VIRTUAL LOGROLLING: HOW THE COURT, CONGRESS, AND THE STATES MULTIPLY RIGHTS

WILLIAM N. ESKRIDGE, JR.*
JOHN FEREJOHN**

Mary Ann Glendon maintains that the United States has created too many legal rights in the last two generations.[1] She argues, to an increasingly receptive audience, that this multiplication of rights threatens both national values and efficiency. The critique of rights can be seen as containing both normative and positive aspects. The expansion of rights-oriented discourse is said by some to impoverish political debate by posing public issues in rigid and inflexible terms that limit our capacity to find solutions.[2] The creation of new rights is also thought to diminish our commitment to older and perhaps more fundamental rights. Moreover, the shift to a rights-based politics is marked by a shift of institutional forum away from legislatures and into courts. Insofar as courts lack the capacity to make complex and well-informed public policy decisions, this forum shift is likely to lead to worse policies.

Glendon is not the first observer to comment on the American tendency to transform political issues into questions of rights, to place these disputes in juridical rather than political settings, and to deliberate about them in a legal rather than a political discourse. Within a half century of the adoption of the Constitution, Alexis de Tocqueville noted the legalistic aspects of American public life,[3] the extensive use

* Professor of Law, Georgetown Law Center, and Visiting Professor of Law, Yale University.

** Carolyn S.G. Munro Professor of Political Science and Senior Fellow of the Hoover Institution, Stanford University, and Visiting Professor of Law and Politics, New York University.

1. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).

2. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994).

3. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so

of courts, and the ubiquity of lawyers in public disputes. As de Tocqueville noted, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[4] Historian Gordon Wood similarly describes a vast growth in rights in the post-Constitution period: "The result was paradoxical: as the public power of the state grew in the early Republic, so too did the private rights of individuals—with the courts mediating and balancing the claims of each."[5] There seems good reason for thinking that rights claiming was a distinctive feature early in American public life.

America's distinctive tendency to a rights-claiming politics has been traced to different sources. Some have argued that it is characteristic of America's liberal tradition that we conceive of our public relations in terms of rights rather than in terms of improving the community or increasing the general welfare. Americans have seen themselves, on this account, as intrinsically endowed with rights that define and delimit the appropriate forms of public activity and shape political conflict and dispute. This "culturalist" view, sometimes traced to Locke and sometimes to the Lockean circumstances of the American colonies, might be seen, at once, to underlay America's uniquely litigious culture and to explain its tendency to see political issues as legal ones.

An alternative view, no less culturalist, would put more weight on America's English legal inheritance and on the specific features of common law adjudication. The common law places courts at the center of resource allocation issues; access to courts is achieved through claiming rights. Because the American colonial experience was mediated by these particular legal forms, Americans oriented themselves to public decisioumaking fora, thus making courts rather than other bodies central social decisionmaking institutions. Both culturalist theories find the origins of a rights-claiming politics in colonial experiences, and both theories see these tendencies as deep-seated within our shared values, if not immutable.

While the culturalist views seem descriptively accurate in some ways, they are deficient in accounting for the differences between American politics and politics of other nations that share a similar cultural history with us. Why is it, for example, that Canada and

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that at last the whole people contract the habits and the tastes of the judicial magistrate.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (1945).

4. *Id.*

5. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 325 (1991).

Great Britain—both common law countries—have evolved so differently with respect to rights creation and enforcement? Why is it that policy debates in those countries do not typically center on questions of rights and liberties but focus as often on welfare, community, or equity? Cultural or historical accounts seem ill-fitted to answer such questions. If, for example, American political culture is different from its Canadian counterpart, these theories do not explain how or why this is so.

For that reason we seek an alternative, structuralist account that roots rights creation in institutional features of American politics and conceives of cultural variables as endogenous with respect to political structure. Such an account locates the development of American legalism in specific institutional or structural innovations, such as the Constitution and other federalist institutions, rather than simply in shared cultural values or common historical experiences. In doing so, a structuralist theory promises to explain why American legal/constitutional culture developed so differently than those cultures in Britain and Canada. The aim of this Article, therefore, is to lay out institutional reasons for our nation's rights fixation. Drawing upon rational choice theories of political institutions,[6] we argue that separation of powers, federalism, and judicial review foster a lawmaking regime that produces multiple opportunities for rights creation and fewer opportunities for rights negation. The result is the multiplication of rights over time—the phenomenon Glendon bemoans.

