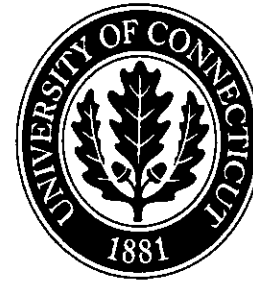


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THE RIGHTS REVOLUTION CONTINUES: WHY NEW RIGHTS
ARE BORN (AND OLD RIGHTS RARELY DIE)

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The Rights Revolution Continues: Why New Rights are Born (and Old Rights Rarely Die)

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I. THE RIGHTS REVOLUTION CONTINUES

The subject of this Symposium, regulation through litigation, is sometimes portrayed as a newborn monster, spawned sometime in the 1990s by greedy, ambitious plaintiffs' lawyers in pursuit of ever-more outrageous fortunes.¹ The proliferation of government-supported lawsuits against tobacco companies, HMOs, and gun manufacturers is indeed a fascinating development in American public policy, but its novelty can be overstated. Americans have, after all, been regulating by litigating for hundreds of years. The political scientist Stephen Skowronek argues that in the years before the United States built a national administrative bureaucracy, America was a nation of "courts and parties," with courts serving as the primary regulators of the economy.² Alexis de Tocqueville was writing in the 19th century, not the 21st, when he made his oft-quoted declaration that "there is hardly a political question in the United States that does not sooner or later turn into a judicial one."³ Moreover, though the creation of the administrative state has displaced some functions previously performed solely by the common law, it has in no way replaced it; many fields of public policy, such as accident compensation, involve a mixture of bureaucratic programs and litigation. Policy realms such as environment, employment, and education are pervaded by litigation.

Regulation by litigation is, then, best understood not as a novelty, but rather as an extension of tendencies characteristic of American public policy. Further, though the origins of regulation by litigation are usually

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1. See, e.g., JOHN FUND & MARTIN MORSE WOOSTER, *THE DANGERS OF REGULATION THROUGH LITIGATION* (2000).

2. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 39 (1982).

3. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer, ed., 1969).

traced to avaricious trial lawyers and ambitious attorneys general, in fact, regulation by litigation has deep roots in the structure of American government and American political culture.⁴ This Article explores these roots, and in so doing, provides a broader context for understanding regulation by litigation.

In particular, this Article explores the implications of the "rights revolution" in American politics. The word "revolution" here is misleading because it suggests a break, rather than continuity, with the past. In fact, there is much more continuity than is usually realized. Yet there is no question that beginning in the 1960s, there was a surge in the creation of new rights.⁵ 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, disabled people, 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 a right 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.⁶

Commentators sometimes speak as if the rights revolution ended in the 1970s, in the exhaustion of liberalism that presaged the Reagan Administration. But in fact, the rights revolution, understood as the extension of rights into new realms, continues today. New rights are being created all the time. Smokers' rights, victims' rights, rights against sexual harassment—each came into political discourse *after* the glory days of the rights revolution had passed. Government-supported lawsuits, seeking a "right to

4. 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*, to be published in 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.

5. Although the term "rights revolution" is widely used, it is 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 v. Board of Education* 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." CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* v (1990). On the other hand, Mary Ann Glendon seems to identify the rights revolution as primarily a judicial enterprise, a product of increasing judicial activism following *Brown*. See MARY ANN GLENDON, *RIGHTS TALK* 6-7 (1991).

6. 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." Aaron Wildavsky, *The Politics of the Entitlement Process*, in *THE NEW POLITICS OF PUBLIC POLICY* 143, 143 (Marc K. Landy & Martin A. Levin eds., 1995).

safe handguns," or a "right to compensation for injuries due to smoking," are just two examples of a continuing expansion of rights politics.

Why do Americans, as de Tocqueville first noticed, turn public policy issues into matters of legal right? What exactly are the forces that created the rights revolution? And how will the continuing expansion of rights policies shape American politics? This Article draws on recent developments in rights politics and on academic analyses of the politics of public policymaking in order to answer these questions.

II. RIGHTS AS ENTRENCHMENTS OF DUTY

First, it is important to define exactly what I mean by "rights." This is a crucial step, because many analysts of the politics of rights seem to be talking past each other, describing different phenomena.

My approach, which follows Wesley Newcomb Hohfeld's classic writings on the nature of rights, starts with the assumption that rights have one defining feature; they correspond with duties.⁷ To say that someone has a right, therefore, is to say that the person has a just claim that a duty be performed by another. To take an example from the rights revolution, a duty not to pollute water correlates with a right to clean water.

