WHAT ARE BASIC LIBERTIES?

ABSTRACT

Two moral powers are central to Rawls’s account of justice: 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 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 in the two fundamental cases. We argue that while necessity is too strong a modal relationship to feature in the definition of the basic liberties, another modal relationship that features in Rawls’s wider discussion of the basic liberties, namely enabling, is too weak. We discuss a new approach to defining the Rawlsian basic liberties in which probability takes over the role previously occupied by modality. However, on this approach some particular freedoms rightly regarded by Rawls as basic liberties do not meet the definition. We conclude that the end relative to which Rawls defines the basic liberties is too narrow. In order to widen it, we appeal to the liberal principle of legitimacy that underlies Rawls’s principles of justice. We explain some implications of this proposal for a broadly Rawlsian theory of justice and current debates about which rights and liberties are genuinely basic.

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

Rawls’s conception of justice as fairness regards citizens as persons engaged in social co-operation who have what Rawls calls ‘the two moral powers’, namely the capacity to have a sense of justice and the capacity to have a conception of the good.¹ 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.²

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’.³ The fundamental case in which the capacity for a conception of the good is exercised is in

¹ Rawls 2001, pp. 18–19. Note that envisaging society as a form of co-operation for mutual advantage and the introduction of the two moral powers are intimately connected. Society is seen this way due to the focus on the basic structure as the first subject of justice. It is because society is seen this way that people are considered to have the two moral powers in question; without these they would be unable to function as ‘normal and fully cooperating members of society’ (Rawls 1993, p. 301). This connection is crucial in other contexts: the debate on disability justice, for example, has a strong focus on these matters since Rawls’s commitments appear to rule out, as he readily admits, citizens with certain disabilities as parties to the original position. See Hartley 2011 for a good overview.

² Rawls 2001, p. 10. There is a separate discussion on what the basic structure consists in. For details, see Scheffler 2006 and Miklós 2011.

³ Rawls 2001, p. 112.
‘forming, revising, and rationally pursuing such a conception over a complete life’. Among the roles that the two moral powers play in Rawls’s theory of justice, besides their role in the definition of the basic liberties (which we discuss shortly), three are especially important. First, their possession is sufficient for status as a person, in the sense relevant to morality, and thus for an entitlement to justice. Second, the full and informed exercise of these powers is ‘essential to us as free and equal citizens’. Third, the stability over time of a just basic structure is promoted by some abilities of citizens that rest upon their possession of the two moral powers, namely the ability of citizens to identify with the principles of justice as their own, in that they understand them and see their implementation as fair, and their ability to recognize the well-ordered society as a system of social co-operation.

The two moral powers, and especially 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 ‘basic’ and therefore the right of all citizens equally and an entitlement that is (at least typically) to be constitutionally protected. That basic liberties are the rights of all

4 Ibid., p. 113.
8 Rawls 1971, pp. 197–199. Rawls 2001, p. 46 writes that ‘some of these liberties, especially the equal political liberties and freedom of thought and association, are to be guaranteed by a constitution (Theory, chap. IV)’. This carries the implicature that not all of the basic liberties are to be constitutionally protected (in a constitution that may be written or unwritten). It is hard to see, however, what would entitle only some of the basic liberties listed by Rawls 2001, p. 44 (quoted in section 2 below), rather than all of them, to constitutional protection.
citizens equally, and (at least typically) to be constitutionally protected, tells us about their functional role in a just social order. Specifying their functional role in this way is not a definition. Our concern in this article is primarily with the analytical question of how the basic liberties should be defined.

In section 2, we discuss how Rawls, in his mature account of the basic liberties, defines as basic those liberties that are *necessary* for the full and informed exercise of the moral powers in the two fundamental cases. Whilst initially leaving the end to which the basic liberties are related fixed, we argue that necessity is too strong a modal relationship to feature in the definition of the basic liberties. We then turn to another modal relationship that features in

This point is further supported by considering how the choice of the relevant liberties would be carried out. Such a choice appears to assume that in the original position (the first stage in Rawls’s ‘four-stage sequence’ as it was first introduced in Rawls 1971, §31) we decide on the list of basic liberties and then in the second, constitutional stage we decide *which* of these liberties are to be constitutionally protected. However, this seems to get things the wrong way around since, according to Rawls, the first, liberty principle of justice is the principle that gives us the primary standard for the constitutional convention. That is, the basic liberties ‘enter essentially into the specification of a just political procedure’ hence they cannot be sorted and selected in the very process that they are used to define. See Rawls 1993, p. 336. (An alternative to this reading would be to hold that in the original position the parties in effect draw up *two* lists of basic liberties: those that are to be constitutionally protected and those that are not. But on just what basis would they do this?)

For detailed discussion of a conception of the basic liberties directed towards a more general (and generous) end, namely that persons should live freely, see Pettit 2008. Pettit (pp. 201, 203) observes that whereas the specification of the basic liberties via lists is common,
Rawls’s discussion, namely enabling. After having provided a more detailed discussion of enabling than does Rawls, we argue that, as a candidate for inclusion in the definition of the basic liberties, enabling has the opposite shortcoming to necessity: enabling is too weak a modal relationship to feature in the definition.

In section 3, we discuss a new approach to the definition of the basic liberties 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 discussed in section 2, by modality.

In section 4, we show that the probabilistic approach discussed 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, freedom of political speech and expression).

In section 5, we propose a remedy for this problem that adds as a sufficient condition upon a particular liberty’s being basic that restrictions upon it that do not promote, or which are not designed to promote, the weighting of liberties in a scheme of liberty would be restrictions that breach an underlying principle of Rawls’s theory of justice, with which his principles of justice were intended fully to cohere, namely the liberal principle of legitimacy.

In section 6, we move beyond the purely analytical concerns of the prior sections, so as to show how the approach to defining the basic liberties that has emerged over the course of our discussion bears on current debates about which rights and liberties are genuinely basic.