PREFACE: AN INSTITUTIONAL UNDERSTANDING OF RIGHTS

Though there is a good deal of disagreement as to how to define a "right," we need not enter deeply into this thicket. We may think of a right as a certain kind of normative claim to resources or to protection from others. Rights critics see two significant aspects of rights creation, normative and institutional. From a normative viewpoint, the creation of a right limits the kinds of reasons that may enter into resource allocation decisions that touch that right, and this prohibition diminishes the quality of these decisions. Where rights are involved, public decisions cannot turn only on issues of what would maximize

6. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992).

social welfare, for example, but must, with some exceptions, respect rights claims.[7] For this reason, except in special conditions, rights-based politics will tend to be rigid and inefficient.[8] Moreover, rights stultify normative discourse by alienating the individual from the community and diminishing the community's sense of shared responsibility.

Institutionally, the creation of a right shifts the locus of decisions to legal officials and away from elected politicians. This means not only that different people, with different capabilities and interests, are making decisions, but also that certain kinds of interests are likely to be respected and others ignored. From the institutional perspective, the creation of a right expands the domain of legality, even if other rights are extinguished. It remains to judges and courts to arbitrate and harmonize the body of rights claims and find some rights actionable and others not.

It is this "forum shifting" feature of rights creation that we consider in this Article. We argue that the structure of American constitutionalism produces powerful and long-lived tendencies to rights creation and, therefore, to a legalistic politics in which courts play a central role in public decisions. This tendency is rooted, we think, in some characteristic asymmetries embedded in the U.S. Constitution, asymmetries that systematically work to create new rights.

Consider three institutional structures. First, in exercising the "judicial Power" allotted to them in Article III, federal courts are in the business of deciding what the law is and how some kinds of law trump others. Judicial review flows from the propositions that the Constitution trumps statutes and that the Supreme Court is the main interpreter of the Constitution (implicit in Article III, Section 2 and Article VI).[9] Hence, the Court has the power to create statute-trumping "rights." Federal judges' life tenure and protection against salary cuts assure that their preferences will not be perfectly aligned with those of officials in the elected branches all of the time.

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7. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (advancing one version of this view).

8. The exceptions cover what may be called the neoclassical cases where rights-exercising does not generate externalities and where rights may be exchanged in markets.

9. *See* THE FEDERALIST No. 78 (Alexander Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). We treat judicial review as an exogenous variable in this Article, but at the founding this was not necessarily so. *See* Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of* Marbury v. Madison, 38 AM. J. POL. SCI. 285 (1994).

Second, separation of legislative, executive, and judicial powers is assured by Articles I, II, and III of the Constitution. A consequence of separation of powers is that lawmaking in the United States is interactive and sequential. Sequential action by differently situated institutions assures that each has some degree of trumping power over the others. Combined with judicial review, this interactive process places a premium on rights creation. On the one hand, the Court will often create rights the political process will not recognize; the political branches have imperfect trumping power when the Court creates constitutional rights. On the other hand, when the Court refuses to create a constitutional right, the political branches may do so through statutes which the Court is bound to implement more or less faithfully.

As the Founders anticipated in Article I and the Tenth Amendment, federalism permits the states to act as a third level of rights creation, as discussed in Hamilton's *Federalist No. 28*. In *Federalist No. 51*, James Madison posited that the federal structure assures a "double security" for individual rights. In the United States, most government action is at the state and local, rather than the national, level. If the Supreme Court and Congress both refuse to create rights, state courts and legislatures have the option to do so and can often be expected to exercise it.[10]

The foregoing structures assure many entry points for rights creation. Surely, however, rights get weeded out as well as created, but Glendon and others seem correct in perceiving that many more rights are being created than are being abolished or narrowed. Rights creation dominates rights abolition, at least in part for structural reasons.[11] In the final part of this Article, we suggest what we shall call a "virtual logroll" between the Court and the political process to explain our system's tendency to create more rights than it weeds out. That is, the

10. "State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

11. Traditional historical reasons do not completely persuade us. The main reason is that it is much harder to take away a legal "entitlement" from people in our society than it is to deny them a desired entitlement. This partly explains the force of stare decisis, due process, rules against retroactive regulation, the Takings Clause, and the like. It is not completely satisfying, however, because entitlements are being changed whenever new rights are created, as well as when old rights are being weeded out. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 127-38 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter Wheeler Cook ed., 1923).

Court will create the rights it cares about the most while deferring to Congress' and the states' most cherished rights, and Congress and the states will do the same. That this virtual logroll is reinforced by stable and revered institutional arrangements suggests that its results will not be easily ameliorated.

