply opposed, however, to the notion that “all human interests are commensurable, and that between any two there always exists some rate of exchange in terms of which it is rational to balance the protection of one against the protection of the other.”³ Anything short of lexical priority for the basic liberties would countenance such trade-offs under certain circumstances.

This central component of Justice as Fairness has been criticized in a long string of articles, including ones by Brian Barry, Kenneth Arrow, H.L.A. Hart, Russell Keat and David Miller, Henry Shue, Joseph DeMarco and Samuel Richmond, Ricardo Blaug, and Norman Daniels.⁴ All of these authors have found Rawls's defense of the Priority of Liberty wanting in certain respects, and many of them have been sharply critical of the very idea of lexical priority for the basic liberties: Brian Barry considers it “outlandishly extreme,” while H.L.A. Hart deems it “dogmatic.”⁵ In Section II of this paper, I will examine Rawls's three arguments for the Priority of Liberty in *Theory of Justice* and show that two of them do indeed fail (either in whole or in part) because of a common error: Rawls's belief that once he has shown the instrumental value of the basic liberties for

2. On the Priority of Fair Equality of Opportunity, see John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), p. 163, n. 44; on the Difference Principle, see Rawls, *Theory of Justice*, p. xiv.

3. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 312, henceforth PL in references.

4. Brian Barry, “John Rawls and the Priority of Liberty,” *Philosophy & Public Affairs* 2 (1973): 274–90; Kenneth Arrow, “Some Ordinalist-Utilitarian Notes on Rawls' Theory of Justice,” *Journal of Philosophy* 70 (1973): 245–63; H.L.A. Hart, “Rawls on Liberty and Its Priority,” in *Reading Rawls: Critical Studies on Rawls' A Theory of Justice*, ed. Norman Daniels (Stanford: Stanford University Press, 1989), pp. 230–52; Russell Keat and David Miller, “Understanding Justice,” *Political Theory* 2 (1974): 3–31; Henry Shue, “Liberty and Self-Respect,” *Ethics* 85 (1975): 195–203; Joseph DeMarco and Samuel Richardson, “A Note on the Priority of Liberty,” *Ethics* 87 (1977): 272–75; Ricardo Blaug, “John Rawls and the Protection of Liberty,” *Social Theory and Practice* 12 (1986): 241–58; and Norman Daniels, “Equal Liberty and Unequal Worth of Liberty,” in Daniels, *Reading Rawls*, pp. 253–81.

5. Barry, p. 276; Hart, p. 252; also see Richard Arneson, “Rawls Versus Utilitarianism in Light of *Political Liberalism*,” in *The Idea of a Political Liberalism*, ed. Victoria Davion and Clark Wolf (Oxford: Rowman & Littlefield, 2000), pp. 231–52, here pp. 240–41.

some essential purpose (e.g., securing self-respect), he has automatically shown the reason for their lexical priority. I will hereafter refer to this belief—that the *lexical* priority of the basic liberties can be inferred from the *high* priority of the interests they serve—as the *Inference Fallacy*. Lexical priority is such a stringent condition that a special form of justification will turn out to be necessary for its defense.

As I will also show, however, Rawls's third argument for the Priority of Liberty is *not* vulnerable to this inference-fallacy objection. This argument, which I will call the *Hierarchy Argument*, suggests that the Priority of Liberty follows directly from a certain conception of free persons. Unfortunately, the argument as presented is radically incomplete, leaving many important questions unanswered. In Section III, therefore, I present a Kantian reconstruction of the Hierarchy Argument, showing that it can offer a compelling and attractive defense of the Priority of Liberty. Beginning with the Kantian conception of autonomy endorsed by Rawls (sec. 40 of *Theory*), this reconstruction explains our highest-order interest in rationality, justifies the lexical priority of all basic liberties, and reinterprets the threshold condition for the application of the Priority of Liberty. What had perhaps previously seemed an oddly disproportionate concern for the basic liberties is shown to flow quite naturally from one of Rawls's deepest moral commitments.

Finally, in Section IV, I examine Rawls's defense of the Priority of Liberty in *Political Liberalism*, where he adds two new arguments to the battery of arguments presented in *Theory*. After showing that these two new arguments are themselves susceptible to the inference-fallacy objection, I then explore the question of whether the reconstructed Hierarchy Argument can be used to defend the Priority of Liberty within the context of a *political* (as opposed to a Kantian) liberalism. I conclude that it cannot, a result that casts doubt on the desirability of the move from the Kantian comprehensive doctrine defended in *Theory of Justice* to the idea of an overlapping consensus of reasonable comprehensive doctrines in *Political Liberalism*.

II. THREE ARGUMENTS FOR THE PRIORITY OF LIBERTY IN *THEORY OF JUSTICE*

Here I examine Rawls's three arguments for the lexical Priority of Liberty found in the revised edition of *A Theory of Justice*.⁶ In the first of these three, which I label the *Self-Respect Argument*, Rawls maintains that the

6. Rawls presents an additional argument in the *first* edition of *Theory of Justice*, pp. 542–43, but he later rejects it in *Political Liberalism*, p. 371, n. 84, for being inconsistent with

priority of the (equal) basic liberties is needed to secure equal citizenship, which is itself a prerequisite for self-respect. In the second, which I call the *Equal Liberty of Conscience Argument*, Rawls contends that the integrity of our *religious* beliefs (and, by extension, of our moral and philosophical ones) is of such importance that liberty of conscience (and, by extension, other basic liberties) must be given lexical priority. Finally, in what I refer to as the *Hierarchy Argument*, Rawls argues that the lexical priority of the basic liberties is justified by the lexical priority of a particular *interest* that they protect: namely, our interest in choosing our final ends under conditions of freedom. I will argue that the first and second arguments are illustrations of the Inference Fallacy (although the second can be given a narrow interpretation that rescues it from the charge) but that the third is immune to this criticism and can therefore serve as the basis for a reconstructed defense of the Priority of Liberty.

