SEEKING THE CENTER

Politics and Policymaking at the New Century

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and Martin Shapiro
Editors

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On the Resilience of Rights

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Beginning sometime in the 1960s, what has been called a "rights revolution" transformed American public policy.[1] Civil rights law, more or less comatose since Reconstruction, was revived, and its benefits eventually extended beyond African Americans to additional beneficiaries—other racial minorities, religious minorities, women, the aged, people with disabilities, and eventually gays and lesbians. "Due process" in various forms was provided to welfare recipients, schoolchildren, criminal suspects, prisoners, and the mentally ill. A host of consumer and environmental laws were advertised as creating rights to clean air and water, and safe and effective products. New constitutional rights, most prominently the right to privacy, came into being. A bunch of fiscal "entitlements"—welfare, disability, and medical support programs—became obligations of the federal government.[2]

This brief recitation suggests the variety of policy mechanisms commonly lumped under the heading of "rights." Some of the rights in the rights revolution grew out of the Constitution, others out of statutes, others through regulatory processes. Some were justified by concerns about equality; others were animated by notions of autonomy, or social decency, or procedural fairness, or a combination of all these things. Some of these rights solely governed public officials; others were aimed at reshaping the behaviors of businesses and individuals.

Given this variety of origins and effects, it's not clear why all these disparate policies have been lumped together—or why any

analyst would hope to make generalizations about them. Yet generalizations are frequently made, usually by critics of the rights revolution. Among the most common criticisms of rights is that they are too strident and inflexible. Communitarian critics of rights argue that rights impose hard and fast rules where give and take is needed instead. Claims of interests, they say, can be compromised, but rights claims are inherently intractable.[3] For example, the political theorist Charles Taylor argues that debate over abortion has become polarized in part because it has become a debate over rights, either the privacy right of the woman or the right to life of the fetus: "[J]udicial decisions about rights tend to be conceived as all-or-nothing matters. The very concept of a right seems to call for integral satisfaction, if it's a right at all; and if not, then nothing."[4]

Mary Ann Glendon, in her influential analysis of the rights revolution, focuses her ire not so much on rights themselves, but on the strident, absolutist rhetoric that accompanies them: "in its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over."[5]

This emphasis on the stridency of rights claims is common among both academic and popular commentators.[6] It gets to the heart of what many find so troublesome about rights: their tendency to overwhelm other considerations, to flatten and simplify discourse over public policy. Yet this focus leaves certain puzzles.

First, although rights rhetoric is often absolutist, in practice rights are constantly being compromised against other concerns—rights are almost never "trumps" that overcome all competing claims.[7] So while in form rights might seem strident and absolutist, in function they turn out to be much more pliant. Even the right to an abortion has turned out to be more flexible than previously imagined, a point pursued later.

Second, though rights are sometimes considered beyond politics, the recognition of a right rarely ends the struggle among competing forces. It simply changes the rules. The result is a "politics of rights," a continuing battle over the implementation of rights.[8] And the politics of rights often looks a lot like the politics of other forms of public policy.

These two observations raise the main questions of this chapter. If, despite the absolutist rhetoric of rights, a struggle over rights continues in American politics, what is likely to be the fate of the

rights revolution? The question is sharpened by conservative gains in all the institutions of government in recent years, particularly the federal courts, which have resulted in challenges to nearly every component of the rights revolution. In this environment rights appear uniquely vulnerable. Despite their rhetorical power, many of the rights in the rights revolution were built on shaky political foundations. They were crafted by ephemeral coalitions of policy entrepreneurs and public interest groups, bound more by the power of their ideas than by highly mobilized constituencies. If even "iron" triangles could be dissolved, what should we expect will happen to rights policies when they are attacked? In sum, how *resilient* should we expect rights policies—especially those of the rights revolution—to be? This chapter seeks to answer these questions, drawing on recent developments in rights politics and on academic analyses of the politics of public policymaking.

Rights as Entrenchments of Duty

First it is important to define exactly what I mean by "rights." Wesley Hohfeld, in his classic exposition on the nature of rights, concludes that they have one defining feature: they correspond with duties.[9] To say that someone has a right, Hohfeld maintains, is to say that the person has a just claim that a duty be performed by another. Indeed, Hohfeld implies that legal duties *always* correlate with rights. For example, the law against homicide correlates with a right not to be murdered. Or, to take an example from the rights revolution, a duty not to pollute water correlates with a right to clean water.

