Rejecting Rights

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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.

1 The classic conception of rights: the "democratic deficit"

How should we limit democratic government? Assuming we care about the competing values of liberty and democracy, what is the best regulatory principle for balancing them? Obviously, with no constraint on democratic government, there is nothing to thwart democratic tyranny. There is nothing to stop the polity from passing conventional sodomy laws or laws mandating racial segregation. We must limit democracy to some extent in order to ensure liberty. Alternatively, specifying all or even most of our normative obligations prior to any democratic decision-making may ensure liberty but leaves no place for democracy. We must be careful, then, not to go too far in limiting democracy. The puzzle is not whether or not to limit state power but *how* to do so. Consequently, I am *not* concerned with the following questions: Why should we limit democratic government? How do we arrive at such limits? How do we substantiate them? What are their foundations? Why do we even care about liberty and democracy? My book seeks only to answer "how": *How do we limit government so as to ensure liberty but simultaneously allow for and permit a good deal of democratic discretion?*

The conventional answer employs rights to balance and realize the values of liberty and democracy. I do not interrogate the philosophical foundation of rights.[1] Mine is an argument in political and legal theory not morality. It is an argument of application. I criticize the traditional method of limiting government by showing that it does not strike the appropriate balance between the values of liberty and democracy. As applied, it fails. We should reject it. I then propose an alternative way of limiting government, one that does a better job of realizing these values. I simply hope to reorient the way we think about and debate limited government. This is the nature and scope of my argument. In this way, it is both bold and modest: modest because I hope to propose a better way of

[1] For a foundational critique see, e.g., Bentham 1987 [1843], Burke 1973 [1790], MacDonald 1984; see generally Kramer *et al.* 1998.

conceptualizing how we limit democratic decision-making and bold because I do so by rejecting rights.

Rights undoubtedly have great staying power in both real world debates and academic scholarship. They are the fodder of much political and legal theory as well as political discourse. Issues like abortion, affirmative action, non-discrimination, welfare and same-sex marriage appear invariably to implicate talk of rights. In fact, the rights to property, religion, and intimacy that make up the conventional private sphere seem to have particular purchase in political theory and discourse. Rights carve out those areas, interests, and classifications off limits to state regulation. While the state may not legislate "private" matters, it may legislate "public" ones, or so the conventional argument goes. This chapter and the next argue that the conventional account is flawed. We should reject it. We should reject rights like the rights to free speech, due process, equality, property, religion, privacy and the like, turning instead to a particular theory of Justification.

For the purposes of my argument, rights have two salient features, features that are interrelated.[2] First, rights attach to individuals or groups of individuals. The traditional "subject" of rights is the individual.[3] We say that A has a right to *x*. Or that a group of Bs has a right to *y*. When the state violates a right, it has done a wrong to an individual or group. For example, a law prohibiting pornography may violate an individual's right to free speech. Or a law mandating racial segregation may violate a group's right to equality. Rights accrue to members of the polity. The state itself is not the beneficiary of rights. These doctrines are conceptually independent and distinct from the democratic state.

Second, a right is always a right to something: *to* free speech, *to* property, *to* privacy, or *to* equality. It protects a certain interest or area. If the activity implicates free speech, property, privacy, or equality, we deem it worthy of presumptive protection. For rights, the relevant inquiry is what specific category does the activity or behavior fall under? Rights carve out spaces or interests that the state ought not to interfere in or with. The methodology of rights functions negatively, articulating not what count as the relevant objects of state regulation but what are excluded from the purview of state power.

Rights represent the conventional account of limited government, an account that makes no necessary room for collective decisions by the democratic polity. This account does not explicitly value democracy, a particular polity's articulation of our normative obligations. After all, once

[2] Cf. Shapiro 1986: 14. [3] Ibid.: 14.

we have specified those behaviors, activities, or interests of a person or group beyond the scope of state regulation, we leave little room for democracy.

Since the subjects of rights are members of the polity, and not the polity itself, there is no necessary connection to the democratic value of self-government. In his discussion of negative liberty, Isaiah Berlin says as much:

> But there is no necessary connection between individual liberty and democratic rule. The answer to the question "Who governs me?" is *logically distinct* from the question "How far does government interfere with me."[4]

If we focus simply on rights – this is the way we go about securing liberty, it does not matter whether our government is democratic or non-democratic. As long as our rights are not violated, why does it matter what government we find ourselves in:

> Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom.[5]

In this way, the scope of liberty is "logically distinct" from democracy. As I argue, the classic conception of rights therefore entails a "democratic deficit." The puzzle is how to connect liberty to democracy – to limit government so as to ensure liberty while necessitating a robust role for democracy.

This very brief chapter lays out this motivating puzzle behind my argument leaving the ensuing chapters to answer it. It is in two parts. First, I explicate the "democratic deficit" in the classic characterization of rights, arguing that the conventional account of limited government fails to value democracy. Second, I argue that the republican alternative, an alternative that exemplifies and cures this deficit, fails to secure liberty.

The classic conception of rights

The following accounts of rights, though different in many respects, fail to value or allow for a robust role for democracy. These accounts (and this is not an exhaustive list) merely explicate what behaviors, activities, or interests of a person or group are beyond the scope of state regulation. In so doing, they do not contemplate a necessary role for democracy.

[4] Berlin 1970 [1958]: 130 (emphasis added). [5] Ibid.: 129.

John Locke articulates the classic conception of rights. He argues that as *individuals* we have certain interests in securing our "Life, Health, Liberty, or Possessions."[6] Government is needed because our enjoyment of these rights is "uncertain" and "constantly exposed to the Invasion of others"[7] in the state of nature as it turns into a state of war. Because we cannot be judges in our own case – deciding when the "law of nature" has been broken – government is required.[8] If we are left to judge on our own, self-interest will lead us to do not what the law of nature requires but what is best for us. This precarious and dangerous state of affairs necessitates government.

Consequently, the social compact arises as a more satisfactory method of securing the rights to life, health, liberty, and property. Individuals do not give up their rights in civil society. They only relinquish their power to protect themselves and enforce such claims against each other.[9] The advent of government does not change, alter, or add to our rights. As individuals, we possess such rights in civil society as we did in the statute of nature. This renders them natural or pre-political.

