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James Fleming is concerned about the status of rights in debates about the Constitution. On the one hand, he is worried that those who talk of "balancing" rights either "reduce claims of basic liberties or rights of individuals to mere claims of interests," or else "elevate mere claims of interests of government into claims of rights."[1] Frankfurter, he observes, does both of these things. In *Dennis v. United States*,[2] Frankfurter did the first by treating First Amendment freedom of expression as a "mere interest which Congress may balance against the claims of the nation to national security,"[3] and he did the second in dissent in *West Virginia State Board of Education v. Barnette*[4] by describing the clash between Jehovah's Witnesses' freedom of religion and expression and the government's interest in inculcating patriotism as "a clash of rights."[5] But, Fleming says, those who try to avoid these problems by making rights "absolute" run the risk of reifying rights by detaching them from the interests that give them their point and purpose.[6] This is what happens, for example, in *Buckley v. Valeo*.[7]

Fleming wants to avoid these errors, but he thinks that there may be genuine cases of conflicts of rights (or basic liberties) such as a "clash between concern to protect freedom of expression, on the one hand, and concern to secure equal citizenship for all, including racial, sexual, or sexual orientation minorities, on the other."[8] He wants to show how a constructivist framework based on Rawls's ideas can advance our understanding of these debates, and provide a way of avoiding these dilemmas about balancing and absolutism.[9]

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1. James E. Fleming, *Securing Deliberative Democracy*, 72 Fordham L. Rev. 1435, 1446 (2004).
2. 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring).
3. Fleming, *supra* note 1, at 1446.
4. 319 U.S 624, 646-71 (1943) (Frankfurter, J., dissenting).
5. Fleming, *supra* note 1, at 1446.
6. *Id.* at 1459-60, 1464-65.
7. 424 U.S. 1 (1976); *see* Fleming, *supra* note 1, at 1465-66.
8. Fleming, *supra* note 1, at 1447.
9. *See generally id.*

I share Fleming's concerns and agree with much of what he says. What I will do here is sketch my own account of the framework that Rawls provides for thinking about constitutional issues. My one slight disagreement with Fleming may be that I take a somewhat firmer line against the idea of "clashes" of rights.

I will begin with a few remarks about the importance of the distinction between rights and the values that those rights protect and promote. For example, we rightly value privacy, that is to say, the ability to conduct certain parts of our lives free from the scrutiny of others. This value is secured by institutionally-defined rights, which specify what people are not free to look at or listen to without the permission of those affected. But these two things, privacy and institutionally-defined rights to privacy are quite distinct, and can vary independently of one another. Two people can have different degrees of privacy even though their rights are the same, either because the rights of one are violated, or because one has the advantage of living in a very remote location, where there is no problem of being observed by one's neighbors.

Terms such as "freedom of expression," "freedom of association," and so on, can be understood as referring to goods, like privacy, which we properly value and wish to secure, or they can be understood as referring to institutionally-defined rights, which are important means of securing these valued goods. Using these terms without clearly distinguishing between these two different understandings can lead to confusion about "conflicts," "clashes," and "balancing."

Values can "conflict" when it turns out that pursuing one requires some sacrifice in the pursuit of the other. When this happens, the way to decide what to do may be to "balance" these values against one another: that is to say, to decide which of these values is more important (or, more precisely, to assess the importance of the marginal increments and decrements of these values that are at stake).

Rights, understood as institutional constraints and prerogatives can "clash" in a different sense: What one set of constraints and prerogatives allows us to do may be forbidden by the other. So, for example, the right to freedom of expression (understood in a particular way) might forbid the legal proscription of acts of expression that reveal embarrassing facts about public officials, whereas the right to privacy (understood in a particular way) might include a legal prohibition against such acts. What we need to do in such a case is to adjust our understanding of these rights so as to make them coherent. This adjustment is not best understood, I think, as a matter of "balancing" rights against one another. The idea of "balancing" institutionally-defined powers and prerogatives against one another hardly makes sense. It is true, however, that in deciding which readjustment of these rights to accept, we may need to

"balance" certain values or interests against one another. If some of these values are referred to by the same terms (such as "freedom of expression" and "privacy") that are used to denote rights, then this process may seem to be a balancing of rights. But this way of describing the matter seems to me a mistake, or perhaps two mistakes. First, even if the names are the same, the term "balancing" is more appropriate in one case than the other: values are balanced, rights are adjusted, or redefined. Second, it is an open question whether these all-encompassing terms are the best way of identifying the relevant values.

