Introduction

This is a book about rights. It is, to be more specific, a book about the place of rights in American political debate. The language of rights has been central to American political culture for centuries, and nearly every major issue in American political history has been argued as an issue of rights. In some circles, however, rights have recently fallen upon hard times. It has become a familiar refrain in politics that America is a land of too many rights and too few responsibilities. In the academy, the concept of rights today attracts criticism that is both serious and diverse. The critical legal studies movement charges that a rights-based political order is intellectually incoherent and morally pernicious, the former because rights conflict with one another and the latter because a system of rights entrenches the power of the privileged classes. Communitarians contend that framing political debate in terms of rights leads to excessive individualism, unwillingness to compromise, and the decline of community spirit. These two schools of thought differ in many important ways, but their different critiques of rights share the idea that the substance of American politics is conditioned by the fact that it speaks the language of rights. To some extent, that observation must be valid. Because language is often a constituent element of thought, belief, and action, political activity from legislative drafting to electioneering to international diplomacy relies upon and is shaped by the language that mediates and helps constitute the political world. When communitarian and critical legal scholars argue that speaking the language of rights pushes a political culture toward some substantive outcomes and away from others, the reality that language plays a constituent role in politics lends intuitive appeal to their claim.

That claim, however, underplays two other elements of the relationship between politics and language. First, the constituent

relationship between them is reciprocal. Precisely because language and politics are closely interconnected and therefore difficult to analyze sophisticatedly in isolation from each other, it is hard to imagine language as a separate and antecedent sphere that influences politics while remaining itself untouched.[1] Language does shape politics, but politics shapes language as well. Second, the influence of language upon politics is not always narrowly determined. Even if speaking the language of rights does distinctively condition political discourse in America, it does not follow that the language of rights shapes politics in the specific ways that prominent critics contend. The tendency of rights discourse to favor one set of political outcomes over another, I suggest, has been widely overstated. As a conceptual matter, people with all sorts of differing political views can use the language of rights to their advantage. Such diverse usage is a historical fact, not merely an abstract possibility: the history of American rights discourse shows that Americans of all political stripes have in fact used the language of rights to support their various causes, and all of the greatest political conflicts in American history have involved, and been spoken about as, conflicts of rights. That these political conflicts have been described as conflicts between opposing rights rather than as conflicts between rights on one side and something else on the other suggests that the language of rights does not attach to only one kind of political outcome. Instead, either side of an issue can and usually will use the language of rights in support of its position. Eighteenth-century Americans who advocated independence from Britain drew heavily on the language of rights in their political writings, but Americans who opposed independence were no more loath to use rights language in their anti-independence arguments. In the nineteenth century, when the issue of slavery split the United States, abolitionists and Republicans argued their cause in the name of a whole battery of rights, ranging from the natural rights of people to be free to the rights of free labor and free speech. Southerners and slaveholders, however, also marshaled arguments from rights, invoking the right to property and the rights of states. Later conflicts in American history featured the right to strike against the right to work, the right to dispose of one's property in whatever way one

[1] I explore these ideas in more detail in chapter 1, with reference to scholars such as W. V. O. Quine and Quentin Skinner.

chose against the right to regulate private property in the public interest, the right to equality against the right of association, the rights of the federal government against the rights of the states, and the "right to life" against the "right to choose." In short, the language of rights has not shown itself systematically partisan to any one political vision at the expense of all others. It has been a versatile tool, suitable for many different agendas.

It could, of course, be argued that both sides in all of those conflicts shared elements of the classical liberal framework and that the language of rights is useful to all those (but only those) who are within that political family. Whether all of American politics can be described as liberal is the subject of a venerable scholarly debate which cannot be satisfactorily resolved here. I suspect that significant currents in American political thought can indeed be described as illiberal and that those currents, like others, have managed to use the language of rights. For present purposes, however, it is enough to say that a liberalism broad enough to encompass all major currents in American politics necessarily encompasses everything, or almost everything, that is worth studying in American political discourse. Whether or not rights language can only support liberal ends, it can and has supported virtually every significant agenda that has been pursued in American politics.