Section 7 is a concluding summary.

the question of how the basic liberties are to be defined is, work by Rawls and by H.L.A. Hart aside, ‘remarkably neglected in the literature’.
2. The Basic Liberties: Rawls’s Mature Characterization

So far as the question of how the Rawlsian basic liberties should be defined is concerned, we draw mainly on Rawls’s account in *Justice as Fairness: A Restatement*, which supersedes his earlier work on this question. There, 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.\(^{10,11}\)

According to Rawls, there are two routes to a list of the basic liberties: a historical method, and an analytical method.\(^{12}\) Proceeding historically, ‘we survey various democratic

\(^{10}\) Rawls 2001, p. 44. Cf. Rawls 1971, p. 61; Rawls 1993, p. 291. Henceforth, we will use ‘basic liberties’ as shorthand for ‘basic rights and liberties’. In so doing, we emulate Rawls. He introduces the list just quoted, despite its inclusion of rights, as a list of ‘basic liberties’. For consistency, ‘liberty’ and ‘liberties’, when used either by Rawls or by us, should also be understood, when rights are not mentioned separately, and the context does not otherwise preclude this, to include rights. (Rawls’s decision to mention rights and liberties together is reminiscent of Hohfeld’s analysis of the structure of rights, in particular, of his notion of a ‘privilege’ or ‘liberty-right’. See Wenar 2015, §2. While Rawls nowhere mentions Hohfeld in his writings, some authors (e.g., de Hert & Gutwirth 2004) do make the connection.)

\(^{11}\) It is significant to our discussion later to note that neither freedom of speech nor, more widely, freedom of expression appears in this list. However, Rawls regards them as having been covered by ‘freedom of thought’. We show this in section 5.

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’. Proceeding analytically, which is the method with which we are henceforth 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’. While Rawls does not mention the two fundamental cases in this sentence, he proceeds to claim that the exercise of these powers in the two fundamental cases ‘is essential to us as free and equal citizens’. This suggests that the full and informed exercise of the moral powers in the two fundamental cases is the end relative to which the basic liberties are to be defined. Moreover, when Rawls later refers back to his introduction of the analytical method, he does explicitly mention the two fundamental cases. (In section 2, we argue that Rawls’s specification of what the analytical method is requires modification.)

13 Rawls 2001, p. 45. For a summary of the historical method’s disadvantages, see Arnold 2017, §2.

14 Rawls 2001, p 45.

15 Rawls 2001, p 45. Cf. Rawls 1993, p. 293 (which does not refer to the two fundamental cases); Rawls 1993, p. 308 (which does). Freeman 2007, p. 55 defines the basic liberties following Rawls 1993, p. 293 and omits mention of the two fundamental cases.

16 Rawls 2001, p. 112, quoted in the next paragraph of the main text. Even if reference to the two fundamental cases were, other things being equal, to be dropped from Rawls’s definition of the basic liberties, our substantive points (in section 2) against modal definitions of the basic liberties would still be effective.
We take it, then, 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 the full and informed exercise of [people’s] two moral powers […] in [at least one of] the two fundamental cases’. 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. The basic liberties pertain to Rawls’s first principle of justice, that:

Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all […]

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’ and no trade-offs are to be made of basic liberties for other social primary goods.

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17 Following von Platz 2014, p. 41, note 9, this ‘and’ should read ‘and/or’. Presumably, so should the ‘and’ of ‘full and informed exercise’. Henceforth in our discussion, we make these amendments. Rawls 1993, 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. Throughout, we presume that they are interchangeable.


19 Rawls 2001, pp. 43, 112.

20 Ibid., p. 42.

21 Ibid., p. 45.

22 Ibid., pp. 46–47.
When Rawls draws the contrast between the historical and the analytical methods, his characterization of the analytical method is inadequate. Rawls writes that when we adopt the analytical method, ‘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’ in the two fundamental cases.\(^\text{23}\) This is a specification of a set of conditions intended to be necessary and sufficient for a liberty’s counting as basic. Rather than being an adequate general explanation of what the analytical method is, this is an actual definition of the basic liberties. 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 a 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, is to be specified if not in these terms.

Rawls proceeds to remark 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 ‘liberty of conscience and freedom of association enable citizens’ to form, revise, and rationally pursue ‘their conceptions of the good’.\(^\text{24}\) 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 in the two fundamental cases.\(^\text{25}\) The explanatory

\(^\text{23}\) Ibid., p. 45.

\(^\text{24}\) Ibid., p. 45.

\(^\text{25}\) ‘Essential’ is the 2001 term; ‘necessary’ the 1993 term. See footnote 17.
remarks just quoted appeal to the weaker claim that the basic liberties *enable* the full and informed exercise of the moral powers in the two fundamental cases.\(^{26}\)

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 both necessary for, and an enabler of, our making a salad.) Rawls’s shift from talk of essentiality to talk of enabling represents no inconsistency, but it is relevant to the critical discussion that is to follow.\(^ {27}\)

Is the presence of the basic liberties a necessary condition for the full and informed exercise of the moral powers in the two fundamental cases? Before we answer this question,

\(^{26}\) von Platz 2014, p. 28 observes 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’. While endorsing no such revision, von Platz 2014, pp. 28–34 critically discusses various ways of attempting to revise Rawls’s definition of the basic liberties (not including the way that is discussed in section 3 below).

\(^{27}\) For those more versed in meta-ethics, Dancy’s particularism and the theory of reasons he works out to support it might be a tempting parallel to our account of enabling. See Dancy 2004, Chapter 3. However, for Dancy to enable a consideration to be a reason (i.e. to favour an action or attitude), it must be the case that without the enabler, the consideration cannot be a reason. As our explanation makes clear, we have a weaker account of enabling in mind.
we first note that the claim that it 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. 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 unjust 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 an unjust regime to one that either is, or which more closely approximates to being, in Rawls’s sense, a well-ordered society, rests upon the ability of a body of citizens or subjects 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.