I. THE ASYMMETRY OF THE COURT'S DISCRETION IN CREATING CONSTITUTIONAL AND STATUTORY RULES: THE AFFIRMATIVE ACTION CASES

Our political system requires lawmaking by the interaction of three political branches: Congress enacts statutes, the executive branch implements them, and the courts both interpret statutes and review them as applied. This interaction can be modeled as a sequential political game.[12] The game is played across a linear space of possible statutory policies, in which a position to the right represents relatively conservative policy preferences and a position to the left represents relatively liberal policy preferences. Suppose Congress enacts a statute that reflects its preferences, but disagreements about the statute arise. Persons and institutions then turn for interpretation to the courts and ultimately to the Supreme Court, which has a preference of its own, J.[13] Although the Court can substitute its interpretation for that of the agency, the current Congress, L, can in turn override the Court's interpretation, subject to veto by the president, P, which Congress can override by a two-thirds vote in each chamber, l. In equilibrium, each player in the game will try to impose its policy preferences upon the statute, to the extent that its policy result is not overridden by a subsequent player.

In this sequential game of policy formation, the Supreme Court can greatly affect policy through dynamic interpretation of statutes. It can do so under three different conditions. First, the Court can immediately interpret a statute contrary to legislative preferences, L, where the Court's preferences, J, are aligned in the same direction as those of the president, P. In this circumstance, the president's veto power

12. This idea is developed more elaborately in William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

13. The Court's preference may be of a different kind than legislative preferences. The Court's preferences may be informed by its responsibility for the rule of law—hence judicial preference for plain meanings over linguistic creativity. On some issues, the Court will have strong preferences about the substantive policy. In some part of those cases, the Court's policy preferences will be more important than its rule of law preferences.

ought to protect the Court up to the legislature's "veto median," *l*. Second, the Court can interpret statutes dynamically over time when the legislature's preferences change from L to L'. (Throughout this Article, we shall use the prime (') or double prime (") symbol to signify later points in time.) Third, the Court can interpret statutes dynamically when legislative preferences are inconsistent with the Court's interpretation of the Constitution, X. (Throughout this Article, we shall use upper-case notation, X, to denote the equilibrium location of constitutional policy and lower-case notation, x, to denote the equilibrium location of statutory policy.)

The classic example of dynamic interpretation is *United Steelworkers v. Weber*,[14] where the Court interpreted Title VII of the Civil Rights Act of 1964 to permit a "quota" program designed to remedy low numbers of African-American employees. As the dissenting opinion strenuously argued, this interpretation ($x' = J'$) was at odds with the legislative expectations of the 1964 Congress ($x = L$), which emphasized the ways in which the statute would create color blindness in the workplace. The dissenting opinion's characterization of the Court's disposition is captured in Figure 1.

FIGURE 1

The *Weber* decision, 1979, from the dissent's perspective: Statutory policy shifts from $x = L$ to $x' = J'$

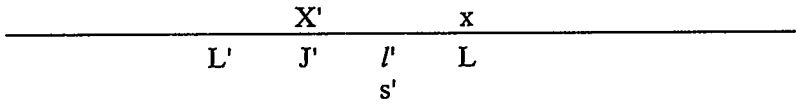
From the dissent's point of view, the Court was unwilling to create a "right" for white employees disadvantaged by workplace affirmative action, because it disagreed with that right and because the 1979 Congress was unwilling to override the Court to establish that right on its own.

A more sophisticated understanding of *Weber* must take account of the Court's apparently inconsistent approach in *Regents of the University of California v. Bakke*.[15] In that case, the Court struck down a quota program run by a state medical school. The judgment of the Court was delivered by Justice Lewis Powell, whose opinion created a new civil right for white applicants not to be disadvantaged by open

14. 443 U.S. 193 (1979).
15. 438 U.S. 265 (1978).

"quota" programs.[16] Yet this is the very right that the Court rejected the next year in *Weber*. What explains the difference in the two cases which were decided by the very same Justices? We hypothesize that the Court's median voter—Potter Stewart[17]—was swayed by the different context in which plaintiffs were asking the Court to create rights. In the statutory context of *Weber*, the Court was willing to sacrifice its preference for creating a right so as to avoid an override by Congress—which in 1979 supported a liberal civil rights agenda. In the constitutional context of *Bakke*, the Court's desire to create a new right was not so easily overcome, for an override in this case would require a constitutional amendment, usually obtained by a two-thirds vote in Congress, l', and ratification by three quarters of the states, s'. Figure 1a maps the Court's freedom.

FIGURE 1A

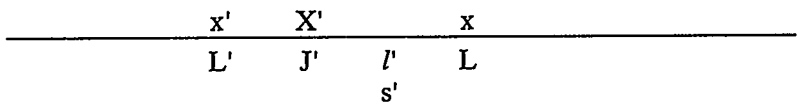


The *Bakke* decision, 1978: Constitutional policy set at $X' = J'$, and not at $X' = L'$

Specifically, the Court could have set constitutional policy anywhere to the left of l' without danger of an override. Given that freedom, it is reasonable to suppose that the Court set policy at the point favored by its median Justice, Lewis Powell.

