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THE CRITIQUE OF RIGHTS

Mark Tushnet*

IMMEDIATELY after the Supreme Court announced its decision in the 1992 abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ lawyers and spin doctors on both sides of the issue congregated on the Supreme Court's plaza to interpret the outcome. Remarkably, both sides went out of their way to emphasize how serious a blow the Court had dealt to their position. Pro-choice advocates insisted that the Court had severely impaired the protection available to the right to choose by abandoning the proposition that the right to choose was fundamental; anti-choice advocates bemoaned the fact that the Court had reaffirmed rather than overruled *Roe v. Wade*.²

These press conferences illustrate one aspect of the more general critique of rights developed by critical legal studies.³ The advocates believed that winning a legal victory in court was less important to their goals than winning in the arena of public opinion, and their comments showed that they believed they could gain more public support by persuading audiences that they had *lost* in court. The critique of rights examines the relation between legal victories and political effects. In its weakest version the critique of rights argues that there is no necessary connection between winning legal victories and advancing political goals; in a somewhat stronger version it argues that, more frequently than most lawyers think, winning legal victories either does not advance political goals or actually impedes them. In the strongest and most implausible version the critique of rights argues that winning legal victories almost never advances political goals.

I. WINNING AND LOSING

The critique of rights distinguishes between winning legal victories and winning political ones. Sometimes this is simply a distinction between *short-term* effects and *long-term* ones. Merely getting a judgment from the

* Professor of Law, Georgetown University Law Center. This essay is based on a talk given at the SMU Law School in April 1993, when I participated in the Atwell course in constitutional law. I would like to thank the SMU faculty, and particularly Lackland Bloom, for their hospitality.

1. 112 S. Ct. 2791 (1992).

2. 410 U.S. 113 (1973).

3. This essay is the second in a series dealing with critical legal studies as what I call informal political theory. The first is Mark Tushnet, *The Indeterminacy Thesis*, J. PROGRESSIVE LEGAL THOUGHT (forthcoming), which also offers a brief description of informal political theory. I have deliberately refrained from annotating this essay; I will provide more complete discussions of comments on and responses to the critique of rights in the larger work of which this essay is a part.

Supreme Court that constitutional rights have been violated may not have much meaning unless that judgment is enforced. The history of school desegregation litigation, one of the prime examples for the critique of rights, illustrates this difficulty. The Supreme Court held school segregation unconstitutional in 1954, but its judgment was so widely disregarded in the deep South that only a tiny number of schools there were desegregated by 1964. In this sense *Brown v. Board of Education*⁴ was a short-term victory (the short term being the days following the Court's decision) and a long-term irrelevancy (the long term being the ensuing decade).

Of course that view of *Brown* is distorted in several ways. Why, for example, should the long term be a decade rather than a generation? If we take the even longer perspective, *Brown* was successful in eliminating legally sanctioned explicit racial school segregation. (By the time that happened many people had come to think that de facto segregation was at least as important, and that *Brown* was a failure because it did not address that problem. Recall here the indeterminacy thesis, which implies that all we can say is that the Supreme Court eventually decided to treat *Brown* as if it did not address de facto segregation.) And, why should the measure of success be actual desegregation rather than the public assertion by the nation's highest court of a principle with large-scale effects on public opinion about race?

Another way to think about the relation between legal victories and political ones is to distinguish between *ideological* effects and *material* ones. The Court's statement that segregation was unconstitutional could be an ideological victory in court even if it had no material effects on schools in the deep South. And, ideological victories can have material effects over the long run; the principle the Court articulated in *Brown* may have become embedded in the nation's self-understanding in ways that affect race relations much more generally.

These distinctions help in explaining the critique of rights. If we start with the simple distinction between legal outcomes and political outcomes, there are four possibilities: winning a legal victory and winning politically (Category I); losing in court but winning politically (Category II); winning a legal victory but losing politically (Category III); and losing in court and in politics, too (Category IV). The abortion case press conferences show people trying to put their causes in Category III. The weak version of the critique of rights claims that there are interesting and important examples in all four categories.

Before examining how these boxes get filled, it is worth asking why people on the left developed the critique of rights. After all, some of the most important progressive advances in this century occurred through winning legal victories: *Brown*, the 1973 abortion decision,⁵ restructuring the law of gender equality. And, even if the legal victories alone were insufficient to vindicate the material interests at stake—insufficient, that is, to achieve racial or gender equality—they still had something to do with alleviating the worst

4. 347 U.S. 483 (1954).