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 fundamental cases’. The charitable interpretation of this remark is that a liberty is basic if and only if is necessary to the provision of the social conditions that must be in place in order for it to be

28 Here we follow Melenovsky & Bernstein 2015, p. 50.
29 Cf. Arnold 2017, §3.
30 Rawls 2001, p. 112.
the case that *every citizen* naturally capable of doing so is 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 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 illiberal laws that deprive citizens of core liberal freedoms.31 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’;32 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 (while grossly illiberal) 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. We think it is very unlikely that, under such conditions, every citizen could be so fortunate as to be able to do this. However, we agree with Arnold that it does not seem to be impossible.

The upshot of this discussion is that if necessity were to be the relationship that features in the definition of the basic liberties, this would not tend adequately to protect citizens from somewhat arbitrary, and certainly illiberal, restrictions upon freedoms that feature in Rawls’s list of the basic liberties. One response to this might be to revise the list to fit the definition. The other, which we adopt, is to regard the definition as having been intended to capture the liberties in the list and to amend it to fix the inadequacy that the definition is too stringent for

31 Arnold 2017, §4.2.

32 Rawls 1993, p. 335.
it to be the case that all of the liberties in the list fall under it. There is textual warrant for adopting this approach, because while Rawls listed the basic liberties relatively early in his career, he did not get around to writing anything amounting to an attempt to define them (via his application of the analytical method), until later. 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.

As we have seen, alongside Rawls’s official definition, in terms of essentiality/necessity, of the basic liberties to the full and informed exercise of the moral powers in the two fundamental cases he remarks that the basic liberties enable the full and informed exercise of the moral powers in the two fundamental cases. Given the above argument that necessity is too strong a notion for inclusion in the definition, this leaves enabling as a candidate to replace necessity in the definition. Even enabling, however, is not the right relationship. Recall that to enable A to V is to provide A with an object or good, O, that A can use in order to V. 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 to be true that the basic liberties are goods that enable the full and informed exercise of the moral powers in the two fundamental cases. Even if, unlike the claim that the basic liberties are necessary to the full and informed exercise of the moral powers in the two fundamental cases, 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. While the appeal

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34 Ibid., p. 45.
to necessity sets the bar too high, the appeal to enabling sets it too low.\footnote{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).} This is for a simple reason. All social primary goods are enablers for the full and informed exercise, in one or both of the two fundamental cases, of the moral powers.\footnote{Here is Rawls 1993, p. 307 (our italics) defining 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.’} Not all social primary goods are basic liberties. 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 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.

Switching to enabling would have another (for Rawls) unwelcome consequence that also offers a partial, albeit somewhat contentious, illustration of the above general point. Should Rawls proceed to endorse an enabling-based account of basic liberties, he would have to amend his list with liberties that he does not consider to be basic. Certain economic freedoms offer a good case. While they presumably count as social primary goods, they are not properly to be considered to be among the Rawlsian basic liberties. Wells remarks that:

the typical Rawlsian view does not […] include amongst the basic rights and liberties economic liberties such as freedom of trade and freedom of contract, which loom large in
classical liberal views. The typical Rawlsian view also includes amongst the basic rights and liberties only a modest basic property right, which is specified as a right to *personal* property.\(^{37}\)

Various authors have recently shown that there are indeed some economic liberties that are not, on a Rawlsian, ‘high liberal’, account of justice, among the basic liberties.\(^{38}\) Some of

\(^{37}\) Wells 2017, §2. While it is not in our focus in this paper, Rawls’s handling of the question of why the right to private property qualifies as a basic liberty is somewhat unclear (although he repeatedly states, e.g. Rawls 1993, p. 298, that it does so qualify). On the one hand, this right does not appear on his ‘official’ list of basic liberties, nor is it obviously in line with the general thrust of justice as fairness (cf. Murphy & Nagel 2002). On the other hand, Rawls does say (e.g., Rawls 2001, p. 114) that a right to private property is necessary to self-respect. He then states that self-respect, in turn, is necessary to the moral powers. This then raises the question of how long the list of basic liberties really is if liberties that are only derivatively justified (i.e. needed for something that in turn is needed for the exercise of our moral powers) are also on the list. There is also some indeterminacy lurking here. The right to private property, as a basic liberty, cannot encompass the rightful ownership of important economic assets (land, productive resources etc.), for it would be hard to show such a right has a close relation to the two moral powers (Rawls 1993, p. 298). And even if we accept that the right to *personal* property is different, it seems that the question – “How much personal property does one need in these terms and when does an asset become an economically important one?” – becomes crucial for Rawls to answer.

\(^{38}\) von Platz 2014; Melenovsky & Bernstein 2015; Wells 2017. For discussion, with further references, of the differences between high liberalism and other forms of liberalism, see, in addition, Arnold 2017 and Freeman 2011.
these economic liberties, such as freedom of contract, clearly seem to be social primary goods, although Rawls does not explicitly state them to be.\textsuperscript{39} If this is so, and assuming we are right that certain economic liberties qualify as social primary goods due to their enabling function, a switch to an enabling-based definition of basic liberties would place liberties on Rawls’s list of basic liberties that he certainly would not want to see there and which, if they were included in the list, would preclude his theory of justice from counting, as he intended it to count (albeit not under this description), as a high liberal theory.

However, in response to both these objections, 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 Theory, Rawls argued that primary goods come in a hierarchy depending on what exactly they are necessary for. In particular, he made a distinction between highest-order and higher-order interests: the former are interests in the exercise of the two moral powers while the latter are interests in the advancement of one’s determinate conception of the good. The basic liberties, Rawls claims, serve both sorts of interests, but other social primary goods, such as income and wealth, only serve the latter.\textsuperscript{40} While this distinction doesn’t damage our argument against the necessity reading (since that calls into question the strong modal connection between basic liberties and highest-order interests), it might still spell trouble for our argument against the enabling account. It could be claimed that the basic liberties in their enabling role help satisfy persons’ highest-order as well as higher-order interests, whereas other social primary goods do this only in relation to

\textsuperscript{39} Cf. Arnold 2017, §3.

