

The Basic Liberties and Their Priority

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THE TANNER LECTURES ON HUMAN VALUES

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JOHN RAWLS was educated at Princeton University, where he was an undergraduate before World War II and a graduate student afterward. Later he was a Fulbright Fellow at Oxford University. He has taught primarily at Cornell and at Harvard, where he has been for the last twenty years. Professor Rawls has been a Guggenheim Fellow and a Fellow of the Center for Advanced Study in the Behavioral Sciences. His published writings include *A Theory of Justice* (1971) and various articles before and since. He gave the Tanner Lectures at Oxford University in May 1978 and the Dewey Lectures at Columbia University in April 1980. He hopes eventually to rework all these lectures into a short book.

THE TANNER LECTURES ON HUMAN VALUES

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Obert C. Tanner was born in Farmington, Utah, in 1904. He was educated at the University of Utah, Harvard University, and Stanford University. He has served on the faculty of Stanford University and is presently Emeritus Professor of Philosophy at the University of Utah. He is the founder and chairman of the O. C. Tanner Company, manufacturing jewelers.

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This is a much revised and longer version of the Tanner Lecture given at the University of Michigan in April 1981. I am garteful to the Tanner Foundation and the Department of Philosophy at the University of Michigan for the opportunity to give this lecture, I should like to take this occasion to express my gratitude to H. L. A. Hart for writing his critical review (see footnote 1) to which I attempt a partial reply. I have tried to sketch replies to what I believe are the two most fundamental difficulties he raises; and this has led to several important changes in my account of liberty. For many valuable comments and suggestions for how to meet the difficulties Hart raises, I am much indebted to Joshua Rabinowitz.

In making this revision I am indebted to Samuel Scheffler and Anthony Kronman for their comments immediately following the lecture and for later conversations. Scheffler's comments have led me to recast entirely and greatly to enlarge the original version of what are now sections V and VI. Kronman's comments have been particularly helpful in revising section VII. I must also thank Burton Dreben, whose instructive advice and discussion have led to what seem like innumerable changes and revisions.

I remark as a preface that my account of the basic liberties and their priority, when applied to the constitutional doctrine of what I call "a well-ordered society," has a certain similarity to the well-known view of Alexander Meiklejohn (see footnote 11). There are, however, these important differences. First, the kind of primacy Meiklejohn gives to the political liberties and to free speech is here given to the family of basic liberties as a whole; second, the value of self-government, which for Meiklejohn often seems overriding, is counted as but one important value among others; and

finally, the philosophical background of the basic liberties is very different.

* * *

*It was pointed out by H. L. A. Hart that the account in my book *A Theory of Justice of the basic liberties and their priority contains, among other failings, two serious gaps. In this lecture I shall outline, and can do no more than outline, how these gaps can be filled. The first gap is that the grounds upon which the parties in the original position adopt the basic liberties and agree to their priority are not sufficiently explained.*¹ This gap is connected with a second, which is that when the principles of justice are applied at the constitutional, legislative, and judicial stages, no satisfactory criterion is given for how the basic liberties are to be further specified and adjusted to one another as social circumstances are made known.² I shall try to fill these two gaps by carrying through the revisions already introduced in my *Dewey Lectures*. I shall outline how the basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods.³ These revisions bring out that the basic liberties and their priority rest on a conception of the person that would be recognized as liberal and not, as Hart thought, on considerations of rational interests alone.⁴ Nevertheless, the structure and content of justice as fairness is still much the same; except for an important change of phrase in the first principle of justice, the statement of the two principles of justice is unchanged and so is the priority of the first principle over the second.*

¹ Hart, "Rawls on Liberty and Its Priority," *University of Chicago Law Review*, vol. 40, no. 3 (Spring 1973), pp. 551-55 (henceforth Hart); reprinted in Norman Daniels, ed., *Reading Rawls* (New York: Basic Books, 1975), pp. 249-52 (henceforth Daniels).

² Hart, pp. 542-50; see Daniels, pp. 239-44.

³ See "Kantian Constructivism in Moral Theory," *Journal of Philosophy* vol. 77, no. 9 (September 1980), especially the first lecture, pp. 5 19-30.

⁴ Hart, p. 555; Daniels, p. 252.

I

Before taking up the two gaps in the account of the basic liberties, a few preliminary matters should be noted. First, the two principles of justice read as follows:

1. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
2. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.

The change in the first principle of justice mentioned above is that the words “a fully adequate scheme” replace the words “the most extensive total system” which were used in *A Theory of Justice*.⁵ This change leads to the insertion of the words “which is” before “compatible.” The reasons for this change are explained later and the notion of a fully adequate scheme of basic liberties is discussed in section VIII. For the moment I leave this question aside.

A further preliminary matter is that the equal basic liberties in the first principle of justice are specified by a list as follows: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law. No priority is assigned to liberty as such, as if the exercise of something called “liberty” has a pre-eminent value and is the main if not the sole end of political and social justice. There is, to be sure, a general presumption against imposing legal and other restrictions on conduct without

⁵ The phrase “the most extensive” is used in the main statements of the principles of justice on pp. 60, 250, and 302. The phrase “total system” is used in the second and third of these statements.

sufficient reason. But this presumption creates no special priority for any particular liberty. Hart noted, however, that in *A Theory of Justice* I sometimes used arguments and phrases which suggest that the priority of liberty as such is meant; although, as he saw, this is not the correct interpretation.⁶ Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bills of rights and declarations of the rights of man. The account of the basic liberties follows this tradition.

Some may think that to specify the basic liberties by a list is a makeshift which a philosophical conception of justice should do without. We are accustomed to moral doctrines presented in the form of general definitions and comprehensive first principles. Note, however, that if we can find a list of liberties which, when made part of the two principles of justice, leads the parties in the original position to agree to these principles rather than to the other principles of justice available to them, then what we may call “the initial aim” of justice as fairness is achieved. This aim is to show that the two principles of justice provide a better understanding of the claims of freedom and equality in a democratic society than the first principles associated with the traditional doctrines of utilitarianism, with perfectionism, or with intuitionism. It is these principles, together with the two principles of justice, which are the alternatives available to the parties in the original position when this initial aim is defined.

Now a list of basic liberties can be drawn up in two ways. One way is historical: we survey the constitutions of democratic states and put together a list of liberties normally protected, and we examine the role of these liberties in those constitutions which have worked well. While this kind of information is not available

⁶ Hart gives a perceptive discussion of whether the first principle of justice means by “liberty” what I have called “liberty as such.” This question arises because in the first statement of the principle on p. 60, and elsewhere, I use the phrase “basic liberty,” or simply “liberty” when I should have used “basic liberties.” With Hart’s discussion I agree, on the whole; see pp. 537–41, Daniels, pp. 234–37.

to the parties in the original position, it is available to us — to you and me who are setting up justice as fairness — and therefore this historical knowledge may influence the content of the principles of justice which we allow the parties as alternatives.⁷ A second way is to consider which liberties are essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete life. Doing this connects the basic liberties with the conception of the person used in justice as fairness, and I shall come back to these important matters in sections III–VI.

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

A final remark concerning the use of a list of liberties. The argument for the priority of liberty, like all arguments from the original position, is always relative to a given enumeration of the

⁷ See "Kantian Constructivism in Moral Theory," Lect. I, pp. 533–34, Lect. III, pp. 567–68.

alternatives from which the parties are to select. One of these alternatives, the two principles of justice, contains as part of its specification a list of basic liberties and their priority. The source of the alternatives is the historical tradition of moral and political philosophy. We are to regard the original position and the characterization of the deliberations of the parties as a means of selecting principles of justice from alternatives already presented. And this has the important consequence that to establish the priority of liberty it is not necessary to show that the conception of the person, combined with various other aspects of the original position, suffices of itself to derive a satisfactory list of liberties and the principles of justice which assign them priority. Nor is it necessary to show that the two principles of justice (with the priority of liberty included) would be adopted from any enumeration of alternatives however amply it might be supplemented by other principles.⁸ I am concerned here with the initial aim of justice as fairness, which, as defined above, is only to show that the principles of justice would be adopted over the other traditional alternatives. If this can be done, we may then proceed to further refinements.

II

After these preliminaries, I begin by noting several features of the basic liberties and their priority. First, the priority of liberty means that the first principle of justice assigns the basic liberties, as given by a list, a special status. They have an absolute weight with respect to reasons of public good and of perfectionist values.⁹ For example, the equal political liberties cannot be denied to certain social groups on the grounds that their having these liberties

⁸ On this point, see *A Theory of Justice* (henceforth *TJ*), p. 581.

⁹ The phrases “public good” and “perfectionist values” are used to refer to the notions of goodness in the teleological moral doctrines of utilitarianism and perfectionism, respectively. Thus, these notions are specified independently of a notion of right, for example, in utilitarianism (and in much of welfare economics also) as the satisfaction of the desires, or interests, or preferences of individuals. See further *TJ*, pp. 24–26

may enable them to block policies needed for economic efficiency and growth. Nor could a discriminatory selective service act be justified (in time of war) on the grounds that it is the least socially disadvantageous way to raise an army. The claims of the basic liberties cannot be overridden by such considerations.

Since the various basic liberties are bound to conflict with one another, the institutional rules which define these liberties must be adjusted so that they fit into a coherent scheme of liberties. The priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties, and never, as I have said, for reasons of public good or of perfectionist values. This restriction holds even when those who benefit from the greater efficiency, or together share the greater sum of advantages, are the same persons whose liberties are limited or denied. Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; nor is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for (whatever that might mean). Rather, however these liberties are adjusted to give one coherent scheme, this scheme is secured equally for all citizens.

In understanding the priority of the basic liberties we must distinguish between their restriction and their regulation.¹⁰ The priority of these liberties is not infringed when they are merely regulated, as they must be, in order to be combined into one scheme as well as adapted to certain social conditions necessary for their enduring exercise. So long as what I shall call “the central range of application” of the basic liberties is provided for, the principles of justice are fulfilled. For example, rules of order

¹⁰ This distinction is familiar and important in constitutional law. See, for example, Lawrence Tribe, *American Constitutional Law* (Mineola, N. Y.: The Foundation Press, 1978), ch. 12, section 2, where it is applied to freedom of speech as protected by the First Amendment. In *TJI* I failed to make this distinction at crucial points in my account of the basic liberties. I am indebted to Joshua Rabinowitz for clarification on this matter.

are essential for regulating free discussion.¹¹ Without the general acceptance of reasonable procedures of inquiry and precepts of debate, freedom of speech cannot serve its purpose. Not everyone can speak at once, or use the same public facility at the same time for different ends. Instituting the basic liberties, just as fulfilling various desires, calls for scheduling and social organization. The requisite regulations are not to be mistaken for restrictions on the content of speech, for example, for prohibitions against arguing for certain religious, philosophical, or political doctrines, or against discussing questions of general and particular fact which are relevant in assessing the justice of the basic structure of society. The public use of our reason¹² must be regulated, but the priority of liberty requires this to be done, so far as possible, to preserve intact the central range of application of each basic liberty.

It is wise, I think, to limit the basic liberties to those that are truly essential in the expectation that the liberties which are not basic are satisfactorily allowed for by the general presumption when the discharge of the burden of proof is decided by the other requirements of the two principles of justice. The reason for this limit on the list of basic liberties is the special status of these liberties. Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority. Therefore, I shall assume throughout, and not always mention, that the basic liberties on the list always have priority, as will often be clear from the arguments for them.

¹¹ See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper and Row, 1948), ch. 1, section 6, for a well-known discussion of the distinction between rules of order and rules abridging the content of speech.

¹² The phrase “the public use of our reason” is adapted from Kant’s essay “What Is Enlightenment?” (1784), where it is introduced in the fifth paragraph; Academy edition of the *Gesammelte Schriften*, vol. 8 (1912), pp. 36–37. Kant contrasts the public use of reason, which is free, to the private use, which may not be free. I do not mean to endorse this view.

The last point about the priority of liberty is that this priority is not required under all conditions. For our purposes here, however, I assume that it is required under what I shall call “reasonably favorable conditions,” that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties. These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well. I assume as sufficiently evident for our purposes, that in our country today reasonably favorable conditions do obtain, so that for us the priority of the basic liberties is required. Of course, whether the political will exists is a different question entirely. While this will exists by definition in a well-ordered society, in our society part of the political task is to help fashion it.

Following the preceding remarks about the priority of liberty, I summarize several features of the scheme of basic liberties. First: as I have indicated, I assume that each such liberty has what I shall call a “central range of application.” The institutional protection of this range of application is a condition of the adequate development and full exercise of the two moral powers of citizens as free and equal persons. I shall elaborate this remark in the next sections. Second, the basic liberties can be made compatible with one another, at least within their central range of application. Put another way, under reasonably favorable conditions, there is a practicable scheme of liberties that can be instituted in which the central range of each liberty is protected. But that such a scheme exists cannot be derived solely from the conception of the person as having the two moral powers, nor solely from the fact that certain liberties, and other primary goods as all-purpose means, are necessary for the development and exercise of these powers. Both of these elements must fit into a workable constitutional arrangement. The historical experience of democratic institutions and

reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found.

I have already remarked that the scheme of basic liberties is not specified in full detail by considerations available in the original position. It is enough that the general form and content of the basic liberties can be outlined and the grounds of their priority understood. The further specification of the liberties is left to the constitutional, legislative, and judicial stages. But in outlining this general form and content we must indicate the special role and central range of application of the basic liberties sufficiently clearly to guide the process of further specification at later stages. For example, among the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers. Two wider conceptions of the right of property as a basic liberty are to be avoided. One conception extends this right to include certain rights of acquisition and bequest, as well as the right to own means of production and natural resources. On the other conception, the right of property includes the equal right to participate in the control of means of production and natural resources, which are to be socially owned. These wider conceptions are not used because they cannot, I think, be accounted for as necessary for the development and exercise of the moral powers. The merits of these and other conceptions of the right of property are decided at later stages when much more information about a society's circumstances and historical traditions is available.¹³

Finally, it is not supposed that the basic liberties are equally important or prized for the same reasons. Thus one strand of the liberal tradition regards the political liberties as of less intrinsic

¹³ As an elaboration of this paragraph, see the discussion in *TJ*, pp. 270–74, 280–82, of the question of private property in democracy versus socialism. The two principles of justice by themselves do not settle this question.

value than freedom of thought and liberty of conscience, and the civil liberties generally. What Constant called “the liberties of the moderns” are prized above “the liberties of the ancients.”¹⁴ In a large modern society, whatever may have been true in the city-state of classical times, the political liberties are thought to have a lesser place in most persons' conceptions of the good. The role of the political liberties is perhaps largely instrumental in preserving the other liberties.¹⁵ But even if this view is correct, it is no bar to counting certain political liberties among the basic liberties and protecting them by the priority of liberty. For to assign priority to these liberties they need only be important enough as essential institutional means to secure the other basic liberties under the circumstances of a modern state. And if assigning them this priority helps to account for the judgments of priority that we are disposed to affirm after due reflection, then so far so good.

III

I now consider the first gap in the account of liberty. Recall that this gap concerns the grounds upon which the parties in the original position accept the first principle of justice and agree to the priority of its basic liberties as expressed by the ranking of the first principle of justice over the second. To fill this gap I shall introduce a certain conception of the person together with a companion conception of social cooperation.¹⁶ Consider first the conception of the person: there are many different aspects of our nature that can be singled out as particularly significant depending on our aim and point of view. This fact is witnessed by the use of

¹⁴ See Constant's essay, “De la Liberté des Anciens comparée a celle des modernes” (1819).

¹⁵ For an important recent statement of this view, see Isaiah Berlin's “Two Concepts of Liberty” (1958), reprinted in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); see, for example, pp. 165–66.

