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SHOULD ALL FREEDOM BE BASIC?

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In a recent paper, Jessica Flanigan claims that the logic internal to Rawlsian high liberalism requires elevating nearly all freedoms to the list of basic rights.[1] 'High liberalism' refers to a set of liberal views, of which Rawls's justice as fairness serves as one notable example, that weds a commitment to freedom with a commitment to the common good.[2] On the one hand, Rawls's commitment to freedom is reflected in the lexical priority (referred to as the priority of liberty principle) he attaches to the list of freedoms protected as basic rights by his first principle of justice. Because these rights are supposed to protect citizens' most fundamental interests, the priority of liberty principle prohibits absolutely the violation of basic rights for the sake of protecting nonbasic rights or for the sake of promoting either perfectionist values or the common good. Basic rights may be violated only for the sake of protecting other basic rights. They consequently constrain the extent to which the state may legitimately interfere with individual freedom for the sake of promoting the common good—that is, for the sake of promoting things such as equality of opportunity, economic growth and a fairer distribution of wealth, public health, campaign finance reform, national defense, etc. Rawls specifies the list of basic rights very narrowly for this reason, as including too many freedoms would undermine his commitment to the common good, and it is also partly for the same reason that he excludes capitalist economic freedoms. The viability and much of the appeal of high liberalism depend on its ability to synthesize these two commitments into a harmonious whole in which individual freedom does not completely eclipse or marginalize the normative and political importance of the common good.

Insofar as Flanigan argues that nearly *any* freedom should count as basic in this Rawlsian sense, then her argument threatens Rawlsian high liberalism by completely marginalizing its commitment to the common good.[3] When

1 Flanigan, "All Liberty Is Basic." I use the terms 'freedom' and 'liberty' interchangeably.

2 For a survey of high liberalism in contrast to classical liberalism and libertarianism, see Freeman, "Capitalism in the Classical and High Liberal Traditions."

3 Her argument is therefore more threatening than the argument pressed by John Tomasi, who argues that capitalist economic freedoms ought to be included within the list of basic

nearly any freedom qualifies as a basic right, there will be little if any political and legal space remaining for the state to promote the common good. To the extent that her argument requires marginalizing the common good for the sake of individual freedom, it thereby implies that the very logic internal to Rawlsian high liberalism is responsible for paving the way to what are standard libertarian conclusions, such that in the end there will be little theoretical and practical differences between the two. For if nearly all freedoms are to be protected as basic rights, then it turns out that the primary if not exclusive function of the state becomes the protection of individual freedom.

My aim in this paper is to survey potential Rawlsian high-liberal responses to Flanigan's argument. To do so, the paper is organized as follows. Section 1 provides a very brief exposition of Rawls's view. As has been mentioned already, a key feature of basic rights is that they are not to be violated for the sake of promoting the common good, so the section also explains in greater detail what is meant by the 'common good'. Section 2 draws out the implications of Flanigan's argument for the viability of the high-liberal project. Flanigan considers and rejects several responses offered by high liberals in her paper, so section 3 considers two novel responses. I argue that both responses depend on controversial value judgments, making them unattractive from the high-liberal perspective. Section 4 turns to the most promising response. I argue that to stave off the implications that follow from Flanigan's argument, Rawlsian high liberals should abandon the priority principle and preserve their commitment to the common good. Doing so not only allows them to preserve the more egalitarian aspects of their views but also brings additional benefits. Preserving their commitment to the common good allows Rawlsian high liberalism to operationalize the harm principle (section 4.1); to determine a coherent, compossible scheme of basic rights (section 4.2); and to adjudicate conflicts between citizens' basic rights (section 4.3). Abandoning the priority principle thus preserves high liberalism's theoretical flexibility in a way that allows it to address important political problems. Lastly, section 5 rejects an objection that attempts to preserve the priority principle.

1. RAWLS'S VIEW

1.1. The Connection Between Personhood and Basic Rights

For Rawlsian high liberals, there are two important differences between basic rights and nonbasic rights. The first important difference is that the basic rights

rights. Tomasi, *Free Market Fairness*. For criticisms of Tomasi's arguments, see Arnold, "Right-Wing Rawlsianism"; Patten, "Are the Economic Liberties Basic?"; and Melenovsky and Bernstein, "Why Free Market Rights Are Not Basic Liberties."

protected by Rawls's first principle of justice possess absolute normative and political status relative to the rights not protected by that principle (but not to other basic rights). This difference in status between the two categories of rights is reflected in the scope of reasons capable of justifying their violation. In virtue of their absolute normative and political status, basic rights may not be violated for the sake of protecting nonbasic rights, promoting the common good, or promoting perfectionist values.[4] Rawls refers to this feature of basic rights as a commitment to the priority of liberty. The priority of liberty principle expresses the idea that the rights (i.e., the freedoms) protected by the first principle of justice take absolute priority over other rights and the second principle of justice within Rawls's theory. Nonbasic rights, in contrast, may be violated for the sake of promoting the common good.

The second difference between basic and nonbasic rights explains why the former carry absolute weight. Rawls singles out his basic rights in virtue of their connection to his conception of personhood. Under the Rawlsian framework, fully cooperating moral persons, or citizens, possess two moral powers: the capacity for a sense of justice and the capacity to form, revise, and pursue a conception of the good. What distinguishes basic rights from nonbasic rights is that basic rights are necessary for the adequate development and exercise of the two moral powers.

Rawls identifies several rights that are to be protected by his first principle of justice. These rights include freedom of thought and liberty of conscience, political liberties, freedom of association, integrity of the person, and the rights and freedoms covered by the rule of law.[5] Notably, Rawls excludes any economic rights—such as a right to own the means of production, a right protecting freedom of contract, or other entrepreneurial rights—from the first principle. According to him, these rights are not necessary for the development and exercise of the moral powers and, for that reason, do not qualify as basic rights.

1.2. The Common Good

In expressing his commitment to the priority of liberty, Rawls tells us that the basic rights protected by the first principle of justice "have an absolute weight with respect to reasons of public good."[6] Basic rights cannot be violated for the sake of promoting the common good. What exactly constitutes the common good, however? Rawls does not expand on precisely what sorts of reasons count as "reasons of public good" in *Political Liberalism*, although

4 Rawls, *Political Liberalism*, 294–95.

5 Rawls, *Political Liberalism*, 291.

6 Rawls, *Political Liberalism*, 294.

he does provide a few examples: reasons that pertain to economic efficiency and growth, as well as a discriminatory selective service act for the purpose of raising an army. In the revised edition of *A Theory of Justice*, he provides a bit more detail, as he uses the term to refer to the interests shared by citizens from their position as citizens.[7] More specifically, these shared interests include both the scheme of basic rights and the fair equality of opportunity principle. These brief comments suggest that there may be a tension between how the concept is employed in *Political Liberalism* and the way in which Rawls understands it in *A Theory of Justice.* For it appears that in *Theory*, the scheme of basic rights comprises one part of the common good rather than a categorically different set of interests. One way to resolve the tension here is by appealing to the priority of liberty principle: even if the scheme of basic rights were one part of the common good as is suggested by *Theory*, Rawls's commitment to the priority of liberty would nonetheless prohibit this part of the common good from being violated or sacrificed for the sake of promoting other parts of the common good, such as fair equality of opportunity or a particular distribution of wealth.

In either case, because Rawls does not specify the concept in sufficient detail and because the concept plays an important role in the paper, I provide some general remarks as to how I understand it. To do so, I will follow—albeit with one important qualification—the account laid out by Waheed Hussain in his *Stanford Encyclopedia* article on the concept. In his article, Hussain identifies five central features of the common good: (1) the common good provides a shared account of practical or deliberative reasoning for citizens of a political community; (2) the common good refers to a set of facilities—political institutions, human artifacts (hospitals, schools, roads, etc.), and the environment—that serve some common interests; (3) the set of interests included with the common good are a *privileged* set of common interests; (4) the common good expresses a solidaric concern on the part of citizens to give the same status to the interests of other citizens as they do to their own in their deliberation; and finally, (5) "most" conceptions of the common good, according to Hussain, do not take an aggregative view of citizens' interests.[8]

For the purposes of this paper, the one "modification" I propose is to allow aggregative concerns to form a legitimate part of our understanding of the concept. Given that Hussain concedes that some conceptions of the common good already allow aggregation to play a role, it really is not a modification at all. It is nonetheless important to emphasize the aggregative aspect, because although Hussain tends to minimize its importance, he recognizes that different

7 Rawls, *A Theory of Justice: Revised Edition*, 82–83, 271.

8 Hussain, "The Common Good."

conceptions of the common good will have different ways of specifying the privileged set of common interests. For example, some conceptions of the common good—those he refers to as "private individuality" conceptions—define that set by appealing to the common interest that individuals have in pursuing lives as private individuals. Similarly, a "distributive" conception of the common good does *not* require that citizens abstract from their sectional or private interests in evaluating competing political policies. Importantly, both conceptions are more sensitive to the possibility of conflict between citizens' interests. For instance, although citizens may possess a common interest in having *a* scheme of basic rights that allows them to pursue private lives, there will be significant disagreement over which scheme of rights to implement. Even though all citizens possess a common interest in being able to live as private individuals, the exact contours of their lives will obviously differ under different schemes of rights, and this will explain why one scheme will be in the interest of some citizens but another less so. Consequently, the support citizens may express for one scheme over another will often be motivated by their sectional or private interests.