\textsuperscript{40} The two relevant works are “Basic Liberties and Their Priority” and “Social Unity and Primary Goods”. Both works were incorporated into Political Liberalism, the former as a self-standing lecture (Lecture VIII). The latter, in its original form, is reprinted in Rawls 1999, as paper 17. In interpreting Rawls in this way, we rely on Davenport’s ms, section II.
persons’ higher-order interests. The same might also be said of the economic liberties we mention above: they too could be claimed to help satisfy only persons’ higher-order interests in their enabling role. Thus, in accordance with Rawls’s wishes, they would not end up being placed in the list of basic liberties.

We think that this move is illegitimate without substantive and detailed argumentation, which is not provided either by Rawls or 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 promote persons’ corresponding highest-order interests in this particular way). It is telling, and this was how we presented it above, that Rawls introduces the distinction between highest-order and higher-order interests while presupposing the necessity reading and nowhere, as far as we can tell, does he make the move from necessity to enabling in this context. In fact, we think making such a move would be a clear mistake and that therefore the burden of proof is on the side of those who nonetheless want to make it.

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41 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 an effect.

42 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 liberty over other principles of justice. However, by using the distinction between highest-order and higher-order interests and mapping our soon-to-be-proposed definition of the basic liberties onto it, we can re-introduce a hierarchy among social primary goods and preserve, at least in this regard, the principle of the priority of liberty.
We conclude that of the two modal relationships to which Rawls alludes between the basic liberties and the full and informed exercise of the moral powers in the two fundamental cases, neither is suitable for inclusion in the definition of the basic liberties. The next section shows that, in addition to the analytical case for doing so, there is independent textual warrant for supplanting these modal relationships with an appeal to probability. This results in a new approach to defining the basic liberties that sets the bar neither as high as the appeal to necessity nor as low as the appeal to enabling.

3. Defining the Basic Liberties: From Modality to Probability

According to Rawls,

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.  

Martin O’Neill seems to interpret this remark as having been intended to provide a criterion for deciding upon whether a given liberty is basic. In fact, Rawls’s remark was intended to guide the weightings of particular basic liberties, within ‘a fully adequate scheme’ of basic

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43 Rawls 2001, p. 113; cf. Rawls 1993, p. 335. We view the fact that Rawls uses both the language of essence and that of necessity here as a purely stylistic matter. If, however, Rawls intended essentiality and necessity to be separate notions, then this has no negative impact on our arguments.

liberties, once a list of basic liberties (specified at a high level of abstraction) is in place.\textsuperscript{45} The wording immediately before and after the remark makes this clear.\textsuperscript{46} The remark concerns the question of how, ‘when the principles of justice are applied at the constitutional, legislative and judicial stages […] the basic liberties are to be further specified and adjusted to one another as social circumstances are made known’.\textsuperscript{47} The question of ‘the general form and content of the basic rights and liberties’ –that is, at a high level of abstraction, so short of providing a full specification, the question of which rights and liberties are basic– is to be answered at the first stage.\textsuperscript{48} Since, at the first stage, ‘the parties in the original position adopt the basic liberties’ they know, at a high level of abstraction, such as that at which they are specified in the list quoted above, what they are.\textsuperscript{49} In his remarks about the degrees of significance, quoted at the start of this section, Rawls does not intend to suggest that the status of a liberty as basic is a matter of degree; rather, his distinction between basic and non-

\textsuperscript{45} Pettit 2008, p. 206 distinguishes between \textit{proximal} and \textit{distal} freedoms: “In order to have the distal, general freedom to speak to others on any topic, I must have the specific freedom to speak about the weather and the proximal freedom to open my mouth. But the more specific and proximal freedoms need not be important as such in my personal life; their importance will turn on the importance of the more distal and general freedom that they can serve. Hence it is the latter freedom that ought to count as a matter of basic liberty.” Since Rawlsian basic liberties are to be specified at a high level of abstraction, they are, as is noted by Pettit (p. 207), distal freedoms.


\textsuperscript{48} Rawls 2001, p. 172.

basic liberties is binary. Thus, it would be mistaken to treat the remark about degrees of
significance as providing a definition of, or a test for, the basic liberties. Nevertheless, the
remark is relevant to our analytical concerns. Rawls, when providing his modal definition of
the basic liberties, does not appeal to degrees of essentiality 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 in at least one of the two fundamental cases 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).

Moreover, there is an obvious analytical shortcoming with Rawls’s remark about degrees
of significance, though it is one that, as far as we know, has not previously been noted in the
literature on Rawls. 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. For
example, it is commonly held that logical necessity is stronger than physical necessity, for the
notion of physical necessity may be cashed out as follows.\(^50\) That which is physically
necessary is that which follows, as a matter of logical consequence, from the laws of physics.
On this account, every logically necessary truth is also a physically necessary truth, but not
vice versa. As a corollary, given that possibility is the dual of necessity (i.e., a notion that
can, with negation, be defined in terms of necessity) whatever is physically possible is
logically possible, but not vice versa. Despite the fact that one notion of necessity or
possibility may be stronger than another, when we are working with a single notion of
necessity or possibility 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 in one (or both) of the two

\(^{50}\) See, e.g., Hale 1997.
fundamental cases\textsuperscript{51} 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 in the two fundamental cases.