¹⁶ In this and the next section I draw upon my “Kantian Constructivism in Moral Theory,” footnote 3, to provide the necessary background for the argument to follow.

such expressions as *Homo politicus*, *Homo oeconomicus*, and *Homo faber*. In justice as fairness the aim is to work out a conception of political and social justice which is congenial to the most deep-seated convictions and traditions of a modern democratic state. The point of doing this is to see whether we can resolve the impasse in our recent political history; namely, that there is no agreement on the way basic social institutions should be arranged if they are to conform to the freedom and equality of citizens as persons. Thus, from the start the conception of the person is regarded as part of a conception of political and social justice. That is, it characterizes how citizens are to think of themselves and of one another in their political and social relationships as specified by the basic structure. This conception is not to be mistaken for an ideal for personal life (for example, an ideal of friendship) or as an ideal for members of some association, much less as a moral ideal such as the Stoic ideal of a wise man.

The connection between the notion of social cooperation and the conception of the person which I shall introduce can be explained as follows. The notion of social cooperation is not simply that of coordinated social activity efficiently organized and guided by publicly recognized rules to achieve some overall end. Social cooperation is always for mutual benefit and this implies that it involves two elements: the first is a shared notion of fair terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them. Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison. This element in social cooperation I call the Reasonable. The other element corresponds to the Rational: it refers to each participant's rational advantage; what, as individuals, the participants are trying to advance. Whereas the notion of fair terms of cooperation is shared, participants' conceptions of their own rational advantage in general differ. The

unity of social cooperation rests on persons agreeing to its notion of fair terms.

Now the appropriate notion of fair terms of cooperation depends on the nature of the cooperative activity itself: on its background social context, the aims and aspirations of the participants, how they regard themselves and one another as persons, and so on. What are fair terms for joint-partnerships and for associations, or for small groups and teams, are not suitable for social cooperation. For in this case we start by viewing the basic structure of society as a whole as a form of cooperation. This structure comprises the main social institutions — the constitution, the economic regime, the legal order and its specification of property and the like, and how these institutions cohere into one system. What is distinctive about the basic structure is that it provides the framework for a self-sufficient scheme of cooperation for all the essential purposes of human life, which purposes are served by the variety of associations and groups within this framework. Since I suppose the society in question is closed, we are to imagine that there is no entry or exit except by birth and death: thus persons are born into society taken as a self-sufficient scheme of cooperation, and we are to conceive of persons as having the capacity to be normal and fully cooperating members of society over a complete life. It follows from these stipulations that while social cooperation can be willing and harmonious, and in this sense voluntary, it is not voluntary in the sense that our joining or belonging to associations and groups within society is voluntary. There is no alternative to social cooperation except unwilling and resentful compliance, or resistance and civil war.

Our focus, then, is on persons as capable of being normal and fully cooperating members of society over a complete life. The capacity for social cooperation is taken as fundamental, since the basic structure of society is adopted as the first subject of justice. The fair terms of social cooperation for this case specify the content of a political and social conception of justice. But if

persons are viewed in this way, we are attributing to them two powers of moral personality. These two powers are the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus to be reasonable), and the capacity for a conception of the good (and thus to be rational). In greater detail, the capacity for a sense of justice is the capacity to understand, to apply and normally to be moved by an effective desire to act from (and not merely in accordance with) the principles of justice as the fair terms of social cooperation. The capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue such a conception, that is, a conception of what we regard for us as a worthwhile human life. A conception of the good normally consists of a determinate scheme of final ends and aims, and of desires that certain persons and associations, as objects of attachments and loyalties, should flourish. Also included in such a conception is a view of our relation to the world — religious, philosophical or moral — by reference to which these ends and attachments are understood.

The next step is to take the two moral powers as the necessary and sufficient condition for being counted a full and equal member of society in questions of political justice. Those who can take part in social cooperation over a complete life, and who are willing to honor the appropriate fair terms of cooperation, are regarded as equal citizens. Here we assume that the moral powers are realized to the requisite minimum degree and paired at any given time with a determinate conception of the good. Given these assumptions, variations and differences in natural gifts and abilities are subordinate: they do not affect persons' status as equal citizens and become relevant only as we aspire to certain offices and positions, or belong to or wish to join certain associations within society. Thus political justice concerns the basic structure as the encompassing institutional framework within which the natural gifts and abilities of individuals are developed and exercised, and the various associations in society exist.

So far I have said nothing about the content of fair terms of cooperation, or what concerns us here, about the basic liberties and their priority. To approach this question, let's sum up by saying: fair terms of social cooperation are terms upon which as equal persons we are willing to cooperate in good faith with all members of society over a complete life. To this let us add: to cooperate on a basis of mutual respect. Adding this clause makes explicit that fair terms of cooperation can be acknowledged by everyone without resentment or humiliation (or for that matter bad conscience) when citizens regard themselves and one another as having to the requisite degree the two moral powers which constitute the basis of equal citizenship. Against this background the problem of specifying the basic liberties and grounding their priority can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect. Until the wars of religion in the sixteenth and seventeenth centuries these fair terms were narrowly drawn: social cooperation on the basis of mutual respect was regarded as impossible with those of a different faith; or (in terms I have used) with those who affirm a fundamentally different conception of the good. As a philosophical doctrine, liberalism has its origin in those centuries with the development of the various arguments for religious toleration.¹⁷ In the nineteenth century the liberal doctrine was formulated in its main essentials by Constant, Tocqueville and Mill for the context of the modern democratic state, which they saw to be imminent. A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good.¹⁸

¹⁷ For an instructive survey of these arguments, see J. W. Allen, *A History of Political Thought in the Sixteenth Century* (London: Methuen, 1928), pp. 73–103, 231–46, 302–31, 428–30; and also his *English Political Thought, 1603–1660* (London: Methuen, 1938), pp. 199–249. The views in Locke's Letter on Toleration (1689) or in Montesquieu's *The Spirit of Laws* (1748) have a long prehistory.

¹⁸ This assumption is central to liberalism as stated by Berlin in "Two Concepts of Liberty"; see *Four Essays*, pp. 167–71, footnote 15. I believe it is implicit in the writers cited but cannot go into the matter here. For a more recent statement, see Ronald Dworkin, "Liberalism," in Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978).

In a modern democratic society the existence of such diverse ways of life is seen as a normal condition which can only be removed by the autocratic use of state power. Thus liberalism accepts the plurality of conceptions of the good as a fact of modern life, provided, of course, these conceptions respect the limits specified by the appropriate principles of justice. It tries to show both that a plurality of conceptions of the good is desirable and how a regime of liberty can accommodate this plurality so as to achieve the many benefits of human diversity.

My aim in this lecture is to sketch the connection between the basic liberties with their priority and the fair terms of social cooperation among equal persons as described above. The point of introducing the conception of the person I have used, and its companion conception of social cooperation, is to try to carry the liberal view one step further: that is, to root its assumptions in two underlying philosophical conceptions and then to indicate how the basic liberties with their priority can be regarded as belonging among the fair terms of social cooperation where the nature of this cooperation answers to the conditions these conceptions impose. The social union is no longer founded on a conception of the good as given by a common religious faith or philosophical doctrine, but on a shared public conception of justice appropriate to the conception of citizens in a democratic state as free and equal persons.

IV

In order to explain how this might be done I shall now summarize very briefly what I have said elsewhere about the role of what I have called “the original position” and the way in which it models the conception of the person.¹⁹ The leading idea is that the original position connects the conception of the person and its

¹⁹ On the original position, see *TJ*, the entries in the index; for how this position models the conception of the person, see further “Kantian Constructivism in Moral Theory,” footnote 3.

companion conception of social cooperation with certain specific principles of justice. (These principles specify what I have earlier called “fair terms of social cooperation.”) The connection between these two philosophical conceptions and specific principles of justice is established by the original position as follows: The parties in this position are described as rationally autonomous representatives of citizens in society. As such representatives, the parties are to do the best they can for those they represent subject to the restrictions of the original position. For example, the parties are symmetrically situated with respect to one another and they are in that sense equal; and what I have called “the veil of ignorance” means that the parties do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent. And, as I have already remarked, the parties must agree to certain principles of justice on a short list of alternatives given by the tradition of moral and political philosophy. The agreement of the parties on certain definite principles establishes a connection between these principles and the conception of the person represented by the original position. In this way the content of fair terms of cooperation for persons so conceived is ascertained.

Two different parts of the original position must be carefully distinguished. These parts correspond to the two powers of moral personality, or to what I have called the capacity to be reasonable and the capacity to be rational. While the original position as a whole represents both moral powers, and therefore represents the full conception of the person, the parties as rationally autonomous representatives of persons in society represent only the Rational: the parties agree to those principles which they believe are best for those they represent as seen from these persons’ conception of the good and their capacity to form, revise, and rationally to pursue such a conception, so far as the parties can know these things. The Reasonable, or persons’ capacity for a sense of justice, which

here is their capacity to honor fair terms of social cooperation, is represented by the various restrictions to which the parties are subject in the original position and by the conditions imposed on their agreement. When the principles of justice which are adopted by the parties are affirmed and acted upon by equal citizens in society, citizens then act with full autonomy. The difference between full autonomy and rational autonomy is this: rational autonomy is acting solely from our capacity to be rational and from the determinate conception of the good we have at any given time. Full autonomy includes not only this capacity to be rational but also the capacity to advance our conception of the good in ways consistent with honoring the fair terms of social cooperation; that is, the principles of justice. In a well-ordered society in which citizens know they can count on each other's sense of justice, we may suppose that a person normally wants to act justly as well as to be recognized by others as someone who can be relied upon as a fully cooperating member of society over a complete life. Fully autonomous persons therefore publicly acknowledge and act upon the fair terms of social cooperation moved by the reasons specified by the shared principles of justice. The parties, however, are only rationally autonomous, since the constraints of the Reasonable are simply imposed from without. Indeed, the rational autonomy of the parties is merely that of artificial agents who inhabit a construction designed to model the full conception of the person as both reasonable and rational. It is equal citizens in a well-ordered society who are fully autonomous because they freely accept the constraints of the Reasonable, and in so doing their political life reflects that conception of the person which takes as fundamental their capacity for social cooperation. It is the full autonomy of active citizens which expresses the political ideal to be realized in the social world.²⁰

²⁰ I use the distinction between the two parts of the original position which correspond to the Reasonable and the Rational as a vivid way to state the idea that this position models the full conception of the person. I hope that this will prevent several

Thus we can say that the parties in the original position are, as rational representatives, rationally autonomous in two respects. First, in their deliberations they are not required to apply, or to be guided by, any prior or antecedent principles of right and justice. Second, in arriving at an agreement on which principles of justice to adopt from the alternatives available, the parties are to be guided solely by what they think is for the determinate good of the persons they represent, so far as the limits on information allow them to determine this. The agreement in the original position on the two principles of justice must be an agreement founded on rationally autonomous reasons in this sense. Thus, in effect, we are using the rationally autonomous deliberations of the parties to select from given alternatives the fair terms of cooperation between the persons they represent.

Much more would have to be said adequately to explain the preceding summary. But here I must turn to the considerations that move the parties in the original position. Of course, their overall aim is to fulfill their responsibility and to do the best they can to advance the determinate good of the persons they represent. The problem is that given the restrictions of the veil of ignorance, it may seem impossible for the parties to ascertain these persons' good and therefore to make a rational agreement on their behalf. To solve this problem we introduce the notion of primary goods and enumerate a list of various things which fall under this heading. The main idea is that primary goods are singled out by asking which things are generally necessary as social conditions and all-purpose means to enable persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers. Here we must look to social requirements and the normal

misinterpretations of this position, for example, that it is intended to be morally neutral, or that it models only the notion of rationality, and therefore that justice as fairness attempts to select principles of justice purely on the basis of a conception of rational choice as understood in economics or decision theory. For a Kantian view, such an attempt is out of the question and is incompatible with its conception of the person.

circumstances of human life in a democratic society. That the primary goods are necessary conditions for realizing the moral powers and are all-purpose means for a sufficiently wide range of final ends presupposes various general facts about human wants and abilities, their characteristic phases and requirements of nurture, relations of social interdependence, and much else. We need at least a rough account of rational plans of life which shows why they normally have a certain structure and depend upon the primary goods for their formation, revision, and execution. What are to count as primary goods is not decided by asking what general means are essential for achieving the final ends which a comprehensive empirical or historical survey might show that people usually or normally have in common. There may be few if any such ends; and those there are may not serve the purposes of a conception of justice. The characterization of primary goods does not rest on such historical or social facts. While the determination of primary goods invokes a knowledge of the general circumstances and requirements of social life, it does so only in the light of a conception of the person given in advance.

The five kinds of primary goods enumerated in *A Theory of Justice* (accompanied by an indication of why each is used) are the following:

1. The basic liberties (freedom of thought and liberty of conscience, and so on): these liberties are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers (particularly in what later, in section VIII, I shall call “the two fundamental cases”); these liberties are also indispensable for the protection of a wide range of determinate conceptions of the good (within the limits of justice).
2. Freedom of movement and free choice of occupation against a background of diverse opportunities: these opportunities allow the pursuit of diverse final ends and give

effect to a decision to revise and change them, if we so desire.

3. Powers and prerogatives of offices and positions of responsibility: these give scope to various self-governing and social capacities of the self.
4. Income and wealth, understood broadly as all-purpose means (having an exchange value) : income and wealth are needed to achieve directly or indirectly a wide range of ends, whatever they happen to be.
5. The social bases of self-respect: these bases are those aspects of basic institutions normally essential if citizens are to have a lively sense of their own worth as persons and to be able to develop and exercise their moral powers and to advance their aims and ends with self-confidence,²¹

Observe that the two principles of justice assess the basic structure of society according to how its institutions protect and assign some of these primary goods, for example, the basic liberties, and regulate the production and distribution of other primary goods, for example, income and wealth. Thus, in general, what has to be explained is why the parties use this list of primary goods and why it is rational for them to adopt the two principles of justice.

In this lecture I cannot discuss this general question. Except for the basic liberties, I shall assume that the grounds for relying on primary goods are clear enough for our purposes. My aim in the following sections is to explain why, given the conception of the person which characterizes the citizens the parties represent, the basic liberties are indeed primary goods, and moreover why the principle which guarantees these liberties is to have priority over the second principle of justice. Sometimes the reason for this priority is evident from the explanation of why a liberty is basic,

²¹ For a fuller account of primary goods, see my "Social Unity and Primary Goods," in Amartya Sen and Bernard Williams, eds., *Beyond Utilitarianism* (Cambridge: Cambridge University Press, 1982).

as in the case of equal liberty of conscience (discussed in sections V–VI). In other cases the priority derives from the procedural role of certain liberties and their fundamental place in regulating the basic structure as a whole, as in the case of the equal political liberties (discussed in section VIII). Finally, certain basic liberties are indispensable institutional conditions once other basic liberties are guaranteed; thus freedom of thought and freedom of association are necessary to give effect to liberty of conscience and the political liberties. (This connection is sketched in the case of free political speech and the political liberties in sections X–XII.) My discussion is very brief and simply illustrates the kinds of grounds the parties have for counting certain liberties as basic. By considering several different basic liberties, each grounded in a somewhat different way, I hope to explain the place of the basic liberties in justice as fairness and the reasons for their priority.

V

We are now ready to survey the grounds upon which the parties in the original position adopt principles which guarantee the basic liberties and assign them priority. I cannot here present the argument for such principles in a rigorous and convincing manner, but shall merely indicate how it might proceed.