1. *The Self-Respect Argument*

Rawls argues that self-respect is “perhaps the most important primary good”: without it, we will doubt our own value, the value of our plan of life, and our ability to carry it out, and we will therefore be susceptible to the siren call of “apathy and cynicism.”⁷ As a prelude to the Self-Respect Argument, he goes on to note how self-respect is tightly linked to *status*, that is, to our position in a social hierarchy (TJ, sec. 82). Because even a just society will be characterized by various kinds of inequalities (e.g., income differentials) that may erode the self-respect of the poorly ranked, any society concerned with securing self-respect for all of its citizens must affirm equality of status along some key dimension. Rawls believes *political equality*, or “equal citizenship,” can serve this purpose, especially when economic and social inequalities are kept within reasonable bounds by “just background institutions” (p. 478).

What is required for “equal citizenship,” however? Rawls contends that *equality in the provision of basic liberties* is a necessary condition for equal citizenship and that such equality therefore provides a secure basis for self-respect:

The basis for self-respect in a just society is . . . the publicly affirmed distribution of fundamental rights and liberties. And this distribution

one of his other arguments for the Priority of Liberty (which I will identify as the Hierarchy Argument).

7. TJ, p. 386.

being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society (p. 477).

Rawls convincingly argues that citizens in a just society would never consent to less than equal basic liberties, as “this subordinate ranking in public life would . . . be humiliating and destructive of self-esteem” (p. 477). A self-respecting citizenry therefore requires equal basic liberties.

Up to this point, Rawls has said nothing about the *priority* of the basic liberties; rather, he has focused exclusively on their *equal provision*. Only at the end of his main presentation of the Self-Respect Argument does he briefly discuss the Priority of Liberty:

When it is the position of equal citizenship that answers to the need for status, the precedence of the equal liberties becomes all the more necessary. Having chosen a conception of justice that seeks to eliminate the significance of relative economic and social advantages as supports for men’s self-confidence, it is essential that the priority of liberty be firmly maintained (p. 478).

These two sentences provide a good illustration of what I earlier called the Inference Fallacy: Rawls tries to derive the lexical priority of the basic liberties from the central importance of an interest they support—in this case, an interest in securing self-respect for all citizens. Without question, the Self-Respect Argument makes a strong case for assigning the basic liberties a *high* priority: otherwise, economic and social inequalities might reemerge as the primary determinants of status and therefore of self-respect. It does not explain, however, why *lexical* priority is needed. Why, for example, would very small restrictions on the basic liberties threaten the social basis of self-respect, so long as they were equally applied to all citizens? Such restrictions would involve no subordination and, being very small, would be unlikely to jeopardize the central importance of equal citizenship as a determinant of status.

Even if such minor restrictions were ruled out as too risky, we would still need to ask why self-respect is of such overwhelming importance that its social basis, an equal distribution of the basic liberties, must be given lexical priority. As noted above, Rawls maintains (TJ, sec. 67) that self-respect is “perhaps the most important primary good,” but he does not explain why this particular primary good should trump all others. As we shall see in the third subsection, the only way to justify something as

strong as lexical priority for the basic liberties is to justify *lexical priority for the interest they support*, i.e., the assigning of such weight to an interest that it cannot be traded off for any other interest, no matter how high the rate of exchange. Securing self-respect for all citizens might be such an interest, but Rawls's arguments do not show why.

2. *The Equal Liberty of Conscience Argument*

In *Theory*, Rawls contends that free persons have certain "fundamental interests" that they must secure through the Priority of Liberty (sec. 26):

I assume that the parties [in the Original Position] view themselves as free persons who have *fundamental aims and interests* in the name of which they think it legitimate for them to make claims on one another concerning the design of the basic structure of society. The *religious interest* is a familiar historical example; the interest in the integrity of the person is another. In the original position the parties do not know what particular forms these interests take; but they do assume that they have such interests and that the basic liberties necessary for their protection are guaranteed by the first principle. *Since they must secure these interests, they rank the first principle prior to the second* (p. 131, emphasis added).

Later, Rawls further develops this argument with respect to the *religious* interest, among others (TJ, sec. 33). He explains the importance of this interest and the *equal liberty of conscience* that protects it as follows:

. . . the parties [in the Original Position] must assume that they may have moral, religious, or philosophical interests which they cannot put in jeopardy unless there is no alternative. One might say that they regard themselves as having moral or religious obligations which they must keep themselves free to honor. . . . They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. . . . *To gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs.*⁸

8. *Ibid.*, pp. 180–81 (emphasis added). Cf. Hart, p. 252: "It might be said that any rational person who understood what it is to have a religious faith and to wish to practice it would agree that for any such person to be prevented by law from practicing his religion must be worse than for a relatively poor man to be prevented from gaining a great advance in material goods through the surrender of a religious liberty which meant little or nothing to him."

We might view this argument as simply another illustration of the Inference Fallacy: Rawls tries to derive the lexical priority of equal liberty of conscience from the central importance of the interest it supports, namely, an interest in examining and subscribing to certain philosophical, moral, and religious beliefs. The vital importance of this interest is insufficient, however, to establish the lexical priority of the liberty that supports it: one might “highly value” this interest yet still endorse small sacrifices of equal liberty of conscience if such sacrifices were necessary to advance *other* highly valued interests.

We can interpret Rawls’s argument in another way, though. The passages just quoted are filled with the language of *compulsion*: “must secure,” “cannot put in jeopardy,” “cannot take chances,” and so on. Also, when discussing the same issue in sec. 82 of *Theory*, Rawls says that “in order to secure their unknown but particular interests from the original position, they [the parties] are led, *in view of the strains of commitment* (sec. 29), to give precedence to basic liberties” (p. 475, emphasis added). Perhaps Rawls’s argument here is best understood as follows: the parties in the original position, given their general knowledge of human psychology, must avoid committing to political principles whose outcomes they might not be able to accept; political principles that place fundamental interests (such as the religious interest) at even the slightest risk, by refusing lexical priority to the liberties that protect them, make the strains of commitment intolerable.

This argument seems especially powerful with regard to the religious interest. Religious persons have faith that their religious duties (e.g., acceptance of a creed, participation in certain ceremonies, and the like) are divinely mandated and that a failure to abide by these commitments may lead to divine retribution, even eternal damnation. If the parties in the original position agree to anything less exacting than the lexical priority of equal liberty of conscience, they may emerge from behind the veil of ignorance to discover that their own religious beliefs and practices have been put in jeopardy by discriminatory legislation and that they are psychologically incapable of abiding by such legislation due to an overriding fear of supernatural punishment.