Locke, then, separates the question of "who governs" us from the question of what interests we ought to be left alone in. Only after Locke has delineated our pre-political rights[10] does he move on to the question of government.[11] His answer does not connect with his earlier discussion of rights. As Locke explains, once individuals band together to form a society or "body politck,"[12] they must decide by majority rule on a particular form of government. Such possibilities include a democracy, oligarchy, monarchy (hereditary and elective) or a mixture of the three.[13] Moreover, this majority will also be the effective judge of when the government (that they have so entrusted the protection of their liberties to) has failed in protecting their rights, triggering dissolution of civil or political society.[14]

But majority rule serves no conceptual role in the Lockean argument. Though this kind of rule may be a practical, second-best solution, Locke offers no "necessary connection" between rights and the question of "who governs" us. For Locke, the rights a government must protect are conceptually specified prior to its creation. "The Obligations of the Law of Nature, cease not in Society. … Thus, the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others."[15] Though any constraint on government – even the one I propose in Part II – is in a

[6] Locke 1988 [1690]: sec. 6. [7] Ibid.: sec. 123. [8] Ibid.: sec. 13.
[9] Ibid.: sec. 127–130. [10] Ibid.: Ch. II. [11] Ibid.: Ch. VIII.
[12] Ibid.: sec. 96–97, sec. 133. [13] Ibid.: Chs. VIII, X.
[14] Ibid.: Ch. XIX; see also Shapiro 2003b: 325–332. [15] Locke 1988 [1690]: sec. 135.

way pre-political, we should be careful not to impose too much of a constraint. We need to permit the polity to have a substantive (though not complete) role in defining our normative obligations. Locke provides no such role. It is no surprise, then, that Locke contemplates the existence of any number of governments. The kind of government – monarchic, oligarchic, or democratic – does not change the obligations it has to its members. His argument does not begin with the democratic state but rather with the individuals who will comprise it. This is the crucial difficulty with the classic conception of rights. The kind of government instituted is not a component in Locke's normative argument. If our primary political obligations are derived independently of the political process, what does it matter whether we live under a democracy or a monarchy? After all, the enlightened monarch could protect our rights as well.

Democracy is normatively unnecessary for Locke. Thus, the classic characterization of rights suffers from a "democratic deficit." If we care about affording democracy a substantive (but again not complete) role in defining our normative commitments (and I assume as much), Locke's account is inadequate. Locke is, at the conceptual level, no democratic theorist. If our key obligations are pre-political, as long as they are honored and enforced, the kind of government we happen to find ourselves in does not seem to matter. As long as our concern is with those behaviors, activities, or interests of a person or group off limits to state regulation, we need not worry or even care about "who governs" us.

This is clearest in considering the right to property, a staple in the conventional account of limited government. Such a right problematically ties the hands of the democratic majority. It leaves hardly any discretion for the state to redistribute wealth or pass welfare legislation. Rather, it requires a libertarian state, one where the polity may not regulate property. After all, this right carves out an area or sphere off limits to state regulation.

Robert Nozick is a defender of this conventional account of limited government.[16] He, more explicitly than Locke, argues for a libertarian state. He too leaves the value of democracy out of the normative equation. A democratic polity may not redistribute. It may not decide to be any more robust than a "minimal state." According to Nozick, to engage in redistribution is illegitimate. Why? As long as *individuals* are able to acquire holdings and transfer them, the state will need to constantly interfere to upset any pattern.[17] For Nozick, such interference violates

[16] Nozick: 1974. [17] Ibid.: 150–164.

our rights. This is the classic depiction of the autonomous economic sphere. For instance, a series of consensual economic dealings that result in some having more property than others may not be un-done or regulated by the state. This precludes democratic flexibility, the ability of the democratic polity to redistribute or regulate. Even if we were to imagine our favorite initial distributive scheme (i.e. everyone gets an equal amount of stuff) the fact that individuals can consensually trade or give their stuff to someone else will invariably upset it. As Nozick suggests, it "is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice."[18] Defining the substance of such a conception to include a justice in acquisition and a justice in transfer principle, Nozick argues that no pattern of distribution can long survive.

But it is this very assumption, namely that there even is an entitlement theory and that it includes certain principles, which sidelines democracy, excluding a role for democratic decision-making. Democracy or majority rule makes no appearance in Nozick's argument. After all, what if a democratic polity decided not to recognize the entitlement theory (rejecting the idea, for example, that we can even "own" something through our labor) or instituted, in Jeremy Waldron's language, a "collective property" regime instead of its more familiar private property counterpart?[19] In this way, Nozick articulates the economic claims of justice – I am entitled to this stuff and you are entitled to that – *without* appeal to democracy. There is no genuine room for it. The right to property prevents the polity from interfering in this area. Like Locke, Nozick takes democracy out of the normative equation. As a collective, the polity may decide to redistribute wealth, pass minimum wage legislation, or a host of other policies. The right to property and its attendant economic sphere preclude such democratic decisions. They do not make room for democratic decision-making in this area.

This is clearest in Nozick's characterization of rights as "side-constraints." Rights constrain the actions of the state.

> There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints.[20]

Redistribution violates the rights of individuals – once again exemplifying the concern not with the state (the state only comes in as the possible violator of rights) but with its members. In making his conceptual argument from dominant protective agencies to the minimal state, Nozick is careful to contend that no rights are violated. Whether or not his argument

[18] Ibid.: 160. [19] Waldron 1985: 328–329. [20] Nozick 1974: 33.

succeeds (whether "independents" can be forcibly included in the ambit of the dominant protection agency without violating rights) is not relevant here. What is significant is that Nozick makes sure to respect these "side-constraints" as he moves from the state of nature to the minimal state. Thus, such constraints, those behaviors, activities, or interests of a person beyond the scope of state regulation, are defined independently of the democratic process. The liberty inquiry is once again unconnected to its "who governs" counterpart.

Rather than posit a state of nature like Locke or Nozick, John Rawls articulates his famous "original position."[21] He asks what principles of justice would *individuals* behind a "veil of ignorance" agree upon. Individuals in this position are ignorant of such things as their "class position or social status," "fortune in the distribution of natural assets and abilities," "intelligence and strength," or their "conception of the good."[22] Rawls argues that these individuals would not only select an extensive compatible schedule of rights but also arrange social and economic inequalities so as to benefit the least advantaged while securing equality of opportunity.[23] As a contemporary Kantian, Rawls uses the veil of ignorance to achieve universalization. The principles arising from this device are those that all should agree to.