Let us note first that given the conception of the person, there are three kinds of considerations the parties must distinguish when they deliberate concerning the good of the persons they represent. There are considerations relating to the development and the full and informed exercise of the two moral powers, each power giving rise to considerations of a distinct kind; and, finally, considerations relating to a person's determinate conception of the good. In this section I take up the considerations relating to the capacity for a conception of the good and to a person's determinate conception of the good. I begin with the latter. Recall that while the parties know that the persons they represent have determinate

conceptions of the good, they do not know the content of these conceptions; that is, they do not know the particular final ends and aims these persons pursue, nor the objects of their attachments and loyalties, nor their view of their relation to the world — religious, philosophical, or moral — by reference to which these ends and loyalties are understood. However, the parties do know the general structure of rational persons' plans of life (given the general facts about human psychology and the workings of social institutions) and hence the main elements in a conception of the good as just enumerated. Knowledge of these matters goes with their understanding and use of primary goods as previously explained.

To fix ideas, I focus on liberty of conscience and survey the grounds the parties have for adopting principles which guarantee this basic liberty as applied to religious, philosophical, and moral views of our relation to the world.²² Of course, while the parties cannot be sure that the persons they represent affirm such views, I shall assume that these persons normally do so, and in any event the parties must allow for this possibility. I assume also that these religious, philosophical, and moral views are already formed and firmly held, and in this sense given. Now if but one of the alternative principles of justice available to the parties guarantees equal liberty of conscience, this principle is to be adopted. Or at least this holds if the conception of justice to which this principle belongs is a workable conception. For the veil of ignorance implies that the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view. They cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble in this way, they would show

²² In this and the next two paragraphs I state in a somewhat different way the main consideration given for liberty of conscience in *TJ*, section 33.

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.

Note that, strictly speaking, this first ground for liberty of conscience is not an argument. That is, one simply calls attention to the way in which the veil of ignorance combined with the parties' responsibility to protect some unknown but determinate and affirmed religious, philosophical, or moral view gives the parties the strongest reasons for securing this liberty. Here it is fundamental that affirming such views and the conceptions of the good to which they give rise is recognized as non-negotiable, so to speak. 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. To be sure, there are religious conversions, and persons change their philosophical and moral views. But presumptively these conversions and changes are not prompted by reasons of power and position, or of wealth and status, but are the result of conviction, reason, and reflection. Even if in practice this presumption is often false, this does not affect the responsibility of the parties to protect the integrity of the conception of the good of those they represent.

It is clear, then, why liberty of conscience is a basic liberty and possesses the priority of such a liberty. Given an understanding of what constitutes a religious, philosophical, or moral view, the kinds of considerations covered by the second principle of justice cannot be adduced to restrict the central range of this liberty. If someone denies that liberty of conscience is a basic liberty and maintains that all human interests are commensurable, and that between any two there always exists some rate of exchange in terms of which it is rational to balance the protection of one against the protection of the other, then we have reached an impasse. One way to continue the discussion is to try to show that the scheme of basic liberties as a family is part of a coherent and

workable conception of justice appropriate for the basic structure of a democratic regime and, moreover, a conception that is congruent with its most essential convictions.

Let's now turn to considerations relating to the capacity for a conception of the good. This capacity was earlier defined as a capacity to form, to revise, and rationally to pursue a determinate conception of the good. Here there are two closely related grounds, since this capacity can be viewed in two ways. In the first way, the adequate development and exercise of this capacity, as circumstances require, is regarded as a means to a person's good; and as a means it is not (by definition) part of this person's determinate conception of the good. Persons exercise this power in rationally pursuing their final ends and in articulating their notions of a complete life. At any given moment this power serves the determinate conception of the good then affirmed; but the role of this power in forming other and more rational conceptions of the good and in revising existing ones must not be overlooked. There is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision. For these reasons the adequate and full exercise of the capacity for a conception of the good is a means to a person's good. Thus, on the assumption that liberty of conscience, and therefore the liberty to fall into error and to make mistakes, is among the social conditions necessary for the development and exercise of this power, the parties have another ground for adopting principles that guarantee this basic liberty. Here we should observe that freedom of association is required to give effect to liberty of conscience; for unless we are at liberty to associate with other like-minded citizens, the exercise of liberty of conscience is denied. These two basic liberties go in tandem.

The second way of regarding the capacity for a conception of the good leads to a further ground for liberty of conscience. This ground rests on the broad scope and regulative nature of this capacity and the inherent principles that guide its operations (the

principles of rational deliberation). These features of this capacity enable us to think of ourselves as affirming our way of life in accordance with the full, deliberate, and reasoned exercise of our intellectual and moral powers. And this rationally affirmed relation between our deliberative reason and our way of life itself becomes part of our determinate conception of the good. This possibility is contained in the conception of the person. Thus, in addition to our beliefs being true, our actions right, and our ends good, we may also strive to appreciate *why* our beliefs are true, our actions right, and our ends good and suitable for us. As Mill would say, we may seek to make our conception of the good “our own”; we are not content to accept it ready-made from our society or social peers.²³ Of course, the conception we affirm need not be peculiar to us, or a conception we have, as it were, fashioned for ourselves; rather, we may affirm a religious, philosophical, or moral tradition in which we have been raised and educated, and which we find, at the age of reason, to be a center of our attachments and loyalties. In this case what we affirm is a tradition that incorporates ideals and virtues which meet the tests of our reason and which answer to our deepest desires and affections. Of course, many persons may not examine their acquired beliefs and ends but take them on faith, or be satisfied that they are matters of custom and tradition. They are not to be criticized for this, for in the liberal view there is no political or social evaluation of conceptions of the good within the limits permitted by justice.

In this way of regarding the capacity for a conception of the good, this capacity is not a means to but is an essential part of a determinate conception of the good. The distinctive place in justice as fairness of this conception is that it enables us to view our final aims and loyalties in a way that realizes to the full extent

²³ See J. S. Mill, *On Liberty*, ch. 3, par. 5, where he says, To a certain extent it is admitted, that our understanding should be our own; but there is not the same willingness to admit that our desires and impulses should be our own likewise; or that to possess impulses of our own, and of any strength, is anything but a peril and a snare. See the whole of pars. 2–9 on the free development of individuality.

one of the moral powers in terms of which persons are characterized in this political conception of justice. For this conception of the good to be possible we must be allowed, even more plainly than in the case of the preceding ground, to fall into error and to make mistakes within the limits established by the basic liberties. In order to guarantee the possibility of this conception of the good, the parties, as our representatives, adopt principles which protect liberty of conscience.

The preceding three grounds for liberty of conscience are related as follows. In the first, conceptions of the good are regarded as given and firmly rooted; and since there is a plurality of such conceptions, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt. In the next two grounds, conceptions of the good are seen as subject to revision in accordance with deliberative reason, which is part of the capacity for a conception of the good. But since the full and informed exercise of this capacity requires the social conditions secured by liberty of conscience, these grounds support the same conclusion as the first.

VI

Finally we come to the considerations relating to the capacity for a sense of justice. Here we must be careful. The parties in the original position are rationally autonomous representatives and as such are moved solely by considerations relating to what furthers the determinate conceptions of the good of the persons they represent, either as a means or as a part of these conceptions. Thus, any grounds that prompt the parties to adopt principles that secure the development and exercise of the capacity for a sense of justice must accord with this restriction. Now we saw in the preceding section that the capacity for a conception of the good can be part of, as well as a means to, someone's determinate conception of the

good, and that the parties can invoke reasons based on each of these two cases without violating their rationally autonomous role. The situation is different with the sense of justice: for here the parties cannot invoke reasons founded on regarding the development and exercise of this capacity as part of a person's determinate conception of the good. They are restricted to reasons founded on regarding it solely as a means to a person's good.

To be sure, we assume (as do the parties) that citizens have the capacity for a sense of justice, but this assumption is purely formal. It means only that whatever principles the parties select from the alternatives available, the persons the parties represent will be able to develop, as citizens in society, the corresponding sense of justice to the degree to which the parties' deliberations, informed by common-sense knowledge and the theory of human nature, show to be possible and practicable. This assumption is consistent with the parties' rational autonomy and the stipulation that no antecedent notions or principles of justice are to guide (much less constrain) the parties' reasoning as to which alternative to select. In view of this assumption, the parties know that their agreement is not in vain and that citizens in society will act upon the principles agreed to with an effectiveness and regularity of which human nature is capable when political and social institutions satisfy, and are publicly known to satisfy, these principles. But when the parties count, as a consideration in favor of certain principles of justice, the fact that citizens in society will effectively and regularly act upon them, the parties can do so only because they believe that acting from such principles will serve as effective means to the determinate conceptions of the good of the persons they represent. These persons as citizens are moved by reasons of justice as such, but the parties as rational autonomous representatives are not.

With these precautions stated, I now sketch three grounds, each related to the capacity for a sense of justice, that prompt the parties to adopt principles securing the basic liberties and assign-

ing them priority. The first ground rests on two points: first, on the great advantage to everyone's conception of the good of a just and stable scheme of cooperation; and second, on the thesis that the most stable conception of justice is the one specified by the two principles of justice, and this is the case importantly because of the basic liberties and the priority assigned to them by these principles.

Clearly, the public knowledge that everyone has an effective sense of justice and can be relied upon as a fully cooperating member of society is a great advantage to everyone's conception of the good.²⁴ This public knowledge, and the shared sense of justice which is its object, is the result of time and cultivation, easier to destroy than to build up. The parties assess the traditional alternatives in accordance with how well they generate a publicly recognized sense of justice when the basic structure is known to satisfy the corresponding principles. In doing this they view the developed capacity for a sense of justice as a means to the good of those they represent. That is, a scheme of just social cooperation advances citizens' determinate conceptions of the good; and a scheme made stable by an effective public sense of justice is a better means to this end than a scheme which requires a severe and costly apparatus of penal sanctions, particularly when this apparatus is dangerous to the basic liberties.

The comparative stability of the traditional principles of justice available to the parties is a complicated matter. I cannot summarize here the many considerations I have examined elsewhere to support the second point, the thesis that the two principles of justice are the most stable. I shall only mention one leading idea: namely, that the most stable conception of justice is one that is clear and perspicuous to our reason, congruent with and unconditionally concerned with our good, and rooted not in abnegation but in affirmation of our person.²⁵ The conclusion argued for is

²⁴ Here I restate the reasoning for the greater stability of justice as fairness found in *TJ*, section 76.

²⁵ See *TJ*, pp. 498f.

that the two principles of justice answer better to these conditions than the other alternatives precisely because of the basic liberties taken in conjunction with the fair-value of the political liberties (discussed in the next section) and the difference principle. For example, that the two principles of justice are unconditionally concerned with everyone's good is shown by the equality of the basic liberties and their priority, as well as by the fair-value of the political liberties. Again, these principles are clear and perspicuous to our reason because they are to be public and mutually recognized, and they enjoin the basic liberties directly — on their face, as it were.²⁶ These liberties do not depend upon conjectural calculations concerning the greatest net balance of social interests (or of social values). In justice as fairness such calculations have no place. Observe that this argument for the first ground conforms to the precautions stated in the opening paragraphs of this section. For the parties in adopting the principles of justice which most effectively secure the development and exercise of the sense of justice are moved not from the desire to realize this moral power for its own sake, but rather view it as the best way to stabilize just social cooperation and thereby to advance the determinate conceptions of the good of the persons they represent.

The second ground, not unrelated to the first, proceeds from the fundamental importance of self-respect.²⁷ It is argued that self-respect is most effectively encouraged and supported by the two principles of justice, again precisely because of the insistence on the equal basic liberties and the priority assigned them, although self-respect is further strengthened and supported by the fair-value of the political liberties and the difference principle.²⁸

²⁶ In saying that the principles of justice enjoin the basic liberties directly and on their face, I have in mind the various considerations mentioned in *TJ* in connection with what I called "embedding"; see pp. 160f, 261–63, 288–89, and 326–27.

²⁷ Self-respect is discussed in *TJ*, section 67. For its role in the argument for the two principles of justice, see pp. 178–83. For the equal political liberties as a basis of self-respect, see pp. 234, 544–46.

²⁸ The fair-value of the political liberties is discussed in *TJ*, pp. 224–28, 233–34, 277–79, and 356. In the discussion of the equal political liberties as a basis of self-

That self-respect is also confirmed by other features of the two principles besides the basic liberties only means that no single feature works alone. But this is to be expected. Provided the basic liberties play an important role in supporting self-respect, the parties have grounds founded on these liberties for adopting the two principles of justice.

Very briefly, the argument is this. Self-respect is rooted in our self-confidence as a fully cooperating member of society capable of pursuing a worthwhile conception of the good over a complete life. Thus self-respect presupposes the development and exercise of both moral powers and therefore an effective sense of justice. The importance of self-respect is that it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out. Without self-respect nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them. Thus, the parties give great weight to how well principles of justice support self-respect, otherwise these principles cannot effectively advance the determinate conceptions of the good of those the parties represent. Given this characterization of self-respect, we argue that self-respect depends upon and is encouraged by certain public features of basic social institutions, how they work together and how people who accept these arrangements are expected to (and normally do) regard and treat one another. These features of basic institutions and publicly expected (and normally honored) ways of conduct are the social bases of self-respect (listed earlier in section IV as the last kind of primary goods).

It is clear from the above characterization of self-respect that these social bases are among the most essential primary goods. Now these bases are importantly determined by the public principles of justice. Since only the two principles of justice guarantee the basic liberties, they are more effective than the other alterna-

respect on pp. 544–46, the fair-value of these liberties is not mentioned. It should have been. See also sections VII and XII below.

tives in encouraging and supporting the self-respect of citizens as equal persons. It is the content of these principles as public principles for the basic structure which has this result. This content has two aspects, each paired with one of the two elements of self-respect. Recall that the first element is our self-confidence as a fully cooperating member of society rooted in the development and exercise of the two moral powers (and so as possessing an effective sense of justice); the second element is our secure sense of our own value rooted in the conviction that we can carry out a worthwhile plan of life. The first element is supported by the basic liberties which guarantee the full and informed exercise of both moral powers. The second element is supported by the public nature of this guarantee and the affirmation of it by citizens generally, all in conjunction with the fair-value of the political liberties and the difference principle. For our sense of our own value, as well as our self-confidence, depends on the respect and mutuality shown us by others. By publicly affirming the basic liberties citizens in a well-ordered society express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life. Thus the basic liberties enable the two principles of justice to meet more effectively than the other alternatives the requirements for self-respect. Once again, note that at no point in the parties' reasoning are they concerned with the development and exercise of the sense of justice for its own sake; although, of course, this is not true of fully autonomous citizens in a well-ordered society.

The third and last ground relating to the sense of justice I can only indicate here. It is based on that conception of a well-ordered society I have called "a social union of social unions."²⁹ The idea is that a democratic society well-ordered by the two principles of justice can be for each citizen a far more comprehensive good than the determinate good of individuals when left to their

²⁹ This notion is discussed in *TJ*, section 79. There I didn't connect it with the basic liberties and their priority as I attempt to do here.

own devices or limited to smaller associations. Participation in this more comprehensive good can greatly enlarge and sustain each person's determinate good. The good of social union is most completely realized when everyone participates in this good, but only some may do so and perhaps only a few.