There would seem to be two ways of viewing Rawls’s talk of degrees of necessity (and essentiality). On the one hand, one might view it as a slip up and consider that Rawls would have recognized that the necessity in question is a binary property, rather than a scalar one. On the other, one might think that Rawls’s talk of degrees of necessity was confused but that it was appropriate for him to have had in mind a scalar property. The second option is clearly preferable. To adopt the first would be to relinquish the claim that liberties admit of degrees of significance. The picture left by this would just be that some liberties are basic and others are not basic. Within each category, the basic and the non-basic liberties would be all on a par with each other. In fact, they are not. For example, while bodily integrity and freedom of assembly are both basic liberties, bodily integrity is considerably more significant to the full and informed exercise of the capacity for a conception of the good.

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

\textsuperscript{51} Rawls 2001, p. 113.
Now this observation relates, as we observed near the beginning of this section, not to how an appropriate list of basic liberties is, following the analytical method, to be drawn-up but, rather, to the question of how particular basic liberties are to be ranked in a fully adequate scheme of liberties once a list of the basic liberties is already in place. It is a matter for the second, constitutional stage, in Rawls’s four-stage account of justice, rather than for the first stage (in which the principles of justice are determined in the original position).

Nevertheless, we have already argued (in section 2) that the modal relationship that features in Rawls’s definition, namely necessity, and the weaker relationship that he includes in his discussion, namely enabling, are both inappropriate for inclusion in an extensionally correct definition of the basic liberties. Thus, 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 contingent risk, above a certain threshold, to the full and informed exercise of the moral powers in the two fundamental cases. Accordingly, we 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 in one or both of the fundamental cases will be stunted or atrophy. This suggestion, while indicating the form of a full definition, falls short of being one because the threshold itself has not been specified.\textsuperscript{52}

Despite this, we take it to be progress.

\textsuperscript{52} There are many ways of setting such thresholds: they can be rigid specifying a specific upper limit or more flexible by, e.g., being indexed to relevant circumstances. As we note in the main text, some of these technical matters could be decided in later stages after the veil of ignorance is (at least partially) lifted.

In this section, we discuss two problems with the idea of a probability threshold. The outcomes of our discussions of these two problems do not suggest that any fundamental change is needed to the probabilistic approach. In the next section, we highlight and attempt to resolve a third and more fundamental problem, this time with the extensional adequacy of the probabilistic approach.

The first problem concerns whether the parties in the original position can decide about a threshold of any kind. In response, we think that if the parties in the original position can draw up a list of basic liberties using a modal definition (whether Rawls’s own or the one that appeals to enabling), then they can also handle a probabilistic definition. It is true that the veil of ignorance hides ‘all but the vaguest knowledge of likelihoods’. However, this refers to a different set of probabilities: ‘[T]he parties have no basis for determining the probable nature of their society, or their place in it.'\textsuperscript{53} Although setting the threshold requires risk assessment, the risks involved are not those the veil is designed to hide from the parties. In particular, if the parties are able to decide, using the knowledge available to them, about which liberties are essential for or enable our exercise of the two moral powers, they should also be able to decide about which liberties are such that not having them would push us above a certain probability threshold of not being able to exercise the two moral powers in a full and informed manner in the two fundamental cases. As far as we can tell, making such a decision does not require knowledge of the particular nature of one’s society or one’s own psychology, only of general facts about human societies and of the relevant social sciences; in short, knowledge that the parties are allowed to have.\textsuperscript{54} Add to this, finally, that the parties in the original position do not have to provide a precise specification of the list: its elements

\textsuperscript{53} Rawls 1971, p. 155.

can be further specified in later stages after the veil is (at least partially) lifted, as Rawls explicitly admits and proposes.\textsuperscript{55}

The second potential stumbling block concerns whether a threshold exists at all. In a different context, Liam Murphy argues that the so-called over-demandingness objection to consequentialism is not an objection proper because it lacks solid foundations. In particular, in discussing Samuel Scheffler’s proposal that aims to limit consequentialist demands by employing what he calls an agent-centred prerogative,\textsuperscript{56} Murphy argues that no such limit can be set for one fundamental reason: there is no independent way of specifying the limit, independent, that is, of ‘the shape of the demands of one’s prior beliefs about the decent life’.\textsuperscript{57} This is a problem since the over-demandingness objection is designed to operate as a (moral) theory-independent constraint on consequentialism, not as a theory-driven one that opposes consequentialism in the name of another moral outlook. Applying analogous reasoning against our proposal, one could argue that setting the threshold in our definition of basic liberties is impossible: there is no independent way of specifying the threshold, independent, that is, of our prior beliefs about the shape of a just basic structure. However, this analogy clearly breaks down, for the simple reason that, unlike the over-demandingness objection, we do not have to hold that setting the threshold is a (moral) theory-independent matter.\textsuperscript{58} Still, one could try to salvage the objection by pointing out that the original position

\textsuperscript{55} Rawls 1993, p. 298.

\textsuperscript{56} The prerogative would allow agents, in assessing what they are required to do, to give their own interests greater weight than they give the interests of others: they can multiply the value of their own interests by some fixed factor. See Scheffler 1982 for details.

\textsuperscript{57} Murphy 2000, p. 69.

\textsuperscript{58} It is true that Rawls’s method of justification, namely the method of reflective equilibrium, uses what he calls ‘considered judgments’ as inputs into the process of finding the principles
does not allow personal knowledge behind the veil and recourse to moral convictions would be just that. To this, we have two replies. One, even if setting the threshold would be a moral matter, this could presumably be done by the parties’ using general knowledge of moral theories. Two, as our response to the first problem shows, we do not think that setting the threshold is a matter of moral argumentation. This is not because we think that this is somehow an intuitive (i.e. theory-independent) issue, but because we think that deciding upon the threshold should be done by using the non-moral sciences in conjunction with general facts about human societies and psychology.