This strains-of-commitment argument provides strong support for the lexical priority of equal liberty of conscience *as applied to religion*. Does it, however, extend to philosophical and moral commitments as well, as Rawls claims (TJ, sec. 33)? Although one can point to a few important his-

torical examples of people who were either incapable or unwilling to abide by laws that discriminated against their philosophical and moral beliefs (e.g., Galileo and Socrates), these cases are celebrated precisely because of their rarity: religious martyrs are far more common than moral or philosophical ones. Thus, the strains-of-commitment argument, if it applies to moral and philosophical beliefs at all, is much less compelling than in the case of religious belief.

What of Rawls's additional claim (TJ, sec. 33) that "the reasoning in this case [i.e., equal liberty of conscience] can be generalized to apply to other freedoms, *although not always with the same force*" (p. 181, emphasis added)? In some cases, this claim seems justified. Consider, for instance, Rawls's own example of "the rights defining the integrity of the person" (mentioned along with liberty of conscience in TJ, sec. 39, p. 217; see also pp. 53, 131). If something less than lexical priority for these rights were agreed to by the parties in the Original Position, they again might emerge from behind the veil of ignorance to discover that their fundamental interest in bodily integrity had been jeopardized by legislation implementing, for example, compulsory live-donor organ harvesting or a radically egalitarian "slavery of the talented" for the benefit of the poor, legislation that they would be hard pressed to obey. In other cases, however, this strains-of-commitment argument seems less compelling, as Rawls himself has admitted. Consider, for example, freedom of speech. If freedom of speech were given less than lexical priority, would the speech-curbing legislation that might result lead to intolerable strains of commitment? Perhaps, although the not insubstantial variation in such laws across stable liberal democracies (e.g., laws restricting libel, obscenity, advocacy of political revolution or race hatred, pornography, and so forth) suggests otherwise.

In summary, the strains-of-commitment interpretation of the Equal Liberty of Conscience Argument provides strong support for the lexical priority of certain basic liberties (e.g., religious liberty, the rights protecting integrity of the person) but minimal support for others (e.g., moral and philosophical liberty of conscience, freedom of speech). This result may not be particularly surprising: there is no reason why the psychological strains of obeying laws that encroach upon fundamental interests should be the same for each of these interests—some interests, after all, may be more fundamental than others. Consequently, this interpretation of the Equal Liberty of Conscience Argument cannot by itself provide

the desired support for the Priority of Liberty. What is needed is a defense of the Priority of Liberty that can justify the lexical priority of *all* basic liberties, not merely the subset of such liberties whose violation creates intolerable strains of commitment. Fortunately, Rawls's third argument for the Priority of Liberty points the way towards such a defense.

3. *The Hierarchy Argument*

Rawls presents the Hierarchy Argument in secs. 26 and 82 of *Theory*. He begins by distinguishing what he calls our "highest-order interest" from our fundamental interests and by linking the former to the Priority of Liberty (sec. 26):

Very roughly the parties [in the Original Position] regard themselves as having a *highest-order interest* in how all their other interests, including even their fundamental ones, are shaped and regulated by social institutions. They do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any given time, although they want the right to advance such interests. . . . *Rather, free persons conceive themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters.* Hence, they not only have final ends that they are in principle free to pursue or to reject, but their original allegiance and continued devotion to these ends are to be formed and affirmed under conditions that are free (pp. 131–32, emphasis added).

Rawls identifies here what he later calls a "hierarchy of interests" for free persons. Our highest-order interest is in shaping our other interests, including our fundamental ones, under conditions of freedom, which we therefore give "first priority." Our fundamental interests, including both our religious interest and our interest in integrity of the person, come second. Rawls spells out the implications of this paragraph more clearly (sec. 82):

Thus the persons in the original position are moved by a certain *hierarchy of interests*. They must first secure their highest-order interest and fundamental aims (only the general form of which is known to them), and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place (p. 476, emphasis added).

Thus, the lexical priority of the basic liberties over the other primary goods (“means that enable them to advance their other desires and ends”) can be justified by a hierarchy of interests: our highest-order interest in choosing our ends in freedom takes lexical priority (“they must first secure”) over our interest in advancing those ends.

The Hierarchy Argument just described attempts to justify a hierarchy of goods (basic liberties *over* other primary goods) with a hierarchy of interests (a highest-order interest in free choice of ends *over* an interest in advancing those ends). Note how this argument deftly avoids the inference-fallacy objection: by asserting the *lexical* priority of our highest-order interest in the free choice of ends, Rawls is able to justify the lexical priority of the basic liberties, which are its indispensable support. The Hierarchy Argument appears to be a promising defense of the Priority of Liberty.

Several important questions arise at this point, however. First, what is the precise nature of our highest-order interest, and why are the basic liberties its essential support? Second, what justifies the asserted hierarchy of interests? To put the question more sharply: Does the Hierarchy Argument just kick the problem of defending the Priority of Liberty up one level of abstraction (from goods to interests) without actually solving it?⁹ Third, are there goods other than the basic liberties that are indispensable supports for our highest-order interest (e.g., literature comparing religious faiths) and, if so, does this fact not undermine the Hierarchy Argument? Rawls does not directly address any of these questions, yet they must be answered in order for the Hierarchy Argument to be considered a full success.

In the next section, I show that *all* of these questions can be answered within the context of Rawls’s *Theory*. To do this, however, I will have to reconstruct the Hierarchy Argument along Kantian lines. More specifically, I will have to show not only that our highest-order interest in the free choice of ends flows naturally from the Kantian conception of autonomy endorsed by Rawls (TJ, sec. 40), but also that the Priority of Liberty becomes effective only if sufficient material means are available to support this interest.

9. For a similar line of criticism, see Christoph Fehige, “Justice Beyond Desires?” in Davion and Wolf, *The Idea of a Political Liberalism*, pp. 253–84, at p. 265.

