Introduction

I warn you from the outset that my argument may seem controversial, even highly counter-intuitive. After all, as my title suggests, I seek to reject rights. Yet, our intuitions here should only be thought of as knee-jerk. While they may rightly place the argumentative weight on me, they should not preempt an open mind. Like the prosecutor trying a case, I accept that the burden is mine. But just as a judge instructs jurors not to form any settled opinions of guilt or innocence until the trial is complete, I ask that you similarly withhold judgment until the end.

Imagine a polity passes the following law: blonds are forbidden from having sex with redheads. How would we respond to such a law? I'm confident that most (if not all) of us would immediately find it suspect. But why? Is it because the law violates a right to equality? That is, it discriminates on the basis of hair color. Or is it because the law violates a right to privacy? That is, it interferes with the intimate and personal decisions of redheads and blondes. I argue that the better argument stems from neither right. Rather, we need simply proclaim that the law is irrational, arbitrary even ridiculous. After all, there's no good reason for enacting it, for prohibiting blonds from sleeping with redheads. Reasons, not rights, ought to do the normative work. Once we realize this – once we turn our attention to the polity's reason for enacting the law – rights turn out to be unnecessary. This is the framework I deploy, a framework that asks us to reject conventional rights-talk and re-conceptualize the way we limit democratic government.

The conventional way of doing so specifies those areas, interests, spheres, or classifications that are off limits to state regulation. This is the typical view of limited government. Central to it is the private sphere. Whereas the state may legislate over public activities, it must refrain from interfering with private ones. Under the standard view, the state ought not to violate our rights to intimacy, religion, and property – rights that are seen as essential components of the private sphere.

Take as an example the argument for sexual freedom. The conventional account of limiting government suggests that I may sleep with the adult of

my choice, because sexual activity occurs in private. I should be left alone in the personal and intimate areas of my life. The state ought not to regulate or interfere with behavior that occurs in it. Doing so violates one's right to intimacy. After all, as the argument goes, it is in this space that we articulate and ground our personal, idiosyncratic conception of the good, engage in basic human self-development, bond with others, and form our core identity. If there is anything that does not concern the state, it is this intimate sphere. Sexual activity is part of that sphere and thus off limits to state regulation, or so the conventional argument goes.

Similarly, the state ought not to violate rights to equality. Democratic majorities are forbidden from discriminating on the basis of various classifications such as race, sex, and sexual orientation. Considering the argument of sexual freedom, the conventional account also suggests that prohibiting sex improperly discriminates on the basis of sex or sexual orientation. A law mandating racial segregation is problematic precisely because it invokes race or discriminates against a particular identity group. It violates one's right to equal treatment. Such classifications are off limits to state regulation.

Rights, then, are seen as essential in limiting the scope of democratic decision-making. Any account of limited government must fulfill and balance two competing values: democracy as a matter of self-government and liberty as a matter of restraining government. First, it must provide space for democratic discretion, decision-making, and debate. It must permit the democratic polity to pass a wide range of laws. It must value democracy. Second, an account of limited government must ensure genuine liberty. It must appropriately thwart majority tyranny. Assuming that the values of liberty and democracy are important, rights represent the reigning method for best securing them. Rights are the traditional and widely accepted doctrines that thwart majority tyranny. They demarcate those interests, areas, spheres, or classifications off limits to state regulation. Conversely, under the conventional account, the state may regulate those interests and activities that do not violate such rights that are, for example, "public." The role for courts, then, is to strike down those democratically enacted laws that do encroach upon rights like our rights to intimacy and equality. This is the traditional methodology for balancing and realizing the values of liberty and democracy.

In fact, the essential purpose of constitutional law is to limit the reach of the state. Constitutions serve as basic constraints on the scope and reach of democratic government. In line with the conventional account of limited government, constitutions generally specify those rights the state may not violate. For instance, the First Amendment of the United States' Bill of Rights says in part that "Congress *shall make no law* respecting an

establishment of religion; or abridging the free exercise thereof. …"[1] The conventional argument secures religious liberty negatively by specifying religion as an area or interest the state may not interfere or legislate in.