Critics of Hohfeld have taken issue with the notion that duties always correlate with rights, in part because they have a more expansive definition of rights than he did.[10] For the rights of the rights revolution, however, Hohfeld's assertion seems uncontroversial: this brand of rights quite clearly always involves duties. Civil rights statutes told government officials they had a duty to treat people equally and to punish those outside the government who did not follow suit. Environmental protection statutes authorized the government, in protecting the rights of the public to clean air and water, to punish polluters. Due process rules told governmental officials that they had to do certain things—hold meetings, develop records, listen

to testimony—before making a decision. Welfare rights forced government officials to provide benefits to eligible recipients. The new rights mostly committed the government to action rather than inaction.

The relationship that Hohfeld suggests, of right to duty, is not merely a conceptual nuance. Indeed, I believe it most helpful to think about the growth of rights in American politics as an establishment of new duties. Contrary to the declamations of some critics, then, the proliferation of rights is best understood as an expansion of, rather than a diminution of, social responsibility. The new rights are more about telling people what to do than telling them to do whatever they wish.

Rights do their work by *entrenching* duties. By this I mean that they create a presumption that the duty will be fulfilled, even over countervailing considerations. "Entitlements," for example, are privileged over other budget items, making the process of cutting Social Security much more difficult than, say, cutting the Tennessee Valley Authority. Similarly, the goals of clean air or clean water are privileged in environmental statutes against considerations such as the cost of pollution abatement. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to command that government's duty to treat citizens of different races equally is outweighed only by a "compelling interest." Under the Americans with Disabilities Act, the right of people with disabilities to "reasonable accommodation" at a work site can be displaced, but only if an employer can demonstrate "undue hardship."

So rights create a presumption about duties, and to overcome this presumption one must do more than "the usual." We can say that the more one has to do to displace a presumption of duty, the more *legally entrenched* it is.

But there's another kind of entrenchment, one that comes from a sense that connected with the mechanisms in the law is a larger *moral* obligation. The civil rights movement was in part aimed at convincing Americans that they owed blacks equal treatment, just as the disability rights movement aims to convince Americans that they owe people with disabilities accessible buildings. When a principle becomes morally entrenched, it creates the presumption one has to have more than "the usual" reason for displacing it. For example, the fact that the United States has a national debt is not by itself generally viewed as a sufficiently compelling reason to eliminate guaranteed payment of Social Security or Medicare, though it has been

considered a reason to slice other programs. To the extent that the public believes that one has to have more than "the usual" reason for displacing a presumption, the more *morally entrenched* it is.

Legal entrenchment and moral entrenchment need not go together. A law can legally entrench a duty, but no sense of moral entrenchment need attach to it. In the area of entitlements, for example, public opinion data suggest that few people really thought that taxpayers had a duty to provide an unending stream of AFDC (Aid to Families with Dependent Children) benefits to eligible recipients.[11] Similarly, it seems there is no widespread belief that immigration officials must provide extensive hearing procedures to certain categories of illegal immigrants whom they deport.[12] Policy entrepreneurs who advance rights laws desire to develop an accompanying sense of moral entrenchment, but moral entrenchment is neither a prerequisite for nor a necessary consequence of legal entrenchment.[13]

When duties are both morally and legally entrenched, they are safe from abolition, but they are still subject to various forms of diminution. Despite the popularity of Ronald Dworkin's metaphor, rights are never really trumps, after all.[14] Rights simply tell judges and other policymakers that there's a presumption against displacement of duty by other considerations. Policymakers who are unsympathetic will lower the presumption. For example, the Rehnquist Court decided that states need not come up with a "compelling interest" when displacing (through a law neutral on its face) the duty to protect the free exercise of religion.[15] This example could be multiplied many times, across many policy realms and areas of law. The struggle over the implementation of legally entrenched duties is a major feature of American politics, one which undercuts the notion that rights are all-powerful in the United States. Yet as I will suggest later, the flexibility of rights can also be a source of strength.

Why Rights Have Proliferated

On my account, the "rights revolution" consists of two distinct but related phenomena: the proliferation of legal entrenchment and the proliferation of moral entrenchment.

I'm more certain about the proliferation of legal entrenchment in American public policy over the last thirty years than moral entrenchment. True, American society has taken on a lot of new moral obligations lately, attempting to ensure that all kinds of groups are treated fairly and equally, and that, as Lawrence Friedman put it in his book *Total Justice*,[16] no one suffers too much from things that are not his or her fault. But we should not forget that there are also moral obligations that have gone out of style during this period—for example, that we should protect people's property, that we should protect the autonomy of community decision making, that we should protect parents' rights, that we should protect traditional Christian morality. There's clearly been a *shift* in moral entrenchment, but it's not so clear that there's been growth, at least on the scale that labels like the "rights revolution" suggest. In any case, I want to bracket off the issue of the growth of moral entrenchment, since it is far beyond the scope of this chapter. Instead I will suggest some of the mechanisms by which, even in the absence of moral entrenchment, legal entrenchment might be expected to grow, particularly in an era of divided government.