The idea derives from von Humboldt. He says:

Every human being . . . can act with only one dominant faculty at a time: or rather, one whole nature disposes us at any given time to some single form of spontaneous activity. It would, therefore, seem to follow that man is inevitably destined to a partial cultivation, since he only enfeebles his energies by directing them to a multiplicity of objects. But man has it in his power to avoid one-sidedness, by attempting to unite distinct and generally separately exercised faculties of his nature, by bringing into spontaneous cooperation, at each period of his life, the dying sparks of one activity, and those which the future will kindle, and endeavoring to increase and diversify the powers with which he works, by harmoniously combining them instead of looking for mere variety of objects for their separate exercise. What is achieved in the case of the individual, by the union of past and future with the present, is produced in society by the mutual cooperation of its different members; for in all stages of his life, each individual can achieve only one of those perfections, which represent the possible features of human character. It is through social union, therefore, based on the internal wants and capabilities of its members, that each is enabled to participate in the rich collective resources of all the others.³⁰

To illustrate the idea of social union, consider a group of gifted musicians, all of whom have the same natural talents and who could, therefore, have learned to play equally well every instrument in the orchestra. By long training and practice they have become highly proficient on their adopted instrument, recognizing that human limitations require this; they can never be sufficiently

³⁰ This passage is quoted in *TJ*, pp. 523–24n. It is from *The Limits of State Action*, J. W. Burrow, ed. (Cambridge: Cambridge University Press, 1969), pp. 16–17.

skilled on many instruments, much less play them all at once. Thus, in this special case in which everyone's natural talents are identical, the group achieves, by a coordination of activities among peers, the same totality of capacities latent in each. But even when these natural musical gifts are not equal and differ from person to person, a similar result can be achieved provided these gifts are suitably complementary and properly coordinated. In each case, persons need one another, since it is only in active cooperation with others that any one's talents can be realized, and then in large part by the efforts of all. Only in the activities of social union can the individual be complete.

In this illustration the orchestra is a social union. But there are as many kinds of social unions as there are kinds of human activities which satisfy the requisite conditions. Moreover, the basic structure of society provides a framework within which each of these activities may be carried out. Thus we arrive at the idea of society as a social union of social unions once these diverse kinds of human activities are made suitably complementary and can be properly coordinated. What makes a social union of social unions possible is three aspects of our social nature. The first aspect is the complementarity between various human talents which makes possible the many kinds of human activities and their various forms of organization. The second aspect is that what we might be and do far surpasses what we can do and be in any one life, and therefore we depend on the cooperative endeavors of others, not only for the material means of well-being, but also to bring to fruition what we might have been and done. The third aspect is our capacity for an effective sense of justice which can take as its content principles of justice which include an appropriate notion of reciprocity. When such principles are realized in social institutions and honored by all citizens, and this is publicly recognized, the activities of the many social unions are coordinated and combined into a social union of social unions.

The question is: which principles available to the parties in the original position are the most effective in coordinating and combining the many social unions into one social union? Here there are two desiderata: first, these principles must be recognizably connected with the conception of citizens as free and equal persons, which conception should be implicit in the content of these principles and conveyed on their face, as it were. Second, these principles, as principles for the basic structure of society, must contain a notion of reciprocity appropriate to citizens as free and equal persons engaged in social cooperation over a complete life. If these desiderata are not satisfied, we cannot regard the richness and diversity of society's public culture as the result of everyone's cooperative efforts for mutual good; nor can we appreciate this culture as something to which we can contribute and in which we can participate. For this public culture is always in large part the work of others; and therefore to support these attitudes of regard and appreciation citizens must affirm a notion of reciprocity appropriate to their conception of themselves and be able to recognize their shared public purpose and common allegiance. These attitudes are best secured by the two principles of justice precisely because of the recognized public purpose of giving justice to each citizen as a free and equal person on a basis of mutual respect. This purpose is manifest in the public affirmation of the equal basic liberties in the setting of the two principles of justice. The ties of reciprocity are extended over the whole of society and individual and group accomplishments are no longer seen as so many separate personal or associational goods.

Finally, observe that in this explanation of the good of social union, the parties in the original position need have no specific knowledge of the determinate conception of the good of the persons they represent. For whatever these persons' conceptions of the good are, their conceptions will be enlarged and sustained by the more comprehensive good of social union provided that their determinate conceptions lie within a certain wide range and are

compatible with the principles of justice. Thus this third ground is open to the parties in the original position, since it meets the restrictions imposed on their reasoning. To advance the determinate good of those they represent, the parties adopt principles which secure the basic liberties. This is the best way to establish the comprehensive good of social union and the effective sense of justice which makes it possible. I note in passing that the notion of society as a social union of social unions shows how it is possible for a regime of liberty not only to accommodate a plurality of conceptions of the good but also to coordinate the various activities made possible by human diversity into a more comprehensive good to which everyone can contribute and in which each can participate. Observe that this more comprehensive good cannot be specified by a conception of the good alone but also needs a particular conception of justice, namely, justice as fairness. Thus this more comprehensive good presupposes this conception of justice and it can be attained provided the already given determinate conceptions of the good satisfy the general conditions stated above. On the assumption that it is rational for the parties to suppose these conditions fulfilled, they can regard this more comprehensive good as enlarging the good of the persons they represent, whatever the determinate conceptions of the good of these persons may be.

This completes the survey of the grounds upon which the parties in the original position adopt the two principles of justice which guarantee the equal basic liberties and assign them priority as a family. I have not attempted to cover all the grounds that might be cited, nor have I tried to assess the relative weights of those I have discussed. My aim has been to survey the most important grounds. No doubt the grounds connected with the capacity for a conception of the good are more familiar, perhaps because they seem more straightforward and, off-hand, of greater weight; but I believe that the grounds connected with the capacity for a sense of justice are also important. Throughout I have had

occasion to emphasize that the parties, in order to advance the determinate conceptions of the good of the persons they represent, are led to adopt principles that encourage the development and allow for the full and informed exercise of the two moral powers. Before discussing how the basic liberties are to be specified and adjusted at later stages (that is, before discussing what I earlier called “the second gap”), I must consider an important feature of the first principle of justice which I have referred to several times, namely, the fair-value of the political liberties. Considering this feature will bring out how the grounds for the basic liberties and their priority depend on the content of the two principles of justice as an interrelated family of requirements.

VII

We can summarize the preceding sections as follows: given first, that the procedure of the original position situates the parties symmetrically and subjects them to constraints that express the Reasonable, and second, that the parties are rationally autonomous representatives whose deliberations express the Rational, each citizen is fairly represented in the procedure by which the principles of justice to regulate the basic structure of society are selected. The parties are to decide between the alternative principles moved by considerations derived solely from the good of the persons they represent. For the reasons we have just surveyed, the parties favor principles which protect a wide range of determinate (but unknown) conceptions of the good and which best secure the political and social conditions necessary for the adequate development and the full and informed exercise of the two moral powers. On the assumption that the basic liberties and their priority secure these conditions (under reasonably favorable circumstances), the two principles of justice, with the first principle prior to the second, are the principles agreed to. This achieves what I earlier called “the initial aim” of justice as fairness. But to this it will rightly be objected that I have not considered the provisions made

for the material means required for persons to advance their good. Whether principles for the basic liberties and their priority are acceptable depends upon the complementing of such principles by others that provide a fair-share of these means.

The question at hand is this: How does justice as fairness meet the long-standing problem that the basic liberties may prove to be merely formal, so to speak.³¹ Many have argued, particularly radical democrats and socialists, that while it may appear that citizens are effectively equal, the social and economic inequalities likely to arise if the basic structure includes the basic liberties and fair equality of opportunity are too large. Those with greater responsibility and wealth can control the course of legislation to their advantage. To answer this question, let's distinguish between the basic liberties and the worth of these liberties as follows:³² the basic liberties are specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere. The basic liberties are a framework of legally protected paths and opportunities. Of course, ignorance and poverty, and the lack of material means generally, prevent people from exercising their rights and from taking advantage of these openings. But rather than counting these and similar obstacles as restricting a person's liberty, we count them as affecting the worth of liberty, that is, the usefulness to persons of their liberties. Now in justice as fairness, this usefulness is specified in terms of an index of the primary goods regulated by the second principle of justice. It is not specified by a person's level of well-being (or by a utility function) but by these primary goods, claims to which are treated as claims to special needs defined for the purposes of a

³¹ I am indebted to Norman Daniels for raising the question I try to resolve in this section. See his "Equal Liberty and Unequal Worth of Liberty," in Daniels, pp. 253–81, footnote 1. I am grateful to Joshua Rabinowitz for extensive comments and discussion.

The rest of this paragraph and the next elaborate the paragraph which begins on p. 204 of *TJ*.

political conception of justice. Some primary goods such as income and wealth are understood as all-purpose material means for citizens to advance their ends within the framework of the equal liberties and fair equality of opportunity.

In justice as fairness, then, the equal basic liberties are the same for each citizen and the question of how to compensate for a lesser liberty does not arise. But the worth, or usefulness, of liberty is not the same for everyone. As the difference principle permits, some citizens have, for example, greater income and wealth and therefore greater means of achieving their ends. When this principle is satisfied, however, this lesser worth of liberty is compensated for in this sense: the all-purpose means available to the least advantaged members of society to achieve their ends would be even less were social and economic inequalities, as measured by the index of primary goods, different from what they are. The basic structure of society is arranged so that it maximizes the primary goods available to the least advantaged to make use of the equal basic liberties enjoyed by everyone. This defines one of the central aims of political and social justice.

This distinction between liberty and the worth of liberty is, of course, merely a definition and settles no substantive question.³³ The idea is to combine the equal basic liberties with a principle for regulating certain primary goods viewed as all-purpose means for advancing our ends. This definition is a first step in combining liberty and equality into one coherent notion. The appropriateness of this combination is decided by whether it yields a workable conception of justice which fits, on due reflection, our considered convictions. But to achieve this fit with our considered convictions, we must take an important further step and treat the equal political liberties in a special way. This is done by including in the first principle of justice the guarantee that the political liberties, and

³³ The paragraph which begins on p. 204 of *TJ* can unfortunately be read so as to give the contrary impression.

only these liberties, are secured by what I have called their “fair-value.”³⁴

To explain: this guarantee means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions. This notion of fair opportunity parallels that of fair equality of opportunity in the second principle of justice.³⁵ When the parties in the original position adopt the priority of liberty, they understand that the equal political liberties are treated in this special way. When we judge the appropriateness of this combination of liberty and equality into one notion, we must keep in mind the distinctive place of the political liberties in the two principles of justice.

It is beyond the scope of a philosophical doctrine to consider in any detail the kinds of arrangements required to insure the fair-value of the equal political liberties, just as it is beyond its scope to consider the laws and regulations required to ensure competition in a market economy. Nevertheless, we must recognize that the problem of guaranteeing the fair-value of the political liberties is of equal if not greater importance than making sure that markets are workably competitive. For unless the fair-value of these liberties is approximately preserved, just background institutions are unlikely to be either established or maintained. How best to proceed is a complex and difficult matter; and at present the requisite historical experience and theoretical understanding may be lacking, so that we must advance by trial and error. But one guideline for guaranteeing fair-value seems to be to keep political parties independent of large concentrations of private economic and social power in a private-property democracy, and of govern-

³⁴ While the idea of the fair-value of the equal political liberties is an important aspect of the two principles of justice as presented in *TJ*, this idea was not sufficiently developed or explained. It was, therefore, easy to miss its significance. The relevant references are given in footnote 28 above.

³⁵ For fair equality of opportunity in *TJ*, see pp. 72–74 and section 14.

ment control and bureaucratic power in a liberal socialist regime. In either case, society must bear at least a large part of the cost of organizing and carrying out the political process and must regulate the conduct of elections. The guarantee of fair-value for the political liberties is one way in which justice as fairness tries to meet the objection that the basic liberties are merely formal.

Now this guarantee of the fair-value of the political liberties has several noteworthy features. First, it secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely, the public facility specified by the constitutional rules and procedures which govern the political process and control the entry to positions of political authority. As we shall discuss later (in section IX), these rules and procedures are to be a fair process, designed to yield just and effective legislation. The point to note is that the valid claims of equal citizens are held within certain standard limits by the notion of a fair and equal access to the political process as a public facility. Second, this public facility has limited space, so to speak. Hence, those with relatively greater means can combine together and exclude those who have less in the absence of the guarantee of fair-value of the political liberties. We cannot be sure that the inequalities permitted by the difference principle will be sufficiently small to prevent this. Certainly, in the absence of the second principle of justice, the outcome is a foregone conclusion; for the limited space of the political process has the consequence that the usefulness of our political liberties is far more subject to our social position and our place in the distribution of income and wealth than the usefulness of our other basic liberties. When we also consider the distinctive role of the political process in determining the laws and policies to regulate the basic structure, it is not implausible that these liberties alone should receive the special guarantee of fair-value. This guarantee is a natural focal point between merely formal liberty on the one side and some kind of wider guarantee for all basic liberties on the other.

The mention of this natural focal point raises the question of why a wider guarantee is not included in the first principle of justice. While there is a problem as to what a wider guarantee of fair-value would mean, the answer to this question is, I believe, that such a guarantee is either irrational or superfluous or socially divisive. Thus, let's first understand it as enjoining the equal distribution of all primary goods and not only the basic liberties. This principle I assume to be rejected as irrational, since it does not permit society to meet certain essential requirements of social organization, and to take advantage of considerations of efficiency, and much else. Second, this wider guarantee can be understood to require that a certain fixed bundle of primary goods is to be secured to each citizen as a way publicly to represent the ideal of establishing the equal worth of everyone's liberties. Whatever the merits of this suggestion, it is superfluous in view of the difference principle. For any fraction of the index of primary goods enjoyed by the least advantaged can already be regarded in this manner. Third and last, this guarantee can be understood as requiring the distribution of primary goods according to the content of certain interests regarded as especially central, for example, the religious interest. Thus, some persons may count among their religious obligations going on pilgrimages to distant places or building magnificent cathedrals or temples. To guarantee the equal worth of religious liberty is now understood to require that such persons receive special provision to enable them to meet these obligations. On this view, then, their religious needs, as it were, are greater for the purposes of political justice, whereas those whose religious beliefs oblige them to make but modest demands on material means do not receive such provision; their religious needs are much less. Plainly, this kind of guarantee is socially divisive, a receipt for religious controversy if not civil strife. Similar consequences result, I believe, whenever the public conception of justice adjusts citizens' claims to social resources so that some receive more than others depending on the determinate final ends and loyalties

belonging to their conceptions of the good. Thus, the principle of proportionate satisfaction is likewise socially divisive. This is the principle to distribute the primary goods regulated by the difference principle so that the fraction K (where $0 < K < 1$), which measures the degree to which a citizen's conception of the good is realized, is the same for everyone, and ideally maximized. Since I have discussed this principle elsewhere, I shall not do so here.³⁶ It suffices to say that one main reason for using an index of primary goods in assessing the strength of citizens' claims in questions of political justice is precisely to eliminate the socially divisive and irreconcilable conflicts which such principles would arouse.³⁷

Finally, we should be clear why the equal political liberties are treated in a special way as expressed by the guarantee of their fair-value. It is not because political life and the participation by everyone in democratic self-government is regarded as the pre-eminent good for fully autonomous citizens. To the contrary, assigning a central place to political life is but one conception of the good among others. Given the size of a modern state, the exercise of the political liberties is bound to have a lesser place in the conception of the good of most citizens than the exercise of the other basic liberties. The guarantee of fair-value for the political liberties is included in the first principle of justice because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality. The idea is to incorporate into the basic structure of society an effective political procedure which mirrors in that structure the fair representation of persons achieved by the original position. It is the fairness of this procedure, secured by the guarantee of the fair-value of the political liberties, together with the second principle of justice (with the

³⁶ See "Fairness to Goodness," *Philosophical Review*, vol. 84 (October 1975), pp. 551-53.

³⁷ See further "Social Unity and Primary Goods," footnote 21, sections IV-V.

difference principle), which provides the answer as to why the basic liberties are not merely formal.