If the Court revealed its raw preferences as to affirmative action in *Bakke*, we must rethink the configuration of preferences in *Weber*. Thus, Figure 1b reflects an amalgamation of the affirmative action right in 1979.

FIGURE 1B



Statutory (x') and constitutional (X') rights against affirmative action, 1979

This diagram vividly displays the Court's greater freedom to create rights in constitutional as opposed to statutory cases, based upon

16. Justice Powell's opinion approved programs that considered race a "plus" for diversity reasons. Hence, his approach was not colorblind; rather, it was a compromise. *See* JOHN CALVIN JEFFRIES, JR., JUSTICE LEWIS POWELL, JR. 1483-87 (1994).

17. Justice Stewart "switched" sides from the Powell position in *Bakke* to the Brennan position in *Weber*.

nothing more than the different procedures required for overriding the Court.

The foregoing example suggests other interesting hypotheses. One is that the Court has an incentive to constitutionalize issues about which it feels intensely but not to constitutionalize issues about which it is uncertain. This makes the Court's choice between statutory analysis and constitutional analysis itself a signal of the Court's preferences to the rest of the political system.[18] The Court in 1978-79 was deeply ambivalent about affirmative action, and *Bakke* reflected that ambivalence. Five Justices ruled against the university's quota system, but only Justice Powell reached the constitutional issue; the other four Justices relied on statutory grounds.

Ronald Reagan ran for president on platforms hostile to affirmative action, and for three election cycles that platform won substantial presidential victories. To the surprise of no one, the Court grew more conservative as President Reagan added Justices to the Court (Sandra Day O'Connor in 1982, William Rehnquist elevated to Chief Justice and Antonin Scalia in 1986, and Anthony Kennedy in 1987). That conservatism pressed the Court to the right in affirmative action cases and made clear that *Bakke* stood for a constitutional right. Expanding upon the *Bakke* constitutional right, the Court struck down municipal affirmative action programs in several cases during that period.[19]

During this same period, Congress was hostile to the Court-created right.[20] That hostility bothered the Court very little in constitutional cases, for the Court in 1989 expanded *Bakke* to overturn a minority "set-aside" program in *Croson v. City of Richmond*.[21] The hostility bothered the Court a great deal, however, in statutory cases.

18. Pablo Spiller and Matthew Spitzer propose an alternative explanation for the Court's choosing to undertake statutory rather than constitutional rulings. In their theory, constitutional judgments do not permit the Court as much control over the outcome of the case as do statutory ones. Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORGANIZATION 8 (1992). Their focus is, however, on policing agency discretion, whereas ours is on creating or refusing to create legal rights that must be respected by Congress. In our setting, the Court may have somewhat greater control in constitutional as opposed to statutory interpretations.

19. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984).

20. Evidence of this hostility was displayed at hearings held by Senator Hatch in 1981 to override *Weber* and that part of *Bakke* that allowed some affirmative action. Even though the Republicans then controlled the presidency, the Senate, and a working majority in the House, no one showed up at Hatch's hearings. This suggested that no political support existed for overriding *Weber*.

21. 488 U.S. 469 (1989).

Thus the Court in 1986 reaffirmed *Weber*'s interpretation of Title VII in *Johnson v. Transportation Agency*.[22] Justice William Brennan's majority opinion in *Johnson* refused to consider the constitutional issue (even though the employer was a government agency), arguing that it had not been properly presented to the Court. Justice Rehnquist (dissenting), as well as the two Reagan appointees then sitting (Justice O'Connor concurring and Justice Scalia dissenting) insisted that the constitutional issue was properly before the Court, a signal that they not only favored a more conservative approach (X' rather than x' in Figure 1b), but also that they felt strongly about the issue. They were able to express that intensity two years later in *Croson*, when Justice Powell's replacement by Justice Kennedy deprived Justice Brennan of his *Johnson* majority. Justice O'Connor wrote an opinion for the Court which revealed very conservative preferences about governmental set-aside programs, even when adopted for assertedly "benign" remedial purposes. *Croson* and other decisions handed down by the Court in the 1988 Term reflected the Court's increasing disapproval of affirmative action to help African-Americans. Congress was powerless to do anything about *Croson* but overrode the Court's other decisions with a statute that instructed the Court to leave *Weber* and *Johnson* alone.[23]

II. THE ASYMMETRY OF CONSTITUTIONAL RESPONSE BY CONGRESS (THE VOTING RIGHTS CASES) AND THE STATES (THE SCHOOL FUNDING CASES)

The phenomenon explored in Part I, where an activist Court can create constitutional rights that the political system would not, was just as characteristic of the Warren Court as it was of the Burger Court. The Warren Court in *Fortson v. Dorsey*[24] suggested in dictum that an electoral scheme that had either the effect or the intent to minimize the voting strength of minority racial groups would violate the Fifteenth Amendment. The Burger Court in *White v. Regester*[25] applied this standard to invalidate a multi-member district plan which

22. 480 U.S. 616, 627 (1987).