III. A KANTIAN RECONSTRUCTION OF THE HIERARCHY ARGUMENT

A Kantian reconstruction of the Hierarchy Argument must begin with sec. 40 of *Theory*, in which Rawls presents a Kantian interpretation of justice as fairness. This interpretation, Rawls notes, is founded on Kant's understanding of *autonomy*, the connection of which to his own conception of justice can be seen in the following passage:

My suggestion is that we think of the original position as in important ways similar to the point of view from which noumenal selves see the world. The parties qua noumenal selves have complete freedom to choose whatever principles they wish; but they also have a desire to express their nature as rational and equal members of the intelligible realm with precisely this liberty to choose, that is, as beings who can look at the world in this way and express this perspective in their life as members of society. They must decide, then, which principles when consciously followed and acted upon in everyday life will best manifest this freedom in their community, most fully reveal their independence from natural contingencies and social accident (p. 225).

Thus, for Rawls as for Kant, autonomy is a kind of *freedom*, a freedom from the determination of our choices by "natural contingencies and social accident." As parties in the original position or members of the intelligible realm, we are free from such influences, and we can translate this independence into our lives as citizens by acting according to principles that we would choose as noumenal selves.

I want to argue here that the *capacity* for such autonomy (i.e., the potential any rational being has to achieve a certain distance from "his social position or natural endowments, or . . . the particular kind of society in which he lives or the specific things that he happens to want" [p. 222]) has *two* distinct facets. These facets are succinctly described by Rawls during his discussion of moral personality (TJ, sec. 77): "moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of the good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree" (p. 442). Let us refer to the former, the capacity for a conception

of the good, as *rationality*, and to the latter, the capacity for a sense of justice, as *reasonableness*. I will look at these two capacities in turn, beginning with reasonableness, in order to show not only why they are aspects of autonomy but also how they are related to Rawls's three notions of priority (p. 214). More specifically, I will show that the Priority of Justice over Efficiency and Welfare and the Priority of the Right over the Good are both expressions of our reasonableness, whereas *the Priority of Liberty is an expression of our rationality*.

1. *Reasonableness and the Priorities of Right and Justice*

Reasonableness, or the capacity for a sense of justice, is the ability to limit the pursuit of one's conception of the good out of a respect for the rights and interests of other people and out of a desire to cooperate with them on fair terms. A person who acts reasonably acts according to a principle of reciprocity: he seeks to give "justice to those who can give justice in return" (p. 447). The tight connection between reasonableness and autonomy is explained by Rawls in sec. 86 of *Theory*: "the sense of justice . . . reveals what the person is, and to compromise it is not to achieve for the self free reign but to give way to the contingencies and accidents of the world" (p. 503). When we act reasonably, says Rawls, we demonstrate an ability to subordinate the pursuit of our own good, which may be unduly influenced by the "contingencies and accidents of the world," to those principles we would choose as members of the intelligible realm—our reasonableness, in other words, is emblematic of our autonomy, our independence from natural and social contingencies. This explains our sense of shame when we *fail* to act reasonably: we behave then as if we were members of a "lower order" of animal, whose actions are determined by the laws of nature rather than the moral law (p. 225).

Over the course of *Theory*, Rawls introduces three notions of priority: the Priority of Liberty (First Priority Rule), the Priority of Justice over Efficiency and Welfare (Second Priority Rule), and the Priority of the Right over the Good (pp. 27–28, 266–67). The second and third kinds of priority are very closely related to one another: they both suggest that justice is paramount and that it therefore takes absolute priority over all other concerns, especially the concerns of rival moral theories (e.g., utilitarianism's concern for welfare, perfectionism's concern for excellence of character,

and so on). These second and third kinds of priority, in addition to being closely related to each other, are closely related to what Rawls calls the “lexical priority” of the good will in Kant’s moral theory:

We know that Kant has both a formal conception of a good will and a formal conception of right. He begins with these two interdependent formal conceptions. The goodness of all things—talents of the mind and qualities of temperament, gifts of nature and of fortune, and happiness—is conditioned: their goodness depends on being compatible with the substantive requirements on actions and institutions imposed by these formal conceptions. This is the general meaning of the priority of right in his doctrine.¹⁰

The Priority of Right over the Good and the Priority of Justice over Welfare and Efficiency are both expressions of our nature as *reasonable* beings, i.e., beings able to act in conformity with, and out of respect for, the moral law. In Kant’s terms, to sacrifice justice for the sake of welfare or excellence of character would be to sacrifice what is of absolute value (the good will) for what is of merely relative value (its complements). Rawls himself makes the same strong connection between reasonableness and these two kinds of priority:

But the desire to express our nature as a free and equal rational being can be fulfilled only by *acting on the principles of right and justice as having first priority*. . . . Therefore in order to realize our nature we have no alternative but to plan to preserve our sense of justice as governing our other aims. *This sentiment cannot be fulfilled if it is compromised and balanced against other ends as but one desire among the rest* (TJ, p. 503, emphasis added).

Just as reasonableness is a key facet of our autonomy, so the priorities of right and justice are expressions of our reasonableness: we best indicate our commitment to guide our actions by the principles of justice by refusing to compromise those principles for the sake of our other ends.

10. John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge, Mass.: Harvard University Press), pp. 156–57.

2. *Rationality and the Priority of Liberty*

Rationality is our capacity for a conception of the good, which we pursue through a plan of life. We schedule, prioritize, temper, and prune our desires in accordance with this plan; rather than living from impulse to impulse, as other animals do, we arrange the pursuit of our interests and ends according to a coherent scheme (secs. 63–64). Now, given what was said in the previous subsection, one may find it difficult to see the connection between rationality, so defined, and autonomy: if our desires are largely the product of natural and social contingencies, then how can acting in accordance with a plan to advance them be an aspect of our autonomy? In other words, if rationality is merely the “slave of the passions,”¹¹ and these passions are the result of such contingencies, then how can rationality possibly express our nature as free and equal beings?