The language of rights is ubiquitous. Most legal, political, and theoretical arguments concerning issues like abortion, affirmative action, and sexual freedom invariably appeal to such doctrines. Since *Roe v. Wade* (1973) (holding that the right to privacy protects a woman's decision to abort), the contemporary abortion debate has revolved around whether removing the fetus is about the right to life, a right to privacy, or about a right to women's equality. With the recent conservative appointments of Justices John Roberts and Samuel Alito framing the abortion debate seems even more salient. The Supreme Court's current jurisprudence on race-based affirmative action also trades in the language of rights, here the right to equality. The typical theoretical arguments juxtapose the rights of individuals – a notion of formal equality – with the rights of groups – a notion of anti-subordination. Moreover, defending sexual freedom including same-sex marriage is caught in the theoretical construct of the public and private divide. The alleged "private" nature of sex pushes for its protection requiring something else to permit the more "public" aspect of same-sex marriage.

Rights have set the terms of how we conceptualize and debate these and similar issues. It is difficult to pick up a book on contemporary theory, justice, or law or to watch a commentary on television that does not invoke these doctrines. Rights have a long pedigree stemming at least as far back as John Locke's classic depiction of them as natural or pre-political. Indeed, the rights to intimacy, property, and religion that make up the private sphere may have an even older history. Aristotle's distinction between the household and the polis stands as a testament to their enduring nature. Undoubtedly, these doctrines have great purchase.

Still, they have been criticized. Republican theorists have rightly charged rights with failing to offer a substantive role for democracy, with failing to honor the common good of a particular polity. According to this criticism, rights invite courts to frustrate our commitment to majoritarian decision-making. After all, they act as "trumps."[2] They fail to make room for genuine and robust collective, democratic discretion, treating individuals as atomistic, as un-connected to their fellow citizens. Others have accused the private sphere of serving as cover for the domination of workers, women, and minorities preventing the polity from doing anything about it. In particular, the right to property has stymied attempts by

[1] U.S. Constitution Amendment I (emphasis added). [2] R. Dworkin 1984: 153.

the democratic majority to redistribute wealth making it difficult for the polity to pass legislation it deems desirable. Yet, rights seem firmly lodged as the only alleged way to secure equality and freedom.

As evidence of this prevailing attitude, much contemporary democratic theory recognizes some of the pathologies of rights but refuses to reject such doctrines. These democrats seek only to democratize rights, permitting the polity to reflect on and redefine their content. This is yet another instantiation of the conventional method of avoiding majority tyranny, of ensuring liberty while deferring to and permitting democratic decision-making. Again, in seeking to balance liberty and democracy, we are stuck within the conceptual framework of rights. These theorists merely "tinker" with this regime, offering a more reflexive, democratic-friendly conception of rights. But their failure to reject rights altogether permits rights to be interpreted so as to invite majority tyranny rather than thwart it. The conventional account of limited government is the reigning orthodoxy even for those who find it unsatisfactory. The language of rights seems entrenched.

I reject the conventional account. It fails as an account of limited government. I argue that we better ensure liberty simultaneously permitting robust democratic decision-making and debate by rejecting rights. We need simply re-conceptualize limited government as one where we limit the reasons or rationales on which the polity may act. I want us to look away from individuals and groups. We should turn our normative attention to the state itself. We should conceive of limited government *not* as carving out those areas, interests, or spheres off limits to state regulation. We should limit government by limiting the rationale or justification on which the democratic polity may act. In this way, we secure freedom and equality by contending that the state has no good reason for limiting whom we can sleep with, for segregating individuals on account of their race, or for curtailing religious liberty. Simultaneously, we value democracy. We permit the polity to pass a wide range of laws as long as it has a good reason to do so. The focus ought only to be on the polity's reason for acting not the area, interest, or sphere at issue. Our focus ought to be on reasons not rights.