Because this Kantian argument abstracts from our contingent position, it must abstract from our membership in a democratic polity. Such membership is nothing other than our contingent, particular social preferences. The veil of ignorance by its very terms requires a "democratic deficit." The state is not the normative subject under the veil. Individuals are once again the only players. To have democracy play a role in the original position – informing Rawls' principles of justice – is to un-do the veil of ignorance. The abstracting quality of the veil entails that we leave behind our affiliation or membership in a democratic polity. After all, it is the a-contextual nature of the original position that supposedly generates the correctness of the two principles of justice. Since these principles are universal – they apply to all – a robust role for democracy is once more absent.

In putting forth his second principle of justice, Rawls effectively adds to the list of classic rights by including a certain right to social equality or what he calls democratic equality. This is his "difference principle." It postulates that obligations ought to be structured so as to benefit the "least advantaged."[24] Unlike Locke and Nozick, Rawls permits some kind of regulation in order to redress economic and social inequality at least for

[21] Rawls: 1971. [22] Ibid.: 137. [23] Ibid.: Ch. II. [24] Ibid.: 76–83.

the worst off.[25] The upshot of such a principle is that it does seem to implicate a range of economic alternatives. Various kinds of economies could be said to benefit the worst off. Socialism and conventional market capitalism may very well meet the difference principle.[26] Rawls' second principle of justice goes some way in valuing the democratic context. It suggests that not every just polity need look the same.

Yet, Rawls shies away from explicitly embracing democracy as necessary to articulate such economic arrangements. He fails to realize that democratic polities may very well disagree over the meaning and scope of the "least advantaged."[27] And if they do, we must appeal to democracy to define our normative obligations. But Rawls' Kantian methodology that seeks to arrive at principles for all has no room for democratic context. My concern is not the feasibility or soundness of Rawls' two principles of justice. What is significant is that his methodology like Locke's and Nozick's does not go far enough in valuing democracy.

Just as Rawls is able to articulate a just state's obligations to its members on his own, so too can anyone else through the apparatus of the original position fulfilling the Kantian principle of universalization. Since all polities will, according to Rawls, accept these two principles of justice, we may secure equality and freedom but we do so at the cost of excluding a robust positive role for democratic decision-making. The later Rawls, as I outline in Chapter 3, does offer a more democratic-friendly account with his notion of public reason.

While these three rights based theories all suffer from an unacknowledged "democratic deficit," Ronald Dworkin is explicit about such a shortage.[28] He sees rights as "trumps," as superseding the welfare of the community.[29] Rights take precedence over decisions by the democratic majority. He holds that moral rights are normative obligations that the government may not un-do. Anyone who thinks that "men and women have only such moral rights as Government chooses to grant […] means that they have no moral rights at all."[30] If rights are not understood in this privileged democracy-transcending way, we have none at all.

The democratic polity has little say in articulating our normative commitments or obligations. Dworkin, as a result, contemplates a strong and substantive role for a supreme court. A court must enforce these morals rights, even if such enforcement contravenes majoritarian decision-making.[31] To do otherwise is not to take "rights seriously."[32] Enforcing such rights must be done "even when the majority thinks it would be

[25] Ibid.: 75–83. [26] Shapiro 2003c: 136–137. [27] Benhabib 2004: 108.
[28] R. Dworkin 1978, 1984, 1985. [29] R. Dworkin 1984: 153.
[30] R. Dworkin 1978: 185. [31] R. Dworkin 1985. [32] R. Dworkin 1978.

wrong to do it, and even when the majority would be worse off for having it done."[33] Dworkin, then, does not explicitly contemplate a democratically informed understanding of our rights or of our normative obligations to others. As individuals we hold "trumps" against the government. Since the normative subject in his argument is also the individual, there is no conceptual link to the question of "who governs" us. Dworkin's emphasis on the role of courts as opposed to the legislature points to a "democratic deficit." While any account of limited government must limit democratic decision-making, the classic conception of rights goes too far. It provides no genuine normative space for democratic discretion.

The republican alternative

Republican and some communitarian[34] theorists criticize the classic conception of rights in this very way. Drawing from the republican traditions of Jean-Jacques Rousseau and Aristotle and even Hegelian theory, these theorists contend that our normative obligations ought to be defined by the community.[35] Assuming that rights genuinely secure freedom and equality (I question this claim throughout the book), they do so by failing to offer a substantive role for democracy. If we care about affording democracy such a role (again, I assume we do), the classic accounts above are inadequate. We must reject them. My interpretation of the republican political alternative seems to do just that. Rather than look to the individuals of the democratic polity, republicanism turns to the democratic state, to the common good.

A commitment to the common good highlights the importance of the connectedness of individuals in a polity permitting democratic flexibility and discretion. What may be good for one community may not be good for another. Rights are universal. They apply regardless of the context leaving little if any room for democratic decision-making. In this way, rights based theories offer an unsatisfactory conception of the self. Michael Sandel argues that emphasis on the classic account of rights problematically treats the self as "unencumbered."[36] In specifically

[33] Ibid.: 194.

[34] In specifying our normative obligations, much communitarian thought looks not to democracy but to tradition, to practices or narratives passed down by the community (see, e.g., MacIntyre 1984, Taylor 1992 [1979]). Still, I believe this communitarian charge trades on a "democratic deficit." It trades on the fact that rights fail to take into account the preferences of the particular democratic majority. For instance, MacIntyre does not believe there are rights. For him, "belief in them is one with belief in witches and in unicorns" (MacIntyre 1984: 69).

[35] See, e.g., Pettit 1997, Sandel 1982, 1984, 1996, Walzer 1983.

[36] Sandel: 1982, 1984.

attacking the Rawlsian approach, Sandel finds the stripping away of our current characteristics, interests, social position, and aims as restricting and false:

> To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. … Denied the expansive self-understanding that could shape a common life, the liberal self is left to lurch between detachment on the one hand, and entanglement on the other. Such is the fate of the unencumbered self, and its liberating promise.[37]

Sandel's lament stems from the "democratic deficit" inherent in these classic rights based accounts. Since our individual normative obligations to others are pre-political, we do not need others to define them. There is no connection between liberty and the question of "who governs" us. Rights tie the hands of the democratic majority. By attaching to individuals regardless of their membership in a particular democratic polity, rights imply a conception of the self that is a-contextual and abstract. They preempt the polity from collectively defining a range of normative commitments.