Let us sum up our discussion, so far, of a probabilistic approach to defining the basic liberties. The approach, while working with the scalar notion of probability, retains a binary basic/non-basic distinction because it is a binary matter as to whether a given liberty meets or does not meet the threshold. Unlike on Rawls’s account, which falls into inconsistency due to its having treated modal notions both (correctly) as binary and (incorrectly) as scalar, there is no need, on a probabilistic approach, to provide both a definition of the basic liberties and a separate criterion for ranking their significance, once a list of them, is in place, in a fully of justice. One could therefore argue that such judgments play the role of intuitions in Rawls’s system and intuitions are best understood, among other marks, as pre-theoretical. However, it is not clear that Rawls’s notion of considered judgments is the same as intuitions in this traditional sense: see further Kauppinen 2015 and Daniels 1996, p. 25. Moreover, even if this was the case, considered judgments are only one kind of input to what Daniels (1996, p. 51) calls ‘wide reflective equilibrium’ and the other elements are not themselves pre-theoretical. Finally, these elements are not used directly to set the threshold. This is done in the original position (the construction of which is part of the equilibrium process) where, as we shall argue, setting the threshold may not require appeal to moral theories at all.
adequate scheme of liberties. There is no such need because liberties that are above the threshold will differ in the extent to which they are above it.

5. 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 basic liberties in Rawls’s lists 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 lists, is extensionally inadequate. Unfortunately, the probabilistic approach we discussed as an alternative to modal definitions is vulnerable to counter-examples that show it to be extensionally inadequate as well. One such counter-example is the freedom to produce or to consume political satire, which we will henceforth call ‘freedom of political satire’. The case of freedom of political satire results in a dilemma for the probabilistic approach. Suppose (contrary to our own actual opinion) that any satirical content can be conveyed non-satirically. (This would be that 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.\(^{59}\)) It follows that freedom of political satire is not, on the probabilistic approach, a basic liberty because the equivalence of expressions of satire 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

\(^{59}\) For an introductory discussion of metaphor, see Lycan 2000, Chapter 14.
other hand, that political satire can include content that is not literally expressible.\textsuperscript{60} 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 observers, 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.\textsuperscript{61}

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 against political satire cannot be criticized (on this horn of the dilemma) on the grounds that

\textsuperscript{60} One way of meta-ethically reinforcing this would be to endorse, as is often done with respect to humour, a sensibility theory about political satire. The idea would then be that the property of being satirical is not reducible to whatever makes something satirical (i.e. the natural properties of that thing). Instead, the satirical is best seen as essentially bound up with human sensibilities (in this case: that of the satirical). See Miller 2003, Chapter 10 for a good critical analysis. However, it is important to note that what we say in the text does not require the non-reducibility of the satirical to the natural: all it requires is the non-reducibility of the satirical to the literally expressible.

\textsuperscript{61} Rawls 1993, p. 346.
it is a restriction on the free and informed public use of reason. 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 in the two fundamental cases, 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 traditionally cherished by liberals an included, whether explicitly or implicitly, in Rawls’s list of the basic liberties). The outcome of our 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 for freedom of political satire (and, more widely, for freedom of expression of whatever kind such that its content cannot fully be conveyed in literal language) to emerge as a basic liberty.

Freedom of speech (and, more widely, of expression) is a particular case of the basic liberty that Rawls calls ‘freedom of thought’. After he remarks that, once we have a list of the basic liberties, particular liberties can be weighted, in a scheme of liberties, Rawls gives as examples of particular liberties ‘freedom of speech, press and discussion’. In the context, a particular liberty is one that, specified at a higher degree of abstraction, is one of the liberties

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62 This is not to say that the property of being satirical cannot be itself reason-providing over and above the natural properties that make something satirical. Many think this to be so at least regarding thin properties such as right and wrong (e.g. Dancy 2004, p. 16). Our position is neutral on this matter insofar as it is accepted that the fact that something is satirical is also literally expressible.

63 Rawls 2001, p. 113.
in Rawls’s lists of basic liberties. \(^{64}\) A particular liberty, so understood, such as ‘freedom of political speech’ is presumably regarded by Rawls ‘as a basic liberty’ \(^{65}\) because it is an instance of a listed basic liberty, namely freedom of thought. At the same time, freedom of political speech can, at the constitutional stage, be specified ‘into more particular liberties’. \(^{66}\) Now this process 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. \(^{67}\)

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 which restricts the right of citizens to criticize the basic structure and its social policies. \(^{68}\) A 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,

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\(^{64}\) See further footnote 45 above.

\(^{65}\) Rawls 1993, p. 341.

\(^{66}\) Ibid., pp. 341–342; cf. p. 344.

\(^{67}\) We consider an emphasis on the discernment of limits to free political speech to be prevalent in ibid., pp. 340–356.

\(^{68}\) 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 persons 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. 295–296, 348, 364–365 and Rawls 2001, p. 111. For further details on freedom of speech and expression, see Rawls 1971, p. 222–225; Rawls 1993, pp. 340–356; Rawls 2001, pp. 111–114, 149–150; Freeman 2007, pp. 46, 51–53, 57, 66–72, 79, 210–211, 412. Rawls regards freedom of speech as a requirement of the first principle of justice. See, e.g., Rawls 1971, p. 225.
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 in the two fundamental cases.
If there be citizens among whose 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’. The upshot of
this discussion is that, 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
lists of such freedoms or regarded by him as particular cases of freedoms that are in the lists.

We are not ready to conclude that the search for an analytical definition of the basic
liberties is a lost cause that is to be abandoned in favour either 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 freedom of thought (and thus, of expression) in the list of the basic liberties with the
functional role that the basic liberties are intended to play as inalienable freedoms. The case
of the freedom of political satire shows, since it is a particular case of freedom of expression,
both that not everything in the list meets the definition and that the definition does not have

69 Melenovsky & Bernstein 2015, p. 53.
70 On inalienability, see Freeman 2007, p. 51.
the result that every listed freedom is inalienable. Therefore, if freedom of expression is indeed properly to be considered a basic liberty, the end to which Rawls defines the basic liberties is too narrow.