If it is not true, as both the critical legal scholars and the communitarians allege, that rights discourse systematically privileges a certain kind of political outcome, it still might be true that arguing in terms of rights is not an intellectually coherent way of framing political or moral debate. After all, the critical scholar might point out, the litany of conflicts above suggests that we cannot resolve issues by reference to rights, because rights so often conflict with one another. There is a sense in which that critique is well made. It is true that rights conflict, so it is true that asking which side in a dispute is the possessor of applicable rights will not always yield a clear resolution to the dispute. It does not follow, however, that the language of rights is an incoherent way of talking about political issues, because conflicts among rights raise problems only if one believes that we should be able to settle substantive questions by reference to rights alone. In other words, the charge that rights language is an insufficiently good adjudicatory framework is significant only if one assumes that the sole or highest function of rights language is adjudicatory. That assumption is common, ironically, to

the liberal theorists who would use rights as means of adjudication and the communitarian and critical legal scholars who object that rights discourse is inadequate as an adjudicatory framework.

The language of rights is, however, at least as much about rhetoric and reflection as it is about adjudication. Rhetoric is one of the obvious ways in which language and politics come together, and, considered as a species of political rhetoric, the practice of rights discourse is entirely coherent. As I argue throughout this book, analyzing rights discourse as a form of political rhetoric exposes patterns that leave the meanings of various rights claims more clear than they would otherwise be. There is a gap between the common literal understanding of statements like "I have a right to privacy" and a different set of meanings that the statement carries, meanings that say more about the political values of the speaker than about an objective moral or legal order and which may be all the better for the refocusing, given the real deficiencies of rights discourse as a means of describing such orders. Not all uses of rights language are merely rhetorical, of course: careful reflections of judges and scholars concerned with rights often differ in character from the assertions of agitators and political skirmishers. Accordingly, the rules governing the uses and best interpretations of rights language are not rigidly identical for all circles of discussion. But no sharp line divides jurisprudence or political philosophy from politics itself. Indeed, the best way to understand even the self-conscious rights philosophy of sophisticated liberal theory is not as abstract philosophy alone but also as political discourse.

Not only does liberal rights theory have a political aspect, but its uses of rights language are politically powerful. One reason why the liberal theorists who use the language of rights are likely to defeat their critics on the field that really matters – that is, the field of politics – is precisely that they use the language of rights rather than deconstructing it. In the world of American political discourse, a strong claim of rights, any rights, tends to overpower a subtle intellectual argument about the shortcomings of rights as a concept. When I say that the political field is the field that matters, I say nothing with which those critics should disagree. Critical legal studies has long insisted that philosophy is inescapably political, and communitarian thinkers generally argue, in an aspirational vein, that the philosopher should strive to bring philosophy and politics together. It is ironic that many of those who most explicitly argue for

the nexus between academics and politics cannot or do not use the political value of academic discourse as effectively as the liberals whom they critique. That pattern is especially characteristic of the critical legal scholars. Some communitarians, in contrast, have shown themselves more able to use the language of rights when it is useful to advance their political arguments, irrespective of the fact that communitarianism also contains a strong strain critical of rights discourse.[2] Their willingness to use the language of rights greatly increases the possibility that their political arguments will be persuasive to American audiences, and indeed communitarian ideas are now ascendant in American political discourse. Using the language of rights may dilute communitarianism's intellectual distinctiveness, but it also contributes to the political potency of its platform.

Similarly, the recent critical race theory movement in American law schools tries to support its political agenda by adding an affirmative view of rights to the critical legal studies paradigm. It is not yet clear how, if at all, a legal theory can coherently merge the deconstructive posture of critical legal studies with the celebration of traditionally conceived notions of rights. My own suspicion is that it cannot be done, at least not from a purely philosophical perspective which judges theories by their intellectual consistency. Critical race theory, however, is avowedly political, measuring its success not just by those abstract philosophical standards but also by the concrete results it can achieve for its vision of society.[3] Just as the rights-affirming communitarians have helped make communitarianism a more significant political force, the use of rights language by critical race theorists may make them more powerful political players than their critical legal studies predecessors. In both cases, the uses of rights language raise questions about how much of a scholarly discourse should be understood as different from political rhetoric and how much should be interpreted in the ways appropriate for the analysis of everyday political claims.