5. *Roe v. Wade*, 410 U.S. 113 (1973).

| | | Outcome in Court | |
|---------------------|------|------------------|------|
| | | Win | Lose |
| Outcome in Politics | Win | I | II |
| | Lose | III | IV |

inequalities of race and gender. Does not the critique of rights implicitly, and to some extent explicitly, deprive progressives of a tool—rights arguments—that has proved useful? Does not it implicitly, and to some extent explicitly, criticize advocates for pursuing what seemed to them the only reasonable course available under circumstances of severe inequality?

To some extent the critique of rights serves as a simple caution against overestimating the significance of legal victories. The persistence of segregation after *Brown*, for example, cautions advocates to distinguish between the short term and the long term, and between material accomplishments and ideological ones. To say that *Brown* was more significant as an ideological victory than as a material one does not mean that *Brown* was unimportant; it means only that we ought to be careful in thinking about the way it was important.

Proponents of the critique of rights think that this sort of caution is particularly important for lawyers, and for a public in the United States with its distinctive constitutional and legal culture. For obvious and understandable reasons, lawyers are likely to overestimate the contributions they can make to social progress. Cautions about what we can actually accomplish help deflate our sense that we are essential contributors to progressive social change. And, to the (relatively small) extent that progressives make decisions about where to allocate their limited resources, the cautions serve to improve the accuracy of the calculation of the possible benefit of investing in legal action rather than in something else—street demonstrations, public opinion campaigns, or whatever.

The U.S. constitutional and legal culture matters, too, because in that culture the simple statement by a court that someone has a right—in itself only an ideological victory—can too easily be taken, by the public if not by progressive lawyers and their allies, as a complete victory. It takes work, in our culture, to connect ideological victories to material outcomes, to explain why *Brown*'s condemnation of school segregation is betrayed when African-American children still attend schools with almost no white children. The cautions emerging from the critique of rights remind progressives that such work continues to be necessary.

The constitutional and legal culture may be even more important, though. Sometimes winning a legal victory can actually impede further progressive change. This argument comes in a narrow and a broad version. The narrow version points out that some ways of articulating rights have ideological implications that work against progressive change. The earliest presentations of this narrow argument used the experience of the U.S. labor movement and the Wagner Act of 1937. Critics argued that the Wagner Act embedded a vision of labor-management relations in law that, in the immediate circumstances of 1937, advanced labor's interests but that, in the longer run, provided a strong ideological defense for the exercise of management prerogatives over a wide domain. Another version of the narrow argument is Catherine MacKinnon's controversial claim that the Supreme Court, in protecting a woman's right to choose to have or not have a child as an aspect of her right of privacy, helped define a sphere of private life into which the government could not intrude.⁶ According to MacKinnon, this way of approaching the abortion issue helped immunize the "private" sphere of domestic relations from government regulation even though women are severely disadvantaged within that sphere, as when they are beaten by men they live with, or are coerced into having sex with those men.⁷

This narrow argument is, once again, a caution: Progressive lawyers ought to be careful in articulating their legal claims, so that if the courts adopt their arguments the long-term prospects for progressive change will not be impaired by the ideological implications of the *way* in which the legal claims were made. So, for example, perhaps it would be better to defend the right to choose as an aspect of women's equality, as essential to their full participation in social life in all its aspects, rather than as an aspect of privacy.

The broader version of this argument asserts that these cautions almost certainly cannot succeed. In part this is because advocates lose control over the arguments they make once courts accept them; after that, what privacy means, or what equality means, is substantially determined by courts, which are almost certainly not going to be as progressive as the progressive advocates would like.

More important in the broad version of the argument, though, is the claim that legal rights are *essentially* individualistic, at least in the U.S. constitutional and legal culture, and that progressive change requires undermining the individualism that vindicating legal rights reinforces. The argument's conclusion is that the long-term ideological consequences of winning victories in courts are almost certainly going to be adverse to progressive change.

Why, though, are rights-claims so essentially individualistic? After all, we can easily *define* rights that attach to groups; contemporary international human rights law, for example, recognizes rights of cultural minorities for preservation of their cultures, or of linguistic minorities for preservation of

6. See, e.g., Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

7. *Id.*

their languages. Yet, these group rights have two characteristics: Recognizing them as rights is quite controversial, and their recognition has been quite recent. These characteristics actually support the broader version of the argument that rights are ideologically troublesome because they are almost necessarily individualistic. They show that, in the modern world, rights-claims really do have a strong individualist spin, which advocates of group rights must work to overcome.