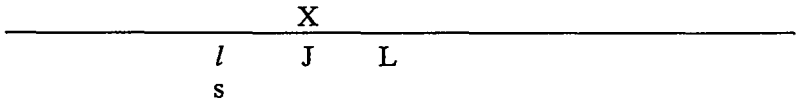
23. The Civil Rights Act of 1991, § 116. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). A coalition of civil rights groups worked on an override bill in 1989, and one was passed in 1990 but successfully vetoed by President Bush. 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990). Early discussions considered efforts to override *Croson*, but that idea was abandoned in light of the dynamics discussed in this Article.

24. 379 U.S. 998 (1965).

25. 412 U.S. 755, 765-66 (1972).

effectively excluded African-Americans and Mexican-Americans from election to local offices. This result was a more intrusive regulation of state voting practices than Congress had been willing to make in the Voting Rights Act of 1965 or in its reenactment in 1970. Figure 2 indicates that *Fortson*'s stringent standard was somewhat to the left of congressional preferences in 1965:

FIGURE 2



The *Fortson* decision, 1965: The Court sets constitutional policy, *X*, to the left of Congress' preferences, *L*, but to the right of Congress' veto median, *l*, or the three-quarters state median, *s*

The lesson of *Fortson* is similar to the lesson we draw from *Bakke*: The Court has substantial discretion in creating new constitutional rights, because political supermajorities are needed to override the Court's policy choices.

The Court's next move in the vote dilution cases differed from its corresponding move in the affirmative action cases, however. Whereas the late Burger Court in the affirmative action cases expanded upon the constitutional right created in *Bakke*, it retreated from that right in the vote dilution cases. In *Mobile v. Bolden*,[26] the Court declined to strike down as unconstitutional an at-large election scheme to the Mobile city commission which had never elected an African-American member in its seventy-year history. Justice Stewart's plurality opinion reasoned that even though the "effect" of the scheme might be discriminatory, discriminatory "intent" had not been established.[27] This holding essentially imported into the voting rights area a constitutional doctrine developed by the Burger Court in the areas of employment, housing discrimination, and schools.[28]

The Burger Court moved to the right in the voting rights cases for some of the same reasons it was moving to the right in affirmative action cases. At the same time, Congress was moving to the left because the Voting Rights Act and the increased participation of racial minorities in the electoral system penalized conservative preferences

26. 446 U.S. 55 (1980).

27. *Id.* at 70.

28. Washington v. Davis, 426 U.S. 229 (1976) (employment); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (housing); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (schools).

in this area. In the affirmative action cases, Congress was unable to override the Court's rights-creating decisions, because the Court was protected by the supermajority requirements of Article V. In the voting rights cases, however, Congress was in a position to override the Court's rights-denying decisions. To create a right that the Court has denied, all Congress ordinarily must do is pass a statute. After *Mobile*, the Court was confronted with a firestorm of protest. Some of the protest was a reaction to the confusion occasioned by the lack of a majority opinion in the case, but most of the protest revealed to the Court that it had misjudged the political landscape on voting rights issues. Republicans as well as Democrats criticized the decision as an illegitimate retreat from the nation's commitment to equal voting opportunities.

The Court was not insensitive to the adverse reaction. In 1982, it decided *Rogers v. Lodge*,[29] a case that presented nearly the same facts as *Mobile*. While not formally retreating from *Mobile*, the Court held that the facts in *Rogers* supported a finding of discriminatory "intent." Also in 1982, the district court in another Mobile, Alabama vote dilution case made a finding of discriminatory "intent," which the Supreme Court later affirmed.[30] In effect, the Court acted to shift the judicially imposed position to the left towards the *Fortson* position but without moving all the way back to that position by overruling *Mobile*. As it turned out, these moves were not enough to forestall congressional action, and in the 1982 amendments to the Voting Rights Act Congress adopted the disparate impact test suggested in *Fortson* and *White*. The Court went along with this standard in its interpretation of these amendments in *Thornburg v. Gingles*.[31]

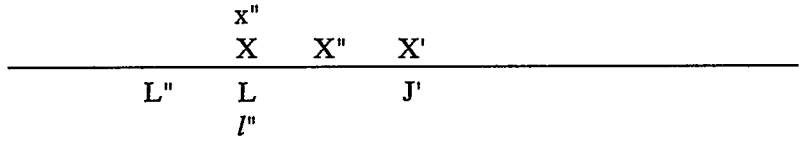
Figure 2a diagrams the shift in policy from *Fortson-Regester*, X, to *Mobile*, X', to *Rogers*, X'', to the 1982 Act as interpreted in *Gingles* (a return to X, but as a statutory policy, x'').