VIII

I now turn to how the second gap may be filled. Recall that this gap arises because once we have a number of liberties which must be further specified and adjusted to one another at later stages, we need a criterion for how this is to be done. We are to establish the best, or at least a fully adequate, scheme of basic liberties, given the circumstances of society. Now, in *A Theory of Justice* one criterion suggested seems to be that the basic liberties are to be specified and adjusted so as to achieve the most extensive scheme of these liberties. This criterion is purely quantitative and does not distinguish some cases as more significant than others; moreover, it does not generally apply and is not consistently followed. As Hart noted, it is only in the simplest and least significant cases that the criterion of greatest extent is both applicable and satisfactory.³⁸ A second proposed criterion in *A Theory of Justice* is that in the ideal procedure of applying the principles of justice, we are to take up the point of view of the representative equal citizen and to adjust the scheme of liberties in the light of this citizen's rational interests as seen from the point of view of the appropriate later stage. But Hart thought that the content of these interests was not described clearly enough for the knowledge of their content to serve as a criterion.³⁹ In any case, the two criteria seem to conflict, and the best scheme of liberties is not said to be the most extensive.⁴⁰

³⁸ See Hart, pp. 542-43; Daniels, pp. 239-40.

³⁹ Hart, pp. 543-47; Daniels, pp. 240-44.

⁴⁰ See *TJ*, p. 250, where I have said in the statement of the priority rule that "a less extensive liberty must strengthen the total system of liberty shared by all." Here the "system of liberty" refers to the "system of equal basic liberties," as found in the statement of the first principle on the same page.

I must clear up this ambiguity concerning the criterion. Now it is tempting to think that the desired criterion should enable us to specify and adjust the basic liberties in the best, or the optimum, way. And this suggests in turn that there is something that the scheme of basic liberties is to maximize. Otherwise, how could the best scheme be identified? But in fact, it is implicit in the preceding account of how the first gap is filled that the scheme of basic liberties is not drawn up so as to maximize anything, and, in particular, not the development and exercise of the moral powers.⁴¹ Rather, these liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers in what I shall call “the two fundamental cases.”

The first of these cases is connected with the capacity for a sense of justice and concerns the application of the principles of justice to the basic structure of society and its social policies. The political liberties and freedom of thought are discussed later under this heading. The second fundamental case is connected with the capacity for a conception of the good and concerns the application of the principles of deliberative reason in guiding our conduct over a complete life. Liberty of conscience and freedom of association come in here. What distinguishes the fundamental cases is the comprehensive scope and basic character of the subject to which the principles of justice and of deliberative reason must be applied. The notion of a fundamental case enables us later to

⁴¹ I take it as obvious that acting from the best reasons, or from the balance of reasons as defined by a moral conception, is not, in general, to maximize anything. Whether something is maximized depends on the nature of the moral conception. Thus, neither the pluralistic intuitionism of W. D. Ross as found in *The Right and the Good* (Oxford: The Clarendon Press, 1930), nor the liberalism of Isaiah Berlin as found in *Four Essays on Liberty*, footnote 15, specifies something to be maximized. Neither for that matter does the economists' utility function specify anything to be maximized, in most cases. A utility function is simply a mathematical representation of households' or economic agents' preferences, assuming these preferences to satisfy certain conditions. From a purely formal point of view, there is nothing to prevent an agent who is a pluralistic intuitionist from having a utility function. (Of course, it is well known that an agent with a lexicographical preference-ordering does not have a utility function.)

define a notion of the significance of a liberty, which helps us to outline how the second gap is to be filled.⁴²

The upshot will be that the criterion at later stages is to specify and adjust the basic liberties so as to allow the adequate development and the full and informed exercise of both moral powers in the social circumstances under which the two fundamental cases arise in the well-ordered society in question. Such a scheme of liberties I shall call “a fully adequate scheme.” This criterion coheres with that of adjusting the scheme of liberties in accordance with the rational interests of the representative equal citizen, the second criterion mentioned earlier. For it is clear from the grounds on which the parties in the original position adopt the two principles of justice that these interests, as seen from the appropriate stage, are best served by a fully adequate scheme. Thus the second gap is filled by carrying through the way the first gap is filled.

Now there are two reasons why the idea of a maximum does not apply to specifying and adjusting the scheme of basic liberties. First, a coherent notion of what is to be maximized is lacking. We cannot maximize the development and exercise of two moral powers at once. And how could we maximize the development and exercise of either power by itself? Do we maximize, other things equal, the number of deliberate affirmations of a conception of the good? That would be absurd. Moreover, we have no notion of a maximum development of these powers. What we do have is a conception of a well-ordered society with certain general features and certain basic institutions. Given this conception, we form the notion of the development and exercise of these powers which is adequate and full relative to the two fundamental cases.

The other reason why the idea of a maximum does not apply is that the two moral powers do not exhaust the person, for persons also have a determinate conception of the good. Recall that such a conception includes an ordering of certain final ends and

⁴² For clarification of the notion of a fundamental case I am indebted to Susan Wolf.

interests, attachments and loyalties to persons and associations, as well as a view of the world in the light of which these ends and attachments are understood. If citizens had no determinate conceptions of the good which they sought to realize, the just social institutions of a well-ordered society would have no point. Of course, grounds for developing and exercising the moral powers strongly incline the parties in the original position to adopt the basic liberties and their priority. But the great weight of these grounds from the standpoint of the parties does not imply that the exercise of the moral powers on the part of the citizens in society is either the supreme or the sole form of good. Rather, the role and exercise of these powers (in the appropriate instances) is a condition of good. That is, citizens are to act justly and rationally, as circumstances require. In particular, their just and honorable (and fully autonomous) conduct renders them, as Kant would say, worthy of happiness; it makes their accomplishments wholly admirable and their pleasures completely good.⁴³ But it would be madness to maximize just and rational actions by maximizing the occasions which require them.

IX

Since the notion of a fully adequate scheme of basic liberties has been introduced, I can outline how the scheme of basic liberties is specified and adjusted at later stages. I begin by arranging the basic liberties so as to show their relation to the two moral powers and to the two fundamental cases in which these powers are exercised. The equal political liberties and freedom of thought are to secure the free and informed application of the principles of justice, by means of the full and effective exercise of citizens' sense of justice, to the basic structure of society. (The political liberties, assured their fair-value and other relevant general prin-

⁴³ It is a central theme of Kant's doctrine that moral philosophy is not the study of how to be happy but of how to be worthy of happiness. This theme is found in all his major works beginning with the *First Critique*; see A806, B834.

ciples, properly circumscribed, may of course supplement the principles of justice.) These basic liberties require some form of representative democratic regime and the requisite protections for the freedom of political speech and press, freedom of assembly, and the like. Liberty of conscience and freedom of association are to secure the full and informed and effective application of citizens' powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life. The remaining (and supporting) basic liberties — the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law — can be connected to the two fundamental cases by noting that they are necessary if the preceding basic liberties are to be properly guaranteed. Altogether the possession of these basic liberties specifies the common and guaranteed status of equal citizens in a well-ordered democratic society.⁴⁴

Given this arrangement of the basic liberties, the notion of the *significance* of a particular liberty, which we need to fill the second gap, 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. Thus, the weight of particular claims to freedom of speech, press, and dis-

⁴⁴ The arrangement in this paragraph is designed to emphasize the role of the two fundamental cases and to connect these cases with the two moral powers. Thus this arrangement belongs to a particular conception of justice. Other arrangements may be equally useful for other purposes. Vincent Blasi, in his instructive essay "The Checking Value in First Amendment Theory," *Weaver Constitutional Law Series*, no. 3 (American Bar Foundation, 1977), classifies First Amendment values under three headings: individual autonomy, diversity, and self-government, in addition to what he calls "the checking value." This value focuses on the liberties protected by the First Amendment as a way of controlling the misconduct of government. I believe the arrangement in the text covers these distinctions. The discussion in section VII and below in sections X–XII indicates my agreement with Blasi on the importance of the checking value.

cussion are to be judged by this criterion. Some kinds of speech are not specially protected and others may even be offenses, for example, libel and defamation of individuals, so-called “fighting words” (in certain circumstances), and even political speech when it becomes incitement to the imminent and lawless use of force. Of course, why these kinds of speech are offenses may require careful reflection, and will generally differ in each case. Libel and defamation of private persons (as opposed to political figures) has no significance at all for the public use of reason to judge and regulate the basic structure, and it is in addition a private wrong; while incitements to the imminent and lawless use of force, whatever the significance of the speakers’ overall political views, are too disruptive of the democratic process to be permitted by the rules of order of political debate. A well-designed constitution tries to constrain the political leadership to govern with sufficient justice and good sense so that among a reasonable people such incitements to violence will seldom occur and never be serious. So long as the advocacy of revolutionary and even seditious doctrines is fully protected, as it should be, there is no restriction on the content of political speech, but only regulations as to time and place, and the means used to express it.

It is important to keep in mind that in filling the second gap the first principle of justice is to be applied at the stage of the constitutional convention. This means that the political liberties and freedom of thought enter essentially into the specification of a just political procedure. Delegates to such a convention (still regarded as representatives of citizens as free and equal persons but now assigned a different task) are to adopt, from among the just constitutions that are both just and workable the one that seems most likely to lead to just and effective legislation. (Which constitutions and legislation are just is settled by the principles of justice already agreed to in the original position.) This adoption of a constitution is guided by the general knowledge of how political and social institutions work, together with the general facts

about existing social circumstances. In the first instance, then, the constitution is seen as a just political procedure which incorporates the equal political liberties and seeks to assure their fair-value so that the processes of political decision are open to all on a roughly equal basis. The constitution must also guarantee freedom of thought if the exercise of these liberties is to be free and informed. The emphasis is first on the constitution as specifying a just and workable political procedure so far without any explicit constitutional restrictions on what the legislative outcome may be. Although delegates have a notion of just and effective legislation, the second principle of justice, which is part of the content of this notion, is not incorporated into the constitution itself. Indeed, the history of successful constitutions suggests that principles to regulate economic and social inequalities, and other distributive principles, are generally not suitable as constitutional restrictions. Rather, just legislation seems to be best achieved by assuring fairness in representation and by other constitutional devices.

The initial emphasis, then, is on the constitution as specifying a just and workable political procedure without any constitutional restrictions on legislative outcomes. But this initial emphasis is not, of course, final. The basic liberties associated with the capacity for a conception of the good must also be respected and this requires additional constitutional restrictions against infringing equal liberty of conscience and freedom of association (as well as the remaining and supporting basic liberties). Of course, these restrictions are simply the result of applying the first principle of justice at the stage of the constitutional convention. But if we return to the idea of starting from the conception of persons as capable of being normal and fully cooperating members of society and of respecting its fair-terms of cooperation over a complete life, then these restrictions can be viewed in another light. If the equal basic liberties of some are restricted or denied, social cooperation on the basis of mutual respect is impossible. For we saw that fair-terms of social cooperation are terms upon which as equal

persons we are willing to cooperate with all members of society over a complete life. When fair-terms are not honored, those mistreated will feel resentment or humiliation, and those who benefit must either recognize their fault and be troubled by it, or else regard those mistreated as deserving their loss. On both sides, the conditions of mutual respect are undermined. Thus, the basic liberties of liberty of conscience and freedom of association are properly protected by explicit constitutional restrictions. These restrictions publicly express on the constitution's face, as it were, the conception of social cooperation held by equal citizens in a well-ordered society.

So much for a bare outline of how the second gap is filled, at least at the constitutional stage. In the next section I shall briefly discuss freedom of speech in order to illustrate how this gap is filled in the case of a particular basic liberty. But before doing this it should be noted that all legal rights and liberties other than the basic liberties as protected by the various constitutional provisions (including the guarantee of the fair-value of the political liberties) are to be specified at the legislative stage in the light of the two principles of justice and other relevant principles. This implies, for example, that the question of private property in the means of production or their social ownership and similar questions are not settled at the level of the first principles of justice, but depend upon the traditions and social institutions of a country and its particular problems and historical circumstances.⁴⁵ Moreover, even if by some convincing philosophical argument — at least convincing to us and a few like-minded others — we could trace the right of private or social ownership back to first principles or to basic rights, there is a good reason for working out a conception of justice which does not do this. For as we saw earlier, the aim of justice as fairness as a political conception is to resolve the impasse in the democratic tradition as to the way in

⁴⁵ For references in *TJ* on this point, see footnote 13 above.

which social institutions are to be arranged if they are to conform to the freedom and equality of citizens as moral persons. Philosophical argument alone is most unlikely to convince either side that the other is correct on a question like that of private or social property in the means of production. It seems more fruitful to look for bases of agreement implicit in the public culture of a democratic society and therefore in its underlying conceptions of the person and of social cooperation. Certainly these conceptions are obscure and may possibly be formulated in various ways. That remains to be seen. But I have tried to indicate how these conceptions may be understood and to describe the way in which the notion of the original position can be used to connect them with definite principles of justice found in the tradition of moral philosophy. These principles enable us to account for many if not most of our fundamental constitutional rights and liberties, and they provide a way to decide the remaining questions of justice at the legislative stage. With the two principles of justice on hand, we have a possible common court of appeal for settling the question of property as it arises in the light of current and foreseeable social circumstances.

In sum, then, the constitution specifies a just political procedure and incorporates restrictions which both protect the basic liberties and secure their priority. The rest is left to the legislative stage. Such a constitution conforms to the traditional idea of democratic government while at the same time it allows a place for the institution of judicial review.⁴⁶ This conception of the constitution does not found it, in the first instance, on principles of justice, or on basic (or natural) rights. Rather, its foundation is in the conceptions of the person and of social cooperation most likely to be congenial to the public culture of a modern democratic

⁴⁶ For a valuable discussion of judicial review in the context of the conception of justice as fairness, see Frank I. Michelman, "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," *University of Pennsylvania Law Review*, vol. 121, no. 5 (May 1973), pp. 991–1019.

society.⁴⁷ I should add that the same idea is used each time in the stages I discuss. That is, at each stage the Reasonable frames and subordinates the Rational; what varies is the task of the rational agents of deliberation and the constraints to which they are subject. Thus the parties in the original position are rationally autonomous representatives constrained by the reasonable conditions incorporated into the original position; and their task is to adopt principles of justice for the basic structure. Whereas delegates to a constitutional convention have far less leeway, since they are to apply the principles of justice adopted in the original position in selecting a constitution. Legislators in a parliamentary body have less leeway still, because any laws they enact must accord both with the constitution and the two principles of justice. As the stages follow one another and as the task changes and becomes less general and more specific, the constraints of the Reasonable become stronger and the veil of ignorance becomes thinner. At each stage, then, the Rational is framed by the Reasonable in a different way. While the constraints of the Reasonable are weakest and the veil of ignorance thickest in the original position, at the judicial stage these constraints are strongest and the veil of ignorance thinnest. The whole sequence is a schema for working out a conception of justice and guiding the application of its principles to the right subject in the right order. This schema is not, of course, a description of any actual political process, and much less of how any constitutional regime may be expected to work. It belongs to a conception of justice, and although it is related to an account of how democracy works, it is not such an account.

X

The preceding outline of how the second gap is filled is extremely abstract. To see in more detail how to proceed, I discuss in this and the next section the freedom of political speech and

47 See "Kantian Constructivism in Moral Theory," pp. 518–19, footnote 3.

press which falls under the basic liberty of freedom of thought and the first fundamental case. Doing this will illustrate how the basic liberties are further specified and adjusted at later stages, and the way the significance of a particular liberty is given by its role in a fully adequate scheme. (For the notion of significance, see the second paragraph of section IX.)