This book, then, analyzes how politicians, lawyers, and philosophers in the United States have actually used the language of rights. Rights discourse, I argue, should be understood as a coherent social

[2] Compare, for example, the attitudes toward rights of more politically engaged communitarians like Amitai Etzioni with those of more philosophical communitarians like Michael Sandel.

[3] On critical race theory's framework and goals, see Angela Harris, "Foreword: The Jurisprudence of Reconstruction," *California Law Review* 82, 741 (1994).

practice, available to a wide range of political agendas and including within its scope the political argument of philosophers as well as politicians, though more sophisticated in some contexts than in others. At the crudest level, Americans often claim the satisfaction of any needs or interests they consider important and deserving of special protection as "rights." These claims are limited in only two ways. First, "rights" is an umbrella term encompassing entitlements, liberties, powers, and immunities, concepts that will be explicated in chapter 1. Second, "There is a right X" means approximately "X is important and should be protected." No other principle, formal or substantive, underlies all the claims of rights that Americans advance or even accept. This understanding of what it means for something to be a right might seem rough and permissive, but it does capture the way that the concept of rights actually operates in much of American politics.

In more disciplined rights philosophy, rights are often the conclusions or waystations of an argument rather than raw normative declarations. Theorists who think about rights in a justificatory way recognize that they must give arguments for why certain things should be rights and that those arguments should not be reducible to emotivism, and theorists who reason in what is now called "reflective equilibrium," revising in turn a set of tentative principles and tentative implications until a desirable system is found, can have "rights" stand in on either side of the ledger. Rights so conceived are revisable working constructs rather than ontological truths.[4] It is not the case, however, that these sophistications make the patterns of academic rights discourse wholly different from the cruder rights discourse of simple advocacy. More refined versions of the same two rules described above do in fact capture the way the concept operates in much of political philosophy. The four categories named in the first rule bound academic as well as non-academic rights discourse; one difference between the discourses is that many academics as well as judges are loath to use "rights" indiscriminately across the four analytic categories, preferring to restrict rights to one or two among the four. Many also try to narrow the second rule, developing theories ostensibly aimed at giving more specific content to rights than "X is important and should be protected." Both of those projects, however, have political undercurrents, because both

[4] The idea of reflective equilibrium is discussed further in chapter 1.

have the effect of limiting the rhetorically powerful category of rights to a subset of the propositions that it might be used to support. Theorists with different political commitments tend to produce different formal conceptions of rights which, in turn, support the different commitments that suffuse the formal theories. Deciding which formal conception of rights is best can therefore be much the same as deciding which set of substantive political commitments is best. In other words, even sophisticated arguments about rights are frequently surrogates for arguments about the substance of politics. To try to settle political questions by reference to theories of rights is problematic at best, because theories of rights do not supply evidence of an order prior to and regulative of politics. They are part of what is contested in political discourse, and the student of politics can learn a great deal about the commitments of political actors, including political philosophers, by analyzing how they use the language of rights.

Not only do formal conceptions of rights reflect substantive political commitments, but the substantive political commitments they reflect change in response to changing historical conditions. Characteristically, the change has been reactive, as people respond to a new set of problems by articulating a new set of rights. I say "reactive" rather than "adaptive" because the major pattern of development in American rights discourse has been one of concrete negation: innovations in conceptions of rights have chiefly occurred in opposition to new adversities, as people articulate new rights that would, if accepted, negate the crisis at hand. In the first years of the American republic, for example, conceptions of rights were frequently grounded in opposition to the British colonial administration. In the nineteenth century, political and judicial conceptions of rights in the American North were often framed in opposition to the slave-labor system of the South. During and after World War II, Americans participating in every kind of rights discourse from the crudest to the most refined rethought the content and form of rights in ways inspired by opposition to European totalitarianism and especially to Nazism. At the end of the twentieth century, the rights discourse of American law, politics, and political philosophy bears the mark of all of these influences. Thus, when the substantive aims of rights discourse change, new rights and sometimes new theories of rights arise to carry the content of the new political commitments. Moreover, the relationship between the substantive commitments

and the formal, conceptual aspects of rights theory is reciprocal: after new crises shape new commitments and new commitments shape new approaches to rights, linguistic and conceptual elements of the new approaches to rights can in turn help shape substantive political commitments.