Returning to the argument for sexual freedom, consider again a law outlawing consensual sex between redheads and blonds.[3] I contend that such a law is illegitimate *not* because it violates a right to equality or a right to intimacy. It is problematic *not* because it discriminates against a group and *not* because it interferes with behavior that is allegedly private or

[3] Throughout the book, I purposely use hair color rather than race, gender or sexuality. My concern is with the rationale behind the legislation, not the category of people affected. To highlight this crucial move in my argument, I often use the example of blonds and redheads.

intimate. All these invoke the conventional account of limited government. An account I argue is problematic. Such a law is illegitimate because there is no good reason for enacting it. Similarly, a contemporary sodomy law prohibiting me from sleeping with someone of the same sex is just as illegitimate – just as arbitrary – as one restricting sexual activity on the basis of hair color. We need not look to rights to deem it suspect. Once we turn our normative attention to reasons, realizing that the polity has no good reason to regulate activity in this way, rights turn out to be unnecessary. This is the theory I propose and defend in this book, one that contemporary liberal theory, albeit half-consciously, already endorses. We should reject rights, turning instead to this superior account of limiting government, to a particular theory of Justification.

This theory of Justification (I purposely capitalize the word), then, conceives of limited government as limiting the rationale on which the polity may act. What needs to be justified is the democratic polity's reason or purpose for acting. By adopting this theory of Justification we re-conceptualize limited government. No longer are certain areas, interests, or classifications off limits to state regulation. No longer must we speak in the language of rights to thwart democratic majorities. The democratic state may legislate in *any* area or sphere or invoke *any* classification as long as it has good reason to do so permitting greater democratic flexibility and discretion while ensuring liberty.

I hope to show that rights turn out to be *inadequate* to secure freedom and equality, also jeopardizing productive democratic debate. They have monopolized political and legal theory as well as political discourse for too long. Why do we insist on rights as *the* protector of our liberties, as if we were living in an age of monarchies and rights were "trumps" we could flail in their despotic direction? Gone are those days. Yet the same amulets that we deployed in those days have grafted onto our own democratic times. Why use rights against our democratically elected governments when we can demand that they *Justify* themselves instead? Surely, as I hope to show, this turn away from rights and towards Justification is at the heart of democratic government; one that is consistent with both the preservation of our liberties and the extension of democratic deliberation.

Though not directly aimed at the doctrine of rights, as a social theorist of possibility, Roberto Unger denounces "institutional fetishism," the nagging orthodoxy of the alleged necessity of certain concepts.[4] His charge against such orthodoxy is instructive here. The fetish for rights takes such doctrines as necessary to claims of justice. It proclaims that we

[4] Unger 1996: 7.

cannot do without talk of rights. Our unwillingness to think beyond them stymies, in Unger's lingo, our "transformative imagination," our ability to imagine alternatives.[5]

I seek to proffer such an alternative. Rather than asking whether a particular behavior falls under a right *to* something – a right to free speech, religion, or even equality – one need only ascertain the democratic polity's reason for acting – its reason for enacting a statute, passing a law, or enforcing a particular regulation. A court ought only to look at the legislative purpose behind a particular law rather than the alleged right it violates. This paradigmatic shift – from individuals to the democratic polity itself – constitutes the core of my argument.

I argue, in the spirit of John Stuart Mill, that we need simply specify the appropriate legislative rationale as one of only preventing harm. If the polity may only seek to prevent demonstrable, non-consensual harm, we have a philosophically sounder method of securing freedom and equality while informing democracy. The democratic polity must in good faith follow this justificatory constraint. By constraining democratic decision-making in this way, we avoid majority tyranny simultaneously making room for democratic flexibility. Doing so renders rights obsolete. This is the superior account of limited government I propose, one that finds life in American constitutional law and one that does all the work that the conventional locution of rights does, and more; while at the same time allowing our democratically elected legislatures to deliberate and decide on areas that a rights regime had previously declared off limits.

By Justification (again, I purposely capitalize the word) I mean a distinctive kind of legitimizing principle that stands as an *alternative* to rights. Conventional justifications are those that are used to arrive at something else: a schedule of rights, a mathematical proof, or a particular course of action. That is, such justifications are like ladders, discarded after they are used to climb up somewhere. They are single attempts to merely prove or establish something. This is not what I mean by Justification. I have a more specific and robust role for Justification. Justification is a constant, deliberative process, a mechanism that is perpetually appealed to in deciding whether the polity acts justly. Justification entails two necessary components: one, something needs to be justified (decided, talked about, agreed upon, etc.); and such justification takes place under some kind of justificatory constraints, limitations, or conditions. I argue that contemporary liberal political theory has already taken a turn to Justification.

[5] Ibid.: 6.