Consequently, a republican alternative sees rights as anti-democratic. Such doctrines fail to look to the democratic majority in articulating our normative obligations. They fail to make genuine room for democracy. The republican charge is telling – demonstrating the "democratic deficit" of the classic characterization of rights.

However, having the democratic polity articulate our normative obligations fails to offer a workable political alternative. If freedom and equality are left at the mercy of the democratic common good, we have no way to avoid majority tyranny. With no limits on democratic government, we have no way to thwart it. As Amy Gutmann rightly contends:

> The common good of the Puritans of seventeenth-century Salem commanded them to hunt witches; the common good of the Moral Majority of the twentieth century commands them not to tolerate homosexuals. The *enforcement of liberal rights, not the absence of settled community*, stands between the Moral Majority and the contemporary equivalence of witch-hunting.[38]

Gutmann's concern is characteristic of much political theory, and I certainly share it. Leaving democracy – and nothing else – to articulate our normative and political obligations jeopardizes liberty. It invites oppression. The antebellum South valued slavery, Jim Crow saw "separate but equal" as legitimate, and currently many American states see marriage as the union of only a man and a woman.

[37] Sandel 1984: 91. [38] Gutmann 1985: 319 (emphasis added).

These are no doubt instances of tyranny of the democratic majority. If we leave democracy to articulate our normative obligations, we open the way for oppression. Mill and Alexis de Tocqueville contend that we must guard ourselves against such tyranny.[39] After all, securing equality and freedom in the face of such majoritarianism stands as the motivation behind the classic account of rights explored above. I share the intuition that we risk liberty by leaving its protection entirely in the hands of the democratic majority. To ensure freedom and equality, we must limit democracy to some extent. Again, the question is *how* best to do so.

The political implications of the republican alternative, then, seem unpalatable. Tyranny of the majority cannot be overlooked or glossed over. It stands as a rightful worry. Though the republican alternative is correct in looking to the democratic state, turning its attention away from individuals or groups, it fails to secure liberty. While the classic conception of rights suffers from a lamentable "democratic deficit," the republican alternative that looks only to democracy seems equally objectionable. If democracy is a "nonnegotiable" value[40] and the prevention of tyranny of the majority is also non-negotiable, we must move beyond the options presented in this chapter. This is the puzzle of limited government, the puzzle of balancing and realizing the competing values of democracy and liberty. We must move beyond endorsing the simple options we have considered so far. In the next chapter, I evaluate such an alternative, namely a reflexive conception of rights.

[39] Mill 1989 [1859]: 8–9, Tocqueville 2000 [1835]: 239–242; see also Berlin 1970 [1958]: 171, 163.
[40] Shapiro 2003a: 1.

2 Reflexive rights: jeopardizing freedom, equality, and democratic debate

The classic characterization of rights fails to take seriously the value of democracy. The republican alternative threatens liberty. How, then, should we limit government? How do we balance the need for democratic decision-making without falling prey to such tyranny? The reigning answer seems to be a reflexive conception of rights.[1] It recognizes the "democratic deficit" inherent in the classic characterization of rights. It offers in its place a dynamic and active counterpart where rights are (re)validated and (re)defined by the democratic majority.

Frank Michelman, for instance, recognizes that American constitutional jurisprudence has commitments to both "self-rule" (to be governed by the people) and "law-rule" (to be governed by the law).[2] Adapting Robert Cover's term of "jurisgenerative,"[3] Michelman articulates a "jurisgenerative politics" where the aim of reconciling these two commitments stands at the core of constitutionalism.[4] That is, we are both the "subject" and the "author" of the laws.[5] Not only do we follow the law but also have a hand in articulating and re-articulating it. Holding on to rights, the reflexive account would have democracy inform and define those interests or areas of the subject where the state ought not to interfere. The reflexive approach aims to democratize rights, democratize the conventional account of limited government. It aims to offer democracy a necessary role.

Seyla Benhabib describes her project as one of "democratic iteration."[6] It emphasizes the reflexive and debatable character of rights. Rights claims and principles must be "contested and contextualized, invoked and revoked, posited and positioned."[7] Benhabib describes this approach in the following way:

> Whereas natural right doctrines assume that the principles that undergird democratic politics are impervious to transformative acts of will, and whereas legal

[1] See, e.g., Benhabib 1986, 1992, 2002, 2004, Cohen J. 2002, Cover 1983, Habermas 1990, 1996, 2001, Michelman 1988, cf. Shapiro 1999.
[2] Michelman 1988: 1499. [3] Cover 1983. [4] Michelman 1988: 1502.
[5] Benhabib 2004: 181. [6] Ibid. [7] Ibid.: 179.

positivism identifies democratic legitimacy with the correctly posited norms of a sovereign legislature, jurisgenerative politics signals a space of interpretation and intervention between transcendent norms and the will of democratic majorities.[8]

She rightly seeks to avoid both a "democratic deficit" and majority tyranny. She like other reflexive theorists sees the democratic polity as interpreting rights, as defining their scope and meaning.

Jürgen Habermas, in fact, self-consciously sees his project as attempting to "strike a balance between popular sovereignty and human rights, or between the 'freedom of the ancients' and the 'freedom of the moderns'."[9] He sees himself as connecting liberty with democracy. I leave discussion of Habermas' discourse theory to Part II, suggesting that it articulates a theory of Justification. I am sympathetic to the turn away from static rights and towards a more dynamic, democratically informed counterpart. However, by clinging to rights, the reflexive approach fails to ensure genuine freedom and equality needlessly also frustrating democratic debate. By failing to reject the conventional way of limiting government, the reflexive approach problematically only "tinkers" with it.

In turn, this chapter is in three parts. First, I argue that the reflexive conception of rights is too prone to majority tyranny. It invites the very tyranny that rights are meant to thwart. Second, I specifically look at a reflexive right of privacy arguing that its regime of tolerance fails to achieve genuine liberty. Third, I suggest that such a dynamic account of rights frustrates democratic debate leaving opposing parties trapped between unnecessary, incommensurable positions.

The problem of scope and meaning

Integral to the reflexive or jurisgenerative approach is the democratic polity's ability to revise and reflect upon principles and rights, to define their scope. According to Benhabib, democratic majorities must be able to "*re-iterate* these principles and incorporate them into democratic will-formation processes through argument, contestation, revision, and rejection."[10]

Take the rights to property, religion, and intimacy that make up the conventional private sphere. These rights have permitted harm to vulnerable minorities in the name of protection within this sphere. History has shown that such rights have, for instance, condoned and shielded from state regulation harm to workers, women, and minorities.