While some might be inclined to reject aggregative conceptions of the common good as viable candidates, they are important insofar as it is not always possible to arrange the political, economic, and social institutions to accommodate all reasonable forms of life (a point Rawls concedes, as we will see). In circumstances like these, having to determine which interests to promote based on aggregation would be invaluable and likely unavoidable. In fact, as we will see in the disputes between high liberals and their opponents, the arguments offered by both often rely on making appeals to the common good in precisely this fashion.

2. The Implications of Flanigan's Argument for the Distinction between Basic and Nonbasic Rights

In the second part of Flanigan's paper, she extends the reasoning within Rawls's framework to cover nearly all other freedoms. The argument is relatively straightforward: just as some citizens may find religion to constitute a fundamental part of their identities and to play a central role in expressing authorship over their lives, many other pursuits and freedoms will play a similar role for other citizens. Flanigan illustrates this point with the example of the fervid Green Bay Packers football fan, Owen. Insofar as Owen "identifies as a Packers fan above all else," his support for the Packers shapes his sense of self; it infuses all aspects of his life with vibrancy and color—in a literal sense too, as he even desires to buried in a casket painted with team colors—to make life meaningful for him. It is no accident that Flanigan describes Owen's fandom in quasi-religious terms. After all, as

she describes him, Owen would be willing to give up both religious protections and the right to vote before he would be willing to give up his right to support the Green Bay Packers. The freedom to pursue a life centered around athletic fandom, like the freedom of religious worship and the freedom to start and run a business, is *important* for *some* individuals to develop their moral powers.[9] And this argument does not apply only to athletic fandom. Insofar as *any* liberty *could* play this sort of role within an individuals' life, Flanigan concludes that it should therefore be elevated to a basic right.[10]

How does Flanigan begin with this claim and arrive at the conclusion that nearly any liberty could play this role? The answer lies in assumptions found within Rawlsian high liberalism about the nature of value and how it is created in the world—assumptions that, when taken independently, appear to be uncontroversial and relatively innocuous but that produce radical implications when combined.

The first assumption is that under a liberal, democratic regime, citizens possess equal moral worth in virtue of their possession of the two moral powers. One important aspect of this moral worth, as Rawls describes it, is that citizens are "self-authenticating sources of valid claims [who are] able to make claims on their institutions so as to advance their conceptions of the good."[11] These claims made by citizens include at minimum claims against interference with their freedom and their ability to pursue their (reasonable) conceptions of the good.

The second assumption is that the world is devoid of intrinsic, objective value until the choices of citizens (and groups of citizens) imbue the world with value. Various ritualistic practices and activities, objects, lifestyles, and beliefs that were once meaningless and devoid of value suddenly become infused with value through the choices of citizens, particularly when they become part of

9 I say that the basic rights are *important* rather than *necessary* because the former seems to be Flanigan's view, but there is an ambiguity here that is not satisfactorily cleared up by her comments. The ambiguity stems from the fact that it is possible to conjoin different modalities with different referential scopes. As some examples, it is possible that basic rights must be *necessary* for *everyone* to develop their moral powers, *necessary* merely for *some* citizens, or *merely important* for *anyone*. In the end, I do not believe that much rides on requiring one modality over another. For even if the basic rights must be *necessary*, as long as they must be necessary only for *some* individuals, then Flanigan's argument would still go through. I merely mention all this to forestall any potential objections insofar as Flanigan presents her argument as being internal to Rawls's position despite employing a different modality.

10 Flanigan, "All Liberty Is Basic," 466–70. Although Flanigan often refers to examples of basic liberties that she believes *do* play such a central role in the lives of individuals, she denies that the status of any liberty ought to be determined by popular support for it at a given moment of time (467).

11 Rawls, *Justice as Fairness*, 23.

citizens' life plans and conceptions of the good. Think of how religious believers of different denominations imbue all sorts of practices, behaviors, and objects with sacramental value. The story is similar for fanatical football fans like Owen. For him, a life centered around supporting the Packers—including all the sundry activities from the superstitious pregame rituals to the communal weekly tailgating, the momentary merging of the self with other fans into a collective body cheering in unison towards a common goal, and so on—all become infused with tremendous value. The practices, activities, lifestyles, and beliefs imbued with value comprise and represent fundamental aspects of their life plans in which their identities and sense of self are firmly rooted.

The combination of these two assumptions leads to very radical implications. If individuals are self-authenticating sources of valid claims against political institutions, then nearly every single act of valuation by a citizen—every time a citizen imbues a practice, activity, or object with value as part of their life plans—expresses a *politico-legal act.* Citizens are not merely making a personal declaration about what matters to them; in doing that, they are also making a declaration to both other citizens and the state. According to Flanigan's argument, the mere fact that they imbue (or can imbue) nearly any practice or activity with value is sufficient to elevate the associated freedoms to the status of basic rights. Nearly every single instance of valuation has the effect of creating correlative obligations on the part of both other citizens and the state to respect and not interfere with the exercise of those basic liberties. It is no exaggeration to say that such a view would make every citizen "a law unto himself."[12]

The radical implications become more vivid when one remembers that what distinguishes basic rights from nonbasic rights is the scope of reasons capable of justifying violations. Basic rights may be violated only when it is necessary to protect other basic rights, not for any other reason. Taken in the context of Flanigan's argument, it follows not only that citizens' acts of valuation create correlative obligations on the parts of others to not interfere but that those same acts—insofar as they elevate the status of those freedoms to *basic* rights—also prohibit the state from interfering with those liberties for the sake of promoting the common good. In establishing the scheme of basic rights, citizens' acts of valuation thereby determine the bounds of permissible legislative and judicial behavior in the future. In the end, individual acts of valuation take normative and political priority over other all other political values and social interests.

In making this argument, Flanigan's aim is to demolish the distinction between basic rights and nonbasic rights. She can thus claim not only that her

12 *Employment Division v. Smith*, 494 U.S. 872 (1990), 879, 885, 890 of the majority opinion.

view prioritizes freedom to an even greater extent than (unmodified) Rawlsian high liberalism does but also that, in doing so, she "strengthen[s] the presumption of liberty that high liberals already endorse."[13] What makes her argument so challenging from the perspective of Rawlsian high liberals is that their own commitments to personhood and to the priority of liberty principle pave the way to what are essentially libertarian conclusions. For if nearly all freedoms become basic, and their protection takes priority over all other political values and social interests, the common good can be pursued only within the extremely narrow confines established by the (ever-growing) list of basic rights.

It is probably in the spirit of softening this blow that Flanigan claims her argument does not entail that public officials must abandon their commitment to social justice. For those reasonably skeptical of this claim, she insists that institutions can still be arranged to benefit the worst-off: "The citizens who are most vulnerable to abuses of state power are the worst-off, so they are the most likely to benefit from policies that protect them from government interference."[14] I must confess my perplexity with this claim. For under her view, the central purpose of the state is to protect the exercise of basic rights; therefore, what constitutes "abuses of state power" would be the violation of individuals' basic rights. Her view thus has the great irony of turning capitalist magnates into the worst-off, as their economic liberties in particular would be the most vulnerable to "abuses by state power" for a state that seeks to promote a fairer distribution of wealth.