I begin by noting that the basic liberties not only limit one another but they are also self-limiting.⁴⁸ The notion of significance shows why this is so. To explain: the requirement that the basic liberties are to be the same for everyone implies that we can obtain a greater liberty for ourselves only if the same greater liberty is granted to others. For example, while we might want to include in our freedom of (political) speech rights to the unimpeded access to public places and to the free use of social resources to express our political views, these extensions of our liberty, when granted to all, are so unworkable and socially divisive that they would actually greatly reduce the effective scope of freedom of speech. These consequences are recognized by delegates to a constitutional convention who are guided by the rational interest of the representative equal citizen in a fully adequate scheme of basic liberties. Thus, the delegates accept reasonable regulations relating to time and place, and the access to public facilities, always on a footing of equality. For the sake of the most significant liberties, they abandon any special claims to the free use of social resources. This enables them to establish the rules required to secure an effective scope for free political speech in the fundamental case. Much the same reasoning shows why the basic liberty of liberty of conscience is also self-limiting. Here too reasonable regulations would be accepted to secure intact the central range of this liberty, which includes the freedom and integrity of the internal life of religious associations and the liberty of persons

⁴⁸ Hart argues that a strictly quantitative criterion of how to specify and adjust the basic liberties cannot account for this fact, or so I interpret his argument, pp. 550–51; Daniels, pp. 247–48. I agree that some qualitative criterion is necessary and the notion of significance is to serve this role.

to determine their religious affiliations in social conditions that are free.

Let us now turn to freedom of political speech as a basic liberty, and consider how to specify it into more particular liberties so as to protect its central range. Recall that we are concerned with the fundamental case of the application of the principles of justice (and other general principles as appropriate) to the basic structure of society and its social policies. We think of these principles as applied by free and equal citizens of a democratic regime by the exercise of their sense of justice. The question is: What more particular liberties, or rules of law, are essential to secure the free, full and informed exercise of this moral power.

Here as before I proceed not from a general definition that singles out these liberties but from what the history of constitutional doctrine shows to be some of the fixed points within the central range of the freedom of political speech. Among these fixed points are the following: there is no such thing as the crime of seditious libel; there are no prior restraints on freedom of the press, except for special cases; and the advocacy of revolutionary and subversive doctrines is fully protected. The three fixed points mark out and cover by analogy much of the central range of freedom of political speech. Reflection on these constitutional rules brings out why this is so.

Thus, as Kalven has said, a free society is one in which we cannot defame the government; there is no such offense:

. . . the absence of seditious libel as a crime is the true pragmatic test of freedom of speech. This I would argue is what free speech is about. Any society in which seditious libel is a crime-is, no matter what its other features, not a free society. A society can, for example, either treat obscenity as a crime or not a crime without thereby altering its basic nature as a society. It seems to me it cannot do so with seditious libel. Here the response to this crime defines the society.⁴⁹

⁴⁹ See *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1966), p. 16.

Kalven is not saying, I think, that the absence of seditious libel is the whole of freedom of political speech; rather, it is a necessary condition and indeed a condition so necessary that, once securely won, the other essential fixed points are much easier to establish. The history of the use by governments of the crime of seditious libel to suppress criticism and dissent and to maintain their power demonstrates the great significance of this particular liberty to any fully adequate scheme of basic liberties.⁵⁰ So long as this crime exists the public press and free discussion cannot play their role in informing the electorate. And, plainly, to allow the crime of seditious libel would undermine the wider possibilities of self-government and the several liberties required for its protection. Thus the great importance of *N. Y. Times v. Sullivan* in which the Supreme Court not only rejected the crime of seditious libel but declared the Sedition Act of 1798 unconstitutional now, whether or not it was unconstitutional at the time it was enacted. It has been tried, so to speak, by the court of history and found wanting.⁵¹

The denial of the crime of seditious libel is closely related to the two other fixed points noted above. If this crime does exist, it can serve as a prior restraint and may easily include subversive advocacy. But the Sedition Act of 1798 caused such resentment that once it lapsed in 1801, the crime of seditious libel was never revived. Within our tradition there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored. Thus the leading problem of the freedom of political speech has focused on the question of subversive advocacy, that is, on advocacy of political doctrines an essential part of which is the necessity of revolution, or the use of unlawful force and the incitement thereto as a means of political

⁵⁰ See Blasi, "The Checking Value in First Amendment Theory," footnote 44, pp. 529-44, where he discusses the history of the use of seditious libel to show the importance of the checking value of the liberties secured by the First Amendment.

⁵¹ *New York Times v. Sullivan*, 376 U.S. 254 (1964) at 276. See Kalven's discussion of this case, *ibid.*, pp. 56-64.

change. A series of Supreme Court cases from *Schenck* to *Brandenburg* has dealt with this problem; it was in *Schenck* that Holmes formulated the well-known “clear and present danger rule,” which was effectively emasculated by the way it was understood and applied in *Dennis*. Thus I shall briefly discuss the problem of subversive advocacy to illustrate how the more particular liberties are specified under freedom of political speech.

Let us begin by noting why subversive advocacy becomes the central problem once there is agreement that all general discussion of doctrine as well as of the justice of the basic structure and its policies is fully protected. Kalven rightly emphasizes that it is with such advocacy that the grounds for restricting political speech seem most persuasive, yet at the same time these grounds run counter to the fundamental values of a democratic society.⁵² Free political speech is not only required if citizens are to exercise their moral powers in the first fundamental case, but free speech together with the just political procedure specified by the constitution provides an alternative to revolution and the use of force which can be so destructive to the basic liberties. There must be some point at which political speech becomes so closely connected with the use of force that it may be properly restricted. But what is this point?

In *Gitlow* the Supreme Court held that subversive advocacy was not protected by the First Amendment when the legislature had determined that advocating the overthrow of organized government by force involves the danger of substantive evils which the state through its police power may prevent. The Court presumed that the legislature’s determination of the danger was correct, in the absence of strong grounds to the contrary. *Brandenburg*, which is now controlling and therefore ends the story for

⁵² Here and throughout this section and the next I am much indebted to Kalven’s discussion of subversive advocacy in the forthcoming book *A Worthy Tradition*. I am most grateful to James Kalven for letting me read the relevant part of the manuscript of this very important work.

the moment, overrules *Gitlow* (implied by its explicit overruling of *Whitney*). Here the Court adopts the principle that “the constitutional guarantees of free speech and press do not permit a State to forbid or to proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵³ Observe that the proscribed kind of speech must be both intentional and directed to producing imminent lawless action as well as delivered in circumstances which make this result likely.

While *Brandenburg* leaves several important questions unanswered, it is much better constitutional doctrine than what preceded it, especially when it is read together with *N. Y. Times v. Sullivan* and the later *N. Y. Times v. United States*.⁵⁴ (These three cases between them cover the three fixed points previously mentioned.) The reason is that *Brandenburg* draws the line to protected speech so as to recognize the legitimacy of subversive advocacy in a constitutional democracy. It is tempting to think of political speech which advocates revolution as similar to incitement to an ordinary crime such as arson or assault, or even to causing a dangerous stampede, as in Holmes’s utterly trivial example of someone falsely shouting “Fire!” in a crowded theater. (This example is trivial because it has point only against the view, defended by no one, that all speech of whatever kind is protected, perhaps because it is thought that speech is not action and only action is punishable.⁵⁵) But revolution is a very special crime; while

⁵³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.

⁵⁴ *New York Times v. United States*, 403 U.S. 713. See also *Near v. Minnesota*, 283 U.S. 697, the major earlier case on prior restraint.

⁵⁵ A similar critical view of Holmes’s example is found in Kalven’s manuscript, footnote 52. Thomas Emerson, in *The System of Freedom of Expression* (New York: Random House, 1970), attempts to give an account of free speech based on a distinction between speech and action, the one protected, the other not. But as T. M. Scanlon points out in his “A Theory of Freedom of Expression,” *Philosophy and Public Affairs*, vol. 1, no. 2 (Winter 1972), pp. 207–8, a view of this kind puts the main burden on how this distinction is to be made and is bound to depart widely from the ordinary use

even a constitutional regime must have the legal right to punish violations of its laws, these laws even when enacted by due process may be more or less unjust, or may appear to be so to significant groups in society who find them oppressive. Historically, the question of when resistance and revolution are justified is one of the deepest political questions. Most recently, the problems of civil disobedience and conscientious refusal to military service, occasioned by what was widely regarded as an unjust war, have been profoundly troubling and are still unresolved. Thus, although there is agreement that arson, murder, and lynching are crimes, this is not the case with resistance and revolution whenever they become serious questions even in a moderately well-governed democratic regime (as opposed to a well-ordered society, where by definition the problem does not arise). Or more accurately, they are agreed to be crimes only in the legal sense of being contrary to law, but to a law that in the eyes of many has lost its legitimacy. That subversive advocacy is widespread enough to pose a live political question is a sign of an impending crisis rooted in the perception of significant groups that the basic structure is unjust and oppressive. It is a warning that they are ready to entertain drastic steps because other ways of redressing their grievances have failed.

All this is long familiar. I mention these matters only to recall the obvious: that subversive advocacy is always part of a more comprehensive political view; and in the case of so-called “criminal syndicalism” (the statutory offense in many of the historical cases), the political view was socialism, one of the most comprehensive political doctrines ever formulated. As Kalven observes revolutionaries don’t simply shout: “Revolt! Revolt!” They give reasons.⁵⁶ To repress subversive advocacy is to suppress the dis-

of the words “speech” and “conduct.” For an instructive and sympathetic account of how such a view might be developed, see Alan Fuchs, “Further Steps Toward a General Theory of Freedom of Expression,” *William and Mary Law Review*, vol. 18 (Winter 1976).

⁵⁶ See Kalven’s manuscript, footnote 52.

cussion of these reasons, and to do this is to restrict the free and informed public use of our reason in judging the justice of the basic structure and its social policies. And thus the basic liberty of freedom of thought is violated.

As a further consideration, a conception of justice for a democratic society presupposes a theory of human nature. It does so, first, in regard to whether the ideals expressed by its conceptions of the person and of a well-ordered society are feasible in view of the capacities of human nature and the requirements of social life.⁵⁷ And second, and most relevant here, it presupposes a theory of how democratic institutions are likely to work and of how fragile and unstable they are likely to be. The Court said in *Gitlow*:

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.⁵⁸

This passage suggests a view, not unlike that of Hobbes, of the very great fragility and instability of political arrangements. Even in a democratic regime, it supposes that volatile and destructive social forces may be set going by revolutionary speech, to smoulder unrecognized below the surface calm of political life only to break out suddenly with uncontrollable force that sweeps all before it. If free political speech is guaranteed, however, serious grievances do not go unrecognized or suddenly become highly dangerous.

⁵⁷ See "Kantian Constructivism in Moral Theory," pp. 534–35, footnote 3.

⁵⁸ *Gitlow v. New York*, 268 U.S. 652 (1925) at 669.

They are publicly voiced; and in a moderately well-governed regime they are at least to some degree taken into account. Moreover, the theory of how democratic institutions work must agree with Locke that persons are capable of a certain natural political virtue and do not engage in resistance and revolution unless their social position in the basic structure is seriously unjust and this condition has persisted over some period of time and seems to be removable by no other means.⁵⁹ Thus the basic institutions of a moderately well-governed democratic society are not so fragile or unstable as to be brought down by subversive advocacy alone. Indeed, a wise political leadership in such a society takes this advocacy as a warning that fundamental changes may be necessary; and what changes are required is known in part from the more comprehensive political view used to explain and justify the advocacy of resistance and revolution.

It remains to connect the preceding remarks with the deliberations of delegates in a constitutional convention who represent the rational interest of equal citizens in a fully adequate scheme of basic liberties. We simply say that these remarks explain why the delegates would draw the line between protected and unprotected political speech not (as *Gitlow* does) at subversive advocacy as such but (as *Brandenburg* does) at subversive advocacy when it is both directed to inciting imminent and unlawful use of force and likely to achieve this result. The discussion illustrates how the freedom of political speech as a basic liberty is specified and adjusted at later stages so as to protect its central range, namely the free public use of our reason in all matters that concern the justice of the basic structure and its social policies.

XI

In order to fill out the preceding discussion of free political speech I shall make a few observations about the so-called “clear

⁵⁹ See Locke's Second Treatise of Government, sections 223–30. For the idea of natural political virtue in Locke, see Peter Laslett's introduction to his critical edition:

and present danger rule.” This rule is familiar and has an important place in the history of constitutional doctrine. It may prove instructive to ask why it has fallen into disrepute. I shall assume throughout that the rule is intended to apply to political speech, and in particular to subversive advocacy, to decide when such speech and advocacy may be restricted. I assume also that the rule concerns the content of speech and not merely its regulation, since as a rule for regulating speech, it raises altogether different questions and may often prove acceptable.⁶⁰

Let’s begin by considering Holmes’s original formulation of the rule in *Schenck*. It runs as follows: “The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”⁶¹ This rule has a certain similarity with *Brandenburg*; we have only to suppose that the words “clear and present danger” refer to imminent lawless action. But this similarity is deceptive, as we can see by noting the reasons why Holmes’s rule, and even Brandeis’s statement of it in *Whitney*, proves unsatisfactory. One reason is that the roots of the rule in Holmes’s formulation are in his account of the law of attempts in his book *The Common Law*.⁶² The law of attempts tries to bridge the gap between what the defendant did and the completed crime as defined by statute. In attempts, and similarly in the case of free speech, actions with no serious consequences can be ignored. The traditional view of attempts required specific intent to do the particular offense. For Holmes

John Locke, Two Treatises of Government (Cambridge: Cambridge University Press, 1960), pp. 108-11.

⁶⁰ My account of the clear and present danger rule has been much influenced by Kalven’s manuscript, footnote 52, and by Meiklejohn’s *Free Speech and Its Relation to Self-Government*, ch. 2, footnote 11.

⁶¹ *Schenck v. United States*, 249 U.S. 47 at 52.

⁶² For the significance of this origin of the rule, see Yosaf Rogat, “Mr. Justice Holmes: The Judge as Spectator,” *University of Chicago Law Review*, vol. 31 (Winter 1964), pp. 215-17.

intent was relevant only because it increased the likelihood that what the agent does will cause actual harm. When applied to free speech this view has the virtue of tolerating innocuous speech and does not justify punishment for thoughts alone. But it is an unsatisfactory basis for the constitutional protection of political speech, since it leads us to focus on how dangerous the speech in question is, as if by being somehow dangerous, speech becomes an ordinary crime.

The essential thing, however, is the kind of speech in question and the role of this kind of speech in a democratic regime. And *of course* political speech which expresses doctrines we reject, or find contrary to our interests, all too easily strikes us as dangerous. A just constitution protects and gives priority to certain kinds of speech in virtue of their significance in what I have called “the two fundamental cases.” Because Holmes’s rule ignores the role and significance of political speech, it is not surprising that he should have written the unanimous opinions upholding the convictions of *Schenck* and *Debs* and dissented in *Abrams* and *Gitlow*. It might appear that he perceived the political speech of the socialists *Schenck* and *Debs* as sufficiently dangerous when the country was at war, while he dissented in *Abrams* and *Gitlow* because he perceived the political activities of the defendants as harmless.

This impression is strengthened by the fact that the words which follow the statement of the rule (cited above) are these: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured as long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.”

If we look at Holmes’s opinion in *Debs*, the socialist candidate for the presidency is not accused of encouraging or inciting imminent and lawless violence, and so of creating a clear and present

danger in that sense. As reported in the Court's opinion, Debs in a public speech simply attacked the war as having been declared by the master class for its own ends and maintained that the working class had everything to lose, including their lives, and so on. Holmes finds it sufficient to uphold the sentence of ten years' imprisonment that one purpose of the speech "was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended, and if, in all the circumstances, that would be the probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."⁶³ Here the natural and intended effect to which Holmes refers is surely that those who heard or read about Debs's speech would be convinced or encouraged by what he said and resolve to conduct themselves accordingly. It must be the consequences of political conviction and resolve which Holmes sees as the clear and present danger. Holmes is little troubled by the constitutional question raised in *Debs*, even though the case involves a leader of a political party, already four times its candidate for the presidency. Holmes devotes little time to it. He is content to say in one sentence, which immediately follows the passage just quoted, that *Schenck* settles the matter. This sentence reads: "The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*" Holmes is here referring to the fact that Debs had maintained that the statute under which he was indicted is unconstitutional as interfering with free speech contrary to the First Amendment.