[8] Ibid.: 181. [9] Habermas 2001: 116. [10] Benhabib 2004: 181.

The libertarian economic sphere and its accompanying right to property have made it difficult to permit regulation of the economy. If the right to property is pre-political representing just distributions that are independent of the democratic state, as Locke and Nozick would have us believe, altering such relations seems problematic. Adherence to this right allows courts to thwart majority decisions. For example, up until the New Deal, the Supreme Court struck down legislation that sought to do just that. The conventional account of limited government thwarted attempts by the democratic majority to increase welfare by interfering with market transactions.

Similarly, and perhaps even more egregiously, the right to privacy and specifically the realm of family and marriage have condoned violence against women. Again, the conventional account of limited government suggests that the realm of the intimate and familial is off limits to state regulation. But even Mill criticized the way the private sphere via the institution of marriage harmed women.[11] Until recently the common law saw husband and wife as one person. Spouses "could not be on opposite sides of any lawsuit for either personal injury or property damage."[12] Consequently, a husband could physically abuse his wife with no threat of legal sanction.[13] Linda McClain maintains that "the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability."[14] The private sphere (as she goes on to state) "sanctions the violation of women by permitting those with power (men) to act with impunity … toward the powerless (women)."[15] The private sphere has a historical legacy of allowing violence in the family, of serving as the cover for the domination of women.

Multicultural scholarship has also realized that in protecting religion (culture), the private sphere permits harm against minorities within minorities.[16] Okin, for example, chides practices such as "clitoridectomy, polygamy, the marriage of children or marriages that are otherwise coerced" done in the name of protecting culture – leaving them be in the private sphere – as they harm women and children.[17]

The claim that the private sphere with its rights to property, religion, and intimacy has compromised equality is certainly not novel. Karl Marx, in the *Critique of the Gotha Program*, recognized the problem of rights claiming that:

[11] Mill 1989 [1869]. [12] Epstein 1995: 944. [13] Ibid.: 944. [14] McClain 1995: 208.
[15] Ibid.; see also Allen 1999, West 1992.
[16] Benhabib 2002: 88–91, Kymlicka 1995: 39–42, Okin 1999, Parekh 2000.
[17] Okin 1999: 14.

> Right by its very nature can exist only as the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable by an equal standard only insofar as they are made subject to an equal criterion, are taken from a *certain* side only, for instance, in the present case, are regarded *only as workers* and nothing more is seen in them, everything else being ignored.[18]

In this way, rights and the ensuing account of limited government cover up underlying harm, harm that is allegedly beyond the scope of a state's ability to remedy, minimize or prevent.

As Benhabib contends:

> All struggles against oppression in the modern world begin by redefining what had previously been considered "private", non-public and non-political issues as matters of public concern, as issues of justice, as sites of power which need discursive legitimation.[19]

In so far as the classic, static characterization of rights fails to permit such "re-definition" relegating harm beyond the scope of state regulation, we must reject it. However, Benhabib draws from this difficulty the conservative (or weak) conclusion that rights must be open to "democratic iteration." If the choice is between a static conception of rights and its reflexive, dynamic counterpart, perhaps the latter should be chosen. Yet, why keep such doctrines at all? If struggles in the modern world involve moving something from the "private" to the "public," is it not better to purge the distinction altogether? Why even cling to a distinction that has served as the cover for such domination? In criticizing the private sphere, Catharine MacKinnon claims that the "private is the public for those for whom the personal is the political. In this sense, there is no private, either normatively or empirically."[20] But she does not explicitly take the next step in rejecting the public/private divide, a divide that stands at the center of the conventional account of limited government.

I concede that perhaps the reflexive characterization of rights and its jurisgenerative counterpart are improvements on the classic account given in Chapter 1. By permitting the re-negotiation of the public/private divide – allowing the polity to (re)define the scope and meaning of the rights to property, religion, and intimacy – we can more easily allow the minimization of harm once thought beyond the scope of state regulation. However, having gone this far, why not reject such doctrines altogether? Why not reject the conventional way of limiting government? Why not simply reject rights? If reform takes place when a "private" matter is made public – the corresponding right is interpreted so as to permit

[18] Marx 1994 [1891]: 321. [19] Benhabib 1992: 100. [20] MacKinnon 1987: 100.

regulation – we are better off with no private sphere, with no rights to property, religion, or intimacy.

The reflexive theorists, borrowing Unger's terminology, only seek to "tinker" with an admittedly problematic doctrine.[21] They hope for gradual change in permitting the democratic polity to re-negotiate and re-define the scope of rights (and by implication the private sphere). They still look to the individual and the areas or interests she must be left alone in. According to the reflexive characterization of rights, the scope and meaning of such normative doctrines need to be (re)defined only because they have historically shielded harm from state regulation. The dynamic account, then, attempts to treat the symptoms – allowing the polity to engage in reform – neglecting the underlying disease.

We should scrap these doctrines altogether. The need for rights is an unnecessary pathology. We should seek transformative change by focusing not on the kind of activity at hand – is it "private" or "public," a matter of religion or property – but on the democratic polity's reason for acting, its rationale behind passing a particular law or regulation. As Unger quips more generally: "[W]hy should we stop so close to the surface?"[22] Once we have focused in on the private sphere as the culprit in perpetuating domination, why not reject rights altogether?

In fact, in its effort to overcome the "democratic deficit," the dynamic account of rights jeopardizes liberty. By merely tinkering with the system, by offering a middling approach that stops short of rejecting rights, the reflexive theorists invite the kind of majority tyranny rights are supposed to thwart. This is the most damning critique of the reflexive rights based alternative. Leaving the majority to define the scope and meaning of rights cannot be the solution. The majority can decide that pornography, controversial art, or even certain offensive books do not fall under the right to free speech or that the right to equality means "separate but equal" or that the right to intimacy does not include the freedom to engage in consensual sodomy.