To understand the causes of the growth of legal entrenchment, we must consider the factors that create incentives for policymakers to cast their desires in the form of rights. Four such factors have been identified by students of public policy: nationalization, cost shifting, venue shifting, and distrust.

Nationalization

As Robert Kagan has argued, federalism encourages activists to advance rights-based arguments as a way of nationalizing policymaking. Kagan provides a vivid example of this phenomenon, drawn from public policy regarding policing, a realm in which federalism posed a profound obstacle for reformers.[17] In most nations police officers belong to a single national agency, so it is comparatively simple for would-be reformers to gain authority over them. In the United States, a federalist system, those who wanted to reform the police had to somehow reach the practices of local police departments across the nation. The solution to this problem lay in the judicial branch. Faced with the difficulties of redirecting thousands of localities, police reformers turned to the Supreme Court, which expanded old constitutional rights and developed new ones in such areas as search and seizure, right to counsel, and interrogation of suspects.[18] These rights became the mechanism by which the practices of police were brought under control. A similar phenomenon is

seen in civil rights law, in which the proliferation of rights is at least in part an effort to control local and state officials. In a federal system, changing policy often requires getting states and localities to do your bidding. Aside from bribery, in the United States the only sure way to do this is through the entrenchment of duties. Thus, policymakers who seek to nationalize policy in a federal system will seek new rights.

Cost Shifting

Another motivation for the entrenchment of duty is to push the costs of a policy off onto others. It is a commonplace observation that policymakers like to create "unfunded mandates"—laws that require the private sector and other levels of government to fulfill some duty. The policies of the rights revolution typically involved such mandates. For example, the pioneering environmental statutes pushed costs of compliance off onto private actors, along with states and localities. If a policy initiative is characterized as a social goal, then it follows that the costs of the policy should be socialized. But if the initiative is characterized as a matter of rights, then every individual has a duty and should bear on her own the costs of fulfilling this duty. Thus, the rhetoric of rights is attractive to policymakers who want to take public action without dipping into their budgets.

Venue Shifting

Activists frequently turn to courts when they cannot obtain satisfaction in other venues. The civil rights movement is the most prominent example, but there are many others.[19] Shep Melnick and Steve Teles, for instance, both point to the importance of venue seeking in the evolution of the welfare rights movement.[20] As Frank Baumgartner and Bryan Jones have observed, the venue one chooses shapes the claims one puts forward.[21] To engage courts and judges, one must speak their language, and rights are a primary constituent of that language. So wherever activists turn to courts, they will cast their demands in the form of rights.

Distrust

In a system of separation of powers, policymakers in one branch have good reason to distrust the intentions of actors in the other branches. In a system of federalism, policymakers at one level of government have good reason to distrust the intentions of actors in the other levels. In a political culture whose hallmark is distrust of government authority,[22] individuals at least believe that they have good reason to distrust the intentions of *all* government officials. A common response to all these forms of distrust is to entrench duties on others, and so distrust plays a role in many policies from the rights revolution. For example, the strict statutory guidelines written into the major environmental statutes reflected in part the distrust of Democrats in Congress, who feared that Richard Nixon's Environmental Protection Agency (EPA) might be less than vigilant in policing industry. The early gains of the welfare rights movement reflected judicial distrust of local welfare officials: judges interpreted welfare eligibility rules so as to reduce the discretion of these officials.[23]

These efforts to entrench duties would seem unexceptional if not for an interesting feature of American political history: In much of the first half of the twentieth century, leaders of the majority party in Congress often trusted government agencies to use their discretion wisely, either because they accepted the idea of neutral expertise or because they expected those who staffed the agencies to have their same views. Once this trust evaporated, activists of all stripes had a strong incentive to create legal entrenchments that could be enforced in court. The importance of distrust in the enactment of rights is a story told by many scholars of public policymaking.[24]

If all these factors work as students of public policymaking suggest, the fact that activists attempt to entrench their presumptions in law is deeply unsurprising. What needs to be explained instead is the exceptional case when those who want the government to do something *neglect* to entrench their presumptions. The opposite of rights is discretion, and the delegation of discretion needs to be analyzed along with the entrenchment of duties. The grand delegation of discretion and funds to agencies and local government in the New Deal era seems in retrospect to be the exception, not the rule. Legal entrenchment, because it serves the interests of distrustful policymakers in a federalist, separation of powers system, seems the natural condition of American politics. So the proliferation of legal rights, at least in American politics, appears almost a necessary consequence of the growth of government.