Critics have taken issue with the notion that duties always correlate with rights, in part because they envision a more expansive definition of rights.⁸ But my approach seems uncontroversial when applied to the policies formed during the rights revolution and its aftermath; these rights clearly always involve 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 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 dec-

7. 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. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 23-114 (Walter Wheeler Cook ed., 1923).

8. For a review of this argument, see PETER JONES, *RIGHTS* 26-32 (1994). Jones' book is an invaluable guide through contemporary theories and controversies about rights among moral and legal philosophers, and this Article benefits considerably from his insights about rights theories.

lamations of some critics, 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 rather than telling them to do whatever they wish.

Rights do their work by *entrenching* duties. By this I mean that rights 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."⁹ Under the Americans with Disabilities Act, the right of disabled people to "reasonable accommodations" at a worksite can be displaced, but only if an employer can demonstrate "undue hardship."¹⁰

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 is another kind of entrenchment, one that comes from a sense that connected with the mechanisms in the law, there 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 disabled people accessible buildings. When a principle becomes morally entrenched, it creates the presumption that one has to have more than "the usual" reason for displacing it. For example, the fact that the United States has a national debt has not by itself generally been 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. For example, it is still unclear whether litigation against tobacco companies has convinced the public that tobacco companies neglected their duty to make safe products, and thus are responsible for smoking-related injuries. In the area of entitlements, public opinion data suggest that few people really thought that taxpayers had a duty to provide

9. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

10. 42 U.S.C. § 12112(b)(5)(A) (1994).

an unending stream of 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 create legal rights 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 The degree to which regulation by litigation will entrench new duties of HMOs, tobacco companies and gun manufacturers is still open to question, and much of the fight over these public policy initiatives can be seen as a battle over entrenchment, both legal and moral.

This fight will never end, even if government plaintiffs prevail in their immediate aims. That is because the establishment of new rights does not end the battle; it merely changes the rules. 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 is 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 Similarly, the manufacturers snared by regulation through litigation will doubtlessly continue to defend themselves by asserting that claims against them should be adjusted in light of changing conditions or financial exigencies. The struggle over the implementation of legally-entrenched duties is a major feature of American politics, one that undercuts the notion that rights are all-powerful in the United States. Yet as I will suggest below, the flexibility of rights can also be a source of strength.

11. See STEVEN M. TELES, WHOSE WELFARE? AFDC AND ELITE POLITICS 41-59 (1996).

12. See PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 139-48 (1998).

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 Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), and *Plyler v. Doe*, 457 U.S. 202, 221 (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 that, "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* 153, 153 (Jeremy Waldron ed., 1984).

15. See *Dept. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990).

III. 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 am 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*, no one suffers too much from things that are not her fault.¹⁶ 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, and that we should protect traditional Christian morality. There has clearly been a *shift* in moral entrenchment, but it is not so clear that there has 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 Article. 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. Students of public policy have identified four such factors: cost-shifting, venue-shifting, nationalization and distrust.

A. Cost-Shifting

A major motivation for entrenching duties is to push off the costs of a policy 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. If, for example, smoking is considered a public health issue, then the money to ameliorate its effects should come from the public fisc. But if tobacco companies have a duty to make safe products, and if the costs of

16. See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 45-76 (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.

smoking are linked to a dereliction of this duty, then the costs should be borne by the companies. Thus, the rhetoric of rights is attractive to policymakers, who want to take public action without dipping into their budgets. Notice further that this is a particularly attractive strategy when there is both a strong desire for action on a social problem and tight budgetary constraint.

B. Venue-Shifting

Activists frequently turn to courts when they cannot obtain satisfaction in other venues. This is another obvious motive behind regulation by litigation. Anti-tobacco and anti-gun activists moved to the courts when their proposals were thwarted in legislatures. This maneuver was most famously employed by civil rights activists, principally the NAACP, but there are many other examples. Shep Melnick and Steve Teles, for instance, both point to the importance of venue-seeking in the evolution of the welfare rights movement.¹⁷ As Frank Baumgartner and Bryan Jones have observed, there is a relationship between the venue chosen and the claims one puts forward.¹⁸ 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. The rights revolution resulted in part from the rise of activists who were unable to prevail in legislatures and so sought other venues.

C. 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.¹⁹ 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

17. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 108-11 (1994); TELES, *supra* note 11, at 98-118.

18. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 32 (1993).

19. See Robert A. Kagan, *Adversarial Legalism and American Government*, in *THE NEW POLITICS OF PUBLIC POLICY*, *supra* note 6, at 88, 110-11.

search and seizure, right to counsel, and interrogation of suspects.²⁰ 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, the only sure way to do this in the United States is through the entrenchment of duties. Thus, policymakers who seek to nationalize policy in a federal system will seek new rights. The rights revolution was fueled in part by activists who sought control over state policies but were unable to gain power in state and local governments.