Ultimately, I proffer a *particular* theory of Justification that looks to legislative purpose contending that the state may only seek to minimize (mitigate, prevent, regulate, etc.[6]) demonstrable, non-consensual harm. What needs to be justified is the democratic polity's reason or rationale for acting (the first component) and this rationale may only be one of harm minimization (the second component).

A turn to this kind of Justification, to legislative purpose, is not merely semantic. It would be a mistake to interpret my theory of Justification as simply suggesting that as individuals we only have the right not to be harmed. Contending that the state may only act to prevent harm is not the same as suggesting that we have a right not to be harmed. Mine is a *justificatory* constraint on democratic decision-making. Rights attach to individuals and groups. They limit government by suggesting that certain areas, interests, or classifications are off limits to the democratic polity. Simply proposing that each of us has a right not to be harmed fails to balance and realize liberty and democracy. It represents an instantiation of the conventional account of limited government, one where rights are the regulatory principle that limits the scope or reach of the democratic polity – an account I reject.

On one hand, suppose this right not to be harmed applied against other individuals. That is, others could not go around harming you. Such a right would prove too much and too little. Imagine a polity that has a market economy. I'm an intrepid entrepreneur and open a new business near yours. Due to my shrewd business practices, your company is forced to shut down. My competitive actions have undoubtedly harmed you. Had I not started my company, you would not have lost yours. If we have a right not to be harmed by our fellow citizens, this would call into question all kinds of competitive behavior, behavior that we may not deem suspect. Moreover, what is to stop the *polity* from segregating us according to race or hair color or limiting whom we can sleep with? These tyrannical policies may not violate such a right, because the state is acting not our fellow citizens. It's problematic simply to say that we all have a right not to be harmed by others. Rights problematically distract us from considering the rationale on which the state acts.

On the other hand, if this right also applied against the polity – the state could not harm anyone – how can the state even imprison a murderer or, for that matter, impose any kind of behavioral constraint on its members? Here the state would be unable to do a wide variety of things we deem legitimate. In the end, invoking the language of rights simultaneously protects too much – it would force us to outlaw competitive behavior

[6] I use the locution of "minimizing harm" to cover all these possible meanings.

and prevent us from passing simple criminal legislation – and too little – it would give us no grounds on which to object to certain tyrannical policies.

Our normative attention ought to be on the polity's reason for acting, its rationale for imprisoning a murderer or segregating individuals on the basis of race or hair color. And once we reorient our attention in this way, we quickly realize that while there is good reason to imprison a murderer, there is no good reason to segregate individuals on the basis of race, hair color, or a wide variety of other characteristics. In fact, as I intimate throughout this book, we already think in these terms albeit half-consciously. I make explicit this focus on the polity's reason or purpose for acting. Once we realize this – once we endorse my theory of Justification – we no longer need to speak in the problematic language of rights. We can reject rights. I argue that once we constrain democratic government by contending that the polity may only seek to minimize demonstrable harm, we better balance and realize the values of liberty and democracy. We lose nothing in terms of liberty, while allowing democracy to pursue its own course. For too long we have had our cake but not been able to eat it. My account provides one way to do so.

Though equality and freedom are not identical, for much of this book I use them interchangeably, often utilizing the word "liberty" to stand in for both. Because securing one can be characterized as securing the other, my argument does not rest on neatly distinguishing between the two. Taken together, equality and freedom must be balanced against the value of democracy. It is adjudicating this balance – and ultimately the role of courts in reviewing democratically enacted statutes – that motivates my book.

My book is in three parts. Part I sets out the puzzle of rights, namely their inability to properly balance and realize the values of liberty and democracy. The conventional picture of limited government is flawed. Part II rejects such doctrines, offering my positive solution of Justification and its emphasis on the minimization of demonstrable, non-consensual harm as outlining the proper legislative purpose. I argue that this theory of Justification is a better account of limited government. In arguing for this particular justificatory constraint, I do not work up to it. Rather, I simultaneously present and apply it – demonstrating its superiority by its very application. Part III contends that American constitutional law has moved in the direction of Justification, rejecting the core rights of property, religion, and intimacy and should continue to do so.

Part I

Chapter 1 briefly outlines the "democratic deficit" in the classic depiction of rights. By articulating those interests, areas or kinds of behavior that the state ought not to interfere in, rights entail no genuine role for democracy.

