Do people have the right to generate electricity for their own use and still remain connected to the grid? Of course they do. You see it every day. Without prior registration or a background check, anyone can go into a hardware store and buy a diesel generator. Homeowners and businesses can install rooftop solar photovoltaics and enjoy the benefits of low-carbon energy. A business can install backup generation to ensure that it can rely on a steady supply of power. In fact, this right is so self-evident, that one would be hard-put to find a state that has bothered to mention it in a statute or in its constitution. So, why is it even worth mentioning? Because as solar photovoltaics become more cost-competitive, electric utilities across the country are working overtime to find a way to interfere with that right.

It is Jon Wellinghoff, the former Chair of the Federal Energy Regulatory Commission, who first brought this issue to my attention. With the help of three Berkeley Law graduates, he and I have written an article on the subject that was recently published in the Energy Law Journal. The Berkeley Law graduates who contributed to the project are Sheena Stoecker, Emily Sangi, and Romany Webb.

The right to self-generate is a natural extension of the common law — property owners can make productive use of their property. States can invoke police power to regulate the use of liberty and property in order to promote health, safety and economic welfare. Consistent with the exercise of that power, there are reasonable restrictions on the use of electric generators as they affect air emissions, water quality, noise, and conflicting land uses. In the case of rooftop solar, regulators often require the use of shut-off devices to protect line workers who are responding to a power outage. But the right of grid-connected customers to generate their own power remains. Support for this proposition is implicit in the many laws that encourage customer-sited generation through the use of economic incentives, protective easements, or mandates. None of these laws creates a right to self-generate. That right is presumed.

It is important to have that right in mind while considering recent proposals that would discourage or interfere with efforts to self-generate. In California, for instance, regulators are reviewing proposals to impose substantial monthly fees on a customer who self-generates while remaining connected to the grid. They have already imposed a minimum bill requirement on all residential customers – a charge that ensures that rooftop solar customers will pay for utility service, even if they don’t use it. In Minnesota, there has been an effort to prohibit rooftop solar customers from using their own power by forcing them to sell it into the grid. In

many states, there are barriers to the use of third-party solar companies that would install onsite generation and then charge the property owners for the output. In some places, utilities have discussed the imposition of exit fees on customers electing to use their own power, or prohibiting onsite energy storage (usually in the form of batteries) – other limitations that could make it more difficult for some customers to exercise their right to self-generate.

In our article, we suggest that policy advocates may want to encourage regulators and lawmakers to recognize the right to self-generate explicitly, and use potential impacts on that right as a yardstick for assessing the merits of new policy initiatives. Perhaps this is a right that no longer should be implied, but instead, should be saluted.