According to Rawls, however, rationality is much more than a “slave of the passions.” The exercise of rationality involves a clear *distancing* from one’s immediate desires, as Rawls indicates in the following passage:

The aim of deliberation is to find that plan which best organizes our activities and influences the formation of our subsequent wants so that our aims and interests can be fruitfully combined into one scheme of conduct. Desires that tend to interfere with other ends, or which undermine the capacity for other activities, are weeded out; whereas those that are enjoyable in themselves and support other aims as well are encouraged.¹²

The image of rationality here is active, not passive. Rather than being haplessly driven on by the dominant desires, rationality exercises authority over them: rationality elevates some desires and lays low others; it integrates retained desires into “one scheme of conduct”; and it even shapes the development of future desires. Far from being a slave of desire, rationality is its master. This conception of rationality is consistent with at least one reading of Kant’s idea of practical reason as applied to the pursuit of happiness: H. J. Paton notes that prudential reasoning in

11. David Hume, *A Treatise of Human Nature* (London: Penguin Books, 1969), p. 462.

12. *Theory of Justice*, pp. 360–61. Cf. Plato, *Republic*, trans. Allan Bloom (New York: Basic Books, 1991), p. 272 [589a–c].

Kant's moral theory involves "a choice of ends as well as means" and a subsequent "maximum integration of ends."¹³

Rationality, then, is the essence of what Rawls calls our "highest-order interest." Rational persons are precisely the kind of beings who have the ability to "revise and alter their final ends," including even their fundamental interests (TJ, pp. 131–32). Thus, our highest-order interest in freely choosing our ends can be redescribed as *our highest-order interest in preserving both our rationality and the conditions of its exercise* (TJ, pp. 491–92). Such will be our preferred definition of this interest henceforth.

The relationship of rationality, so understood, to autonomy is now easier to discern. Just as one aspect of our autonomy is the distancing from our immediate desires that is involved in acting on principles that would be chosen in an initial position of equality (reasonableness), so another aspect of our autonomy is the less radical distancing involved in scheduling, prioritizing, tempering, and pruning these desires in accordance with a plan of life (rationality). Admittedly, this latter aspect or facet of autonomy is strictly subordinate to the former: as Rawls notes, the "sense of justice [is not] one desire to be weighed against others" but rather the desire that takes absolute priority over all others in a plan of life (p. 508). Despite initial doubts, however, we can now see that reasonableness and rationality are *both* facets of our autonomy. We can also see why our interest in rationality and its preconditions is correctly described as our "highest-order" interest: we cannot sacrifice this interest without sacrificing autonomy, without stooping to the level of creatures that live by natural impulse rather than by a plan of life.

In order to advance the reconstruction of the Hierarchy Argument, we must now answer the following question: How does this highest-order interest in rationality and its preconditions justify the lexical priority of the basic liberties over other primary goods, as called for by the Priority of Liberty? In short, it justifies such priority because the basic liberties *are* necessary conditions for the exercise of rationality, which is why parties in the Original Position "give first priority to preserving their liberty in these matters" (pp. 131–32). If the parties were to sacrifice the basic liberties for the sake of other primary goods (the "means that enable them

13. H. J. Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (Philadelphia: University of Pennsylvania Press, 1947), pp. 86, 92.

to advance their other desires and ends" [p. 476]), they would be sacrificing their highest-order interest in rationality and its preconditions, and thereby failing to express their nature as autonomous beings (p. 493).

A brief examination of the basic liberties enumerated by Rawls will indicate why they are necessary conditions for the exercise of rationality (p. 53). The freedoms of speech and assembly, liberty of conscience, and freedom of thought are essential to the creation and revision of plans of life: without secure rights to explore ideas and beliefs with others (whether in person or through various media) and consider these at our leisure, we would be unable to make informed decisions about our conception of the good. Freedom of the person (including psychological and bodily integrity), as well as the right to personal property and immunity from arbitrary arrest and seizure, are necessary to create a stable and safe personal space for purposes of reflection and communication, without which rationality would be compromised if not crippled. Even small restrictions on these basic liberties would threaten our highest-order interest, however slightly, and such a threat is disallowed given the absolute priority of this interest over other concerns. Note also that lexical priority can be justified here for all of the basic liberties, not merely a subset of them (as was the case with the strains-of-commitment interpretation of the Equal Liberty of Conscience Argument).¹⁴

One problem with both the reconstructed Hierarchy Argument and its original version, as we noted at the end of the last section, is that goods other than the basic liberties are necessary to support our highest-order interest in rationality. For example, while freedom of speech is indeed essential for the creation and revision of plans of life, so are the material goods that make this freedom effective, such as assembly halls, street corners, megaphones, soapboxes, and the like. Much the same could be

14. Careful readers will note that I have neglected to mention one of the basic liberties: political liberty. If we think of political liberty as being instrumentally valuable in the protection of the other basic liberties (as Rawls suggests, TJ, pp. 200–05), then we might be able to construct a *second-order* defense of its lexicality consistent with the current argument: if our highest-order interest in rationality and its necessary conditions (i.e., the other basic liberties) cannot be compromised, then the necessary condition for those necessary conditions (i.e., political liberty) cannot be compromised. I do not find this argument particularly compelling, as it is unclear that political liberty is necessary for (as opposed to strongly contributory to) the protection of other basic liberties. Therefore, the reconstructed Hierarchy Argument may not support the lexical priority of political liberty—a notable and perhaps troubling failure, if true.

said of the other basic liberties. One potential solution to this problem would be to redefine the Priority of Liberty so that it asserted the lexical priority of the basic liberties over other goods *only when those goods were not needed to support our highest-order interest in rationality*. I suggest a more elegant solution in the following subsection, however, a solution that has the additional advantage of elucidating the meaning of Rawls's threshold condition for the application of the Priority of Liberty.