The Counterattack

Nonetheless, attempts have been made to curb or reduce the range of rights. At the level of rhetoric, conservatives have responded to the rights revolution by emphasizing countervailing values, for example, of community order and individual responsibility. These themes have more recently found a place in the writings of the communitarian movement. "The Responsive Communitarian Platform," written in the early 1990s and signed mostly by liberal academics, urges attention to "the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights."[25] It is easy to make fun of academics with their manifestos, but once in a while these documents do presage developments in politics. In this case, communitarian rhetoric has filtered down from academic journals, with their precise discussions of civic republicanism, to the Democratic party, where "rights *and* responsibilities" has become a common theme.

The debate over welfare reform featured much more of the former than the latter. This debate was a rare example in which a right—the right of eligible recipients to AFDC—was curtailed.[26] Many Democrats and liberal organizations opposed welfare reform, but few of them did so on the principle that Americans have a right to welfare. This suggests, as I have argued earlier in this chapter, that the AFDC entitlement was entrenched legally but not morally and thus vulnerable to challenge.

Besides AFDC, the other forms of rights that have been eliminated are mainly procedural. In the wake of the Oklahoma City bombing, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act, a law that takes away the habeas corpus rights of death-row inmates, leaving them only "one bite of the apple." The Supreme Court has upheld the constitutionality of this restriction.[27] The Prison Litigation Reform Act, similarly, reduces the ability of inmates to sue for violations of their rights. As part of a series of immigration bills, Congress has recently restricted the right of noncitizens to challenge their deportation.[28] Tort reform laws passed in many states restrict the ability of individuals to sue for personal injuries they have received.

Much more common than elimination, however, is the diminishment of rights during implementation. After all, not even the most cherished constitutional rights are entrenched beyond challenge. States can pass laws violating freedom of speech, discriminating between individuals on the basis of race, and curbing religious freedoms, though only if they can demonstrate that a "compelling interest" requires this. The strength of a right—its level of entrenchment—is based on how strong the countervailing consideration must be to overcome it. The strength of rights is continually being adjusted, and much of the conservative attack on the rights revolution has taken the form of demands to adjust presumptions downward. So, for example, in *Planned Parenthood v. Casey,* the Supreme Court upheld the basic right to an abortion but downgraded the level of presumption. Where before only a "compelling interest" could justify restricting first-term abortions in any way, after *Casey* any regulation which does not pose an "undue burden" on the right is acceptable.[29] Similarly, in statutory interpretation, the Republican-dominated federal judiciary in the late 1980s interpreted civil rights laws so as to lower the duty of employers in defending policies which have a "disparate impact" on racial minorities. Congress in turn responded by raising these duties back to their original level with the 1991 Civil Rights Act.[30] The adjustment of rights is the primary strategy of attack against the rights revolution.

Another strategy is the promotion of counterrights, a method by which conservatives seek to beat liberals at their own game. For example, victims' rights policies have spread throughout the states, with Bill Clinton even endorsing a constitutional amendment on the subject. Similarly, "Megan's Law" and other such "right to know" policies have been promoted to counter what many consider the excessive civil liberties of convicted sex offenders. To counter environmental rights, property rights laws have been promoted in Congress and enacted in several states. To counter the Internal Revenue Service, everyone's favorite villain, a "taxpayer's bill of rights" has become law.

The fact that conservatives have been driven to create their own rights as a supplement to, or even substitute for, the attack on the rights revolution suggests just how resilient the revolution has been. The result is a kind of population explosion of rights: New rights are continually being born, but old rights have not for the most part died.

Generic Causes of Resilience

What factors might help us understand the resilience of rights policies? First, rights may be resilient for the same reasons that other types of policies are resilient. Rights, like any kind of policy, create

what Paul Pierson has called "policy feedbacks," mechanisms by which the existence of the policy shapes future choices.[31] I want to consider briefly the relevance of three general types of policy feedback to rights.