D. 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 on the other levels. In a political culture whose hallmark is distrust of government authority,²¹ 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 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.²²

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 twentieth century, 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.²³

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.

IV. THE COUNTERATTACK

Nonetheless, there have been attempts to curb or reduce the range of rights. At the level of rhetoric, conservatives have responded to the rights revolution by emphasizing countervailing values of, for example, 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."²⁴ 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.²⁵ Many Democrats and liberal organizations opposed welfare reform, but few of them did so on the prin-

20. Craig M. Bradley maintains that the Constitution allows Congress to create a national code of criminal procedure binding on local police, providing reformers an alternative to court-created rights. See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 144-61 (1993). 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. *Id.*

21. 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. JOHN W. KINGDON, *AMERICA THE UNUSUAL* 23-56 (1999).

22. See MELNICK, *supra* note 17, at 48.

23. See, e.g., Kagan, *supra* note 19; R. Shep Melnick, *The Courts, Congress and Programmatic Rights*, in *REMAKING AMERICAN POLITICS* 188-214 (Richard Harris & Sidney Milkis eds., 1989); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* (1984).

24. *The Responsive Communitarian Platform: Rights and Responsibilities*, in *THE ESSENTIAL COMMUNITARIAN READER* xxv (Amitai Etzioni ed., 1998).

25. 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.

principle that Americans have a right to welfare. This suggests, as I have argued above, 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 Antiterrorism and Effective Death Penalty Act, a law which takes away the habeas corpus rights of death-row inmates, leaving them only "one bite of the apple."²⁶ 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.²⁸ As part of a series of immigration bills, Congress has recently restricted the right of non-citizens to challenge their deportation.²⁹ Tort reform laws passed in many states restrict the ability of individuals to sue for personal injuries they have suffered.

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 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 downwards. For example, in *Planned Parenthood v. Casey*,³⁰ the Supreme Court upheld the basic right to an abortion, but downgraded the level of presumption. Before *Casey*, only a "state's 'important and legitimate interest'"³¹ could justify restricting first-term abortions in any way, after *Casey*, any regulation which does not impose an "undue burden" on the right is acceptable.³² 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 that have a "disparate impact" on racial minorities.³³ The hold-

26. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (codified at 28 U.S.C. §§ 2261-66) (1996).

27. *Felker v. Turpin*, 518 U.S. 651, 662 (1996).

28. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804, 110 Stat. 1321-66, 1321-73 (1996).

29. See SCHUCK, *supra* note 12, at 14-15.

30. 505 U.S. 833 (1992).

31. *Id.* at 871 (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

32. *Id.* at 874.

33. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Supreme Court ruled that defendants in civil rights suits no longer had to prove that employment policies that had a disparate impact on minorities were justified by "business necessity." *Id.* at 652. Instead, plaintiffs had to show that such policies weren't justified by business necessity. *Id.* at 657. This seemingly small, technical

ing in *Wards Cove Packing Co. v. Atonio* that defendants in civil rights suits no longer bore the burden of proving that employment policies that had a disparate impact on minorities were justified by business necessity 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.³⁴ The adjustment of rights is the primary strategy of attack against the rights revolution.

Another strategy is the promotion of counter-rights, 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.³⁵ 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 IRS, everyone's favorite villain, a "taxpayer's bill of rights" has become law.³⁶

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.

IV. 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.³⁷ Briefly, I want to consider the relevance of three general types of policy feedback to rights in general, and government-sponsored litigation in particular.

A. *Settled Institutions/Expectations/Commitments*

Institutions and actors often make their plans based on their assump-

change in the burden of proof in practice greatly diminished the duty of employers to eliminate policies that have a negative impact on racial minorities.

34. See Civil Rights Act of 1991, Pub. L. 102-166, § 105, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2 (1991)).

35. Laurence H. Tribe & Paul G. Cassell, *Amend the Constitution to Ensure the Rights of Crime Victims*, PLAIN DEALER, July 7, 1998, at 9B, LEXIS, News Library, Clevpd File.

36. See, e.g., Tax Payer Bill of Rights 2, Pub. L. 104-168, 110 Stat. 1452 (codified at 26 U.S.C. § 7801-7811 (1996)).

37. PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 39-50 (1994).

tion that a public policy is settled, so unsettling the policy threatens great disruption. This creates what Pierson calls "policy lock-in."³⁸ 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 which aid them. Lock-in effects do not 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.³⁹ 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 also disruption of long-settled life plans. Chief Justice Rehnquist has argued, in *Payne v. Tennessee*,⁴⁰ 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.⁴¹ 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. In the case of the tobacco settlement, however, it could become a factor; state governments may have become dependent on the steady stream of revenue generated by the settlement so that any change could have implications for state budgets.