Notwithstanding these cursory remarks made by Flanigan, there is little encouragement to be gleaned for Rawlsian high liberals, and the issue stems in large part from their commitment to the priority of liberty principle. As we have seen, that principle attributes *absolute* status to basic rights in relation to various components of the common good—whether those components be equality of opportunity, economic growth, distributive justice, campaign finance reform, public health measures, and so on. The principle prohibits violating citizens' basic rights for any of those reasons. Thus, the state's ability to promote the common good is limited in direct proportion to the number of freedoms included within Rawls's list of basic rights. Consider the recent debate over the status of capitalist economic freedoms. If entrepreneurial freedoms and private ownership over the means of production are basic rights, then the state may not interfere with those rights for the sake of promoting either nondiscriminatory business practices or distributive justice. Flanigan's argument further exacerbates the problem as it elevates not merely capitalistic economic freedoms to basic rights as John Tomasi's argument does but nearly

13 Flanigan, "All Liberty Is Basic," 471.

14 Flanigan, "All Liberty Is Basic," 472.

any freedom. Once those freedoms have been elevated to the status of basic rights, it follows that the state is prohibited from interfering with them for the sake of promoting the common good. There is little reason for high liberals to be optimistic about this situation, as the odds that a policy will not conflict with some citizens' basic rights when nearly any freedom counts as basic are very low. Policies would have to be crafted to avoid such conflicts, but it is not clear what political and legal space, if any, remains for policies that could manage to avoid these conflicts. Prioritizing—or we might more accurately say fetishizing—individual freedom in this way marginalizes the normative and political significance of other worthy political values and goals besides freedom. The outcome is the total disruption of the harmonious balance of political values and aims that is so integral to the high-liberal project. And once the commitment to the common good is marginalized for the sake of individual freedom in this way, then it appears that Rawlsian high liberalism shares with standard versions of libertarianism the same all-encompassing normative and political commitment to individual freedom.

3. Two High-Liberal Responses to Flanigan's Argument

Instead of revisiting the responses considered by Flanigan in her paper, I explore three additional responses that high liberals might offer. The first argument will take Rawls's response to the critiques originally raised by H. L. A. Hart and apply that response to Flanigan's argument. The second argument will rely on recasting Rawls's original strains-of-commitment argument for the purpose of restricting the list of basic rights. In section 4, I will consider the third argument, which entails abandoning the priority of liberty principle altogether. In this section, I argue that the first two responses fail because each implicitly relies on controversial value assumptions about what constitutes the good life, thereby rendering those responses incompatible with the Rawlsian high-liberal desire to be neutral on these matters. Thus, if Rawlsian high liberals want to avoid the implications that follow from Flanigan's argument and to preserve their commitment to the common good, the best alternative would be to abandon the priority principle.

3.1. A First Response: Taking Rawls's Response to Hart and Applying It to Flanigan

The untoward implications that follow from incorporating too many freedoms within the first principle of justice were brought to Rawls's attention by H. L. A. Hart, and Rawls attempts to address the issue in subsequent work.[15] Rawls's

15 See Hart, "Rawls on Liberty and Its Priority."

response to Hart, first given in the 1981 lecture "The Basic Liberties and Their Priority," can also be seen as anticipating Flanigan's more recent argument.[16] One might thus attempt to marshal his argument in that work in order to counter Flanigan's argument.

In that essay, Rawls insists that the scope of the rights included under the first principle must be specified in narrower terms if the first principle of justice is going to be not only internally coherent but also compatible with the ambitions of the second principle. To do so, Rawls appeals once more to his idea of personhood. Just as that idea played a fundamental role in determining the general list of basic rights, he returns to the two moral powers to further delimit the scope of the rights included within the first principle:

> The notion of the *significance* of a particular liberty … can be explained in this way: 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 and effective exercise of the moral powers in one (or both) of the two fundamental cases.[17]

Consider the right to freedom of speech. Rawls does not hold the view that any form of speech should be protected by the first principle of justice; in fact, he cites commercial speech and various forms of advertising as examples that do not.[18] Although free speech may be exercised in different ways, only some forms are necessary for the development and exercise of the two moral powers. Those forms that are necessary constitute the "central range of application" of the more abstract right to freedom of speech.[19] The point behind this idea of the "central range of application" is to specify the abstract rights in more specific terms by determining which forms of speech (or of other rights on the list) are significant in the sense described in the quotation above and should, for that reason, be protected by the first principle of justice. The additional step of specifying the precise scope of every single basic right must always be completed.[20] Most importantly, and this point cannot be understated, the additional work of determining the precise scope of the rights protected by the first principle will have very significant implications for the scope of legitimate legislative and judicial action. Because Rawls did not view commercial speech and advertising

16 The lecture appears in Rawls, *Political Liberalism*, 289–371.

17 Rawls, *Political Liberalism*, 335–36.

18 Rawls, *Political Liberalism*, 363–68.

19 Rawls, *Political Liberalism*, 298.

20 This is all part of the successive process of specification outlined by Rawls (*Political Liberalism*, 336–40).

as falling within the "central range of application" of the abstract right to freedom of speech—in virtue of the fact that he did not believe either necessary for the development and exercise of the moral powers—then those forms of speech could be interfered with for the sake of promoting the common good.[21]

It should now be possible to see how this idea could be employed to rebut Flanigan's argument. In brief, the claim is that the many exercises of freedom pointed out by her—such as Owen's sports fandom—do not fall within the central range of application of any of the rights enumerated in the first principle because they fail to hold the requisite modal connection with the moral powers. As a consequence, those exercises of freedom would not qualify as basic and could therefore be interfered with for the sake of promoting the common good.

The problem with this sort of response on behalf of high liberals like Rawls is it relies on controversial assumptions about what sort of life plans are "significant," and which freedoms are connected to those life plans. They would have to argue that some freedoms are not connected in the right way to the development and exercise of the two moral powers. But on what sort of basis can they make an argument like this? In formulating their life plans, citizens like Owen signal which freedoms are in fact important to them. Rawls's belief that it is possible to specify *a priori* the significance of various freedoms is at odds with the liberal assumption, mentioned in the previous section, that the choices made by citizens are responsible for instilling value into the world. If there are no objective values prior to the choices made by citizens, but rather all values are, in a Sartrean fashion, a consequence of their choices, then those citizens become the final arbiters in determining which freedoms possess the right sort of connection to the development and exercise of their moral powers. In offering this sort of response to Flanigan's argument, Rawlsian high liberals would be implicitly relying on the sort of perfectionist considerations they expressly seek to exclude from their theories and in doing so would bring their versions of liberalism closer to perfectionist versions like John Stuart Mill's. Perfectionist liberals like Mill tend to instrumentalize and consequently attenuate the significance of some freedoms—particularly capitalistic economic freedoms—based on their beliefs about the diminished value of lives centered around economic

21 Consider the implications within this context of the United States Supreme Court's decision to treat corporations' financial contributions to political campaigns as an exercise of speech protected by the First Amendment of the Constitution in *Citizens United v. Federal Election Committee*, 588 U.S. 310 (2010). As another example, consider how freedom of the press/speech has become conflated with the commercial freedoms of corporate media owners so that any state regulation of or infringement with their commercial freedoms is now construed as an attack upon a fundamental American freedom. See Phelan and Dawes, "Liberalism and Neoliberalism," 9, 19.

pursuits.[22] It is thus difficult to deny the point raised by critics of Rawls like Tomasi and Flanigan, who argue that his identification of basic rights implicitly harbors value judgments about different life plans. According to these critics, a neutral approach—one compatible with the aspirations of Rawls's own theory—would exclude neither capitalistic economic freedoms nor the freedoms associated with sports fandom (and many others) from the first principle of justice.

3.2. A Second Response: Recasting Rawls's Strains-of-Commitment Argument

A second solution may be found in Rawls's idea of the strains of commitment, which are the "strains that arise in such a society between its requirements of justice and the citizens' legitimate interests its just institutions allow."[23] This idea serves three purposes within Rawls's theory. Its first and most general function is to reinforce the selection of the two principles of justice over utilitarianism. Its ability to perform this function depends on the fact that the selection of principles of justice is made only once and for perpetuity, which means that the parties in the original position must see those they represent as always being able to abide by the agreement made there.[24] If the principles of justice selected in the original position turned out, once the veil was lifted and the principles implemented, to generate significant strains between the requirements of justice and the pursuit of citizens' *legitimate* interests, then citizens could not reasonably be expected to abide by the requirements of justice. That justice as fairness does not violate the strains of commitment, whereas utilitarian principles of justice do, is, Rawls insists, a significant advantage of his theory.

Rawls also employs the idea to support the lexical priority of the first principle of justice over the second principle. In *A Theory of Justice*, Rawls writes that "in order to secure their unknown but particular interests from the original position, [the parties in the original position] are led, in view of their strains of commitment, *to give precedence to basic liberties*."[25] Robert Taylor further elaborates on this connection: "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."[26] This would be intolerable because the failure to attribute lexical priority to something like freedom of religious worship—thereby allowing trade-offs between

22 For a summary of this pattern within the history of liberal thought, see Gaus, *The Modern Liberal Theory of Man*, 238–39.