Settled Institutions/Expectations/Commitments

Institutions and actors often make their plans based on their assumption that a public policy is settled, so unsettling the policy threatens great disruption. This creates what Pierson calls "policy lock-in."[32] The most familiar example of this phenomenon is the Social Security program. Any change to the program potentially disrupts the life plans of millions of people who have come to expect payments when they retire, so would-be reformers face a heavy political burden. The political consequences of such disruptions depend, of course, on the political power of those constituencies whose lives are affected: reformers who sought to abolish the AFDC entitlement generated comparatively weak opposition when they explicitly vowed to disrupt the lives of AFDC recipients along with the operation of those agencies that aid them. Lock-in effects don't seem to generally affect attempts to weaken or eliminate civil rights or civil liberties. Eliminating such rights, as some justices acknowledged in *Casey*, can greatly upset some members of the public and even undermine the legitimacy of the Supreme Court.[33] But this is not the strong form of lock-in suggested by the example of Social Security, in which abolition would cause not only consternation but disruption of long-settled life plans. Chief Justice Rehnquist has argued, in *Payne v. Tennessee,* that concerns about expectations—in law this is called "reliance"—are "at their acme in cases involving property and contract rights," but much less important for other forms of rights.[34] Thus, while the weight of expectations and earlier commitments does seem to be a factor in the fate of the rights revolution, it rarely reaches the level of importance that the "lock-in" terminology would suggest.

Settled Interests/Constituencies

Policies often create constituencies that in turn defend the policies from attack. The archetype of this pattern is the iron triangle, in which agencies, their constituent interest groups, and members of Congress exchange benefits and work together to protect their arrangement. With the obvious exception of entitlements, rights

policies don't develop clienteles in precisely the way iron triangles do, but they do attract constituencies. The most obvious constituency is the lawyers who employ rights in litigation, and in fact attorney groups and public interest groups who bring lawsuits often lobby against changes in rights.[35] This, however, is a rather limited constituency. It does not include the potential *beneficiaries* of rights, who often remain unorganized. In the area of due process, for example, there is little organization of potential beneficiaries. In part this is because many of the beneficiaries lack resources and political power: prisoners, immigrants, welfare recipients, and criminal suspects are the prototypical weak claimants, so it's not surprising that they have not organized effectively. (It's also unsurprising that the few rights that have been wholly eliminated have been associated with these politically weak claimants.)

Another factor, however, also leads to low level of organization of beneficiaries: most people don't worry much about rights until they need them. For example, plenty of nonpoor, nonminority people every day find they have a strong interest in the rights of the accused, but too late to do much about this.[36] Because the beneficiaries of many rights are an amorphous group, rights may be less protected by their constituencies than other forms of public policy.

Settled Ideas/Meanings

Policies often create a conceptual framework for understanding a social problem which is not easily uprooted. Baumgartner and Jones call this a "policy image." They note, for example, that nuclear power for many years had a positive policy image, involving the control of nature for human gain by well-respected experts. This image was, of course, dislodged by the environmental movement.[37] But policy images often have a staying power, and this may be particularly true with rights—once a problem is identified as an issue of rights, it seems especially hard to think about it in another way. As Marc Landy has observed, once environmental policy was considered a matter of rights, "there simply was not readily available repository of intellectual discourse that both displayed sympathy for claimants, proposed to help them, and yet rejected their rights claims."[38] I have noted a similar pattern in disability policy.[39] Where rights are involved, debate often becomes polarized between those characterized as "for" and those "against" or, even more commonly, between supporters and those who favor competing rights. It is

hard to break out of these ways of thinking once they are established. Rights limit the scope of policy debate, and this in turn protects them from some forms of attack.

The Particular Resilience of Rights

Beyond these generic causes of policy resilience, two characteristics of rights may contribute to their durability: they are at once *entrenched* and *flexible*.

The first point, about entrenchment, is tautological, since I have defined rights as entrenching duties. Entrenchment is, in fact, the main feature that separates rights from other policies. Rights entrench duties in rules (legal entrenchment) and in attitudes regarding social obligations (moral entrenchment). By definition, then, it takes more than the usual effort to eliminate a right. Opponents of an entitlement can't simply cut a budget item; opponents of a constitutional right can't simply pass a law overturning it. Opponents of a statutory right can repeal it but often don't—in part because of the difficulties of passing any law, but also because a statutory right often comes to be seen as a social obligation rather than a policy choice. These barriers can be overcome. Ideas about social obligations change over time, so that even rights entrenched in both law and public attitudes can on occasion be swept away. The turn of the 1930s Supreme Court on issues of economic regulation is a particularly dramatic example. The entrenchment of rights, though, generally makes them difficult to attack.