29. 458 U.S. 613 (1982).

30. Brown v. Board of Sch. Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir.), *aff'd mem.*, 464 U.S. 1005 (1983).

31. 478 U.S. 30 (1986).

FIGURE 2A



Shift in policy, from *Mobile* ($X' = J'$) to *Rogers* (X'') to *Gingles* ($x'' \leq l''$)

Note how "mobile" policy becomes when the Court refuses to create a constitutional right that Congress favors. Note also an evolution as to how we characterize X. When X was instantiated by the Court in *Fortson*, it was a constitutional right that could only be trumped by supermajorities in Congress and among the states. When x'' was instantiated by Congress, it was merely a statutory right which could be overridden by a subsequent Congress or by judicial review. Yet x'' retains some constitutional background, X, since Congress intended to codify a prior constitutional regime.

The two asymmetries we have explored reveal double opportunities to create rights, either at the insistence of the Court, if the political system is reluctant, or of Congress, if the Court refuses. We now introduce a third asymmetry and a third opportunity to create rights: If both the Court and Congress refuse to create a right against a state or local government, the state supreme court or the state legislature can create the right. This asymmetry is, theoretically, most important of all because the states have no formal power to resist rights creation by Congress or the Court[32] but are sometimes inclined to be even more rights-protective than Congress or the Court. Consider the most recent and far-reaching example of this phenomenon.

At the same time that the Burger Court was rejecting disparate impact as its standard for protecting civil rights of racial minorities, the Court decided *San Antonio Independent School District v. Rodriguez*.[33] A sharply divided Court rejected an equal protection challenge to the grossly unequal distribution of public educational resources in the Texas school system. The Court refused to create a right to equal education by poor people. Consistent with its emerging stance in the race discrimination cases, the Court was uninterested in the disparate racial (African-American) and ethnic (Latino) impact of the funding disparities. For some of the same reasons that it refused

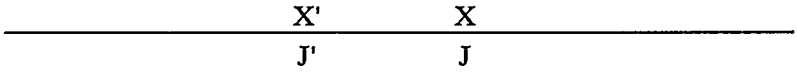
32. *See* U.S. CONST. art. VI, cl. 2 (the Supremacy Clause prevents the states from contravening federal rights, whether under the Constitution or under a congressional statute).

33. 411 U.S. 1 (1973).

to recognize constitutional rights in *Mobile*, the Court refused to recognize rights in *Rodriguez*. The same liberal scholars and civil rights groups criticized both decisions. Based on such criticisms, the Court's refusal to recognize rights was trumped after each case.

The affected states were disinclined to impose the right denied in *Mobile*, but Congress was willing to do so. Congress was unwilling to impose the right denied in *Rodriguez*, but some of the states were willing to do so. The school district that was the focus of litigation in *Rodriguez* continued as the focus of similar litigation in Texas state courts pursuant to the Texas Constitution.[34] And the same groups that lost in the U.S. Supreme Court won in the Texas Supreme Court,[35] as have similar litigants in one fifth of the states.[36] Figure 2b illustrates the heterogeneity this situation has yielded.

FIGURE 2B



The *Rodriguez* decision, 1973, and the *Edgewood* decision, 1989: Policy shifts from $X = J$ to $X' = J'$, but for Texas only

Figure 2b would be somewhat different for each state whose supreme court has adopted a more liberal rights regime than that of *Rodriguez*.

III. WHY THE ASYMMETRIES WORK TO MULTIPLY RIGHTS AND NOT TO CURTAIL THEM: THE FREE EXERCISE CASES

Parts I and II reveal the many entry points for rights creation in the American political system. What the prior analysis does not reveal is why the entry points are not evenly matched with exit points. While Congress reinstated rights curtailed in the Burger Court's voting rights decisions, it did not do so when the Burger and Rehnquist

34. The Texas Constitution provides that "it shall be the duty of the Legislature . . . to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1.

35. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989). The actual implementation of this right has been exceedingly messy.

36. Namely, Arkansas, California, Connecticut, Kentucky, Montana, New Jersey, Washington, West Virginia, and Wyoming. *Id.* at 398. Similar litigation has lost in Arizona, Colorado, Georgia, Idaho, Maryland, New York, Ohio, Oklahoma, Oregon, Pennsylvania, and South Carolina. *See id.* at 398 n.6.