23 Rawls, *Political Liberalism*, 17.

24 Rawls, *Justice as Fairness*, 103.

25 Rawls, *A Theory of Justice*, 475 (cross-reference removed, emphasis added).

26 Taylor, "Rawls's Defense of the Priority of Liberty," 252.

it and the common good—reflects a failure to grant it the appropriate weight it requires. Considering that freedom of religious worship plays such a pivotal and fundamental role in the lives of so many citizens, it would not be reasonable to expect those citizens to abide by principles of justice that permit infringement upon religious freedom for the sake of promoting the common good.[27]

What is of particular interest is that at least in one part of *Political Liberalism*, Rawls employs the strains of commitment as an argument for *including* certain freedoms within the first principle.[28] Now, it must be admitted that in these passages, Rawls does not explicitly mention the strains of commitment. Nonetheless, it is clear from his comments that an implicit appeal to that idea is performing the argumentative work. To see why, consider that in these passages, Rawls says that the parties in the original position are motivated to protect freedom of religious worship for two reasons. The first is that the veil of ignorance prevents them from knowing the determinate conceptions of the good held by those they represent. But if this were the only reason, then the parties may be tempted to gamble by supporting a dominant religion and prohibiting or restricting the freedom of religious worship for all others. Rawls, however, denies that the parties in the original position would be willing to take such a gamble: "If the parties were to gamble in this way, they would show that they did not take the religious, philosophical, or moral convictions of persons seriously, and in effect, did not know what a religious, philosophical, or moral conviction was."[29] Similar to the support offered for the lexical priority of liberty, Rawls again appeals to the special importance of religious faith to explain its inclusion within the first principle. Because religious faith is so important to so many individuals, the parties would not risk limiting freedom of religious worship on the chance that those they represent end up belonging to a minority religion. Given the importance of religious freedom, the strains of commitment would be too much in circumstances where it is not protected to reasonably expect citizens to abide by the requirements of justice. Gambling with this freedom demonstrates, as Rawls says, an ignorance of the nature of religious, moral, and philosophical convictions.

In all three cases, the force behind the strains of commitment depends on the assumption that some beliefs or convictions carry heightened importance, at least

27 "Here it is fundamental that affirming such views and the conceptions of the good to which they give rise is recognized as non-negotiable. . . . They are understood to be forms of belief and conduct the protection of which we cannot properly abandon or be persuaded to jeopardize for the kinds of considerations covered by the second principle of justice" (Rawls, *Political Liberalism*, 311–12).

28 Rawls, *Political Liberalism*, 310–15.

29 Rawls, *Political Liberalism*, 311.

for some individuals. Some convictions rise above the level of mere superficial fancies, likes, or preferences, and it is only the beliefs that belong to the former that can produce the sorts of genuine motivational strains between citizens' desire to follow the requirements of justice on the one hand and their desire to pursue their legitimate convictions on the other. For this reason, not only do the freedoms protecting those beliefs need to be included within the first principle of justice, but that principle also must be attributed priority over the second principle.

This suggests a possible route for employing the strains of commitment as a means for restricting the number of freedoms included within the first principle of justice. This response on behalf of Rawls relies on drawing a substantive distinction between life plans centered on religious, moral, and philosophical beliefs from life plans based on "less weighty" beliefs, such as (according to this argument) being a fan of the Green Bay Packers. The idea would be that because the life plans that fall into the second category are not capable of invoking the strains of commitment like those in the first category are, then the freedoms associated with those life plans would not merit the same sort of privileged protection.

Now, at first glance it appears this response also runs afoul of the assumption of the subjectivist basis for value creation that was highlighted earlier. If individuals are the sources of value in the world, then on what extrapersonal basis can it be argued that some of their acts of valuation—specifically, those nonreligious, nonmoral, and nonphilosophical acts—fail to generate, we might say, "enough" or the "right sort" of value needed to invoke the strains of commitment as a relevant consideration? It is interesting to note that contemporary society already harbors these implicit value distinctions in some contexts in a way that is not altogether consistent with that subjectivist assumption insofar as exemptions are routinely made for religious believers that are not similarly extended to followers of many secular life plans. The question of course is whether Rawlsian high liberals can accommodate this thought, especially once it has been conceded that such freedoms are important for some individuals to develop and exercise their moral powers. Another way to articulate the end goal here is by asking whether it is possible to draw a principled distinction between religious, moral, and philosophical convictions from more "prosaic" (if that is the right word) life plans, such as sports fandoms.

In posing and trying to answer this question, Rawlsian high liberals are led down a thorny road. For whatever consideration is appealed to as a basis for such a distinction, it will have the consequence of conflicting with the way that many citizens relate to their life plans. After all, according to this argument, those life plans that fall on the prosaic side of the distinction would not be capable of generating the strains of commitment, despite citizens' own protestations about how their identities and their sense of self-worth are inextricably

bound up with them. This does not mean that it is impossible to draw such a distinction or even that such a distinction is implausible (there may indeed be some intuitive plausibility to it), but it highlights that this sort of response will rely on controversial value assumptions.

Having made these cautionary remarks, I will briefly consider some potential bases for drawing this distinction between religious, moral, and philosophical convictions from more prosaic life plans.

One possibility is to adopt a quasi-empirical, historically oriented approach. The approach is quasi-empirical insofar as observations taken from an empirical and historical standpoint would be used as a guide for drawing a value distinction. For instance, when we look to the history of Western civilization, we observe that it has continually been riven by religious persecution and war.[30] Yet notwithstanding centuries of religious intolerance, persecuted religious believers from all denominations have persevered in their faith, even to the point of death. That so many individuals throughout history have been willing to go to such great lengths—including the loss of their own lives—for the sake of their religious beliefs gives us good reason to believe that the prohibition of religious worship would invoke the strains of commitment.[31] Of course, this way of drawing the distinction establishes an awfully high threshold for what would count as the sort of legitimate interests capable of invoking the strains of commitment, and it would, as a result, exclude many of the freedoms Flanigan wants to include within Rawls's first principle. If the distinction were to be grounded on a relatively less dramatic or extreme basis—say, whether individuals would be willing to lose other freedoms through imprisonment instead of whether they would be willing to face death for their beliefs—then freedoms like sports team fandom might not pass the test, giving Rawlsian high liberals the conclusion they seek.[32] It is interesting to note, however, that economic liberties (capitalist or socialist, depending on our historical point of reference)

30 Ronald Beiner sees Rawls as providing a genealogy of liberalism in which the paramount concern has been to allay the potentially combustible effects of religious pluralism on political and civil society. See Beiner, *Civil Religion*, ch. 23.

31 In congruence with the hypothetical argument offered here, Taylor finds the strains of commitment to be a relevant consideration when it comes to supporting the priority of freedom of religious worship but not many other freedoms ("Rawls's Defense of the Priority of Liberty," 252–53).

32 One could, following Rawls, attempt to draw the distinction by defining the moral, philosophical, and religious convictions by focusing on the idea of comprehensiveness. According to Rawls, a comprehensive doctrine includes conceptions of what is of value in human life, ideals of personal character, and friendship, and it should inform our conduct and our life as a whole (*Political Liberalism*, 13). But it is difficult to see why many modern life plans would fail to satisfy this notion of comprehensiveness insofar as they do pertain to many if not all

would seem to pass this second test, as many individuals have historically been willing to face imprisonment or worse for their beliefs about the injustice of different economic systems.

In either case, appealing to the strains of commitment as a way of rebutting Flanigan's argument requires that Rawlsian high liberals make judgments about the worthiness of different life plans from an objective, normative standpoint—worthiness in the sense that only some are so important that they can plausibly be said to invoke the strains of commitment. Notice also that either of the two bases considered for this distinction is a matter of stipulating how citizens would respond to prohibition and oppression as a means for gauging the importance of those life plans.[33] This is, to say the least, both an idiosyncratic and morally questionable method for drawing such a distinction.

Nonetheless, the lesson to be drawn from these two initial responses is that it is incredibly difficult to draw a distinction between life plans and their associated freedoms without relying implicitly or explicitly on controversial value judgments. Since Rawlsian high liberals seek to avoid having to make these value judgements, another response is necessary. The third response I consider allows them to avoid this problem, but it requires abandoning the priority of liberty principle.

4. A THIRD RESPONSE: ABANDONING THE PRIORITY OF LIBERTY PRINCIPLE

The most effective response to Flanigan's argument that Rawlsian high liberals might give is to abandon the priority of liberty principle and to thereby preserve their commitment to the common good. Since it is difficult to delimit the number of freedoms protected as basic rights without relying on value judgments, abandoning the priority principle means that it would be permissible for the state to interfere with these basic rights for the sake of promoting the common good. In this way, the high-liberal commitment to freedom need not entirely marginalize the commitment to the common good.