3. *An Interpretation of the Threshold Condition for the Application of the Priority of Liberty*

Rawls notes on several occasions in *Theory* that the Priority of Liberty becomes effective only when certain conditions are realized. For example, Rawls begins sec. 82 of *Theory* with the following observation:

I have supposed that if the persons in the original position know that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for greater economic advantages (sec. 26). It is only when social conditions do not allow the full establishment of these rights that one can acknowledge their restriction. The equal liberties can be denied only when it is necessary to change the quality of civilization so that in due course everyone can enjoy these freedoms. The effective realization of all these liberties in a well-ordered society is the long-run tendency of the two principles and rules of priority when they are consistently followed under reasonably favorable conditions (pp. 474–75).¹⁵

His other discussions of the threshold condition in *Theory* provide little additional information, although later he adds a “degree of fulfillment of needs and material wants” (sec. 82) to the social conditions that must be met before the Priority of Liberty can come into effect.¹⁶

Rawls's description of the threshold condition can be interpreted in at least three different ways, each of which is inclusive of (and therefore more stringent than) the ones preceding it:

(a) *Formal Threshold*: Before the Priority of Liberty can apply, a society must have achieved a level of wealth sufficient for it to maintain a legal

15. Cf. John Stuart Mill, *Considerations on Representative Government* (Amherst, N.Y.: Prometheus Books, 1991), pp. 46–53, 85–93, 345–65.

16. Rawls, *Theory of Justice*, p. 476. Also see TJ, pp. 54–55, 132.

system with courts, police, and so on, that can define and protect the basic liberties of citizens. In addition, most citizens and government officials must respect the rule of law.

(b) *Weak Substantive Threshold*: Before the Priority of Liberty can apply, a society must have achieved a level of wealth sufficient for it to allow its citizens to engage in meaningful *formation* of life plans. For example, citizens must have access to media, public forums, and schools and must have sufficient leisure time to make use of these resources and reflect on their plans.

(c) *Strong Substantive Threshold*: Before the Priority of Liberty can apply, a society must have achieved a level of wealth sufficient for it to allow its citizens to engage in meaningful *advancement* of life plans. For example, citizens must have access to professional training, start-up funds for businesses, grants for artistic, literary, and scientific projects, and so forth.

Two implications of the reconstructed Hierarchy Argument are clear. First, at least the Formal Threshold must be met before the Priority of Liberty can apply: the Priority of Liberty would be meaningless in a society that could not even establish the basic liberties themselves due to social and economic conditions. All arguments for the Priority of Liberty, including the reconstructed one on offer here, must take feasibility into account. Second, the Strong Substantive Threshold must be ruled out. Once the *Weak Substantive Threshold* is met, our highest-order interest in rationality can be fully satisfied, as all of its necessary conditions (including the basic liberties and any other primary goods essential for its exercise) are then in place. Any threshold more stringent than this one, including the Strong Substantive Threshold, in effect sacrifices the basic liberties and the highest-order interest they protect for the sake of *advancing*, not forming, our plans of life, but such a sacrifice is ruled out by the reconstructed Hierarchy Argument. In short, no threshold less stringent than the Formal one or more stringent than the Weak Substantive one can be justified by this argument for the Priority of Liberty.

Now consider the choice between the Formal and Weak Substantive Thresholds: Can the reconstructed Hierarchy Argument justify violations of the Priority of Liberty in order to move society to a level of wealth where the formation of life plans is meaningful? Once we recognize that the only function of the basic liberties is to advance our highest-order interest in rationality, the answer becomes clear: if the *violation* of the

basic liberties is the best means to advance the interest they serve, then the Priority of Liberty can be temporarily set aside. To insist upon the imposition of the Priority of Liberty under such circumstances would be to fetishize the basic liberties, whose value is only instrumental. I therefore conclude that the reconstructed Hierarchy Argument requires a Weak Substantive Threshold for the application of the Priority of Liberty.

Note how this interpretation of the threshold condition solves the problem discussed at the end of the last subsection. Rather than modifying the definition of the Priority of Liberty, we can simply stipulate that its implementation be delayed until all primary goods that are necessary for the advancement of our highest-order interest in rationality can be made available. Once this threshold is reached, however, the basic liberties can no longer be sacrificed for other primary goods. Thus, the reconstructed Hierarchy Argument, in addition to offering a strong defense of the Priority of Liberty, clarifies the meaning of the threshold condition for its application.

We have now completed the reconstruction of the Hierarchy Argument. At the close of the last section, we identified a number of problems with the original argument, all of which have now been solved. We have seen that our highest-order interest is in preserving both our rationality and the preconditions of its exercise, and that these preconditions include first and foremost the basic liberties. We have also noted that the preeminent position this interest holds in our hierarchy of interests is justified by its intimate connection to the Kantian ideal of autonomy. Finally, we have discovered that the contribution of primary goods other than the basic liberties to our highest-order interest does not weaken the argument for the Priority of Liberty but rather strengthens our understanding of the threshold condition for its application.

IV. THE PRIORITY OF LIBERTY IN *POLITICAL LIBERALISM*

A natural question to ask at this point is: What arguments does Rawls make in favor of the Priority of Liberty in *Political Liberalism*, and do these arguments suffer from the same kinds of problems we identified in *Theory*?¹⁷ If they did, in fact, suffer from such problems, then a second

17. Rawls has also defended the Priority of Liberty in at least three of his essays ("A Kantian Conception of Equality," "Kantian Constructivism in Moral Theory," and especially "Social Unity and Primary Goods") and in his *Justice as Fairness: A Restatement*, but his arguments in these pieces either are not as fully developed as those in his major treatises

question would arise: Could the reconstructed Hierarchy Argument be used to defend the Priority of Liberty within the context of a *political* (rather than a Kantian) liberalism? I will address each of these questions in turn.

1. *Defending the Priority of Liberty: Arguments Old and New*

Although Rawls briefly discusses and defends the Priority of Liberty early in *Political Liberalism* (PL, pp. 41, 74, 76), his most sustained arguments for it are to be found late in the book, in the lecture entitled “The Basic Liberties and Their Priority.” All of these arguments are framed in terms of Justice as Fairness rather than liberal political conceptions of justice more generally, a point to which we will return below. The three arguments for the Priority of Liberty that we identified in *Theory* can also be found in *Political Liberalism*, and both their strengths and weaknesses carry over into the new context.¹⁸ At least two new arguments can be found, however, arguments that I will refer to as the Stability Argument and the Well-Ordered Society Argument, respectively.¹⁹ As I will now show, both of these arguments are further illustrations of the Inference Fallacy.