How, then, are we to make progress given the extensional inadequacy of every approach to providing the basic liberties with an analytical definition that we have so far discussed? We acknowledge that it is a theoretical possibility that some of the freedoms included in Rawls’s lists of the basic liberties were included incorrectly. Nevertheless, Rawls listed the basic liberties long before he got around to attempting to provide an analytical definition of them. We take it, therefore, that it is a desideratum that the concept of basic liberty should indeed include in its extension those liberties that feature in Rawls’s lists. It is also a desideratum that all and only those freedoms 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, should be included in the extension of the concept.

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’. The freedom to produce or consume political satire is not one without which universal full and informed exercise of the moral powers in the two fundamental cases 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 the parties in the original position

would recognize such suppression as 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. 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 in one or both of the fundamental cases will be stunted or atrophy;

(ii) a legal restriction upon it, when the restriction neither promoted nor was designed to 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

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72 While, in the main text, our argument about the need for (ii) is based on the case of freedom of political satire, we note that (ii) is plausibly required to secure as basic such crucial liberal 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 (i).
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.\textsuperscript{73}

An objection to our proposal concerns the division of labour between the four stages in Rawls’s four-stage sequence. Leif Wenar writes that:

at the constitutional (second) and legislative (third) stages, the parties specify basic liberties such as ‘freedom of thought’ into more particular rights, like the right to free political speech. The right to political speech is itself then further specified as the right to criticize the government, the rights protecting the press from political interference, and so on.\textsuperscript{74}

Our account was specifically defined to include such particular liberties as freedom of political speech and expression as basic liberties identifiable in the original position. This is because a content restriction upon these freedoms along the lines set out in (ii) is a content restriction on freedom of thought (as understood broadly, following Rawls, to include freedom of expression). Accordingly, a political order in which such a content restriction pertains is not one in which freedom of thought is properly recognized as a basic liberty.

From Wenar’s remarks, however, an objection to our way of proceeding can be extrapolated. The objection is that we have imported a matter that is properly for stage two in the four-stage sequence, namely the specification of particular basic liberties, into stage one. We reply

\textsuperscript{73} This is clearly vindicated by the reflective equilibrium process since in wide reflective equilibrium a feasibility test is always involved. In Theory this only concerned the stability of the theory of justice proposed but in Political Liberalism legitimacy takes centre stage. For details, see Daniels 1996, Chapter 8 and Song 2012.

\textsuperscript{74} Wenar 2017, §4.9.
as follows. For Rawls, a list of basic liberties ‘which achieves the initial aim of justice as fairness’,\textsuperscript{75} namely to show that, in the original position, ‘the principles of justice would be chosen over the other traditional alternatives’\textsuperscript{76} is only:

a starting point that can be improved by finding a second list such that the parties in the original position would agree to the two principles with the second list rather than the two principles with the initial list. This process can be continued indefinitely, but the discriminating power of philosophical reflection at the level of the original position may soon run out. When this happens we should settle on the last preferred list and then specify that list further at the constitutional, legislative and judicial stages, when general knowledge of social institutions and of society’s circumstances is made known. It suffices that the considerations adduced from the standpoint of the original position determine the general form and content of the basic liberties and explain the adoption of the two principles of justice, which alone among the alternatives incorporate these liberties and assign them priority. Thus, as a matter of method, nothing need be lost by using a step-by-step procedure for arriving at a list of liberties and their further specification.\textsuperscript{77}

Provided that Rawls’s own official definition of the basic liberties is not imposed upon the parties in the original position, we see no reason to think that either freedom of speech and expression, generally specified, nor, more particularly, the freedom to produce or consume political satire, could only be, should only be, or would only be likely to be recognized as basic liberties once ‘the discriminating power of philosophical reflection at the level of the

\textsuperscript{75} Rawls 1993, p. 293.

\textsuperscript{76} Ibid., p. 294.

\textsuperscript{77} Ibid., p. 293.
original position’ has run out. Under condition (i), the freedoms that can be recognized as basic in the original position can indeed be further specified, and even supplemented at later stages in the four-stage sequence, as knowledge of actual social conditions is increased. Securing freedom of political satire as a basic liberty via condition (ii) does not depend on such knowledge. Rawls remarks that ‘the basic liberties need to be adjusted to one another and cannot be specified individually’. We do not interpret this as having been intended to mean that a particular liberty cannot properly, on its own, be considered to be basic. Rather, it concerns ‘the mutual adjustment of the basic liberties’: that is, questions about the scopes and limits of liberties already considered to be basic. The case of free political speech, which (given the principle of legitimacy) can and will be considered a basic liberty by the parties in the original position, shows that the identification of a particular liberty as basic need not (even if it can) be a matter for the later stages.

While they are not explicitly mentioned in his list of the basic liberties, Rawls regards freedom of speech and freedom of expression as basic liberties: they are cases of ‘freedom of thought’. After he remarks that, once we have a list of the basic liberties, particular liberties can be weighted, in a scheme of liberties, Rawls gives as examples of particular liberties ‘freedom of speech, press and discussion’. In the context, a particular liberty is one that, specified at a higher degree of abstraction, is one of the liberties in Rawls’s lists of basic

78 Ibid., p. 357.

79 Ibid., p. 358.

80 Cf. the interpretation of Freeman 2007, p. 47. Also Rawls 1993, p. 341 considers ‘freedom of political speech as a basic liberty’ even though it does not appear, under this description, in the list of basic liberties of ibid., p. 291.