For example, Jean Cohen specifically articulates a reflexive conception of the right to intimacy. "Indeed, privacy rights are (recursively) a condition of possibility of democratic contestation."[23] Recognizing as much, she concedes that *Bowers v. Hardwick* (1986) (held that sodomy is not protected under the right to privacy), though now overturned by the Court, interpreted the right narrowly so as to exclude gay sex. (I revisit this decision in more detail in Part III.) In Cohen's words, the debate over the constitutional right to privacy, "has been over whether [privacy is] to

[21] Unger 1996: 30–31. [22] Ibid.: 31. [23] J. Cohen 2002: 121.

be interpreted narrowly as protecting (privileging) only heterosexual marital relationships […] or broadly as protecting the freedom of intimate association and all that it entails irrespective of marital status or gender." Of course, Cohen no doubt pines for a "broad construction."[24] But if she has so opened the right to privacy to such democratic (re)definition, she needlessly invites the majority to curtail equality and freedom. Having handed over to democratic majorities the power to define rights, she has no normative ground on which to now rein them in. If the limits placed on democratic government are themselves now open for revision, we jeopardize liberty. We effectively un-do limited government. While this may value democracy, we do so at the expense of liberty. Nothing stops the majority from defining the scope of such a right narrowly by, for example, prohibiting individuals from sleeping with someone of the same sex. The reflexive conception's attempt to connect democracy and liberty proves problematic.

A contemporary instance of this invitation to majority tyranny is the debate over same-sex marriage. Twenty-six American states have amended their constitutions to declare marriage between same-sex couples void or invalid. (And this does not include the nineteen states that have done so by statute.)[25] And these amendments took place as a response to the marriage litigation in the 1990s that sought equality for gays and lesbians. As amendments to a state constitution, these are paradigmatic instances of democratic decision-making. These twenty-six states did more than just pass a statute or a law through their legislative bodies. Rather, they engaged in the highest form of "democratic iteration" in their respective states by amending their constitutions. They interpreted the scope of the right to marry narrowly to *exclude* same-sex couples from its scope. During much of the twentieth century, American states had done the same for inter-racial marriage, restricting the right to marry to individuals of the same race.

Put another way, by simply tinkering with rights, the reflexive account cannot even tell us what rights we have. It cannot elucidate what limits, if any, to place on government. Do we have a right to marry someone of the same sex? Do we have the right not to be segregated according to certain characteristics like hair color? If not, what core rights, if any, do we have? And leaving this threshold decision to the democratic polity is unsatisfactory. The democratic majority may decide to recognize only a certain limited set of rights in order to tyrannize.

[24] J. Cohen 2002: 122.
[25] Human Rights Campaign. Statewide Marriage Laws (2007): www.hrc.org/documents/marriage_prohibit_20070919.pdf.

If we are authors as well as subjects of the law, criticism of such tyrannical "iterations" seems normatively impossible within the framework of rights. Taking the specific example of same-sex marriage, the reflexive theorist has two options. She can bite the bullet conceding that the democratic polity may exclude such a thing from the scope of the right to marry. Or she must maintain that the ability to marry someone of the same sex is an *integral* component of such a right thereby undercutting the allegedly dynamic (democratic) nature of the right. The former compromises liberty, the latter un-does the "jurisgenerative" enterprise collapsing into its static counterpart where rights are not open to revision or definition. The reflexive alternative either fails to overcome the "democratic deficit" or jeopardizes equality and freedom. It does not go far enough in scaling the pathology of rights and the fear of majority tyranny.

Leaving the definition and scope of rights at the mercy of the polity (not to mention what rights we have in the first place) cannot be the solution. Limiting government by permitting the polity to decide which areas, interests, or classifications are off limits to state regulation invites majority tyranny. Though we move one step forward – permitting "private" acts to be now made "public" – such a dynamic characterization of rights takes us two steps back – permitting the democratic majority to define away liberty. In fact, if a majority must validate rights, the reflexive account has the perverse advantage of giving such decisions an imprimatur of legitimacy. These rights (according to the reflexive theorist) derive their normative scope from the polity. At least the democratic polity in the republican alternative would be hard-pressed to hold out its decision as a conventional claim of justice having thrown out rights. But in the hands of the reflexive majority, such rights threaten justice but under the guise of ensuring equality and freedom. The reflexive account legitimizes these majority tyrannies.

The underlying problem with the reflexive account is its insistence on clinging to rights. Simply retooling the conventional account of limited government is not good enough. The fact that rights generally attach to individuals (specifying those interests or areas beyond the scope of state regulation) and the fact that democracy attaches to the community render any attempt to connect the two hopeless. It is like trying to stick a square peg in a round hole. It just cannot be done. Democratizing rights is not the solution.

The problem of tolerance

Tinkering with the classic characterization of rights is also insufficient in removing the problem of tolerance. Even if the democratic polity defined

the right to intimacy broadly including gay sex within its ambit, the kind of protection this right offers is itself not genuinely equal. That is, the conventional way of limiting government actually fails to secure true liberty. Michael Sandel criticizes privacy – and here I mean a right to intimacy – in this very way, claiming it promotes tolerance rather than acceptance.[26] To understand why an acceptance regime is superior to a tolerance regime, it is crucial to realize that toleration, a widely touted liberal concept, is permission to *deviate* from a standard. The *Oxford English Dictionary* defines the technical use of "tolerance" as the "small margin within which coins, when minted, are allowed to deviate from the standard fineness and weight."[27] The *American Heritage Dictionary* defines tolerance as "leeway for variation from a standard."[28] In the religious context, Catholic theologian John Murray writes that toleration "implies a moral judgment on error and the consequent adoption of a moral attitude, based on charity, toward the good faith of those who err."[29] From all three definitional perspectives, tolerated behavior is erroneous, "deviant" behavior that is only reluctantly permitted. By forcing the act into the bedroom (this is the only way it can be protected), the act becomes unworthy of public consumption. It is a shameful practice that must stay behind closed, "private doors," or so this argument goes. Since the conventional account of limited government isolates interests, areas, or kinds of behavior deserving protection, the right to privacy must characterize gay sex as "private."

Sandel's lament here is one of disparity in respect or what Nancy Fraser calls the harm of "misrecognition."[30] While heterosexual sex, at least the monogamous, procreative kind, is no doubt valued in society – the goodness of this sexual activity is apparent – gay sex is short changed by being swept under the proverbial right to privacy rug. It is seen as a deviation that is reluctantly permitted. Effectively, while gay sex is simply tolerated, straight sex is accepted. "[B]y refusing to articulate the human goods that homosexual intimacy may share with heterosexual unions"[31] the right to privacy argument used to protect gay sex is woefully inadequate. It protects gay sex by invariably demeaning it, placing it in that sphere or space off limits to state interference. After all, I must characterize my sexual act as private to invoke the right to privacy argument.