These concerns lead to a point about the division of labor between philosophy and law. Rawls says that justice as fairness is not to be regarded as a method of answering the jurist's questions, but as a "guiding framework" which if accepted may assist their judgments.[10] Here are some things that such a framework might do. First, as I have just suggested, it can distinguish clearly between rights and the values with reference to which they are to be justified and interpreted. Second, it may specify more fully how this process of interpretation (or definition and adjustment) is to proceed. Specifically, it may offer a particular view of how the values relevant to the justification of certain rights are to be understood. Finally, since such claims about values are bound to be a matter of controversy, the framework may provide a larger theoretical rationale for giving these particular values this special place in our thinking. Rawls's framework does all three of these things in ways that I will try briefly to explain.

One might wonder whether, when Rawls speaks of "basic liberties" such as freedom of speech, freedom of conscience, freedom of association,[11] and so on, he means to be speaking of rights or values. It seems clear that the former is what is intended. He writes, for example, that "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."[12]

In stating his first principle of justice and explaining why this principle and its priority would be adopted in the original position, Rawls speaks in general terms of the basic liberties of freedom of speech, freedom of conscience, freedom of association, and so on, without giving any institutional specification of these rights. I take it that, at this stage of his argument, Rawls is referring to the general idea that *some* right of each of these kinds must be recognized and protected by any just basic structure, leaving open exactly how these

10. John Rawls, Political Liberalism 368 (1996).
11. *See id.* at 291.
12. *Id.* at 325 (contrasting basic liberties and their fair value).

rights are to be specified. This open-endedness may leave the impression that he is referring to values, since the claim that there must be such rights can be read simply as the claim that these values (or valued conditions) must be protected. But this interpretation would be a mistake.

Specifying the basic rights and liberties (giving them well-defined institutional form) is the task of what Rawls calls the constitutional convention, the second stage in his four stage sequence.[13] This sequence consists of the original position, the constitutional stage, the legislative stage, and the stage at which rules are applied to particular cases by judges, administrators, and individual citizens.[14] It is important to recall that these stages are not intended as a sequence of events in time, but rather a set of deliberative standpoints, defined by specified aims and specified constraints on information, that are held to be appropriate for answering certain questions. These are standpoints that we can take up at any time when we are addressing questions of the relevant sort. So, Rawls says, for example, that the original position is a point of view that we can take up at any time when we are considering questions about the justice of our basic institutions.[15] The constitutional stage, on the other hand, is the point of view we should take up when we are considering how basic rights and liberties are to be specified.[16] Since any specification of these rights will always be incomplete, this point of view is one which we have occasion to take up repeatedly, as jurists, political leaders, and private citizens trying to figure out what our rights are.[17] The question before us is how Rawls's account of the constitutional stage can help us in thinking about rights and about the questions of balancing and absolutism with which we began.

The constitutional stage is governed by the conclusions reached in the original position. In particular, it is governed by the first principle of justice, which requires that "[e]ach 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," and by the idea that this principle has priority over (that is to say, is not to be sacrificed for the sake of) considerations of public good and perfectionist values.[18]

The task of the constitutional stage is to implement this principle by defining a "fully adequate scheme" of equal basic liberties for one's society, taking into account facts about that society as well as general

13. John Rawls, A Theory of Justice 171-76 (rev. ed. 1999).
14. *Id.*
15. *Id.* at 514.
16. *Id.* at 172-74.
17. *See id.* at 172-74, 176.
18. *See* Rawls, Political Liberalism, *supra* note 10, at 291 (stating revised formulation in "The Basic Liberties and Their Priority").

facts of history and social theory. But what does this mean? Fully adequate for what? Rawls's answer is fully adequate for the development and exercise of what he calls the two moral powers. These are, first, the capacity for a sense of justice, exercised in deliberating with others about the form of shared social institutions, and second, the capacity for a conception of the good, exercised in deliberating about how to live one's own life.[19]

These are grand terms. But even if it is conceded that these powers are very important, and that we all have what Rawls calls a "higher-order interest"[20] in the development and exercise of such powers, it also seems that these cannot be the *only* interests that are to be taken into account in defining a system of basic liberties. Don't we need to consider also such things as public order and safety in determining the limits of these rights?

Here we should note that in specifying basic rights and liberties we are defining general institutional powers and prerogatives. For example, in specifying the right of freedom of expression we are not just stipulating which kinds of expression are permitted (or protected) and which are not. Since we are specifying *constitutional* rights, what we are doing at least in part is defining and restricting the powers of other agents (legislators and executives) to determine which forms of expression are legally permitted and which are not. That is to say, we are determining what kinds of reasons can justify these agents in restricting expression. For example, we are determining when and in what way the public's interest in keeping order, or in peace and quiet, or in protecting individuals against various kinds of offense, can be taken by legislators or administrative officials as justifying laws or policies that would restrict opportunities for expression. In order to reach conclusions about the proper definition at the constitutional stage, we need to recognize and assess the force of these conflicting reasons. So we must, at that stage, take into account interests other than merely those in the development and exercise of the two moral powers.