Courts curtailed civil rights in school desegregation decisions, resulting in a net erosion of rights. Nor is it inevitable that the congressional override of *Mobile* might not itself be trumped by a Court intensely opposed to the resulting race-conscious districting. In *Shaw v. Reno*,[37] a closely divided Court created a right for white voters against race-conscious redistricting, especially those yielding "uncouth" or "bizarre" shaped districts. *Shaw* suggests that the practice of devising majority-minority districts (the principal remedy available under the *Gingles* test) may sometimes violate the Fourteenth Amendment. *Shaw* indicates that the Supreme Court's hostility to race-based affirmative action might affect its willingness to allow Congress to have its way in voting rights. This reminds us that if the Court wants to raise the stakes it might mount constitutional challenges to the Voting Rights Act or its implementation by the states. In that event, the Court's greater freedom in constitutional cases would allow it to abolish rights as well as create them. Are the instances of rights curtailment generalizable? Or are they overwhelmed by the instances of rights creation?

There are structural reasons to believe that the asymmetries we have described will systematically work to expand rather than to curtail rights in the medium term and perhaps in the long term as well. Federalism provides a starting point for understanding this phenomenon. Most rights claims are asserted against state and local governments. The supremacy of national law forbids states from trumping rights created at the national level, but permits them to create rights of their own. At the same time the national separation of powers permits either the Supreme Court or Congress to impose new rights on the states. This triple opportunity for rights creation is, at most, offset by a double opportunity for rights curtailment. Moreover, there is reason to believe that the Court and Congress will usually not veto one another's imposition of new rights.

Consider the Supreme Court's incentives. On the one hand, the Supreme Court is constantly tempted to create rights, because that is the most obvious way the Court exercises power.[38] In a period where there are no political or economic shocks, the Justices have plenty of

37. 113 S. Ct. 2816 (1993). The Court has elaborated on *Shaw* in Miller v. Johnson, 115 S. Ct. 2475 (1995).

38. The Court has no effective legislative power because it cannot tax and plan. Nor does the Court have effective executive authority. Its power derives from adjudication, and its political importance derives from its authority to interpret statutes and the Constitution. If there were no justiciable limits on federal or state legislatures, the Court would be inconsequential.

opportunities to expand their power to serve whatever goals suit them (whether rule of law or policy). They do this by trumping statutes with rights. On the other hand, every exercise of judicial trumping power is fraught with danger. Political institutions, especially Congress, can hurt the Court if sufficiently riled.[39] In the longer term, congressional support for important Supreme Court initiatives is critically important. One way around this dilemma, even if not inevitable, is what we call a "virtual logroll" between the Court and Congress.[40]

Earlier notions of logrolling rest on the idea of an explicit exchange of political support within a majoritarian legislature. The outcomes supported by such exchanges are always unstable in the sense that a majority can be found that would prefer another outcome. A virtual logroll is an implicit exchange among parties located within a set of institutional locations.[41] Under a virtual logroll, the Court asserts a rights-creating power for those issues it cares the most about, while deferring to the most intense rights-creating preferences of Congress. The sequential structure of interaction among federal institutions makes it difficult to construct coalitions that can overturn the resulting outcome.

While we emphasize the structural biases towards rights creation, we do not deny the existence of psychological supports. Possession is not only nine tenths of the law, but at least sixth tenths of a thing's value. We tend to value more highly a good we possess than an equivalent good we do not possess.[42] In the same vein, as de Tocqueville noted long ago, we tend to value more highly a right we have possessed for a while than a right we are just now asking for.

Since John Marshall's Chief Justiceship, the Court has been politically consequential. The current Justices are not likely to relinquish this role.

39. Congress, in particular, can respond to Supreme Court assaults on its prerogatives by severe but rarely invoked retaliations such as impeachment and jurisdiction stripping, and by more indirect but frequently suggested measures such as screening new Justices, harassing the Court on judicial management issues, and jawboning.

40. This phenomenon is developed in William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

41. Because of the institutional nexus within which exchanges take place, such exchanges need not be vulnerable to the underlying instability that can plague the attempt to engage in an explicit logroll. *See* John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, *in* CONGRESS AND POLICY CHANGE 223 (Gerald Wright et al. eds., 1986).

42. This is sometimes called the "endowment effect." The idea is captured in the famous offer-ask phenomenon: I am willing to offer you less money for Good "A" that you possess than I would ask from you to relinquish Good "A" that I possess. The feature of possession, which is contingent as a legal matter, is valuable in its own right.

This phenomenon reinforces whatever tendencies the Court and Congress might have for respecting one another's different rights creations. Consider the following example.