Or, we can put the argument another way, not from the point of view of the "deviant" behavior, but from the point of view of the "normal" behavior. It is revealing that such a right is unnecessary for couples

[26] Sandel 1996: 106–108. [27] www.oed.com.
[28] *American Heritage Dictionary* 2001: 858. [29] Murray 1993: 150.
[30] Fraser 1997. [31] Sandel 1996: 107.

engaging in procreative sex,[32] since such activity constitutes the standard. *Griswold v. Connecticut* (1965), the Supreme Court case that first articulated the due process right to privacy, involved a challenge to a law that prohibited the use of contraceptives for married individuals. The statute at issue effectively sought to outlaw *non-procreative*, heterosexual sex, sex that did not constitute the standard. Because the sex at issue was not "normal," privacy was necessary. Unsurprisingly, there is no worry that a democratic polity will pass a law outlawing conventional, procreative heterosexual sex within marriage. Even imagining the introduction of such a bill by a legislator seems outrageous. The "normal," gold standard of sexual activity need not be relegated to the private sphere in order to gain protection.

The right to privacy is simply unnecessary for protecting such activities, since most individuals have an interest in permitting them. As long as a majority of the polity cares about something equally, it can be left to the democratic process to ensure. For example, no one ever says to the straight married couple about to engage in procreative non-kinky sex, "what you do in your bedroom is your business!" Under a right to privacy, this often-used mantra is only for those acts we disapprove of but begrudgingly tolerate. Only deviations (leeway) from this standard *require* appeal to privacy.

Jed Rubenfeld argues that the right to privacy staves off normalization, ensuring that the government does not force or compel us to standardize ourselves, to live cookie-cutter lives.[33] For example, limiting sex only to heterosexual intercourse pushes us to lead a certain way of life. Privacy prevents this standardization, or so Rubenfeld contends. But by invoking the right to privacy or intimacy to protect certain behavior we have by this very fact deemed it abnormal. It is true that with a right to privacy, the state may not stop me from having sex with a man. Nevertheless, by the very fact that I must appeal to this right to protect my "life-style," the state has implicitly rendered it "deviant." As demonstrated above, this is Sandel's very critique of the right to privacy.

Since the protection of conventional heterosexual sex does not require the right to privacy, the state ends up compelling us to engage in certain sexual acts and not others. The fear of normalization that Rubenfeld so decries occurs not only by laws outlawing certain acts (it is illegal for me to have oral sex with a man) but also by the social stigma that attaches to

[32] Heterosexuals may also require the use of such a right. Non-procreative sex (oral sex, for example) may still be considered "abnormal" or "deviant." When I refer to heterosexual sex, I mean procreative, monogamous sex carried out within the bounds of marriage.

[33] Rubenfeld 1989.

sexual acts requiring the suspect appeal to privacy. By merely taking cover under a right to privacy, the state has stamped the sexual minority as unsuitable for the public. Rubenfeld is caught in a catch-22. Rubenfeld's reason for the right to privacy, his contention that the problem of normalization will disappear, pushes against privacy's very adoption. Rubenfeld's justification fails on its own terms. The problem of tolerance is inherent to a right to privacy.

Moreover, invoking this right with its regime of tolerance often suggests that such practices are crucial to the formation of identity. Since sexual acts may define who we are or play a large role in our self-definition, the state ought not curtail our ability to engage in them. Michelman makes just such an argument in his criticism of *Bowers*. "It seems very likely that among the effects of a law like Georgia's [the sodomy statute] on persons for whom homosexuality is an aspect of *identity* is denial or impairment of their citizenship, in the broad sense which I have suggested is appropriate to modern republican constitutionalism."[34] This republican conception of citizenship treats the regulation of gay sex as problematic, because such laws interfere with important identity-formation or self-definition.

But even assuming that we can figure out when such self-definition is at stake and thus when privacy should kick in, the problem is that sometimes we may engage in these acts for reasons unrelated to self-definition. Someone may partake in gay sex for purely physical pleasure having nothing at all to do with any gay-identity formation.[35] Michelman's focus on the "identity" forming nature of the sex act exemplifies the pathology of rights. The right to privacy seeks to categorize the relevant behavior or activity in order to determine whether it merits protection. This is the conventional way of limiting the scope of democratic government. If it is part of a sexual minority's identity formation, it falls within privacy's ambit or protection. But this overlooks the more important point. Who cares why the sex act is being done? Someone could engage in a night of gay sex to experiment, to honor a dare, to impress a friend, or to solidify identity. The motivation for the activity does not seem relevant. Rather, the sex act itself should be protected *regardless* of its intention or role in self-definition.

Now Sandel's panacea to the problem of tolerance is a move to a regime of acceptance. He argues that the solution is to create another, legitimate standard to stand alongside the traditional procreative one. By touting the obvious merits to gay intimacy, the state can set up another norm. As a republican, Sandel sees the positive act of democracy as necessary to validate such sexual behavior. Gay sex under an acceptance regime is no

[34] Michelman 1988: 1533 (emphasis added). [35] Rubenfeld 1989.

longer just tolerated but actually *accepted* as another legitimate sexual activity. He writes that a "fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live."[36]

The problem is that this republican enterprise, if even possible, turns out to be too restrictive. Whom should we admit to this sexual Kingdom of Ends? Would Sandel have us publicly articulate the valuable qualities of sex that is anonymous or purely physical – the paradigmatic one-night stand or even the consensual bathhouse orgy? How many standards (or norms) do we create? Do we create one for experimentation? Or a standard for sex done to fulfill a dare?

And even if this is possible, how do we even go about extolling the virtues of these sexual practices? Suppose we decide upon certain criteria of worthiness – the values of love or monogamy. The problem is that in applying such values we invariably exclude those practices or behavior that fail to meet them. Paradoxically, Sandel's plea to accepting gay sex may very well turn out, in the lingo, hetero-normative – valuing such "deviant" sex by re-characterizing it as "acceptable" and "mainstream." This hetero-normativity may also exclude straight one-night stands, orgies, or consensual sadomasochistic sex. Though Sandel may very well be satisfied with such a result – he advocates a thick notion of respectable sexual behavior – his republican alternative is quite restrictive.