Yet while rights are entrenched, they are also surprisingly flexible. Like a program budget, which can be adjusted from year to year based on fiscal constraints, rights are far from dichotomous: they can be moved "up" and "down" depending on the political mood, as I've suggested. Rights, remember, are never really trumps but instead presumptions about duties. The strength of those presumptions is always being adjusted. Consider, for example, one of the most famous rights given to criminal defendants as part the rights revolution, the *Miranda* rule. This rule excludes from trial confessions illegally obtained by police officers who neglect their duty to advise suspects of the right to remain silent and to obtain an attorney. Contrary to the predictions of some observers, the Burger and Rehnquist Courts failed to abolish *Miranda*. In the recently decided *Dickerson v. United States*, Justice Rehnquist's majority opinion held that *Miranda* was so entrenched that it could not be repealed: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[40] Yet while the Supreme Court has upheld the basic rule of *Miranda*, it has at the same time chipped away at its application. The Court, for example, has limited the range of circumstances in which Miranda warnings must be given and allowed confessions from unwarned suspects to be admitted at trial in some instances.[41]

As the example of *Miranda* suggests, the flexibility of rights invites a piecemeal attack rather than a frontal assault: Opponents rightly calculate that the strategy of adjustment has a greater likelihood of payoff—and lower cost—than a campaign for repeal. Overturning *Miranda* would have created a furor, but diminishing its application incrementally has had little fallout. A frontal attack on rights is likely to be highly visible and so attract determined opposition; an attempt to adjust rights downward is routine and often all but ignored.[42] For this reason, adjustments to rights are common, but the wholesale elimination of a right is a rare event, rarer even (I suspect) than the elimination of a federal program or agency.

Conclusion: The Rubberiness of Rights

The main theme of this chapter, and the book in which it resides, is resilience. This is ironic, since *The New Politics of Public Policy* was aimed at demolishing an older picture of resilience, a vision of interest group pluralism in which the possibilities for political change were sharply restricted. Seeking a metaphor for this resilience, scholars and journalists seized on the image of an "iron triangle," and, later, of "gridlock." *The New Politics of Public Policy* took issue with this vision of resilience on two counts. First, it demonstrated that there was nothing particularly ironlike about iron triangles—interest groups could be beaten under certain circumstances. Iron triangles were, in fact, vulnerable to outside actors, even actors armed mainly with the power of their ideas, as, for example, in the case of the 1986 Tax Reform Act. Second, *The New Politics of Public Policy* showed that political entrepreneurs, using such weapons as litigation and the formulation of new rights, had belied notions about "gridlock" by enacting new policies. Moreover, these entrepreneurs, operating in an

era of demobilized politics, often lacked the interest group support considered so significant by earlier generations of political scientists. Thus, the stability of interest group pluralism, the book concluded, was overstated.

In this volume, the theme of resilience is applied in a new setting: this book ponders whether the creations of the political entrepreneurs *The New Politics of Public Policy* celebrated and criticized are themselves resilient in the face of a conservative attack. I have offered some reasons to suggest that at least one subset of these creations, the rights revolution, is likely to be resilient. Students of public policy labeled the agency/client/Congress relationship an "iron" triangle. Rights might be best likened to an entirely different material: rubber, whose pliability is a source both of strength and weakness. Rights are not easily eliminated, but, like rubber, they can be stretched and molded in new directions. Thus, the politics of rights is far more flexible—more rubbery—than the rhetoric of rights would suggest.

This rubbery quality of rights is likely to become an increasingly prominent aspect of American politics, since we are witnessing, even several years after the glory days of the Rights Revolution, a continuing accretion of rights. The right to be free of a hostile workplace environment now competes with the right to speak in whatever way one chooses. The right of victims to have a say in the disposition of their attackers competes with the right of defendants to a fair trial. Each new rights claim is layered on top of older claims: environmental rights on top of property rights, victim's rights on top of defendant's rights, nonsmoker's rights on top of smoker's rights. It seems much easier to create new rights than it has been to get rid of old ones. Thus, American politics seems destined more and more to be a politics of rights.

Notes

1. Although the term *rights revolution* is widely used, it's not at all clear that those who use it have exactly the same phenomenon in mind. Some commentators see the rights revolution as a purely legislative enterprise, whereas others emphasize the increasing activism of the post-*Brown* judiciary. According to Cass Sunstein, the rights revolution involves "the creation, by Congress and the President, of a set of legal rights departing in significant ways from those recognized at the time of the framing of the American Constitution"; see Sunstein, *After the Rights Revolution* (Cambridge, Mass.: Harvard University Press, 1990), v. Mary Ann Glendon, on the other hand, seems to identify the rights revolution as primarily a judicial production, a product of increasing judicial activism following *Brown v. Board of Education*; see Glendon, *Rights Talk* (New York: Free Press, 1991), 7.