Rights-claims are individualistic, in this argument, not because of something inherent in the concept of rights, but rather because of the historical development of the language of rights. The central image of "rights" in our culture is, as MacKinnon's critique suggests,⁸ of a sphere within which each of us can do what he or she pleases. This image, in turn, reinforces the distinction between law and politics that is itself subject to challenge from critical legal studies. Politics is the domain of pure will or preference, not subject to discussion and deliberation except as each individual chooses to be influenced by others. Rights—or law—protect the domain in which political preferences are formed. If, however, a critic believes that making politics truly social is an important task, it might be important as well to fight an ideology, the ideology of rights, that leads people to think of themselves as disconnected from others in important ways.

This broader argument about the individualistic ideology of rights is not an argument about the *concept* of rights. Rather, it is an argument about the way the language of rights actually functions in contemporary U.S. constitutional and legal discourse. Even more, the argument does not assert that the individualistic ideology of rights is the *only* one available in contemporary legal discourse. The argument does assert, though, that the individualistic ideology is the predominant one. Like the narrow argument, it could be taken as simply cautioning against hoping for too much from rights-based arguments, particularly emphasizing the adverse ideological consequences that such arguments might have. Because it is more comprehensive, that is, because it relies on quite general concerns about contemporary constitutional and legal culture, the broader argument suggests a deeper skepticism about the ability of progressive advocates actually to formulate arguments that will not succumb to these ideological perils.

II. WINNING BY WINNING, LOSING BY LOSING

Two categories—winning politically by winning in court (Category I), and losing politically as well as in court (Category IV)—encompass the central images of the traditional notion of why rights are valuable. The critique of rights does not deny that some cases fall into these categories, although its proponents usually suggest that fewer cases do than progressive lawyers sometimes claim.

*Brown v. Board of Education*⁹ may be problematic as an example of win-

8. See *supra* note 6.

9. 347 U.S. 483 (1954).

ning material victories by winning legal ones, but it certainly is an example of winning an ideological victory, falling in Category I. Beyond an authoritative statement about segregation, *Brown* was a demonstration to the entire nation that one of its major institutions took the claims of African-Americans to equal treatment seriously. More generally, ideological victories in court can constitute the entry of previously excluded groups into one of the most important forms of discourse in United States society, that is, the discourse of rights.

Legal victories can, of course, also be material ones. Canada's Supreme Court invalidated the country's regulation of abortions on what could have been taken as rather narrow grounds, which as a matter of law a legislature could have gotten around rather easily.¹⁰ The political context into which the decision was inserted, though, meant that no alternative proposal could obtain a parliamentary majority. As a result, Canada has *no* regulation of abortion aside from its general regulation of medical procedures. The legal victory in Canada, narrow on its face, turned out to be more effective in securing the right to choose than the apparently more sweeping legal victory in the United States abortion litigation.

The political context, which plays such a large part in explaining why the legal victory in Canada was also a material one, points to a broader issue. Sometimes it may be hard to figure out whether the legal victory, or something else, really mattered in bringing about the material change. Often so much else is going on in the culture that change might have been inevitable. A controversial example is the suggestion, made by Gerald Rosenberg and others,¹¹ that in 1973 changes in public policy about abortion were already occurring, and the Supreme Court's abortion decision did relatively little even to accelerate those changes. Or, consider the suggestion that the desegregation of the armed forces and of professional major league baseball in the late 1940s had more to do with changes in public belief about race relations than the ideological victory in *Brown*.

This does not amount to a critique of rights in any large sense, for it does not suggest that the legal victories were harmful. One modest point, though, could be part of a critique of winning by winning (Category I): If other aspects of cultural change are more important than legal victories in producing ideological or material change, investments in legal victories may be imprudent. That is, if a progressive movement has a choice between investing its resources in a legal strategy and investing in some other strategy, such as community mobilization through its churches (a major factor in the civil rights movement), it may make sense to avoid investing in a legal strategy even though the strategy would result in victories in court. This point is modest, however, because social movements rarely are faced with such discrete choices about investing resources; things tend to be much more catch-

10. *Morgentaler v. Regina*, 1 S.C.R. 30 (1988) (Can.).

11. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

as-catch-can, driven by personalities and chance opportunities rather than by deliberate reflection.