The language of rights, then, is a powerful and coherent method not just of reflecting but also of privileging substantive political commitments, a method suitable for an extremely wide variety of ends and regularly employed by academics, politicians, lawyers, and virtually everyone else who argues about political issues. And yet, rights discourse has failings. Notably, as the coming chapters will illustrate, it frequently permits obfuscation in political debate, because claims of rights often enable bare assertions to pass as reasoned arguments. Perhaps that very feature, clearly a shortcoming from a rationalist point of view, explains part of the lasting appeal that rights discourse has held in American politics. Because rights language offers advocates the possibility of presenting assertion as argument, people more concerned to advance a substantive set of political ends than to illuminate a philosophical question are often well served by harnessing the language of rights. Such advocates sacrifice precision of thought, and they expose themselves to the charge that their arguments cannot, in the end, be grounded in anything outside their own political commitments. But that is no more than to say that their politics are rooted in their politics, which may be the case already.

There is here a temptation to say that this problem of circularity should be avoided by not permitting rights language to obfuscate debate and instead insisting that the true grounds underlying a claim of rights should be considered and argued about directly. If one theory of rights relies upon a strong notion of individualism and another on a normative conception of nature, perhaps it would be better to decide conflicts between them not by arguing about rights but by asking about individualism and nature directly. Unfortunately, it would then be necessary to look for the grounds of individualism and naturalism, and, having grounded those concepts in yet other concepts whose grounds would have to be sought in turn, we might soon question what we really meant when we said we were looking for the "true grounds" of the normative argument in the first place. Clifford Geertz told a now-famous story about being confronted by a man who denied the reigning scientific understanding of planetary

orbits, insisting that the earth is in fact borne aloft on the back of an elephant. The elephant, he said, was standing on a turtle. When pressed as to what supported the turtle, he replied that it was another turtle; in fact, he explained, it was "turtles all the way down."[5] Rights are not rights all the way down, but they may not be standing a step or two from the bottom, either, perhaps because there is no bottom to stand upon and perhaps because it is unclear what a bottom would look like if we found one. That rights cannot be the ultimate justificatory ground of a normative argument is thus not a conclusive argument against using rights discourse in politics, because it may not be the nature of normative theory to yield that kind of ground. Knowing that rights are not themselves the grounds, however, does mean that we should be careful not to regard them as such. That caution is all the more important in a culture like America, where the language of rights carries substantial rhetorical power. And it should be applied to the discourse of philosophers and judges who think reflectively about rights as well as other kinds of political actors whose theories are thinner, because philosophers and judges are partly political rhetoricians, perhaps inescapably so. Language and politics come together for them as well as for others, shaping their theories of rights.

[5] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973), pp. 28–29.

CHAPTER 1

Rights theory and rights practice

When two people compete in a game of chess, they each try to win according to the same set of rules. The means of achieving victory are identical for both of them and known to both players in advance. They may find infinite ways of playing the game within the rules that set permissible moves and victory conditions, but those rules and conditions are prior to the game. Nothing that either player can do would suddenly increase the size of the board, or permit one player to move twice in a row, or let one player declare victory by, say, taking the other player's queen as opposed to the king. The rules of the game are static and defined outside the play of the game itself; playing the game consists in adhering to those rules rather than challenging or trying to reshape them.

Law and politics have their share of games or competitive situations like games. When a legislature or a court is going to decide a controversial issue, advocates for rival outcomes use power, rhetoric, argument, and whatever else they can muster to try to secure a favorable outcome. They compete with one another, trying to out-argue and outmaneuver their opponents, and the competition among them is a kind of game with certain patterns and restrictions that might be thought of as rules. There might be a rule specifying that nothing will be a law that does not receive the support of a majority of some legislature, or that one cannot secure someone's vote by promising to pay him or her millions of dollars, or that nobody may be convicted of treason without the testimony of two witnesses. One of the most important ways in which these games of law and politics differ from games like chess, however, concerns the relationship between the rules and the play of the game. In political and legal argument, part of the contest is over how the issue in dispute will be characterized and what kinds of arguments will count as valid or superior. When the same question could be presented as a