The Stability Argument has a structure similar to that of the Self-Respect Argument. In it, Rawls notes the “great advantage to everyone’s conception of the good of a . . . stable scheme of cooperation,” and he goes on to assert that Justice as Fairness is “the most stable conception of justice . . . and this is the case importantly because of the basic liberties and the priority assigned to them.”²⁰ Taking the second point first, Rawls never makes clear why the Priority of Liberty is *necessary* for stability, as opposed to strongly contributory to it. Very small restrictions on the basic liberties would seem unlikely to threaten it, and some types of restrictions (e.g., imposing fines for the advocacy of violent revolution

of political theory or do not add anything to them. See John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), pp. 254–66, at p. 260; pp. 303–58, at p. 348; and pp. 359–87, at pp. 362, 366–67, and 385; and Rawls, *Justice as Fairness: A Restatement*, pp. 46–47, 104–06, and 115.

18. For the Self-Respect Argument, see PL, pp. 318–20; for the Equal Liberty of Conscience Argument, see PL, pp. 310–12; for the (unreconstructed) Hierarchy Argument, see PL, pp. 312–14.

19. For the Stability Argument, see PL, pp. 316–18; for the Well-Ordered Society Argument, see PL, pp. 320–23.

20. PL, p. 316; also see TJ, pp. 261–63 and sec. 76.

or race hatred) might actually *enhance* it. Even if we assume, however, that the Priority of Liberty is necessary for stability, this fact is not enough to justify it: as highly valued as stability is, sacrificing the basic liberties that make it possible may be worthwhile if such a sacrifice is necessary to advance *other* highly valued ends. Pointing out the *high* priority of stability, in other words, is insufficient to justify the lexical priority of the basic liberties that support it—only the *lexical* priority of stability would do so, yet Rawls provides no argument for why stability should be so highly valued.

The Well-Ordered Society Argument relies on the Humboldtian idea of a well-ordered society as a “social union of social unions,” as an organization that integrates and harmonizes its smaller, constituent associations for the sake of a more comprehensive good.²¹ In the course of this argument, Rawls claims that the “principles which secure the basic liberties . . . [are] the best way to establish the comprehensive good of social union.”²² The importance of basic liberties (especially freedom of association) in making such a good possible is clear, but we are again left wondering why such liberties must have *lexical* priority for it to be realized and, even granting this, why the good of social union is of such paramount importance that its preconditions could never be sacrificed for the sake of other goods. The inference-fallacy objection applies as strongly here as it did with the Stability Argument.

After reviewing the defenses of the Priority of Liberty offered by *Political Liberalism*, we find that we have advanced little further than our position at the end of Section III, with only the reconstructed Hierarchy Argument providing strong and sufficiently broad support for the lexical priority of the basic liberties. What implication does this result have for defending the Priority of Liberty from within a *political* (as opposed to a Kantian) liberalism? As I will demonstrate in the next subsection, adherents of non-Kantian reasonable comprehensive doctrines may find it hard to accept the Kantian conception of autonomy animating the Hierarchy Argument and therefore the Hierarchy Argument itself, casting doubt on whether the Priority of Liberty (and Justice as Fairness more generally) could be the focus of an overlapping consensus.

21. PL, pp. 321–22; also see TJ, sec. 79.

22. PL, p. 323.

2. *Defending the Priority of Liberty within a Political Liberalism*

Near the beginning of *Political Liberalism*, Rawls says any *liberal* political conception of justice must have three elements, one of which is “an assignment of special priority” to the basic liberties. He then adds that “these elements can be understood in different ways, so that there are many variant liberalisms.”²³ Thus, some of these liberalisms may, like Justice as Fairness, assign *lexical* priority to the basic liberties, while others may assign only a *high* priority to them, for the word “special” can be interpreted in many reasonable ways.

Later in the book, Rawls speculates about the specificity of an overlapping consensus of reasonable comprehensive doctrines and suggests the following picture of such a consensus as “more realistic and more likely to be realized” than the simple one he had previously offered:

In this case the focus of an overlapping consensus is *a class of liberal conceptions* that vary within a more or less narrow range. The more restricted the range, the more specific the consensus. In a political society with a consensus of this kind, several conceptions of justice will be political rivals and no doubt favored by different interests and political strata.²⁴

As just noted, some liberal conceptions may not assign lexical priority to the basic liberties. Thus, in order for the Priority of Liberty to be the focus of an overlapping consensus (rather than enjoying support from only a subset of reasonable comprehensive doctrines, such as Kantian ones), *the range of admissible liberal conceptions must be narrow enough to exclude any that do not endorse the Priority of Liberty*. Under what circumstances might this occur?

Rawls speculates that “the narrower the differences between the liberal conceptions *when correctly based on fundamental ideas in a democratic public culture* . . . the narrower the range of liberal conceptions defining the focus of the consensus.”²⁵ By “correctly based,” Rawls appears to mean at least two things: first, that the conceptions should be built on the “more central” of these fundamental ideas; second, that these ideas should be interpreted in the right way (PL, pp. 167–68). For example,

23. PL, p. 6. Also see PL, p. 223.

24. PL, p. 164 (emphasis added).

25. PL, p. 167 (emphasis added).

Rawls asserts that his “conception of the person as free and equal” is “central to the democratic ideal” (PL, p. 167). This idea is in competition with other democratic ideas, however (e.g., the idea of the “common good” as it is understood by classical republicans), as well as with other interpretations of the same idea (e.g., the utilitarian understanding of “equality” as the equal consideration of each person’s welfare). A necessary condition, then, for Justice as Fairness to be the focus of an overlapping consensus would be for adherents of *all* reasonable comprehensive doctrines to endorse this idea, along with the interpretation Rawls gives it, as more “central to the democratic ideal” than other fundamental ideas. If they were to accept not only this idea but also its companion idea of society as “a fair system of cooperation,” then the procedures of political constructivism (including the Original Position) would presumably lead them to select Justice as Fairness as their political conception of justice.

Now, we have seen that the only successful argument for the Priority of Liberty is the reconstructed version of the Hierarchy Argument. This argument relies heavily upon a Kantian understanding of autonomy, i.e., upon a very special conception of free persons. This Kantian conception of free persons has strong implications for agent motivation in the Original Position: the parties will treat rationality and its necessary conditions as their highest-order interest, not to be sacrificed for lesser interests no matter what the rate of exchange, and will therefore endorse the lexical priority of the basic liberties. In order for the Priority of Liberty to be the focus of an overlapping consensus, then, adherents of *all* reasonable comprehensive doctrines would have to be able to accept this conception and its implications for the structure of the Original Position.