81 Rawls 2001, p. 113.
liberties. A particular liberty, so understood, such as ‘freedom of political speech’, is presumably regarded by Rawls ‘as a basic liberty’ because it is an instance of a one of the freedoms featuring in his list of basic liberties, namely (in this case) freedom of thought. At the same time, freedom of political speech can, at the constitutional stage, be specified ‘into more particular liberties’. However, as we have already remarked, we think that this process is perhaps better understood as concerning how legitimate limits on free political speech, rather than entitlements to free political speech, are to be discerned. The parties in the original position can already tell, given that their decisions cohere fully with the principle of legitimacy, that there is a presumption in favour of free political speech and that any legitimate restrictions upon it, apt for discernment (partly in view of knowledge of actual social circumstances that is not available to the parties in the original position) at the constitutional stage and afterwards, must therefore aim at promoting the balance of basic liberties in a scheme of liberties. In sum, both the general entitlement to free political speech and the conditions that legitimate restrictions upon it must meet are discernible, via an appropriate analytical definition of the basic liberties at which the parties in the original position can and will arrive, in the original position. In order to secure the general entitlement to free political speech as a basic liberty it is therefore unnecessary to revert to the historical method.

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82 See further footnote 45.


85 Here, our discussion contrasts with that of ibid., p. 342, where entitlements to free political speech are discerned ‘not from a general definition […] but from what the history of constitutional doctrine shows’.
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). We do not consider condition (i) redundant, for the following reason. The right to vote in general elections is an entitlement that citizens can exercise. Legislation that stipulates fixed-term parliaments puts a temporal 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’. 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, for three reasons. First, the parties in the original position would not deem restrictions on market-strategic advertising, even if these were legally imposed (as opposed to just being contractually agreed), to be inconsistent with the principle of legitimacy. For reasonable and rational people may agree with Rawls that market-strategic advertising can be socially wasteful. Second, market-strategic advertising, unlike freedom of political satire, is unrelated to the exercise of the moral powers in the two fundamental cases. It is necessary to the satisfaction of condition (ii) that

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86 Ibid., pp. 364–365.
the liberty in question should be related to the full and informed exercise of the moral powers in the two fundamental cases. The reason why the parties in the original position will recognize freedom of political satire as basic is because, as we have already said, while it does not 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.) A third, though perhaps less important, reason why freedom to engage in market-strategic advertising is not a basic liberty is that the basic liberties belong to individual citizens, not to corporate agents such as firms. Rawls’s discussion of freedom to engage in market-strategic advertising (and of restrictions on it), makes it clear that this freedom pertains to firms, not to individual citizens.

6. Consequences of Our Approach to Defining the Basic Liberties

The question of which rights and liberties are, in a broadly Rawlsian account of justice, to count as basic is contested. Some thinkers on the left have, for example, argued that a right to a measure of democracy in the workplace is among the basic rights and liberties. 87 Recently, thinkers in sympathy with laissez-faire economics have argued that certain free-market economic liberties that Rawls did not consider basic really are basic. 88 The approach to defining the basic liberties we have defended throws these debates open, and casts them in a new light. For example, even if, as O’Neill suggests, an element of workplace democracy is

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87 Clark & Gintis 1978, pp. 303, 311–313.

88 E.g., Tomasi 2012. For critical discussion and further references, see Arnold 2017, Melenovsky & Bernstein 2015, Patten 2014, von Platz 2014 and Wells 2017.
not necessary to the full and informed exercise of the moral powers in the two fundamental cases\textsuperscript{89} 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 in one or both of the fundamental cases.\textsuperscript{90} The same applies to the case of the \textit{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, is whether its lack raises above the threshold the risk to the full and informed exercise of the moral powers in the two fundamental cases. This does not threaten the earlier point that some such liberties, while social primary goods, are not Rawlsian basic liberties; for some of the considerations that show some of these economic liberties not to meet Rawls’s definition, in terms of necessity, of the basic liberties also show that the lack of some of these economic liberties plausibly does not pose any significant risk to the full and informed exercise of the moral powers in the two fundamental cases. Take, for example, freedom of contract. In countries with laws relating to maximum working hours, such as in Norway and in countries belonging to the European Union, this restriction on freedom of contract is not (unlike, for example, restrictions on free speech to disallow the incitement to violence) for the sake of the promotion of some other Rawlsian 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 in the two fundamental cases as to suggest that such freedom is necessary for the full and informed exercise of the moral powers in the

\textsuperscript{89} O’Neill 2008, pp. 41–42.

\textsuperscript{90} Ibid., p. 36 notes this risk but does not question the adequacy of Rawls’s definition of the basic liberties.
two fundamental cases. 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 Rawlsian basic liberty.

7. Conclusion

When Rawls specifies what it is that makes a liberty a basic liberty, he does so in terms of that liberty’s being necessary for the ‘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 fundamental cases’, namely in ‘the application of the principles of justice to the basic structure and its social policies’ and in ‘forming, revising, and rationally pursuing’ a conception of the good ‘over a complete life’.

When Rawls discusses how the basic liberties, once a list of them is in place, are to be ranked in a fully adequate scheme of liberties, he appeals to degrees of necessity (and essentiality). We have shown to be problematic Rawls’s having treated these notions as both binary and scalar matters. Given that it is probability, rather than necessity (or essentiality), that admits of degrees, this is an evident analytical shortcoming in Rawls’s discussion of the basic liberties. This article has 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. Thus, the appeal to the necessity (or essentiality) of a liberty in respect of the full and/or informed exercise of at least

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91 For related discussion, see Melenovsky & Bernstein 2015, pp. 52–54 and, with a particular focus on Norway, Arnold 2017, §3.

92 Rawls 2001, p. 112.

93 Ibid., p. 112.

94 Ibid., p. 113.
one of the moral powers in at least one of the two fundamental cases should be replaced by appeal to the probability that, in the absence of the liberty in question, at least one of the moral power, and/or its full and/or informed exercise in at least one of the two fundamental cases will, due to social conditions, fall below a threshold of adequacy. This proposal renders superfluous the need for a criterion, over-and-above a probabilistic definition itself, for ranking the basic liberties in terms of degrees of significance in a fully adequate scheme of liberties. Using the case of freedom of political satire, we showed 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. In spelling out how that principle is to be applied in separating out basic from non-basic liberties, we appealed to relevance to the moral powers in the two fundamental cases. 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 (which, for example, cannot secure freedom of political satire as a basic liberty).

References