Brandeis's concurring opinion in *Whitney* is another matter. Along with Hand's opinion in *Masses*, it was one of the memorable steps in the development of doctrine. Early in the opinion

⁶³ *Debs v. United States*, 249 U.S. 211 at 215.

Brandeis states that the right of free speech, the right to teach, and the right of assembly are “fundamental rights” protected by the First Amendment. These rights, even though fundamental, are not absolute; their exercise is subject to restriction “if the particular restriction proposed is required in order to protect the State from destruction or serious injury, political, economic, or moral.”⁶⁴ He then proceeds to refer to the *Schenck* formulation of the clear and present danger rule and seeks to fix more exactly the standard by which it is to be applied; that is, to say when a danger is clear, how remote it may be and yet be held present, and what degree of evil is necessary to justify a restriction of free speech.

The strength of Brandeis’s opinion lies in its recognition of the role of free political speech in a democratic regime and the connection he establishes between this role and the requirement that the danger must be imminent and not merely likely sometime in the future. The idea is that the evil should be “so imminent that it may befall before there is opportunity for full discussion. If there is time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.”⁶⁵ Later on he says, referring to advocacy and not incitement: “The fact that speech is likely to result in some violence or in the destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men the deterrents ordinarily applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.”⁶⁶ And finally, in rejecting the grounds of the majority opinion, Brandeis concludes: “I am unable to

⁶⁴ 274 U.S. 357 at 373. For Hand’s opinion in *Masses*, see *Masses Publishing v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917).

⁶⁵ *Ibid.*, at 377.

⁶⁶ *Ibid.*, at 378.

assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment.”⁶⁷ All of this and much else is plainly an advance in fixing the standard by which the clear and present danger rule is to be applied.

Yet in *Dennis* the Court interprets the rule in such a way as to emasculate it as a standard for protecting free political speech. For here the Court adopts Hand’s formulation of the rule which runs as follows: “In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger.”⁶⁸ Expressed this way the rule does not require that the evil be imminent. Even though the evil is remote, it may be enough that it is great and sufficiently probable. The rule now reads like a maxim of decision theory appropriate to a constitutional doctrine that justifies all decisions by what is necessary to maximize the net sum of social advantages, or the net balance of social values. Given this background conception, it can seem simply irrational to require that the danger be in any strict sense imminent. This is because the principle to maximize the net sum of social advantages (or the net balance of social values) does not allow us to give any greater weight to what is imminent than what the improbability and the value of future advantages permit. Free political speech is assessed as a means and as an end in itself along with everything else. Thus Brandeis’s idea that the danger must be imminent because free speech is the constitutionally approved way to protect against future danger may appear irrational in many situations and sometimes even suicidal. His account of free speech needs to be further elaborated in order to make it convincing. This is because

⁶⁷ *Ibid.*, at 379.

⁶⁸ 341 U.S. 494 at 510, citing 183 F. 2d. at 212.

the clear and present danger rule originates from a different view than the constitutional doctrine he is attempting to develop? What is required is to specify more sharply the kind of situation which can justify the restriction of free political speech. Brandeis refers to protecting “the state from destruction,” and from “serious injury, political, economic and moral.” These phrases are too loose and cover too much ground. Let’s see how Brandeis’s view might be elaborated to accord with the priority of liberty.

The essential thing is to recognize the difference between what I shall call “a constitutional crisis of the requisite kind” and an emergency in which there is a present or foreseeable threat of serious injury, political, economic, and moral, or even of the destruction of the state. For example, the fact that the country is at war and such an emergency exists does not entail that a constitutional crisis of the requisite kind also exists. The reason is that to restrict or suppress free political speech, including subversive advocacy, always implies at least a partial suspension of democracy. A constitutional doctrine which gives priority to free political speech and other basic liberties must hold that to impose such a suspension requires the existence of a constitutional crisis in which free political institutions cannot effectively operate or take the required measures to preserve themselves. A number of historical cases illustrate that free democratic political institutions have operated effectively to take the necessary measures in serious emergencies without restricting free political speech; and in some cases where such restrictions have been imposed they were unneces-

⁶⁹ The basis of Brandeis’s own view is best expressed, I think, in the well-known paragraph which begins: “Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.” This paragraph ends: “Believing in the power of reason as applied through public discussion, they eschewed the silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.” It is no criticism of this fine paragraph to recognize that by itself it does not remedy the defect of Brandeis’s formulation of the clear and present danger rule.

sary and made no contribution whatever to meeting the emergency. It is not enough for those in authority to say that a grave danger exists and that they are taking effective steps to prevent it. A well-designed constitution includes democratic procedures for dealing with emergencies. Thus as a matter of constitutional doctrine the priority of liberty implies that free political speech cannot be restricted unless it can be reasonably argued from the specific nature of the present situation that there exists a constitutional crisis in which democratic institutions cannot work effectively and their procedures for dealing with emergencies cannot operate.

In the constitutional doctrine proposed, then, it is of no particular moment whether political speech is dangerous, since political speech is by its nature often dangerous, or may often appear to be dangerous. This is because the free public use of our reason applies to the most fundamental questions, and the decisions made may have grave consequences. Suppose a democratic people, engaged in a military rivalry with an autocratic power, should decide that the use of nuclear weapons is so contrary to the principles of humanity that their use must be foresworn and significant steps taken unilaterally toward reducing these weapons, this done in the hope that the other power might be persuaded to follow. This could be a highly dangerous decision; but surely that is irrelevant to whether it should be freely discussed and whether the government is constitutionally obligated to carry out this decision once it is properly made. The dangerousness of political speech is beside the point; it is precisely the danger involved in making this decision which must be freely discussed. Wasn't it dangerous to hold free elections in 1862–64 in the midst of a civil war?

Focusing on the danger of political speech flawed the clear and present danger rule from the start. It failed to recognize that for free political speech to be restricted, a constitutional crisis must exist requiring the more or less temporary suspension of democratic political institutions, solely for the sake of preserving these institutions and other basic liberties. Such a crisis did not exist

in 1862–64; and if not then, surely at no other time before or since. There was no constitutional crisis of the requisite kind when *Schenck*, *Debs*, or *Dennis* were decided, no political conditions which prevented free political institutions from operating. Never in our history has there been a time when free political speech, and in particular subversive advocacy, could be restricted or suppressed. And this suggests that in a country with a vigorous tradition of democratic institutions, a constitutional crisis need never arise unless its people and institutions are simply overwhelmed from the outside. For practical purposes, then, in a well-governed democratic society under reasonably favorable conditions, the free public use of our reason in questions of political and social justice would seem to be absolute.

Of course, the preceding remarks do not provide a systematic explanation of the distinction between a constitutional crisis of the requisite kind and an emergency in which there is a threat of serious injury, political, economic, and moral. I have simply appealed to the fact, or to what I take to be a fact, that we can recognize from a number of cases in our history that there is the distinction I have indicated and that often we can tell when it applies. Here I cannot go into a systematic explanation. I believe, however, that the notion of a constitutional crisis of this kind is an important part of an account of free political speech, and that when we explain this notion we must start from an account of free political speech which assigns it priority. In justice as fairness this kind of speech falls under the basic liberties, and while these liberties are not absolute, they can be restricted in their content (as opposed to being regulated in ways consistent with maintaining a fully adequate scheme) only if this is necessary to prevent a greater and more significant loss, either directly or indirectly, to these liberties. I have tried to illustrate how in the case of political speech, we try to identify the more essential elements in the central range of application of this basic liberty. We then proceed to further extensions up to the point where a fully adequate pro-

vision for this liberty is achieved, unless this liberty has already become self-limiting or conflicts with more significant extensions of other basic liberties. As always, I assume that these judgments are made by delegates and legislators from the point of view of the appropriate stage in the light of what best advances the rational interest of the representative equal citizen in a fully adequate scheme of basic liberties. If we insist on using the language of the clear and present danger rule, we must say, first, that the substantive evils which the legislature seeks to prevent must be of a highly special kind, namely, the loss of freedom of thought itself, or of other basic liberties, including here the fair-value of the political liberties; and second, that there must be no alternative way to prevent these evils than the restriction of free speech. This formulation of the rule goes with the requirement that a constitutional crisis of the requisite kind is one in which free political institutions cannot operate or take the steps required to preserve themselves.

XII

I now wish to supplement the preceding discussion of political speech in two ways. First, it needs to be emphasized that the basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself, even if, practically speaking, one or more of the basic liberties may be absolute under certain conditions. In this connection I shall very briefly note the manner in which political speech may be regulated in order to preserve the fair-value of the political liberties. I do this not, of course, to try to resolve this difficult problem, but to illustrate why the basic liberties need to be adjusted to one another and cannot be specified individually. Second, it is helpful in clarifying the notion of the basic liberties and their significance to survey several (non-basic) liberties associated with the second principle of justice. This serves to bring out how the significance of a liberty (whether basic or non-basic) is tied to its political and social role within a just basic structure as specified by the two principles of justice.

I begin in this section with the problem of maintaining the fair-value of the equal political liberties. Although (as I said in section VII) it is beyond the scope of a philosophical doctrine to consider in any detail how this problem is to be solved, such a doctrine must explain the grounds upon which the necessary institutions and rules of law can be justified. Let's assume, for reasons stated earlier, that public financing of political campaigns and election expenditures, various limits on contributions and other regulations are essential to maintain the fair-value of the political liberties.⁷⁰ These arrangements are compatible with the central role of free political speech and press as a basic liberty provided that the following three conditions hold. First, there are no restrictions on the content of speech; the arrangements in question are, therefore, regulations which favor no political doctrine over any other. They are, so to speak, rules of order for elections and are required to establish a just political procedure in which the fair-value of the equal political liberties is maintained.

A second condition is that the instituted arrangements must not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner. Plainly, what counts as an undue burden is itself a question, and in any particular case is to be answered by reference to the purpose of achieving the fair-value of the political liberties. For example, the prohibition of large contributions from private persons or corporations to political candidates is not an undue burden (in the requisite sense) on wealthy persons and groups. Such a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class. It is precisely this equality which defines the fair-value of the political liberties. On the other hand, regulations that restrict the use of certain public places for political speech might impose an undue burden on relatively poor groups

⁷⁰ See section VII.

accustomed to this way of conveying their views since they lack the funds for other kinds of political expression.

Finally, the various regulations of political speech must be rationally designed to achieve the fair-value of the political liberties. While it would be too strong to say that they must be the least restrictive regulations required to achieve this end — for who knows what the least restrictive among the equally effective regulations might be — nevertheless, these regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available.

The point of the foregoing remarks is to illustrate how the basic liberties constitute a family, the members of which have to be adjusted to one another to guarantee the central range of these liberties in the two fundamental cases. Thus, political speech, even though it falls under the basic liberty of freedom of thought, must be regulated to insure the fair-value of the political liberties. These regulations do not restrict the content of political speech and hence may be consistent with its central role. It should be noted that the mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute. This kind of adjustment is markedly different from a general balancing of interests which permits considerations of all kinds — political, economic, and social — to restrict these liberties, even regarding their content, when the advantages gained or injuries avoided are thought to be great enough. In justice as fairness the adjustment of the basic liberties is grounded solely on their significance as specified by their role in the two fundamental cases, and this adjustment is guided by the aim of specifying a fully adequate scheme of these liberties.

In the preceding two sections I recalled a part of development of doctrine from *Schenck* to *Brandenburg*, a development with a happy ending. By contrast, *Buckley* and its sequel *First National*

Bank are profoundly dismaying.⁷¹ In *Buckley* the Court held unconstitutional various limits on expenditures imposed by the Election Act Amendment of 1974. These limits applied to expenditures in favor of individual candidates, to expenditures by candidates from their own funds, and to total expenditures in the course of a campaign. The Court said that the First Amendment cannot tolerate such provisions since they place direct and substantial restrictions on political speech.⁷² For the most part the Court considers what it regards as the primary government interest served by the Act, namely, the interest in preventing corruption of the electoral process, and the appearance of such corruption. The Court also considers two so-called ancillary interests of the Act, namely, the interest in limiting the increasing costs of political campaigns and the interest in equalizing the relative ability of citizens to affect the outcome of elections. Here I am concerned solely with the legitimacy of this second ancillary interest, since it is the only one which falls directly under the notion of the fair-value of the political liberties. Moreover, I leave aside, as irrelevant for our purposes, the question whether the measures enacted by Congress were rationally framed to fulfill this interest in an effective way.

⁷¹ *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank v. Bellotti*, 435 U.S. 765 (1978). For discussions of *Buckley*, see Tribe, *American Constitutional Law*, ch. 13, pp. 800-11; and Skelly Wright, "Political Speech and the Constitution: Is Money Speech?," *Yale Law Journal*, vol. 85, no. 8 (July 1976), pp. 1001-21. For an earlier discussion, see M. A. Nicholson, "Campaign Financing and Equal Protection," *Stanford Law Review*, vol. 26 (April 1974) pp. 815-54. In *First National Bank* the Court, by a 5 to 4 decision, invalidated a Massachusetts criminal law which prohibited expenditures by banks and corporations for the purpose of influencing the outcome of voting on referendum proposals, unless these proposals materially affected the property, business, or assets of the corporation. The statute specified that no referendum question solely concerning the taxation of individuals came under this exception. In a dissent joined by Brennan and Marshall, Justice White said that the fundamental error of the majority opinion was its failure to recognize that the government's interest in prohibiting such expenditures by banks and corporations derives from the First Amendment — in particular, from the value of promoting free political discussion by preventing corporate domination; see 435 U.S. 765 (1978) at 803-4. My discussion in the text is in sympathy with this dissenting opinion, and also with White's dissent in *Buckley* at 257-66, and with Marshall's at 287-90.

⁷² *Buckley v. Valeo*, at 58-59.

What is dismaying is that the present Court seems to reject altogether the idea that Congress may try to establish the fair-value of the political liberties. It says: "the concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁷³ The Court then proceeds to cite its own precedents, holding that the First Amendment was designed to secure the widest possible dissemination of information from diverse and opposed sources, and to assure the unrestricted exchange of ideas for bringing about political and social changes favored by the people.⁷⁴ But none of the cases cited involves the fundamental question of the fair-value of the political liberties.⁷⁵ Moreover, the Court's opinion focuses too much on the so-called primary interest in eliminating corruption and the appearance of corruption. The Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage. The way in which this is accomplished need not involve bribery and dishonesty or the granting of special favors, however common these vices may be. Shared political convictions and aims suffice. In *Buckley* the Court runs the risk of endorsing the view that fair representation is representation according to the amount of influence effectively exerted. On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.

⁷³ *Ibid.*, at 48–49.

⁷⁴ *Ibid.*, at 49–51.

⁷⁵ See Tribe, *American Constitutional Law*, p. 806.

It is surprising, however, that the Court should think that attempts by Congress to establish the fair-value of the political liberties must run afoul of the First Amendment. In a number of earlier decisions the Court has affirmed the principle of one person, one vote, sometimes relying on Article I, Section 2 of the Constitution, at other times on the Fourteenth Amendment. It has said of the right to vote that it is the “preservative of all rights,” and in *Wesberry* it stated: “Other rights, even the most basic, are illusory if the right to vote is undermined.”⁷⁶ In *Reynolds* the Court recognized that this right involves more than the right simply to cast a vote which is counted equally. The Court said: “Full and effective participation by all citizens in state government requires . . . that each citizen has an equally effective voice in the election of members of the state legislature.”⁷⁷ Later in the opinion it said: “Since achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by voters in the election of state legislators.”⁷⁸ Thus, what is fundamental is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation. Such a scheme is fundamental because the adequate protection of other basic rights depends on it. Formal equality is not enough.