If winning by winning is relatively unproblematic, and supports only a modest critique, what of losing in court and losing in politics, too (Category IV)? Here not even the investment argument supports a critique, because the political loss shows that investing in a failed legal campaign would not have changed the result. (I put aside the minor point that sometimes switching the resources devoted to a legal strategy into a non-legal one would have changed the political loss into a political victory.) And, besides, social movements rarely go to court—choose a legal strategy—unless they are pessimistic about what they could accomplish through political action. As the campaign against school segregation showed, people who lack political power go to court as a last resort. So, if people go to court only if they are convinced that they cannot win any other way, how could a critique of rights have any force here?

Probably the best recent example of losing and losing (Category IV) is the welfare rights movement. Public sentiment about “welfare” was so adverse in the late 1960s that the courts were the only place advocates of expanded public assistance programs could expect a fair hearing. For a brief period it seemed possible that the Supreme Court would take an aggressive stance in vindicating the claims of recipients of public assistance.¹² When the Supreme Court rejected welfare rights claims,¹³ were those advocates and their constituents any worse off?

The claims of the critique of rights about losing and losing (Category IV) must be as modest as those applied to winning by winning (Category I). In the constitutional and legal culture of the United States, claims of rights occupy a special place. When those claims are vindicated something special happens: Political actors and the public are supposed to take those claims much more seriously than before. When claims of rights are rejected, formally speaking, nothing special ought to happen: The claims should become political demands, no different from the entire range of ordinary political demands made by defense industries, organized labor, and the like. But, one serious adverse possibility does exist. If a social movement places all its bets on a rights strategy (even if it does so because no other strategy has any prospect of success), when its claims of rights are rejected, the public may think that the claims need not be considered *at all*; rather than becoming ordinary political claims like any other, the rejected claims of rights simply drop out of political consideration. In the rhetoric of politics, that is, while rights-claims that are vindicated are extremely important, those that are rejected are not ordinary policy claims but are, instead, completely unimportant.

Although rejected rights-claims *can* become political irrelevancies, they need not. The critique of rights applied to Category IV, then, is relatively modest.

12. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

13. *Dandridge v. Williams*, 397 U.S. 471 (1970).

III. LOSING BY WINNING, WINNING BY LOSING

The critique of rights is most controversial among lawyers when it is applied to Category III (losing by winning). In that category, groups that win legal victories nonetheless are *worse* off because they lost politically. By insisting that Category III situations sometimes arise, the critique of rights threatens the self-understanding of lawyers who believe that the legal work they do contributes to progressive social change. For political scientists, less directly involved in legal work, the critique of rights is less troublesome.

The basic dynamic in Category III (and, in a related way, in Category II—winning by losing) is simple. Consider how proponents and opponents of social change can respond to a legal victory. (The argument is clearest when the legal victory involves constitutional law, but the underlying political dynamics remain the same if the legal victory involves development of the common law or statutory interpretation.) Having won the legal victory, the proponents can turn their attention to another part of their political agenda. They will invest less than they had before in securing or protecting this particular claim. Meanwhile, their opponents may continue to invest as before. Facing constant pressure from the opponents and reduced pressure from supporters, the courts may whittle away at the prior legal victory. Further, having won in court, supporters of change may think that they no longer have to be as worried, and can turn their attention from political and legal matters to other things, such as raising children or making money. On the other side, their opponents may have been outraged by the legal victory, and they may devote even more energy than before to opposing social change. When supporters become complacent and opponents mobilize, the result of winning the legal victory can be losing the political battle.¹⁴

To make the argument somewhat more concrete, consider the following version of the history of abortion litigation in the United States. The Supreme Court struck down most states' abortion laws in 1973.¹⁵ Its decision provided some opportunities for anti-choice forces to try to enact restrictive legislation. Pro-choice activists, though, believed—correctly, for a decade or so—that the courts would strike down restrictive abortion laws. Sensibly enough, they devoted their political energies to other issues, relying on the low-cost courts for protection against restrictive abortion laws. Meanwhile, their opponents mobilized around the abortion issue, but their political concerns were broader. In the short to medium term, their efforts

14. The related argument about winning by losing is that a legal defeat may energize proponents of social change. For example, the Canadian abortion litigation had an early defeat. *Regina v. Morgentaler*, 47 D.L.R. 3d 211 (Quebec Ct. App. 1974). Dr. Henry Morgentaler challenged Quebec's abortion regulation and, remarkably, was acquitted by the jury. Canadian law allows prosecutors to appeal acquittals, and the appellate court reversed the jury's judgment. Instead of sending the case back for another trial, though, the appellate court invoked a rarely-used provision and actually entered a judgment convicting Dr. Morgentaler. Morgentaler served a jail term, which must be counted as a legal defeat. Yet, the sequence of events, and particularly what seemed to many Canadians the appellate court's overreaching, gave pro-choice forces a powerful political boost. This dynamic explains why both sides sought to call the United States Supreme Court decision in 1992 a defeat.