In addition, however, I want to suggest that there are compelling independent reasons for abandoning the priority principle and preserving the high-liberal commitment to the common good within the context of Flanigan's argument. Putting aside for the moment the state's ability to promote what are likely more controversial aspects of the common good, such as equality of opportunity or a fairer distribution of wealth, Flanigan's argument raises

of these areas of life. Owen's sports fandom is not implausibly characterized in such a way by Flanigan.

33 One might also wonder whether most philosophical or moral beliefs would even pass such stringent tests.

doubts that the state can promote a more basic aspect of the common good shared by citizens: establishing a compossible scheme of basic rights. Her argument also raises questions about how the state could adjudicate conflicts between basic rights when nearly all freedoms are basic. In this section, I argue that the concept of the common good will play an important role in addressing both problems.

4.1. What Is the State Permitted to Do?

Before I turn to the two problems highlighted above, I want to focus on the more general issue of what the state may do when it adopts Flanigan's argument. Thus far I have focused on the fact that her argument undermines the state's ability to promote political aspirations like equality of opportunity, a fairer distribution of wealth, public health, etc. While high liberals want to preserve the state's ability to promote these aspects of the common good, those working from competing political persuasions may not appreciate the value of doing so. However, Flanigan's argument threatens the state's ability to operate at a more fundamental level, and any political theory that can accommodate a more modest position for individual freedom in relation to the common good will possess the necessary flexibility to address both this issue and the other two problems mentioned above. Preserving the commitment to the common good thus reflects a distinct advantage of (Rawlsian) high liberalism in comparison to competing political theories.[34]

34 Left-libertarianism may present another alternative here. Left-libertarians, in contrast to right-libertarians or what I have referred to here as "standard libertarianism," couple a commitment to self-ownership with a commitment to a more egalitarian distribution of external resources. Generally speaking, the latter commitment is not defended by an explicit appeal to the common good, although there may be an indirect appeal to the common good lurking somewhere in the background. Determining to what extent left-libertarianism can address the problems I discuss and what sort of role the concept of the common good will play is beyond the scope of the current paper. Much depends on how left-libertarians construe the stringency of their commitment to a more egalitarian distribution of external resources and what exactly that commitment will look like in relation to the demands generated by their commitment to self-ownership (and there are questions about what self-ownership would look like under such a view). It is possible that left-libertarianism will turn out to be more accommodating to incorporating the concept of the common good within its framework. (Although as I suggest in note 41 below, right-libertarians may have reasons for incorporating the concept within their framework as well.) If these very general comments regarding both strands of libertarianism are correct, this could imply greater theoretical flexibility for both left and right versions of libertarianism, putting them relatively more on par with Rawlsian high liberalism, at least regarding this aspect. But these are very controversial points, and my focus is on how Rawlsian high liberals can respond to Flanigan's argument. I thank a reviewer for urging me to address these issues.

To support this claim, I turn to a well-known case considered by the United States Supreme Court: *Employment Division v. Smith*.[35] This case is noteworthy because it clearly demonstrates that the tension between individual freedom and the common good rears its head in a relatively more muted form (compared to Flanigan's argument) in virtue of the privileged protection afforded to freedom of religious worship. The latitude afforded to religious worshipers to imbue various practices, actions, etc. with sacramental value makes conflicts between religious worshipers and the interests of the state—i.e., the common good—inevitable. And given the inevitability of these conflicts in contemporary society, any political theory, whether liberalism or libertarianism, must consider how to handle them. The greater theoretical and political flexibility that comes from preserving a normative and political commitment to the common good thus remains a virtue even if Flanigan's argument were rejected; her argument, however, exacerbates the problem significantly and in doing so further accentuates the importance of that flexibility.

In this particular case, Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote—a crime under Oregon state law—as part of a religious ceremony for their Native American church. They subsequently filed for unemployment compensation but were rejected because they had been fired for work-related misconduct. They argued that the denial of unemployment benefits violated their freedom of religious worship, which is protected by the First Amendment. In a six-to-three decision, the Supreme Court ruled in favor of the Department of Human Resources, arguing that the refusal to provide unemployment benefits did not violate Smith's and Black's free exercise rights. Without pretending to offer any judgments regarding the merits of the decision, I want to look briefly at the reasoning provided by the court in both the majority opinion (written by Justice Antonin Scalia) and in the concurring opinion (written by Justice Sandra Day O'Connor).

Justice Scalia offers two main lines of reasoning explaining the court's decision to uphold the nonprovision of employment benefits to Smith and Black. The first line of reasoning employs the distinction between neutrality of aim/intention and neutrality of effects to determine when a law unduly burdens religious worshippers: although a law may have incidental effects that burden (some) religious worshippers, as long as it was not designed with the intention of doing so, then compliance with the law takes priority over free exercise.[36]

35 *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990).

36 *Employment Division v. Smith*, 494 U.S. at 878–82. According to Justice Scalia, the only case in which a neutral law (neutral of aim/intention) could be judged as violating the First

The second line of reasoning offered by Justice Scalia is meant to support employing the neutrality distinction as the correct and *only* basis for determining the decision in this case. It is illuminating for my purposes here to understand why. Justice Scalia denies that the strict scrutiny standard employed in *Sherbert v. Verner* is relevant to the case at hand.[37] According to the strict scrutiny standard, state actions that burden or violate a constitutional protection such as freedom of religious worship are justifiable only by showing that those actions serve a compelling state interest and that they are either very narrowly tailored or the least restrictive actions open to the state. Strict scrutiny, in other words, places the presumption in favor of protecting constitutional freedoms, while it places the burden on the state to show that it has a compelling interest in interfering with those freedoms. Importantly, the strict scrutiny standard adopted by the court is considerably weaker than Rawls's priority principle insofar as it allows for the possibility of legitimately interfering with or violating a basic right for a compelling state interest. It thus represents a more modest alternative to Rawls's position, and it is the view adopted by Justice O'Connor in her concurring opinion in *Employment Division v. Smith*. There, she argues that the strict scrutiny standard must be applied to all "generally applicable laws that [have] the effect of significantly burdening a religious practice," regardless of whether the laws are neutral in aim/intention.[38]

In contrast, and precisely because strict scrutiny is so demanding as it places the burden on the state to justify its actions, Scalia argues that strict scrutiny applies only to a narrow range of circumstances; otherwise, the government would be held severely hostage to the religious beliefs of citizens:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."... To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.[39]

Amendment is if the law conflicts with the free exercise clause *in conjunction* with other constitutional protections. He refers to these scenarios as "hybrid" ones.

37 *Sherbert v. Verner*, 374 U.S. 398 (1963).

38 *Employment Division v. Smith*, 494 U.S. at 894.

39 *Employment Division v. Smith*, 494 U.S. at 885.

If strict scrutiny were required in a case like this, then it would have to be applied to *all* state actions that infringed upon citizens' freedom of religious worship, no matter how unimportant—to avoid having the court determine which aspects of religious belief are important. Adopting such a demanding position would be, Scalia insists, "courting anarchy." If the state fails to demonstrate a compelling interest, this position would permit religious exemptions from all sorts of sundry civil obligations, including compulsory military service, the payment of taxes, health and safety regulations, child neglect laws, compulsory vaccination laws, drug laws, traffic laws, minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equal opportunity in the context of race.[40] Thus, in rejecting the application of the strict scrutiny standard in this case, the majority adopts a position in which the presumption of protection holds in favor of the state's compelling interests over the protection of individual freedom.

My intention here is not to evaluate the soundness and accuracy of the reasoning offered by the court as it pertains to the unique circumstances of the case itself. What is important for my purposes is that that reasoning—found in the majority and minority opinions as well as in the dissenting opinion, which claims that the state failed to demonstrate a compelling state interest—shows that the court recognizes the necessity of adopting a less absolutist and more nuanced position regarding basic rights and freedoms than what is found in either Rawlsian high liberalism or standard libertarianism. Rather than simply adjudicating these inevitable conflicts in favor of individual freedom, as both those views would require, the court has adopted a more nuanced position because it has been more sensitive to the implications that follow from the valuational autonomy afforded to religious believers as part of the basic freedom of religious worship. With almost no check on this freedom, the court rightly recognizes that the state would become entirely hostage to the beliefs of religious worshippers.

Consider the situation in the context of Flanigan's argument, where the same valuational autonomy is extended to *any* citizen. Obviously, the state may not promote something like a fairer distribution of wealth. But what is it permitted to do? On the one hand, the state is still permitted to interfere with these freedoms for the sake of protecting direct harm to citizens, and libertarians at least would likely argue that nothing more than this is necessary.[41] Yet I argue

40 *Employment Division v. Smith*, 494 U.S. at 889.

41 Determining the status of actions that merely carry the risk of harming others is more complicated, however. Appealing to the common good may be helpful in determining which risky actions to permit and which to prohibit. If so, this could provide standard libertarians with a reason for incorporating the concept within their framework.

that even here, the state will have to rely on a conception of the harm principle shaped by considerations pertaining to the common good.