B. *Settled Interests/Constituencies*

Policies often create constituencies, which 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 do not develop clienteles in precisely the way iron triangles do, but they do attract constituencies. The most obvious constituency is the group of lawyers who employ rights in litigation, and in fact attorney groups and public interest groups who

38. *Id.* at 42.

39. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

40. 501 U.S. 808 (1991).

41. *Id.* at 828. The "swing" justices who wrote the lead opinion in *Casey* (O'Connor, Kennedy & Souter, JJ.) argued that *Roe v. Wade*, 410 U.S. 113 (1973), also created reliance because "people have organized intimate relationships . . . in reliance on the availability of abortion in the event that contraception should fail." *Casey*, 505 U.S. at 856.

bring lawsuits often lobby against changes in rights.⁴² 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 is not surprising that they have not organized effectively. (It is 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 do not worry much about rights until they need them. For example, plenty of non-poor, non-minority people every day find they have a strong interest in the rights of the accused, but too late to do much about it.⁴³ Because the beneficiaries of many rights are an amorphous group, constituents may not protect rights as much as other forms of public policy. In the case of regulation by litigation, however, the rights involved—the right to recover for costs—are held by governments, a very strong constituency.

C. *Settled Ideas/Meanings*

Policies often create a conceptual framework for understanding a social problem that is not easily uprooted. Baumgartner and Jones call this a "policy image."⁴⁴ 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.⁴⁵ Of course, this image was dislodged by the environmental movement.⁴⁶ 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 a repository of intellectual discourse that both displayed sympathy for claimants, proposed to help them, and yet rejected their rights claims."⁴⁷ I have noted a similar pattern in disability policy.⁴⁸ Where rights are involved,

42. This form of political activity is detailed in BURKE, *supra* note 4.

43. This is one of the major bases for Marc Galanter's analysis of "why the haves come out ahead" in legal disputes. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

44. BAUMGARTNER & JONES, *supra* note 18, at 23.

45. *Id.* at 26.

46. *Id.* at 25-27.

47. Marc K. Landy, *The New Politics of Environmental Policy*, in THE NEW POLITICS OF PUBLIC POLICY, *supra* note 6, at 211.

48. Thomas F. Burke, *On the Rights Track: The Americans with Disabilities Act*, in COMPARATIVE DISADVANTAGES? SOCIAL REGULATIONS AND THE GLOBAL ECONOMY 242, 242-318 (Pietro S. Nivola

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. Whether lawsuits against HMOs and the makers of guns and tobacco will have this transforming effect on public discourse is still unclear.

V. THE PARTICULAR RESILIENCE OF RIGHTS

Beyond the generic causes of policy resilience, two particular characteristics of rights 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 cannot simply cut a budget item; opponents of a constitutional right cannot simply pass a law overturning it. Opponents of a statutory right can repeal it, but often do not, 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. But the entrenchment of rights makes them relatively 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 have suggested above. 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.⁴⁹ This rule excludes from trial confessions illegally obtained by police officers neglectful of their duty to advise suspects of the right to remain silent and to obtain an

ed., 1997) (investigating if "there is a better way" than the United States' "uniquely litigious, rights-oriented approach to the problem of disability").

49. *Miranda v. Arizona*, 384 U.S. 436 (1996).

attorney.⁵⁰ Contrary to the predictions of some observers, the Burger and Rehnquist Courts failed to abolish *Miranda*. In the recently decided *Dickerson v. United States*,⁵¹ Justice Rehnquist's majority opinion held that *Miranda* was so entrenched that it could not be repealed, noting that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁵² 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.⁵³

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.⁵⁴ 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.

VI. CONCLUSION—THE RUBBERINESS OF RIGHTS

I have offered some reasons for the resilience of the rights revolution, and of rights more generally. Students of public policy labeled the agency/client/Congress relationship in some domains (defense appropriations, for example) an "iron" triangle, safe from attack because of the strength of the interests attached to it. 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,

50. The *Miranda* Court held that the prosecution may not use statements stemming from custodial interrogation unless the defendant had been properly informed of: (1) his right to remain silent; (2) that anything he says can and will be used against him at trial; (3) he has the right to assistance of counsel; and (4) if he cannot afford an attorney, the government will appoint one for him. *Id.* at 444-45.

51. 530 U.S. 428 (2000).

52. *Id.* at 443.

53. See *New York v. Quarles*, 467 U.S. 649, 657 (1984) ("We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic [*Miranda*] rule protecting the Fifth Amendment's privilege against self-incrimination."); *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.")

54. This 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, *supra* note 37.

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.