Rawls's idea seems to be, however, that in specifying rights that determine how these other interests may be taken into account in regulating expression, we are to be guided first and foremost by the aim of defining rights that allow for the full development and exercise of these powers.[21] He thinks that experience teaches us that the task of seeking such an "adequate scheme" is not fruitless. The historical experience of democratic institutions and reflection on the principles

19. *See, e.g., id.* at 332-33. The "higher-order interests" in developing and exercising these powers are also what Rawls appeals to in explaining why the First Principle and its priority would be adopted in the Original Position. *See id.* at 74-75.

20. *Id.* at 74.

21. *See id.*

of constitutional design gives us confidence that "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."[22]

So one thing that Rawls's framework does is to give the higher-order interests in the development and exercise of the two moral powers the status of "master values"—that is to say, the status of being the values with respect to which the relevance of other values as justifications for restrictions on expression is determined. What justification can be offered for giving these interests this governing role?

One might appeal at this point simply to the evident importance that these interests can be seen to have once they are identified and described in the right way. But Rawls also offers a more theoretical argument. The two powers get their primary place in Rawls's framework because he begins with the idea of society as a certain kind of cooperative venture. The two moral powers are then identified as the powers that citizens must have in order to be participants in this kind of cooperative arrangement.[23] Basic structures that fail to allow for the full development and exercise of these powers are therefore defective in a fundamental way: They do not facilitate the kind of cooperation that they are supposed to involve. I will leave it open whether this is a sufficient reason for giving the development and exercise of these powers such a preeminent justificatory role, and whether other reasons can be offered. I will turn instead to the way in which Rawls uses these powers to specify the content of the right of freedom of expression.

The clear and present danger rule corresponds to a system of powers and prerogatives that gives legislators and administrative officials the power to take the fact that certain expression is likely to lead to serious harms as grounds for forbidding it. The problem with this rule, Rawls says, is that it does not distinguish between harms resulting more or less directly from the expression itself and harms resulting from political decisions that members of the electorate are likely to take as a result of being persuaded by it.[24] A power this broad is incompatible with the exercise of the first moral power (the capacity for a sense of justice), since it can (and history teaches us is likely to be) used to interfere with the free public discussion of questions of political importance. An "adequate" system of basic liberties must therefore distinguish between the risk of harms produced through democratic decisions and harms produced by the lawless action that is the immediate and intended effect of incitement,

22. *Id.* at 297-98.
23. *See id.* at 299-304.
24. *See id.* at 348-56.

and it must not grant the state power to restrict expression because of harms of the former kind.

The qualifiers "immediate" and "intended" are both crucial here. It is important that a harm be immediate, because if it is not immediate then it may be prevented by other means, less restrictive of expression. "Intention" is important because it affects the relation of the expression in question to the exercise of the two moral powers. A lecture on a topic of important political concern (on the merits of gay marriage, for example) might provoke a riot. But the power to restrict expression on such grounds would be a threat to the exercise of both moral powers. On the other hand, the exercise of these powers does not require us to engage in speech that is intended to incite violence. At least it does not do so under conditions in which legitimate political institutions exist and are functioning. As Rawls notes, his argument is limited to such "favorable" conditions, and does not apply in instances of constitutional crisis in which democratic self-government has become impossible.[25]

Rawls frequently refers to the idea that expression may not be restricted on the basis of its content.[26] It is worth saying a few words about how his framework provides a basis for defending and interpreting this familiar idea. The question of the legitimacy or illegitimacy of content-based restrictions on expression is a question of how the right of freedom of expression is to be specified (what restrictions on governmental powers it involves). The clearest examples of illegitimate restrictions of expression on the basis of its content are cases that have the following structure: There is some question, which may concern a political decision or a matter of purely individual choice, on which individuals have good reason to want to make up their own mind. But some institutional agent, having reached a conclusion about the answer to this very question (the truth of a certain claim, or the wisdom of some course of action), holds that expression advocating a contrary answer is harmful and misleading, and that it should be banned on this ground. It is easy to see why the state's power to act in this way is a threat to the full exercise of what Rawls calls the two moral powers.

But not every law that, literally, restricts expression on the ground of its content is threatening in this way. Some restrictions on commercial advertising, for example, may present no such threat. So what seems to follow from Rawls's framework, although he himself does not make this explicit, is not that all content-based restrictions are illegitimate, but that many are (laws against seditious libel being a famous case in point), and that in order to decide whether a content-

25. *Id.* at 297, 353-56.
26. *See, e.g., id.* at 357 (discussing limits on campaign spending).

based restriction is or is not permissible, we should ask whether it presents a threat to the exercise of these powers. The answer will depend not only on what would be restricted by a proposed law, if correctly applied, but also on how it is in fact likely to be used, who will be administering it, and so on.