Is such acceptance likely? Consider the important example of the adherents of *utilitarian* reasonable comprehensive doctrines. Would a utilitarian be able to endorse a Kantian conception of free persons, with its elevation of rationality over the satisfaction of desire and its consequent implications for agent motivation in the Original Position? It seems unlikely that *any* utilitarian (with the possible exception of John Stuart Mill in his most syncretic mood) would countenance this variety of asceticism.²⁶

26. I say “this variety of asceticism” to distinguish it from other varieties, such as Manichaeism, that view the satisfaction of desire as degrading. Both Rawls and Kant would argue that the satisfaction of desire is a good so long as its pursuit does not lead to the sacrifice of autonomy, i.e., our ability to conform to, and act from, both the moral law

Thus, utilitarians would be likely to focus on another interpretation of the idea of free persons or perhaps on an entirely different fundamental idea or set of ideas; doing so would lead them to structure the Original Position differently and would presumably produce a political conception of justice that did *not* include the Priority of Liberty. Rawls argues in *Political Liberalism* that classical utilitarians (such as Jeremy Bentham and Henry Sidgwick) *would* be likely to endorse a “political conception of justice liberal in content,” but he never suggests that they would choose the Priority of Liberty, or Justice as Fairness more generally (PL, p. 170).

We can conclude from this finding that the class of liberal political conceptions of justice constituting the focus of a realistic overlapping consensus would include conceptions that did *not* endorse the Priority of Liberty (although they would all give the basic liberties “special priority”). Moreover, Justice as Fairness might not be alone among the liberal conceptions in endorsing the Priority of Liberty: a reasonable comprehensive doctrine might, for example, support a Kantian conception of free persons but not Rawls’s particular interpretation of society as a “fair system of cooperation,” leading through the procedures of political constructivism to a liberal conception of justice that endorsed the Priority of Liberty but rejected, say, the Difference Principle. Thus, the Priority of Liberty would be one competitor idea among many in an overlapping consensus, endorsed by both adherents of Kantian comprehensive doctrines and their fellow travelers, but rejected by others.

Note that although the Priority of Liberty cannot be the focus of a realistic overlapping consensus, something analogous to it might be the focus of a *constitutional* consensus, that is, a “consensus on constitutional principles . . . rather than on a conception of justice.”²⁷ Specifically, adherents of radically different reasonable comprehensive doctrines might be able to agree on a constitutional analogue of the Priority of Liberty (civil libertarianism) that effectively disallowed violations of the basic liberties under any circumstances; this approach might be institutionalized in part through a combination of written bills of rights and judicial review. Kantian liberals and others who endorse the Priority of Liberty

and a plan of life. Their asceticism (if I may even call it that) is highly tempered: it demands not rejection of desire but rather recognition of a *strict hierarchy* between rationality and desire. See Rawls, *Lectures on the History of Moral Philosophy*, pp. 225, 303–06.

27. PL, pp. 149; also see PL, pp. 158–68.

could be expected to support such a constitutional practice for obvious reasons. Liberal utilitarians (who support “special priority” for the basic liberties) might also support it: if they thought that basic liberties would otherwise be *severely* eroded through legislative encroachment, then they might endorse such civil libertarianism as a “second-best” corrective. Perhaps the other major comprehensive doctrines would sign on for similar reasons. This constitutional consensus would be unlikely to evolve into an overlapping consensus, however, for the reasons noted above: adherents of some reasonable comprehensive doctrines (e.g., liberal utilitarianism) are simply unable to endorse the Priority of Liberty, and neither their objections nor their doctrines are likely to disappear with the passage of time.

V. CONCLUSION: IMPLICATIONS FOR THE RAWLSIAN POLITICAL PROJECT

The reconstructed Hierarchy Argument presented in Section III has both positive and negative implications for the Rawlsian political project. Its primary positive implication is that the Priority of Liberty, from which Justice as Fairness draws so much of its force (TJ, p. 220), can be successfully defended within the framework of *Theory of Justice*. Beginning with the Kantian conception of autonomy endorsed by Rawls in sec. 40, we can now explain our highest-order interest in rationality, justify the lexical priority of all basic liberties, and better understand the threshold condition for the application of the Priority of Liberty. What had perhaps previously seemed an inexplicable and disproportionate concern for the basic liberties can now be seen to flow quite naturally from one of Rawls’s deepest moral commitments.

Unfortunately, this reconstructed defense also has at least one negative implication for the later stages of the Rawlsian political project: specifically, it casts doubt on the desirability of the move from the Kantian comprehensive doctrine defended in *Theory of Justice* to the idea of an overlapping consensus of reasonable comprehensive doctrines in *Political Liberalism*. As we saw in Section IV, the Priority of Liberty cannot serve as the focus of a realistic overlapping consensus, and although it can perhaps be the focus of a *constitutional* consensus, it would then be hostage to “political bargaining or to the calculus of social interests” (TJ, p. 4), and its support would lack the depth and stability achieved in an overlapping consensus. Unless an argument for the Priority of Liberty

can be devised that does not depend upon a Kantian conception of free persons, the move from *Theory of Justice* to *Political Liberalism* will be expensive: the weaker premises of *Political Liberalism* (e.g., jettisoning *Theory of Justice's* Kantian comprehensive doctrine) will simply yield weaker results (e.g., an overlapping consensus in which the Priority of Liberty is just one competitor idea among many). This conclusion may not be surprising: John Tomasi has argued that “political liberals cannot hope to adopt a wholly new motivational base for their view and yet have the content of justice remain exactly the same as before. . . .”²⁸ It is an open question as to whether the benefits of this adoption (such as enhanced political legitimacy and stability) outweigh the costs, but at least one of its costs has now been made clear.

28. John Tomasi, *Liberalism Beyond Justice: Citizens, Society, and the Boundaries of Political Theory* (Princeton, N.J.: Princeton University Press, 2001), p. 127.