For almost 200 years, the First Amendment's protection of the "free exercise of religion" merely protected people from direct government suppression of their faiths and did not protect against state action that indirectly burdened religious freedom.[43] The Warren Court in *Sherbert v. Verner*[44] held that states cannot enforce generally applicable Saturday work requirements against Saturday Sabbatarians without showing a compelling state interest. For the next thirty years the Court applied *Sherbert* sporadically.[45] The Rehnquist Court overruled *Sherbert* in *Employment Division v. Smith*,[46] which abandoned strict scrutiny of general state laws causing indirect harm to religious exercise. An unusual combination of religious as well as liberal groups denounced *Smith* as a deprivation of established free exercise rights. There was immediate pressure for the pre-*Smith* right to be protected notwithstanding the Supreme Court's opinion. Some state courts, for example, evidenced a willingness to give greater protection to the free exercise right than the Supreme Court was willing to do.[47] The more important response was at the national level, however.

Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA")[48] to override *Smith*. Section 1 of the statute provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the application furthers a compelling state interest. With a few exceptions, the statute claims to codify the prior free exercise jurisprudence.[49] Stated another way, RFRA effectively supersedes the *Smith* constitutional right with a *Sherbert* statutory right. An outstanding issue is whether Congress has the constitutional power to accomplish this supersession. Although doctrine in this area is muddy,

43. *See* Reynolds v. United States, 98 U.S. 145 (1878); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

44. 374 U.S. 398 (1963); *see* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

45. In one case it was dramatically applied. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating state insistence that Amish families send their children to public schools).

46. 494 U.S. 872 (1990).

47. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275.

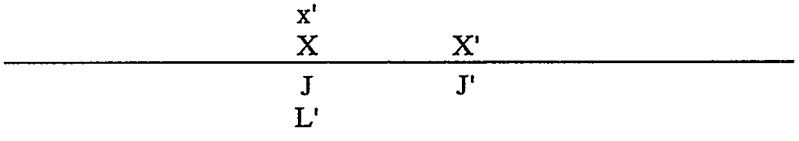
48. 42 U.S.C. § 2000bb (Supp. 1993).

49. *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995).

our game theoretic model suggests reasons why the Court would want to acquiesce in Congress' rights expansion. The Court may narrow RFRA by interpreting it stingily or to avoid constitution-based presumptions, but it will be disinclined to override a congressional enactment as decisive as RFRA.

Figure 3 maps the movement of rights from *Sherbert* through RFRA:

FIGURE 3



Shift in policy, from *Sherbert* ($X = J$) to *Smith* ($X' = J'$) to RFRA ($x' = L'$)

The story of the free exercise cases (Figure 3) resembles the story of the voting rights cases (Figure 2a). In both instances, the Warren Court created a new constitutional right, disregarding precedent and innovating mightily; a more conservative Court overruled the rights-creating decisions and was in turn overridden by Congress seeking to reinstate the Warren Court rules.

CONCLUSION

No doubt, Americans have become accustomed to conceiving of their relationship to each other and to the state in terms of rights. This disposition symbolizes much that is distinctive about our political life and culture, and, many would argue, it has served the nation well. By placing their faith in the individual rather than the state and insisting on a robust space for autonomous choice, Americans have limited the danger of tyranny—or at least tyranny by public officials. The tendency to create rights—the attempt to solve social problems by delegating decisionmaking power to individuals rather than broadening the discretion of public policymakers—has been, on this view, both a characteristic and successful political strategy of American public life.

While we admit that there are cultural and historical roots of rights orientation, we have argued that this tendency cannot be adequately accounted for without considering our nation's distinctive institutional structure. The institutional structure embodied in the Constitution makes the rights-creation solution for social problems a

natural one for American politicians. The division of powers embodied in the Constitution promotes a long-term tendency to create rights. Courts and legislatures are given a great temptation to protect their most cherished preferences by enshrining them as rights creations. Once constitutional rights are found, they are given a great deal of protection against statutory override. Moreover, judicial longevity and stability promoting legal doctrines conspire to make rights unlikely to be reversed. This is not to say that reversals do not happen. The rejection of *Lochner*, *Plessy*, and *Dred Scott* stand as reminders both of the possibility and of the extraordinary nature of such action.

The tendency to rights creation is not necessarily biased in conservative or liberal directions. While the development of privacy rights is currently favored by liberals, expansion of the effects of the Takings Clause is popular with many conservatives. In any case, we think that the temptation to turn political disputes into matters of legal rights has an important and enduring impact both on American political culture and on the content of our public policy. By transforming political argument into legal dispute about rights claims, some kinds of political justifications are privileged and others discounted. Programs that can be comfortably situated in a rights discourse are easier to defend than those whose effects cannot be so explained. Indeed, it seems to us that recent attempts to remove the entitlement status of various welfare programs constitute a recognition of the importance of defending public programs in terms of rights.