To summarize this discussion: Rawls holds that basic liberties such as freedom of expression (once defined) cannot be balanced against other interests. But they need to be "adjusted." The powers and prerogatives (and limits on powers and prerogatives) that define these liberties need to be specified. What is specified in this process is, among other things, the grounds on which expression may legitimately be regulated. In determining these limits we need to take various potentially conflicting interests into account. But in this process of balancing and adjustment, our interest in assuring conditions for the development and full exercise of the two moral powers has the primary role: If allowing some other interest to justify restrictions on expression in a certain way would pose a threat to the full exercise of these powers, then that justification for restriction cannot be allowed.

I will conclude by saying something about how this framework shapes arguments about the difficult question of hate speech. The problem arises in a situation in which a significant number of people in society regard members of a certain group as inferior, not to be associated with and not entitled to rights of full citizenship. This situation is a serious threat to the self-respect of members of the denigrated group; that is to say, to their sense of self-worth and confidence in the value of their achievements and conceptions of the good. Suppose it is therefore proposed that speech expressing these views should be restricted. Among other things, this prohibition would be an affirmation by the state of the equal value of these citizens, a kind of counter-speech. But this prohibition constitutes a content-based restriction of expression, and it is not the least restrictive alternative for addressing the problem: Other kinds of effective counter-speech by the state are surely available.

Restrictions of the kind sought are not *just* counter-speech, however. It may be maintained that the very idea that the standing of certain citizens is a *question* that is on the agenda for decision is itself offensive. The point might be made by drawing on what Rawls says about freedom of conscience. The idea that a certain religion or conception of the good might be legally barred would mean that a good citizen would have reason to abandon his view if the majority so decided. This result is, Rawls says, incompatible with the very ideal of a religious view, or a conception of the good.[27] Surely, it may be said,

27. *See id.* at 311.

the same is true of one's sense of oneself as an equal citizen.

But the two cases are not analogous. Full rights of equal citizenship are guaranteed by the doctrine of the priority of liberty. These rights are not up for revision or revocation by majority vote. Nonetheless, the principle of equal citizenship, like any other fundamental question of justice, is open to discussion and can be questioned. The permissibility of such questioning is part of the transparency involved in a well-ordered society.

In reply, it may be argued that this argument does not take account of the special vulnerability of groups who have long been disadvantaged and discriminated against. The question of their status is not just another abstract question of justice that might be debated and explained. This point might be brought within Rawls's framework by appealing to the idea of fair value of political liberties.[28] This fair value is lost when there exists a climate of opinion in which members of certain groups are not regarded as full participants in political life and their opinions are not taken seriously. Speech that denigrates them and reinforces these attitudes should be restricted, it might be said, in order to restore the fair value of political liberties for them. Like restrictions on campaign finances, it might be said, these are restrictions on the speech of some that are necessary to enhance the value of liberties for others.

But the proposed restrictions would restrict speech on the basis of its *content*, in violation of one of the limitations that Rawls placed on the regulation of campaign finances.[29] This quandary raises the question of whether Rawls should regard this kind of regulation as an impermissible restriction. Insofar as what is being debated is a question of fundamental justice, this restriction would seem to be excluded. So, if we accept the idea that restrictions on hate speech are needed to insure the fair value of political liberty, then we seem to have a genuine clash *within* Rawls's framework. This disharmony would not be a clash of rights, but it would be a clash of values that play a central role in justifying rights and determining their content.

I myself remain doubtful about this clash, because I am not convinced that restrictions on "hate speech" are necessary to promote the fair value of political liberty, or that they are an effective way of doing so. But even if I am correct in this empirical belief, a potential clash remains. One might seek to avoid the clash by narrowly tailoring the relevant statutes so that what is ruled out is disparagement and not serious argument about justice. Like prohibition of excitement, prohibition of ridicule might not threaten the full exercise of the two moral powers. But there are problems

28. *See id.* at 327.
29. *See id.* at 357.

with this response. The first concerns the way in which such a law would be administered. Could officials be trusted to draw the line in the right place, or would they be likely to over-regulate? Second, serious argument about a group's entitlement to equal standing would seem to be *more* wounding than mere ridicule and disparagement. So a clash would remain.

One might take comfort in the idea that this situation is not one that we *presently* face in our society, on the ground that blacks and women are, at least *now*, accepted as full participants in our political life. But it should be noted here that Rawls's idea of the fair value of political liberties is, like his idea of fair equality of opportunity,[30] a very strong requirement. It requires 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."[31] It will be some time before this demanding requirement is fully achieved.

30. *See id.* at 363-68.
31. *Id.* at 358.