2. Aaron Wildavsky defined entitlements as "legal obligations that require the payment of benefits to any person or unit of government that meets the eligibility requirements established by law." Wildavsky, "The Politics of the Entitlement Process," in *The New Politics of Public Policy*, ed. Marc K. Landy and Martin A. Levin (Baltimore: Johns Hopkins University Press, 1995), 143.

3. This preference for interest claims over rights claims contrasts sharply with Theodore Lowi's argument in *The End of Liberalism*. Lowi's book, written in the midst of the rights revolution, can be seen as an argument against "interest" claims and in favor of rights claims. Lowi excoriates the grand delegations of discretion to agencies and localities that facilitated "interest group liberalism." As suggested later, Lowi's argument against delegation is in fact an argument in favor of rights policies, since the defining characteristic of rights is that they impose duties rather than delegate discretion. See Lowi, *The End of Liberalism*, 2d ed. (New York: Norton, 1979).

4. Charles Taylor, "The Dangers of Soft Despotism," in *The Essential Communitarian Reader*, ed. Amitai Etzioni (Lanham, Md.: Rowman & Littlefield, 1998), 52.

5. Glendon, *Rights Talk*, 9. Glendon recognizes that there is little relationship between the absolutist rhetoric of rights in the United States and the reality; she titles her second chapter "The Illusion of Absoluteness."

6. Consider, for example, the approach of Patrick Garry, a lawyer and author of *A Nation of Adversaries*, one of many recent popular commentaries excoriating Americans for their excessive rights consciousness. What concerns Garry is the individualism promoted by rights: "Their power is supreme and they trump all social considerations." Lawrence S. Connor, "Litigation in 'A Nation of Adversaries'" (review), in *Indianapolis Star*, June 28, 1997, p. A11.

7. R. Shep Melnick, in his chapter on the Education for All Handicapped Children Act in *The New Politics of Public Policy*, found that in case of disability policy "rights were more than symbols but less than 'trumps.'" This seems a good generalization about all the rights in the rights revolution. Melnick, "Separation of Powers and the Strategy of Rights," 26.

8. This insight was elaborated by Stuart A. Scheingold in his book *The Politics of Rights* (New Haven, Conn.: Yale University Press, 1974).

9. Hohfeld criticizes those who use "rights" more broadly; he argues that many legal relations wrongly termed "rights" (or what he calls "claim-rights") are really "privileges," "powers" and "immunities," none of which involves a correlative duty. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning I and II," in *Fundamental Legal Conceptions and Other Legal Essays*, ed. Walter Wheeler Cook (New Haven, Conn.: Yale University Press, 1923), 23–114.

10. For a review of this argument, see Peter Jones, *Rights* (New York: St. Martin's, 1994), 26-32. Jones's book is an invaluable guide through contemporary theories and controversies about rights among moral and legal philosophers, and my chapter benefits considerably from his insights about rights theories.

11. Steven Teles, *Whose Welfare? AFDC and Elite Politics* (Lawrence: University Press of Kansas, 1997), 41–59.

12. Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Boulder, Colo.: Westview, 1998), 139–148.

13. It is also possible for a right to be morally entrenched but not legally entrenched. The right to education may be one example. I suspect, without any poll data to support my claim, that the public would consider education a moral right. Courts have, however, resisted finding such a right in the U.S. Constitution, though some state courts have this right in their state constitutions. (For two cases in which the Supreme Court backed off from finding a right to education in the Constitution, see *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 [1973], and *Plyler v. Doe,* 457 U.S. 202 [1982].) There also may be a moral right to nutritional sustenance among Americans, though legally there is only a patchwork of local laws and policies governing emergency aid.

14. Indeed, it's not at all clear that Dworkin himself meant that *in practice* rights act as trumps. He simply claimed, "Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole." Ronald Dworkin, "Rights as Trumps," in *Theories of Rights,* ed. Jeremy Waldron (New York: Oxford University Press, 1989), 153.

15. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).

16. Lawrence Friedman, *Total Justice* (Boston: Beacon, 1985). This book has greatly influenced my view of American legal culture, and I refer readers interested in the phenomenon of widening moral entrenchment to it.

17. Robert A. Kagan, "Adversarial Legalism and American Government," in Landy and Levin, *The New Politics of Public Policy,* 111.