15. *Roe v. Wade*, 410 U.S. 113 (1973).

to enact restrictive *abortion* laws were unavailing, but they had real influence over other issues. That is, pro-choice forces found themselves facing stronger forces on issues *other than* abortion than they had faced before their legal victory in the abortion cases.

Pro-choice forces prevailed, again for a decade or so, on abortion issues, but lost on the other issues they hoped to advance. And, among those other issues was the overall composition of the federal judiciary. That is, the pro-choice legal victories contributed to the right-wing transformation of the federal courts.¹⁶ With that transformation, the pro-choice victories themselves eroded. Perhaps on balance the benefits for pro-choice forces, measured by what happened on the abortion issue over the years since 1973 (including the erosion, but not the overruling, of the initial victory), exceeded their losses on other issues. The critique of rights argues that *that* is the relevant issue for advocates of progressive legal change to consider.

Although the political dynamic of demobilization after a legal victory is the largest component of the critique of rights in Category III, it has other elements. As I have argued, the critique of rights acknowledges that legal victories can be ideologically or culturally significant, particularly in offering support from important social institutions to claims that no such institution had taken seriously before. Like the victories themselves, however, the ideological significance may erode.

When a court recognizes a claim as a legal *right*, and particularly as a *constitutional* right, it treats the claim as really important: Rights outweigh ordinary policy concerns, for example. People on the other side of the issue then have to respond. They can say, as they often do, that the court made a mistake. But, at least in the short run, that may not be a promising strategy. Instead, they can argue that, although the court found a right on the other side (and so overrode mere policy objections), it did not consider whether that right was countered by some other right. That is, the rhetoric of rights generates a rhetoric of counter-rights. Against the right to choose, the right to life is deployed; against affirmative action, the language of discrimination against white men begins to be used.

Proponents of progressive social change tend to treat the rhetoric of counter-rights as phony; for them it is a distortion of the language of rights to say that white men have rights infringed by affirmative action. Counter-rights are invoked so often, though, that they should be understood as systematically bound up with the rights themselves.

Once counter-rights come into play, two things happen. First, and less significant, the framework of legal analysis changes. Rights may outweigh mere policies, but the outcome when a right is arrayed against a counter-right is far less clear. The rhetoric of counter-rights, that is, may assist the courts if they want to whittle away at the initial legal victory.

16. The point is not that conservative Republicans won control of the presidency because of the abortion issue; obviously, economics played a much larger role. Rather, conservative activists in the Republican party gained control over judicial appointments and insisted on appointing only right-wing judges.

Second, and more important, at the outset rights seem to be particularly powerful claims on society. Such powerful claims are needed because they are asserted on behalf of those previously excluded from serious consideration; having been excluded before, these groups not only should be allowed to take part in ordinary politics, they should receive special consideration because of their prior exclusion. As rights proliferate and generate counter-rights, the special force attached to the language of rights dissipates. The distinction between rights and mere policies weakens, and proponents of rights-claims become just another interest group in the ordinary play of politics. Of course, to the extent that the real benefit of recognizing their rights was ideological, in validating their participation in politics, this transformation should be expected. It is likely to be experienced, however, as a betrayal of the promises made when rights, those especially powerful claims on society, were recognized.

The dialectic of rights and counter-rights has another effect. Because rights seem to be especially powerful claims, discussions of rights and counter-rights tend to get particularly heated. When rights are involved, really fundamental matters seem to be at stake. Losing then seems tremendously damaging, something to be avoided at almost all cost. And, because something fundamental is involved, compromises may seem unacceptable in principle: How could pro-choice (or anti-choice) activists compromise to accept a legal regime in which women's access to abortions was impeded (restricting the fundamental right to choose), but not made impossible (contrary to the fetus's fundamental right to life)? Yet, if compromise is ruled out, either one side will face a permanent defeat on an issue it regards as fundamental (which could have bad effects on social stability), or policy will swing wildly from protecting one right and denying the counter-right to protecting the counter-right and denying the initial one.