We can begin with Flanigan's own comments to see why. She appeals to Mill's harm principle to exclude life plans centered on directly harming other individuals, and this is why I have said throughout that her argument allows *nearly* any freedom to become basic. It is for this reason the examples she focuses on refer to freedoms that are relatively "self-regarding" and therefore seemingly innocuous. These freedoms include not only Owen's sports fandom but also Snoop Dogg's recreational drug use, helmetless motorcycling, and even gardening. In focusing on these examples, she conveniently sidesteps ambiguities inherent in Mill's harm principle. For the sake of space, I put to the side issues regarding Mill's distinction between self-regarding and other-regarding actions, and here I focus only on the idea of risk.[42]

Not all actions of the set of actions that harm others are the same. Some actions are clearly intended to harm others (whether they do so successfully or not); some harm is the product of culpable negligence; and some actions may merely increase the risk of harm to others.[43] Insofar as these actions are different, the reasons for prohibiting them will also differ. In the first case, the clear presence of the intent to harm justifies prohibiting any action of that kind—regardless of whether the action results in harm. In the second case, the harm must transpire as a consequence of culpable negligence on the part of an individual. In the third case of risky actions, these actions are like the first category insofar as it is not necessary for harm to occur; there is only some chance of harm. The two categories differ, however, in that risky actions do not involve the intention to inflict harm; the harm is rather an incidental side effect of the action. It is this last fact that makes the normative and legal status of risky actions more complex and ambiguous. For there are many actions that increase the risk of harm to others, but it is not self-evident whether these actions should be prohibited. The matter is further complicated by the fact that these actions may form integral parts of citizens' life plans, which, according to Flanigan's argument, would make them basic rights. Consider the example

42 Ben Saunders persuasively argues that a distinction between consensual and nonconsensual harm is more fundamental to Mill's harm principle. Yet this distinction raises in turn questions about what counts as consent and what counts as a harm. (If it were merely the fact that something is not consented to that makes it a harm, then this would be extremely broad.) See Saunders, "Reformulating Mill's Harm Principle."

43 These distinctions are not meant to be exhaustive, and it is possible to make finer distinctions, such as those made by the legal system in the United States. However, since my aim is only to distinguish between more paradigmatic examples of harm, such as physical assault, from risky actions, it is not necessary to delve into the finer details. I thank an anonymous reviewer for suggesting that I expand on these points.

of a group of adrenaline junkies whose life plans are centered on engaging in high-speed racing on busy streets. While the activity obviously increases the risk of harm to others, as the junkies defy all traffic laws, their intention is not to harm others: racing in busy streets adds an additional layer of challenge and therefore increases the level of skill needed. We could even say, in the same vein, that the mere act of driving increases the risk of harm to others.

Yet I suspect that Flanigan, as well as many liberals and libertarians, would want to prohibit things like high-speed street racing (and similarly, drunk driving) while allowing driving within a system of tightly defined traffic laws. The issue is the basis on which they can prohibit the former while permitting the latter. Given that these actions only increase the risk of harm without any accompanying intention to harm others, the justification for prohibiting them cannot be the intent to cause harm. After all, high-speed street racing is not the same as trying to run someone over with a vehicle, even though the same harm may transpire in both cases.

One way to distinguish between the prohibition of high-speed street racing and drunk driving from the nonprohibition of driving is by relying on socially acceptable thresholds of risk. Depending on the action in question, the severity of the potential harm, and the countervailing social interests promoted by prohibiting the action, society may be willing to tolerate lower or higher thresholds of risk for different actions. It may be (as a conjecture) that the risk of harm that comes about from driving—even within a system of tightly defined traffic laws—is still *higher* than the risk of harm in circumstances where either high-speed street racing or drunk driving is permissible. (We could imagine that the number of individuals engaging in these two activities exceeds their current number once they are made legally permissible, yet that number would still pale in comparison to the total number of drivers on the road, so we could imagine that the risk of being harmed from either of those two activities remains considerably lower than the risk of being harmed by other drivers merely driving about.) The severity of the harms in each case is comparable, yet as a society, we are willing to tolerate the (higher) risks associated with general driving, while we are not willing to tolerate the risks (even if they are lower) that come about from high-speed street racing and drunk driving. This is because allowing driving at all serves the common good. And in the very same way, it also serves the common good to ensure that the activity of driving is conducted within a system of tightly defined traffic laws, for without these laws in place, we would be, as Scalia puts it, "courting [vehicular] anarchy."

What this shows is that the valuational autonomy attributed to citizens as part of Flanigan's argument cannot always be sufficient for elevating freedoms to the status of basic rights. Even when those freedoms are integral to citizens'

life plans, determining their status will depend, at least when they carry the risk of harming others, on whether they promote or conflict with the common good.

4.2. Determining a Coherent, Compossible Scheme of Basic Rights

Although the previous subsection focused on the application of the harm principle only within the context of risky actions, the same insight generalizes to nonrisky actions. When citizens are capable of unilaterally elevating nearly any freedom to the status of basic rights, they will attempt to elevate freedoms that are often incompatible and that cannot all be protected under a unitary institutional apparatus. For instance, some citizens may have life plans (or fundamental philosophical views) that involve a refusal to pay taxes. Elevating this freedom may make it difficult for the state to enforce and protect other citizens' freedoms. Protecting corporations' right to speech may undermine the integrity of the political system and the fair value of political rights. Some citizens may desire to live under a capitalist framework and to exercise free market freedoms, whereas others may desire to live under a socialist framework and to exercise socialist economic freedoms.

While Flanigan does not devote attention to this problem, others have focused more directly on it. C. M. Melenovsky and Justin Bernstein, for instance, press this exact claim against Tomasi. They cite Rawls, who cites Isaiah Berlin in saying that there is no social world without loss—some (reasonable) life plans must and will lose out. It is for this reason that Melenovsky and Bernstein conclude that capitalist entrepreneurial freedoms may have to be excluded: "While it may seem intuitive that Amy should be able to open her own business, the fact that she cares deeply about it is not the appropriate ground to justify protection of rights that allow her to do so."[44] It is an unfortunate but inescapable limitation of the real world that even some reasonable and legitimate ways of life will be marginalized either by garnering weaker institutional protections or by being excluded from the social world altogether—in the sense that they are not afforded any institutional protections or prohibited entirely. Only by excluding some freedoms, the thought goes, can the list of basic rights be organized into a coherent, effective, and compossible scheme.

What we need to know is on what basis high liberals plan to determine which life plans fall outside the boundaries of the social world. Why do sports team fandoms and Amy's free market entrepreneurial freedoms lose out, but freedom of religious worship does not? For as we saw, Flanigan not implausibly describes Owen as willing to sacrifice both his religious freedom and his political freedoms far before he would sacrifice his ability to support the Green Bay Packers.

44 Melenovsky and Bernstein, "Why Free Market Rights Are Not Basic Liberties," 53.

As I already remarked upon the ineffectiveness of Rawls's solution to this problem in section 3.1, I will explain why the main argument made by Melenovsky and Bernstein is also unsatisfactory. As if they were responding directly to Flanigan, they argue that no *particular* life plan is an appropriate ground for justifying any basic right. Just a few sentences prior to making this point, they say that we protect religious freedom "because all would agree to guaranteeing the conditions necessary for the development and exercise of the two moral powers, and religious freedom guarantees those conditions."[45] Rawls also attempts to draw the same distinction.[46] The thought here seems to be that protecting religious freedom guarantees the social conditions necessary for the *moral powers* rather than for any *particular* life plan.

There is, however, no substantive distinction here that would serve as a basis for excluding some freedoms from the list of basic rights. In denying that a particular life plan is an appropriate ground for justifying any basic right, their concern rightly seems to be the sort of "bottom-up" approach suggested by Flanigan's argument. But Flanigan's argument is meant to exploit the logic internal to Rawls's view. On Rawls's view, religious freedom is necessary (or important—see note 9 above) for some citizens to develop their moral powers *because* these citizens have different yet particular life plans intimately connected with religion. The fact that citizens have these sorts of life plans makes it necessary to protect religious freedom. The justification for doing so is not that it allows them to become Christians or Muslims in particular but that it allows them to pursue their religious life plans. Since the justification itself is not tailored in such specific terms, then the right to religious freedom is also not specified so narrowly—in the sense that it permits citizens to practice only Christianity or only Islam, etc. But I fail to see how the examples mentioned by Tomasi or Flanigan are different in any relevant sense that makes them "more particular" in some problematic fashion. According to their views, capitalist entrepreneurial freedoms or sports fandoms are necessary (or important) for some citizens to develop their moral powers *because* these citizens have different yet particular life plans intimately connected with entrepreneurship or sports. Just as the justification for religious freedom is described in terms of allowing those citizens to pursue their religious life plans, the justification for these freedoms is the very same. Neither the justification nor the freedoms themselves is specified in such particular terms that citizens are permitted to run only certain forms of business or to support only certain teams within certain sports. It is not clear, in other words, in what sense following a religious life plan is any less "particular"

45 Melenovsky and Bernstein, "Why Free Market Rights Are Not Basic Liberties," 53.

46 Rawls, *Political Liberalism*, 10.

than following an entrepreneurial one or one dedicated to sports. In all three cases, these freedoms are necessary (or important) for individuals to develop and exercise their moral powers.