By its very terms, the classic account of rights has no necessary relationship to a positively expressed democratic common good. John Locke articulates the paradigmatic classic account with his rights to life, liberty, health and property, rights that are purposely understood as natural or pre-political. They articulate normative obligations independent of the democratic decision-making process. Rights, as conventionally understood, fail to value democracy. The traditional account of rights does not strike the appropriate balance in limiting government. A more republican political alternative may cure such a deficit but at the cost of compromising equality and freedom. Appealing only to the democratic majority is problematic.

Chapter 2 critiques a dynamic, democratically informed characterization of rights. In an effort to balance liberty and democracy, avoiding the pitfalls of Chapter 1, reflexive theorists regrettably do not go far enough. In merely tinkering with a regime of rights rather than purging these doctrines altogether, these accounts needlessly invite majority tyranny, frustrating democratic debate. They still cling to rights in conceptualizing limited government.

Part II

Chapter 3 introduces my preferred mechanism of constraining democratic decision-making, Justification. I suggest that in the last fifty years or so contemporary liberal theory has, in fact, already taken a turn to reasons, a turn that has gone largely unappreciated. Specifically, I assay Bruce Ackerman's neutrality thesis, Jürgen Habermas' discourse theory, John Rawls' public reason, and Michael Oakeshott's civil association. These theories contend that something needs to be justified (decided, talked about, agreed upon, etc.) under some kind of justificatory constraints, limitations, or conditions. Though each is instructive in highlighting important aspects of an appropriate theory of Justification, I argue that these contemporary accounts fall short in doing the necessary work.

In drawing from them, Chapter 4 articulates my own theory of Justification. In doing so, I outline a superior account of limited government. I argue, in the spirit of Mill, that as long as the democratic polity may only seek to minimize demonstrable, non-consensual harm, we secure equality and freedom simultaneously valuing democracy. I elucidate the four central components of this justificatory constraint: state action, only demonstrable harm, consent, and democracy itself.

Chapter 5 contends we can reject the fetish for rights by accepting my theory of Justification, a theory that specifies the appropriate legislative purpose. By rejecting rights – rejecting the conventional account of

limited government – we avoid the liberty-compromising features of such doctrines, permit needed democratic flexibility, and promote fruitful debate. We transcend (instead of merely "tinker" with) the distinction between an inquiry regarding the interests, spaces, and areas off limits to state intervention and an inquiry concerning self-mastery by the democratic polity.

Part III

Having made my argument in ideal theory, Chapters 6 and 7 contend that American constitutional law has moved in the direction of this theory of Justification turning away from the core rights of the private sphere: property, religion, and intimacy. In making a more modest argument in this part of my book, I argue in Chapter 6 that the Supreme Court has, as a general rule, repudiated the special status of property and religion. By subjecting economic regulations to mere rational review and treating religion like any other voluntary association, the Court effectively rejects such rights.

Chapter 7 makes the same argument for the right to privacy critically examining the Court's jurisprudence in this area. I interpret *Lawrence v. Texas* (2003) (declaring sodomy laws unconstitutional) as laying the foundation for the ultimate repudiation of the right to privacy. I argue that by repudiating morals legislation, *Lawrence* renders privacy constitutionally unnecessary. I suggest that, in line with my theory of Justification, the Court's abortion jurisprudence has also turned away from a focus on individuals to a focus on legislative purpose. In rejecting these core rights and turning entirely to the state's rationale for acting, constitutional law permits robust democratic flexibility. Properly understood, I argue that American constitutional law informs the re-conceptualized account of limited government proffered in Part II.

Chapter 8 seeks to replace the Court's current "equal protection" analysis with this theory of Justification. Though the doctrines of suspect class and classification are ingrained features of the constitutional landscape, I argue that the Court's use of them is internally problematic. By conflating classification with class, the Court fails to articulate a consistent equal protection doctrine, accomplishing neither formal equality nor anti-subordination. In accordance with my theory of Justification, we are better off asking the reason behind the legislation, instead of attempting to categorize legislation as affecting or invoking a suspect class or classification – as fulfilling a right to anti-subordination or a right to formal equality. Finally, I propose a more democratic role for judicial review given the turn away from rights towards the legislative purpose of only minimizing harm.