Of course, if progressives could be assured that they would end up on the winning side in this dialectic, if they knew that they would win a permanent victory, the prospect would hardly trouble them. In the long run, though, the chance of wild swings may be great enough that progressives ought to be willing to accept compromises that are, from their point of view, favorable on balance; the losses during the periods when their opponents are in control may be large enough to outnumber the losses that happen under the permanent compromise regime.

IV. THE CRITIQUE OF RIGHTS AND THE INDETERMINACY THESIS

The critique of rights is connected to the indeterminacy thesis. The most straight-forward connection is this: According to the indeterminacy thesis, nothing whatever follows from a court's adoption of some legal rule (except insofar as the very fact that a court has adopted the rule has some social impact—the ideological dimension with which the critique of rights is concerned). Progressive legal victories occur, according to the indeterminacy thesis, because of the surrounding social circumstances. If those circum-

stances support material as well as ideological gains, well and good. And, of course, as long as those circumstances are stable, the legal victory will be so as well. But, if circumstances change, the "rule" could be eroded or, more interestingly, interpreted to support *anti*-progressive change.

Another connection between the critique of rights and the indeterminacy thesis results from the combination of the individualism of rights in our legal culture with the dialectic of rights and counter-rights. Sometimes progressive lawyers propose changes that, their critics say, infringe on constitutional rights. Recent controversies over regulating hate speech and pornography illustrate the issue (although those proposals have been controversial *within* progressive ranks as well). Conservatives who in other contexts would not blink at suppressing speech, particularly sexually explicit speech, suddenly become ardent (in the case of hate speech regulation) or ambivalent (in the case of pornography) defenders of the First Amendment.

The indeterminacy thesis provides the conceptual tool for those who want to support these proposals. It detaches them from a deep First Amendment absolutism and allows them to develop legal theories that explain why free speech principles to which they remain committed nonetheless are not violated by their proposals. (Of course, the indeterminacy thesis by itself does not tell lawyers *what* those theories are; it does, however, assure them that it is *possible* to develop such theories, and thereby encourages a search that might not otherwise occur.) The critique of rights, though, cautions against expecting too much of these sorts of changes. By identifying the possibility of losing by winning, the critique directs attention to questions about the political forces supporting the changes and whether those same forces are likely to interpret and apply the new rules in a progressive manner. (Are minorities more likely to be prosecuted under hate speech regulations than those who abuse minorities, for example?)

The critique of rights also points out that the rhetoric of rights is available to *anti*-progressives. This has two aspects worth noting. First, if the rhetoric of rights in our culture is individualistic (and if that sort of individualism is anti-progressive in today's circumstances), conservatives are *more* likely than progressives to find the rhetoric of rights helpful. For example, conservatives have used the rhetoric of rights to obstruct progressive regulation of property and—in a directly related field—to challenge campaign finance regulation on the ground that it violates free speech rights. On this view, progressive victories are likely to be short-term only; in the longer run the individualism of rights-rhetoric will stabilize existing social relations rather than transform them.

Second, when conservatives use the rhetoric of rights, the dialectic of counter-rights occurs. Here, progressives must characterize their proposals as themselves vindications of rights: Hate speech and pornography regulations must be said to protect the constitutional rights of African-Americans and women to full participation in social life, for example. The indeterminacy thesis establishes, of course, that these characterizations are possible, and scholars have provided the relevant arguments. Still, it remains true

that defending these proposals as *required* by the Constitution—in order to overcome the conservative rights-claim that they are *prohibited* by the Constitution—is more difficult than defending them as good policy.

V. CONCLUSION

Nothing in the critique of rights ought to be particularly surprising to political activists or political scientists. They know that a legal victory has complicated relations to ideological and material change, in both the short and the long term—and similarly with legal defeats. The critique of rights is directed primarily at progressive lawyers who, inspired by what turned out to be the brief, perhaps aberrational, and sometimes overstated role of the Supreme Court in advancing progressive goals in the 1960s, overestimate the importance of the work they do. And, even there, it hardly undermines that work. Unless the resources the lawyers use would be used in some other, more productive way (which is quite unlikely), the critique of rights says primarily that lawyers should not expect too much from what they do, and that they should not be surprised if things turn out rather differently from what they expected when they urged courts to adopt some progressive formulation of the rights we have.

Tax Reform Essays