18. Craig M. Bradley maintains that the Constitution allows Congress to create a national code of criminal procedure binding on local police, so that reformers have an alternative to court-created rights. Whether or not he is right as a matter of law—the current Supreme Court, with its emphasis on local rights, would clearly find his argument unpersuasive—Bradley neglects to explain how Congress could be persuaded to take up a thankless task such as this one. See Bradley, *The Failure of the Criminal Procedure Revolution* (Philadelphia: University of Pennsylvania Press, 1993), 144–161.

19. Indeed, the turn to rights in American public policy is closely related to the turn to courts, which I analyze in *Litigation and Its Discontents: The Struggle Over Lawyers, Lawsuits and Legal Rights in American Politics* (Berkeley: University of California Press, 2002). Yet there are aspects of the rights revolution that are not court centered—for example, the growth of entitlements. Thus, the rights revolution is even broader than the turn to courts and so merits separate analysis.

20. R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: Brookings Institution, 1994); Teles, *Whose Welfare?* 98–118.

21. Frank Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993), 32.

22. In a concise and convincing review of the literature, John Kingdon concludes that distrust of governmental authority is in fact a central feature of American political culture. See Kingdon, *America the Unusual* (New York: Worth, 1999), 23–56.

23. See Melnick, *Between the Lines,* 48.

24. See, for example, Melnick, "The Courts, Congress and Programmatic Rights," in *Remaking American Politics,* ed. Richard Harris and Sidney Milkis (Boulder, Colo.: Westview, 1989), 188–214; Kagan, "Adversarial Legalism and American Government," in *Who Guards the Guardians?* ed. Martin Shapiro (Athens: University of Georgia Press, 1984).

25. "The Responsive Communitarian Platform: Rights and Responsibilities," in Etzioni, *The Essential Communitarian Reader,* xxv.

26. Indeed, the welfare reform bill included a kind of entrenchment in reverse: it entrenched on state and local welfare officials a duty *not* to provide welfare benefits after certain set points, though it appears there are many loopholes in this requirement.

27. *Felker v. Turpin,* 518 U.S. 651 (1996).

28. Schuck, *Citizens, Strangers, and In-Betweens,* 14–15.

29. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

30. In *Wards Cove Packing Company v. Atonio,* the Supreme Court ruled that defendants in civil rights suits no longer had to prove that employment policies which had a disparate impact on minorities were justified by "business necessity." Instead, plaintiffs had to show that such policies weren't justified by business necessity. This seemingly small, technical change in the burden of proof in practice greatly diminished the duty of employers to eliminate policies which have a negative impact on racial minorities. *Wards Cove Packing Company v. Atonio,* 490 U.S. 642 (1989). This part of *Wards Cove* was reversed by the 1991 Civil Rights Act, which explicitly restored the law to the interpretation that governed on June 4, 1989, the day before *Wards Cove* was handed down.

31. Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* (New York: Cambridge University Press, 1994), 39–50.

32. Ibid., 42.

33. *Planned Parenthood v. Casey,* 505 U.S. 833 at 865.

34. *Payne v. Tennessee,* 501 U.S. 808 (1991) at 828. The "swing" justices who wrote the lead opinion in *Planned Parenthood v. Casey* argued that *Roe* also created reliance because "people have organized intimate relationships . . . in reliance on the availability of abortion in the event that contraception should fail"; 505 U.S. 856.

35. This form of political activity is detailed in Burke, *Litigation and Its Discontents.*

36. This is one of the major bases for Marc Galanter's analysis of "Why the Haves Come Out Ahead" in legal disputes; see Galanter, "Why the Haves Come Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95.

37. Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993), 25–27.

38. Landy, "The New Politics of Environmental Policy," in Landy and Levin, *The New Politics of Public Policy,* 211.

39. Thomas F. Burke, "The Americans with Disabilities Act: On the Rights Track," in *Comparative Disadvantages? Social Regulations and the Global Economy,* ed. Pietro Nivola (Washington, D.C.: Brookings Institution, 1997), 242–318.

40. *Dickerson v. U.S.,* 120 S.Ct. 2326 (2000) at 2336.

41. See *New York v. Quarles,* 467 U.S. 649 (1984), and *Harris v. New York* 401 U.S. 222 (1971).

42. This view parallels Paul Pierson's observations about attacks on the welfare state. He finds that opponents of the welfare state often avoid frontal attacks in favor of low-visibility, gradual strategies. See generally Pierson, *Dismantling the Welfare State?*

PART IV

Social Welfare Policy