Put differently, the point is that while I may find no redeeming value in a one-night stand or a same-sex orgy, someone else may. The problem with a regime of acceptance is that it falls prey to a new kind of categorization with its new rules for defining the sheep from the wolves. Rather than categorizing behavior in a realm of the private and intimate (as in a regime of tolerance), acceptance seeks to characterize a list of activities as meaningful or valuable, and in so doing invariably excludes or demeans others. An acceptance regime, though preferable to a tolerance one, is unlikely to properly secure freedom and equality.

Add insult to injury, the conventional regime of limited government has the perverse consequence of making it that much easier for the state to tyrannize. By leaving "private" issues beyond the scope of state regulation, this regime invites the state to regulate those issues that are "public." A paradigmatic example is same-sex marriage. The privacy argument that gays should be allowed to sleep with the partner of their choice has no force with the issue of same-sex marriage. Marriage is a "public" benefit and does not implicate the same concerns. We can confidently champion the right to sleep with someone of your own choosing – given the regime of

[36] Sandel 1996: 107.

tolerance – but fail to extend this logic to same-sex marriage. Why? The pathology of classification permits one to categorize gay sex as a *different* issue than same-sex marriage, allowing the former and forbidding the latter. After all, according to the account of limited government I criticize, "public" activities are subject to regulation by the state. While what people do in their bedrooms is their business – the state may not pass a sodomy law – democratic majorities may regulate what they do outside of it – the state may prohibit same-sex marriage. The usual method of limiting government, then, is a double-edged sword. On one hand, as I suggest above, it shields harm from state regulation as it merely tolerates behavior. On the other hand, it permits the polity to jeopardize liberty.

Frustrating democratic debate

My final criticism focuses on that which the reflexive concept of rights holds in such high esteem, namely democratic debate. I argue that the language of rights renders debate unnecessarily frustrating. If various members in the democratic polity must discuss, validate, and define rights, the hope is that some common ground will be available. If the debate is incommensurable, if the opposing parties in the democratic polity talk past one another, "democratic iteration" seems at worst pointless and at best needlessly exasperating. I say "needlessly," because, as I will argue below, rejecting rights turning to Justification informs a more productive debate.

With rights, the debate is invariably about what relevant category should be invoked – is it, for example, an issue of privacy, or women's equality, or free speech or property. This leads to the problem of incommensurability. One group claims that the activity falls under a non-protected category and the other group claims the opposite. For example, affirmative action opponents contend that race-conscious programs are a kind of racial discrimination. These programs violate a person's right to formal equality. Proponents of such remedial legislation characterize the very same activity – treating individuals of one race differently than those from another – as an anti-subordinating measure, as truly promoting equality. According to this pro-affirmative action position, there is no violation of a right to equality. What category is relevant – formal equality or anti-subordination? How is it, then, we can even debate the issue? At best, we are stuck convincing each camp to re-characterize the activity as falling under the other.

Abortion is an even better example of the frustrating nature of debate carried out within the language of rights.[37] Since *Roe v. Wade* (1973), a

[37] MacIntyre 1984: 7; see also Glendon 1993: 47–75.

woman's decision to abort has revolved around whether removing the fetus is about the right to life, a right to privacy, or a right to women's equality. The political and legal debate is about which category abortion falls under. This is how the conventional view determines whether abortion is beyond the scope of state regulation. And the stated purpose of the reflexive account is to decide the meaning and scope of rights. According to the pro-lifer, abortion is about saving innocent lives. If this is the correct category abortion falls under, the woman may not remove the fetus. She must carry it to term. For the pro-choice counterpart, on the other hand, the very same activity is an issue of privacy (bodily integrity) or women's equality. Given this categorization, the woman has the option of removing it. One claims the right of the fetus or a right to life, the other the right to privacy or perhaps the right to woman's equality. Both sides look to the individual woman characterizing her behavior in mutually exclusive ways. Nothing can be said to the pro-lifer to convince her that the activity is not "murder" falling under the category of life. And the pro-choice advocate is firm on seeing abortion as a matter of privacy or women's equality.

In her scathing critique of "rights talk," Mary Ann Glendon argues that:

> A tendency to frame nearly every social controversy in terms of a clash of rights … impedes compromise, mutual understanding, and the discovery of common ground. … A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic obligations.[38]

Rights pose the wrong question. In asking what category the activity – removing the fetus, preferring the black candidate in lieu of the white one – falls under, we cannot help but run up against incommensurability. With no common ground, the debate over the correct characterization – privacy, life, formal equality, or anti-subordination – becomes quite frustrating. Short of what the relevant activity is, there is nothing that these opposing factions can agree upon. There is no way to decide or debate whether abortion is beyond the scope of state regulation. An appeal to spaces, interests, and classifications to limit democratic government is not fruitful in generating democratic debate.

Part of this problem is that rights are seen as the province of the law. They are legal constructs that require special training in constitutional law. All too often, we resign the issue to courts, placing our faith in their hands. Who else can adjudicate and decide upon the scope of these rights? Paradoxically, seeing the debate as one of rights problematically takes us out of it, relegating the decision to courts. In so doing, it is no surprise that

[38] Glendon 1993, xi.

the demos is likely to pass the buck – fail to take up their democratic role – simply because the debate is too often seen as one involving rights.[39]

In this way, deciding on what abortion is about – life or privacy – does not require a democratic decision. The inquiry simply concerns the correct characterization of abortion. It is as if the pro-lifers see the overturning of *Roe* as invariably deeming abortion illegal. At issue in *Roe* was a Texas statute outlawing abortion. A reversal of *Roe* would not mean that abortion is unconstitutional but only that the debate would be in the hands of the states, the relevant democratic polities. After all, even before *Roe*, four states – New York, Washington, Hawaii, and Alaska – freely permitted a woman to abort during the first trimester.[40] Even Justice Antonin Scalia, one of the most conservative members of the Court, does not contend that the Constitution *requires* that abortion be illegal, that the woman *not* be able to abort. Rather, Scalia argues that:

> [B]y banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.[41]

Scalia desires to leave the issue in the hands of the states. But the pathology of rights – and its concern with individuals – has left the value of democracy in deciding the abortion question out of the debate. By failing to reject the reigning methodology of limiting government, the reflexive conception of rights threatens liberty while frustrating and even weakening democratic debate. I introduce my preferred solution in the next Part.

[39] Cf. Bickel 1986: 22. [40] Burt 1992: 348.
[41] *Planned Parenthood v. Casey* (1992) at 1002, dissenting, J. Scalia.