It would seem to follow that the aim of achieving a fair scheme of representation can justify limits on and regulations of political speech in elections, provided that these limits and regulations satisfy the three conditions mentioned earlier. For how else is the full and effective voice of all citizens to be maintained? Since it is a matter of one basic liberty against another, the liberties protected by the First Amendment may have to be adjusted

⁷⁶ *Wesberry v. Sanders*, 376 U.S. 1 (1964) at 17.

⁷⁷ *Reynolds v. Sims*, 377 U.S. 533 (1964) at 565.

⁷⁸ *Ibid.*, at 565–66.

in the light of other constitutional requirements, in this case the requirement of the fair-value of the political liberties. Not to do so is to fail to see a constitution as a whole and to fail to recognize how its provisions are to be taken together in specifying a just political procedure as an essential part of a fully adequate scheme of basic liberties.

As already noted (in section VII), what kinds of electoral arrangements are required to establish the fair-value of the political liberties is an extremely difficult question. It is not the task of the Court to say what these arrangements are, but to make sure that the arrangements enacted by the legislature accord with the Constitution. The regulations proposed by Congress and struck down in *Buckley* would quite possibly have been ineffective; but in the present state of our knowledge they were admissible attempts to achieve the aim of a fair scheme of representation in which all citizens could have a more full and effective voice. If the Court means what it says in *Wesberry* and *Reynolds*, *Buckley* must sooner or later give way. The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era.⁷⁹ In both cases the results of the free play of the electoral process and of economic competition are acceptable only if the necessary conditions of background justice are fulfilled. Moreover, in a democratic regime it is important that the fulfillment of these conditions be publicly recognized. This is more fundamental than avoiding corruption and the appearance of corruption; for without the public recognition that background justice is maintained, citizens tend to become resentful, cynical, and apathetic. It is this state of mind that leads to corruption as a serious problem, and indeed makes it uncontrollable. The danger of

⁷⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

Buckley is that it risks repeating the mistake of the *Lochner* era, this time in the political sphere where, for reasons the Court itself has stated in the cases cited above, the mistake could be much more grievous.

XIII

To clarify further the notion of the significance of the basic liberties I shall briefly discuss several liberties associated with the second principle of justice. The examples I consider are related to advertising; and although some of these liberties are quite important, they are not basic liberties, since they do not have the requisite role and significance in the two fundamental cases.

We may distinguish three kinds of advertising according to whether the information conveyed concerns political questions, openings for jobs and positions, or the nature of products for sale. Political advertising I shall not discuss; I assume that it can be regulated for the reasons just considered in the preceding section, provided that the regulations in question satisfy the conditions already indicated. Let us turn, then, to advertisements of openings for jobs and positions. These contain information important in maintaining fair equality of opportunity. Since the first part of the second principle of justice requires that social and economic inequalities are to be attached to offices and positions open to everyone under conditions of fair equality of opportunity, this kind of advertising is associated with this part of the principle and it is granted protection accordingly. Thus, announcements of jobs and positions can be forbidden to contain statements which exclude applicants of certain designated ethnic and racial groups, or of either sex, when these limitations are contrary to fair equality of opportunity. The notion of fair equality of opportunity, like that of a basic liberty, has a central range of application which consists of various liberties together with certain conditions under which these liberties can be effectively exercised. The advertising of employment opportunities may be restricted and regulated to

preserve intact this central range. Just as in the case of basic liberties, I assume that this range of application can be preserved in ways consistent with the other requirements of justice, and in particular with the basic liberties. Observe here that the restrictions in question, in contrast with the basic liberties, may be restrictions on content.

In the case of the advertising of products, let's distinguish two kinds. The first kind is advertising which contains information about prices and the features of products used by knowledgeable purchasers as criteria of evaluation. Assuming that the two principles of justice are best satisfied by a substantial use of a system of free competitive markets, economic policy should encourage this kind of advertising. This is true whether the economy is that of a private-property democracy or a liberal socialist regime. In order for markets to be workably competitive and efficient, it is necessary for consumers to be well informed about both prices and the relevant features of available products. The law may impose penalties for inaccurate or false information, which it cannot do in the case of freedom of thought and liberty of conscience; and for the protection of consumers the law can require that information about harmful and dangerous properties of goods be clearly described on the label, or in some other suitable manner. In addition, it may be forbidden for firms, or for trade and professional associations, to make agreements to limit or not to engage in this kind of advertising. The legislature may require, for example, that prices and accurate information about commodities be readily accessible to the public. Such measures help to maintain a competitive and efficient system of markets and enable consumers to make more intelligent and informed decisions.

A second kind of advertising of products is market-strategic advertising, which is found in imperfect and oligopolistic markets dominated by relatively few firms. Here the aim of a firm's expenditures on advertising may be either aggressive, for example, to expand its volume of sales or its share of the market; or the

aim may be defensive: firms may be forced to advertise in order to preserve their position in the industry. In these cases consumers are usually unable to distinguish between the products of firms except by rather superficial and unimportant properties; advertising tries to influence consumers' preferences by presenting the firm as trustworthy through the use of slogans, eye-catching photographs, and so on, all designed to form or to strengthen the habit of buying the firm's products. Much of this kind of advertising is socially wasteful, and a well-ordered society that tries to preserve competition and to remove market imperfections would seek reasonable ways to limit it. The funds now devoted to advertising can be released for investment or for other useful social ends. Thus, the legislature might, for example, encourage agreements among firms to limit expenditures on this kind of advertising through taxes and by enforcing such contracts as legally valid. I am not concerned here with how practicable such a policy would be, but solely with illustrating how in this case the right to advertise, which is a kind of speech, can be restricted by contract, and therefore this right is not inalienable, in contrast to the basic liberties.

I must digress a moment to explain this last point. To say that the basic liberties are inalienable is to say that any agreement by citizens which waives or violates a basic liberty, however rational and voluntary this agreement may be, is void *ab initio*; that is, it has no legal force and does not affect any citizen's basic liberties. Moreover, the priority of the basic liberties implies that they cannot be justly denied to any one or to any group of persons, or even to all citizens generally, on the grounds that such is the desire, or overwhelming preference, of an effective political majority, however strong and enduring. The priority of liberty excludes such considerations from the grounds that can be entertained.

A common-sense explanation of why the basic liberties are inalienable might say, following an idea of Montesquieu, that the

basic liberties of each citizen are a part of public liberty, and therefore in a democratic state a part of sovereignty. The Constitution specifies a just political procedure in accordance with which this sovereignty is exercised subject to limits which guarantee the integrity of the basic liberties of each citizen. Thus agreements which alienate these liberties cannot be enforced by law, which consists of but enactments of sovereignty. Montesquieu believed that to sell one's status as a citizen (and, let's add, any part of it) is an act so extravagant that we cannot attribute it to anyone. He thought that its value to the seller must be beyond all price.⁸⁰ In justice as fairness, the sense in which this is so can be explained as follows. We use the original position to model the conception of free and equal persons as both reasonable and rational, and then the parties as rationally autonomous representatives of such persons select the two principles of justice which guarantee the basic liberties and their priority. The grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the Reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived. For these liberties are beyond all price to the representatives of citizens as free and equal persons when these representatives adopt principles of justice for the basic structure in the original position. The aims and conduct of citizens in society are therefore subordinate to the priority of these liberties, and thus in effect subordinate to the conception of citizens as free and equal persons.

This explanation of why the basic liberties are inalienable does not exclude the possibility that even in a well-ordered society some citizens may want to circumscribe or alienate one or more of their basic liberties. They may promise to vote for a certain political party or candidate; or they may enter into a relationship with a party or candidate such that it is a breach of trust not to vote in a certain way. Again, members of a religious association may regard

⁸⁰ *The Spirit of the Laws*, B 15, ch. 2.

themselves as having submitted in conscience to religious authority, and therefore as not free, from the standpoint of that relationship, to question its pronouncements. Relationships of this kind are obviously neither forbidden nor in general improper.⁸¹

The essential point here is that the conception of citizens as free and equal persons is not required in a well-ordered society as a personal or associational or moral ideal (see section III, first paragraph). Rather it is a political conception affirmed for the sake of establishing an effective public conception of justice. Thus the institutions of the basic structure do not enforce undertakings which waive or limit the basic liberties. Citizens are always at liberty to vote as they wish and to change their religious affiliations. This, of course, protects their liberty to do things which they regard, or which they may come to regard, as wrong, and which indeed may be wrong. (Thus, they are at liberty to break promises to vote in a certain way, or to apostatize.) This is not a contradiction but simply a consequence of the role of the basic liberties in this political conception of justice.

After this digression, we can sum up by saying that the protection for different kinds of advertising varies depending on whether it is connected with political speech, or with maintaining fair equality of opportunity, or with preserving a workably competitive and efficient system of markets. The conception of the person in justice as fairness ascribes to the self a capacity for a certain hierarchy of interests; and this hierarchy is expressed by the nature of the original position (for example, by the way the Reasonable frames and subordinates the Rational) and by the priorities in the two principles of justice. The second principle of justice is subordinate to the first since the first guarantees the basic liberties

⁸¹ There are many other reasons why citizens in certain situations or at certain times might not put much value on the exercise of some of their basic liberties and might want to do an action which limited these liberties in various ways. Unless these possibilities affect the agreement of the parties in the original position (and I hold that they do not), they are irrelevant to the inalienability of the basic liberties. I am indebted to Arthur Kuflik for discussion on this point.

required for the full and informed exercise of the two moral powers in the two fundamental cases. The role of the second principle of justice is to ensure fair equality of opportunity and to regulate the social and economic system so that social resources are properly used and the means to citizens' ends are produced efficiently and fairly shared. Of course, this division of role between the two principles of justice is but part of a guiding framework for deliberation; nevertheless, it brings out why the liberties associated with the second principles are less significant in a well-ordered society than the basic liberties secured by the first.

XIV

I conclude with several comments. First, I should emphasize that the discussion of free speech in the last four sections is not intended to advance any of the problems that actually face constitutional jurists. My aim has been solely to illustrate how the basic liberties are specified and adjusted to one another in the application of the two principles of justice. The conception of justice to which these principles belong is not to be regarded as a method of answering the jurist's questions, but as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment. We must not ask too much of a philosophical view. A conception of justice fulfills its social role provided that persons equally conscientious and sharing roughly the same beliefs find that, by affirming the framework of deliberation set up by it, they are normally led to a sufficient convergence of judgment necessary to achieve effective and fair social cooperation. My discussion of the basic liberties and their priority should be seen in this light.

In this connection recall that the conception of justice as fairness is addressed to that impasse in our recent political history shown in the lack of agreement on the way basic institutions are to be arranged if they are to conform to the freedom and equality of

citizens as persons. Thus justice as fairness is addressed not so much to constitutional jurists as to citizens in a constitutional regime. It presents a way for them to conceive of their common and guaranteed status as equal citizens and attempts to connect a particular understanding of freedom and equality with a particular conception of the person thought to be congenial to the shared notions and essential convictions implicit in the public culture of a democratic society. Perhaps in this way the impasse concerning the understanding of freedom and equality can at least be intellectually clarified if not resolved. It is particularly important to keep in mind that the conception of the person is part of a conception of political and social justice. That is, it characterizes how citizens are to think of themselves and of one another in their political and social relationships, and, therefore, as having the basic liberties appropriate to free and equal persons capable of being fully cooperating members of society over a complete life. The role of a conception of the person in a conception of political justice is distinct from its role in a personal or associational ideal, or in a religious or moral way of life. The basis of toleration and of social cooperation on a footing of mutual respect in a democratic regime is put in jeopardy when these distinctions are not recognized; for when this happens and such ideals and ways of life take a political form, the fair-terms of cooperation are narrowly drawn, and free and willing cooperation between persons with different conceptions of the good may become impossible. In this lecture I have tried to strengthen the liberal view (as a philosophical doctrine) by indicating how the basic liberties and their priority belong to the fair-terms of cooperation between citizens who regard themselves and one another according to a conception of free and equal persons.

Finally, an observation about the concluding paragraphs of Hart's essay to which my discussion owes so much. Hart is quite rightly unconvinced by the grounds explicitly offered in *A Theory of Justice* for the priority of the basic liberties. He suggests that

the apparently dogmatic course of my argument for this priority may be explained by my tacitly imputing to the parties in the original position a latent ideal of my own. This latent ideal, he thinks, is that of a public-spirited citizen who prizes political activity and service to others so highly that the exchange of the opportunities for such activities for mere material good and contentment would be rejected. Hart goes on to say that this ideal is, of course, one of the main ideals of liberalism; but the difficulty is that my argument for “the priority of liberty purports to rest on interests, not on ideals, and to demonstrate that the general priority of liberty reflects a preference for liberty over other goods which every self-interested person who is rational would have.”⁸² Now Hart is correct in saying that the priority of liberty cannot be argued for by imputing this ideal of the person to the parties in the original position; and he is right also in supposing that a conception of the person in some sense liberal underlies the argument for the priority of liberty. But this conception is the altogether different conception of citizens as free and equal persons; and it does not enter justice as fairness by imputation to the parties. Rather, it enters through the constraints of the Reasonable imposed on the parties in the original position as well as in the revised account of primary goods. This conception of the person as free and equal also appears in the recognition by the parties that the persons they represent have the two moral powers and a certain psychological nature. How these elements lead to the basic liberties and their priority is sketched in sections V and VI, and there the deliberations of the parties were rational and based on the determinate good of the persons represented. This conception of the person can be said to be liberal (in the sense of the philosophical doctrine) because it takes the capacity for social cooperation as fundamental and attributes to persons the two moral powers which make such cooperation possible. These powers specify the basis of equality. Thus citizens

⁸² Hart, p. 555. Daniels, p. 252.

are regarded as having a certain natural political virtue without which the hopes for a regime of liberty may be unrealistic. Moreover, persons are assumed to have different and incommensurable conceptions of the good so that the unity of social cooperation rests on a public conception of justice which secures the basic liberties. Yet despite this plurality of conceptions of the good, the notion of society as a social union of social unions shows how it is possible to coordinate the benefits of human diversity into a more comprehensive good.

While the grounds I have surveyed for the basic liberties and their priority have been drawn from and develop considerations found in *A Theory of Justice*, I failed to bring them together in that work. Furthermore, the grounds I cited for this priority were not sufficient, and in some cases even incompatible with the kind of doctrine I was trying to work out.⁸³ I hope that the argument in this lecture is an improvement, thanks to Hart's critical discussion.

⁸³ Here I refer to the errors in paragraphs 3–4 of section 82 of *TJ*, the section in which the grounds for the priority of liberty are discussed explicitly. Two main errors are first, that I did not enumerate the most important grounds in a clear way; and second, in paragraph 3, pp. 542–43, that I should not have used the notion of the diminishing marginal significance of economic and social advantages relative to our interest in the basic liberties, which interest is said to become stronger as the social conditions for effectively exercising these liberties are more fully realized. Here the notion of marginal significance is incompatible with the notion of a hierarchy of interests used in par. 4, p. 543. It is this latter notion, founded on a certain conception of the person as a free and equal person, which is required by a Kantian view. The marginal changes I could have spoken of in par. 3 are the marginal, or step-by-step, changes reflected in the gradual realization of the social conditions which are necessary for the full and effective exercise of the basic liberties. But these changes are a different matter altogether from the marginal significance of interests.