Notice too that it would not be satisfactory to make the argument that even without enshrining sports team fandom as a basic right, Owen is still free in a nonnormative sense to form a life plan centered around a sports team fandom. This response is problematic for several reasons. First, Owen's life plan would be subject to interference for the common good, whereas religious life plans would not be. This implies a diminished relative political and legal status and requires justification. Second, one could then make the exact same argument about being free in a nonnormative sense in the absence of formal freedoms with regards to religious freedom. Third, as both Melenovsky and Bernstein emphasize, basic rights are meant to protect the *social conditions* for the development and exercise of the moral powers. In other words, protecting these freedoms is not simply about protecting belief. As the Supreme Court notes in *Employment Division v. Smith*, the exercise of religion involves not only belief but also the *performance of physical acts*.[47] It is hard to see why other life plans should be treated any differently on this point. To underscore this last point, it is worth mentioning that when Rawls describes the moral power about life plans, he refers explicitly both to *forming* and to *pursuing* them.

Melenovsky and Bernstein's response thus runs into the same problems as the potential solutions canvassed earlier. In the absence of explicit value distinctions, appealing to vague criteria such as "particularity" or "significance" will fail, for such criteria will be overly inclusive unless applied arbitrarily and will leave us with the original dilemma as to which freedoms should be included and which should be excluded.[48] Given that these freedoms are necessary (or important) for the development of citizens' moral powers, we need some other basis for determining which freedoms to protect as basic rights. Appealing to the common good provides the grounds for solving this problem.

To see why, consider that while it is in the common interest of all citizens to have a list of basic rights in place, citizens will be divided over what sorts of rights and freedoms should be included within that list. Since there is no social world without loss, tough choices will have to be made, and since the freedoms among which we must choose all possess the correct modal connection to citizens' moral powers, these tough choices become more costly—the ability for some citizens to develop their moral powers will be affected negatively.

47 *Employment Division v. Smith*, 494 U.S. at 876.

48 See also Flanigan's responses to attempts made by high liberals to draw a distinction between freedoms on formal grounds: Flanigan, "All Liberty Is Basic," 460–62, 468–70.

Fortunately, some conceptions of the common good—such as the private individuality and distributive conceptions mentioned in section 1—are relatively more sensitive to this fact, as they permit appeals to aggregative considerations. Both theorists and legislators will need to rely on aggregative considerations as well as the importance of other goods outside of freedom that also constitute part of the common good to address this problem.

It is in fact quite common to see this sort of reasoning performing much of the argumentative work when it comes to debates about which freedoms should qualify as basic rights. Consider an argument that Samuel Freeman offers against elevating capitalist economic liberties to basic rights. Although he concedes that enshrining them as basic rights would allow *some* citizens whose life plans involve those freedoms to develop and exercise their moral powers, doing so would also make it difficult for the state to provide the *social minimum of goods* (i.e., goods outside of freedom) necessary for the adequate development and exercise of many other citizens' moral powers.[49] Flanigan's response to this argument offers the standard defense of free markets, which is to tout their ostensibly superior ability in promoting economic growth with all its subsidiary effects; she also argues that countries that best protect economic liberty do a better job of providing health care and social safety nets to their citizens—again, goods outside of freedom.[50] Not only do these arguments rely on aggregative considerations, but they also appeal to considerations not permitted by the priority principle and rely in the end on appeals to the common good—to the interests shared by all (or most) citizens in having access to goods *besides* freedom.[51]

Like these theorists, legislators will have to make hard decisions about which freedoms to include within the scheme of basic rights. In deciding whether to elevate freedom of contract to the status of a basic right (and potentially prohibiting mandatory minimum wage laws) or to protect employees' freedom to negotiate collectively, legislators will have to consider the social effects in each case, and they will have to determine whether protecting the former over the latter, or vice versa, would better promote the common good.

49 Freeman, *Rawls*, 395.

50 For the exchange between Freeman and Flanigan, see Flanigan, "All Liberty Is Basic," 463–64.

51 Samuel Arnold defends a similar view in his paper "Putting Liberty in Its Place," where he argues that goods besides freedom—he refers to goods such as opportunities for culture, leisure, education—also contribute to the development and exercise of the moral powers and should therefore be included within Rawls's first principle of justice. Arnold's argument thus rejects the priority principle, as his argument permits trade-offs between basic freedoms and these goods.

4.3. Adjudicating Conflicts Between Basic Rights

Once a scheme of basic rights has been established, conflicts between citizens' basic rights will still be inevitable. While we can organize the list of basic rights into a compossible set at an abstract level, in practice, citizens will exercise their rights in ways that obstruct or interfere with the ability of other citizens to exercise their rights. These conflicts are a consequence of the reasonable epistemic limitations on the part of theorists and legislators to articulate the contours of citizens' rights to avoid such conflicts altogether in the first place, as this would require predicting both every possible way each citizen might exercise their rights and all the possible effects those actions may have on the ability of other citizens to exercise their rights. These epistemic limitations are further compounded by the fact that the social, cultural, religious, economic, political, and technological aspects of the world are in continual flux and continually generating novel circumstances in which citizens must continue living their lives and exercising their rights. As these circumstances change, citizens' rights will be thrown against one another in unpredictable and conflicting ways, and Flanigan's argument will only exacerbate the likelihood of these conflicts.[52]

Once we recognize the likelihood of these conflicts and the practical necessity of adjudicating them, it becomes vital to develop conceptual and methodological tools for doing so. Jurists and legal philosophers have devoted considerable attention to this issue, and the primary result of this scholarship is the legal test of proportionality, which is employed as a necessary and sufficient test for adjudicating conflicts between basic rights.[53] One of the necessary components of this test—the component referred to as proportionality *stricto sensu* (balancing)—incorporates considerations that form part of the common good. In applying proportionality as a test for adjudicating these conflicts, it turns out that the common good plays an integral role in addressing this third problem.

52 I am therefore skeptical of specificationists who deny that these sorts of conflicts are possible once the rights in question have been articulated in specific detail. See Wellman, "On Conflicts Between Rights"; and Shafer-Landau, "Specifying Absolute Rights." It will be necessary, of course, to specify the rights to adjudicate conflicts when they do arise. But it is difficult to imagine that this process can be completed from the armchair beforehand, nor does it necessarily follow that once a right has been specified in more detail, the losing right no longer exists as a right at all. For an argument that rejects this latter point, see Waldron, "Rights in Conflict," 211–15. However these conceptual disputes are settled, the point remains that we would still need to know on what basis we may determine that one right should win out over another, and so my argument would still be relevant even if the specificationist thesis were true.

53 The literature on proportionality is quite extensive. For two thorough accounts, see Alexy, *A Theory of Constitutional Rights*; and Barak, *Proportionality*.

Before turning to an explanation of this test, it is necessary to note some qualifications concerning the following discussion. I do not intend to offer a full defense of proportionality here, as this would require determining whether basic rights are absolute and more thoroughly evaluating rival alternatives to proportionality, both of which are beyond the scope of this paper.[54] Instead, I want to highlight the role that the common good plays in the test—particularly in light of the fact that this test is firmly entrenched within the constitutional frameworks of many democratic countries.[55] Secondly, by contextualizing its application within the circumstances generated by Flanigan's argument, I hope to motivate its attractiveness. Appreciating its merits provides Rawlsian high liberals with yet another reason for abandoning the priority of liberty principle in favor of their commitment to the common good.

Jurists employ this evaluative test to determine whether the limitation of a basic right is justified or legitimate. Any statute or common law implemented for the sake of limiting a basic right must pass the test, whereas failure to do so renders the limiting statute or common law unconstitutional. Determining whether a statute or common law passes the test and is therefore proportional is a matter of applying its four components to the concrete circumstances at hand. These four components are: (1) proper purpose, (2) rational connection, (3) necessary means, and (4) proportionality *stricto sensu*. The first component, proper purpose, restricts the range over what sorts of reasons or purposes can limit basic rights. Although both constitutional theory and comparative law have recognized—in contrast to Rawlsian high liberalism—that the common good can serve as a proper purpose for limiting basic rights, the focus of our current discussion is on cases where one basic right is being limited for the sake of another.[56] The second and third components require that the means implemented by the limiting statute or common law are capable of sufficiently advancing the proper purpose while minimizing the extent to which the losing right is limited in comparison to alternative, rational means.

The fourth component—proportionality *stricto sensu*—is the most important. This component is inherently evaluative because it requires balancing the value of achieving the proper purpose on the one hand and the value of protecting the right on the other. Because this component involves an evaluative balancing act between conflicting values, it raises the question as to what sorts of considerations can be employed as a basis for rationally doing so—particularly

54 For a more complete defense of proportionality, see Barak, *Proportionality*, pt. IV, where he addresses both issues.

55 Barak, *Proportionality*, 132, 141.

56 On the issue of the common good serving as a proper purpose for limiting basic rights, see Barak, *Proportionality*, 249–59, 265–76.

when the two sides of the scale are values protected by rights of equal normative status. This balancing act involves a more consequentialist approach: applying it is a matter of evaluating the *social importance* of each right. Aharon Barak is careful to note, however, that this balancing procedure does not occur at an abstract level: it is not a matter of evaluating the general social importance of, e.g., religious freedom as opposed to sports team fandom.[57] The balancing that occurs at this judicial level is rather an evaluative judgment concerning the *marginal* social importance of protecting one right compared to the *marginal* social importance of protecting another right.[58] In a conflict between a concrete act protected by the right to religious freedom and a concrete act protected by the right to sports team fandom, proportionality allows courts to adjudicate this conflict by weighing the marginal social benefits and harms of protecting the former against the marginal social benefits and harms of protecting the latter.

Adjudicating conflicts between rights in this manner means that the common good will play an important role in the process. Proportionality requires that judges incorporate citizens' collective and aggregative interests in their decisions. Evaluating the marginal social benefits and harms between protecting one right over another will involve settling questions such as—but certainly not limited to: how many citizens will be affected directly in the decision to privilege one right over another; what effects the decision will have on citizens' ability to exercise other rights; and whether the decision will interfere with the state's ability to provide other common goods such as equality of opportunity, public health and safety, the integrity and fairness of the political system, etc. A distinct advantage of proportionality is that it allows judges to acknowledge the equal normative status of the rights in conflict but also to recognize that the marginal social importance of those rights can vary due to the unique features of a society and the peculiar details of the conflict itself.[59]

Rawls believed that he could solve the problems outlined in an *a priori* fashion by appealing to his conception of personhood. He thought it possible to distinguish the significance of free speech and political speech in contrast to commercial speech, for instance, by delineating the connection between the former and citizens' moral powers. Flanigan's argument casts doubt over the viability of Rawls's solution, as she argues that this connection holds for nearly any freedom. All freedom is basic, according to her. But this also means that (nearly) all freedom is of equal normative status. When we have to choose

57 This more abstract balancing would be more appropriate when it comes to determining which rights should be included within the list of basic rights in the first place, as we saw in section 4.2 above.

58 Barak, *Proportionality*, 349–52.

59 Barak, *Proportionality*, 359.

which values, freedoms, or rights to privilege or prioritize, the common good is what allows us to do so. It helps us to determine which rights should be included in a compossible scheme of rights, to adjudicate conflicts between those rights, to balance between values that are part of the common good—such as preserving the integrity of the political system versus protecting the speech of corporations—and to decide which risky behaviors to limit. It is difficult to see, in the context of Flanigan's argument, how these theoretical and practical political problems could be addressed without appealing to the common good. For these reasons then, Rawlsian high liberals ought to preserve their commitment to the common good and abandon the priority of liberty principle.

5. AN OBJECTION: PRESERVING THE PRIORITY PRINCIPLE

Since the priority principle permits the restriction of some basic rights for the purpose of protecting other basic rights, one might argue that my comments about how conflicts between rights are to be adjudicated are therefore consistent with it. The objection implies that the priority principle is satisfied if and only if our intention behind violating one basic right is the protection of another. But as mentioned in section 1, the priority principle also generates constraints over what sorts of *reasons* can be appealed to in order to justify the violation of a basic right.

The criterion set out by Rawls in *A Theory of Justice* suggests that the only permissible basis would be the quantity or extent of freedom. An example he employs is that it is permissible to limit freedom of speech (specifically, the right to interrupt speech) for the sake of promoting freedom of speech (the right to engage in discussion).[60] Limiting the former opens up freedom of speech to a greater extent. Hart finds this argument problematic, however. The central point behind his criticism of Rawls's view in *Theory* is that it attempts to resolve all conflicts in a purely formal or quantitative manner. Hart thinks that this method would prove effective only in the simplest cases (like Rawls's speech example) and that the resolution of many other conflicts would have to rely on considerations beyond the extent of freedom—considerations such as the value of the freedoms in conflict or the various social effects that would come about from protecting or privileging one freedom over another (similar to the proportionality test).[61]

60 Rawls, *A Theory of Justice*, 203.

61 Hart, "Rawls on Liberty and Its Priority," 542–47.

Rawls responds to this criticism in a number of interrelated ways.[62] The first step is to reject the notion that the list of basic rights is meant to maximize the development and exercise of the two moral powers. Instead, the basic rights are meant to guarantee, according to Rawls, the social conditions essential for the *adequate* development and exercise of the two moral powers. Once Rawls adopts the notion of a fully adequate scheme instead of the most extensive scheme of basic liberties, the second step of his response to Hart, as we have already seen, is to appeal to the idea of the "central range of application," which specifies the significance of concrete exercises of freedom by tying those freedoms to the adequate development and exercise of the two moral powers. Those concrete exercises of freedom that fall outside the central range of application would not merit status as basic rights.

But it is unclear how these changes address the main point behind Hart's criticism, which is only exacerbated with the addition of Flanigan's argument. Again, the first problem is that there are so many freedoms that satisfy the above criterion (of adequacy) that it is not possible to organize them all into a coherent, compossible scheme. As a consequence, it is necessary to exclude some of those freedoms from the list of basic rights, despite the fact that they possess the right modal connection to the moral powers. The question, to repeat it once more, is on what grounds theorists and legislators can exclude those freedoms. The next problem—adjudicating conflicts between basic rights—are conflicts between rights that *do* possess the proper connection to the moral powers. The question here too is on what grounds theorists and judges can then adjudicate these conflicts. In both cases, it appears that theorists, legislators, and judges will have to rely on the sorts of considerations highlighted by Hart—considerations either about the value of one freedom over another or about the broader social effects of protecting (or prohibiting) different freedoms.

Consider once more the choice confronting theorists and legislators as to whether capitalist economic liberties should be excluded from the list of basic rights despite their centrality to the life plans of at least some citizens. This example certainly differs from Rawls's example of freedom of speech. To note one important difference, while all citizens may concede the rationality of limiting the freedom to interrupt speech for the sake of promoting greater freedom of speech, rationality would not dictate the same consensus in the case of limiting the exercise of capitalist economic liberties. Whatever it would require in this case would depend, as Hart rightly points out, on the value associated with those freedoms for different citizens. It is difficult to see why rationality would dictate accepting limitations on or the prohibition of capitalist economic

62 Rawls, *Political Liberalism*, 331–40.

freedoms for citizens with life plans depending on these freedoms for the sake of promoting either an adequate level of socialist economic liberties or freedom of religious belief. Appealing to the adequacy criterion fails to resolve this issue.

Once we appeal to the common good as a basis for resolving these problems, we have moved beyond the sorts of considerations permitted by the priority principle. Our choice as to which freedoms should count as basic—when nearly any freedom possesses the right sort of connection to the moral powers—will depend on what best promotes the common good. And while it is also true that we are violating one basic right for the sake of protecting another basic right in accordance with the priority principle, our choice over which basic right to protect will also depend on what we ultimately think best promotes the common good.

6. CONCLUSION

Flanigan presses an important argument against Rawlsian high liberalism: she argues that the logic internal to the high-liberal position requires a significant expansion of the freedoms protected by Rawls's first principle of justice. In making this argument, not only does she place the high-liberal commitment to the common good on precarious footing, but she also reduces the conceptual space between Rawlsian high liberalism and standard versions of libertarianism, insofar as the overriding if not exclusive function of the state becomes the protection of individual freedom. I have considered several potential responses that high liberals could make, and I have argued that the strongest response would be for high liberals to abandon the priority of liberty principle. In doing so, Rawlsian high liberals will have to make greater normative space for considerations pertaining to the common good within their theoretical framework.[63]

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