Preface

Of all the tasks entrusted to American political institutions, none is more fundamental than securing individual rights. The individuals who founded American state and national governments were concerned above all with ensuring that these institutions would safeguard the people’s liberties. The first step that several states took in 1776, prior even to separating from Great Britain, was to draft documents that enumerated the rights to which all individuals were entitled. When it came time to announce a formal separation, the signers of the Declaration of Independence made it clear that governments are instituted to secure rights and that they are legitimate only insofar as they do so effectively. Similarly, those who drafted the U.S. Constitution stated in the preamble that one of the primary purposes of establishing a national government was to secure the blessings of liberty. Even after these institutions had begun operating, the founding generation continued to reflect on a question posed most explicitly by James Madison in an essay entitled “Who Are the Best Keepers of the People’s Liberties?”

One might therefore expect that the centrality of rights in the American regime would inspire ongoing studies of the institutional arrangements under which rights are best protected. In fact, this question is rarely raised or addressed in an empirical and systematic manner. Although historians have been concerned with determining the original understanding of particular rights, and law professors continue to analyze judicial interpretations of these rights, political scientists have given remarkably little attention to the question of which institutions are the best keepers of the people’s liberties.

The conventional understanding is that this question has already been answered. It is considered to have been addressed at the time of the founding, when the creation of an independent judiciary, the ratification of a bill of rights, and the establishment of judicial review demonstrated that rights were intended to be secured through judicial interpretation of bills of rights. It is thought to
have been settled, furthermore, by the practice of the last forty years, during which time a number of important liberties have been secured through these institutions. It is thought to have been resolved, finally, by recent discussions among the nation’s leading law faculty, who are nearly unanimous in holding that rights are best secured in this manner.

In fact, in the current era, as Robert Nagel has written, it is “difficult for many, whether in or out of the academy, even to imagine any alternative” to judicial review as a means of securing rights, much less to evaluate the effectiveness of any other institutional arrangements. It has even come to the point that this view has become an orthodoxy that is accepted as an article of faith rather than as the product of systematic study. Ronald Dworkin, for instance, argues in Law’s Empire that “The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.” He then admits, “I offer no argument for this flat claim; a further book would be necessary to do so.” Likewise, in his book Judicial Review and the National Political Process, Jesse Choper concludes that “the experience of history strongly suggests that vesting the majority with the ultimate power of judgment, although far from being calamitous, would not sufficiently protect minority rights.” But then he acknowledges: “In advancing this conclusion, it must be admitted that the data have not been scientifically tested in that the American experience has not been compared to what would have occurred in the absence of judicial review. In the nature of things, there is no way to conduct such a controlled inquiry.”

It is my contention, however, that there is indeed a way to conduct such an inquiry, and that this might consist of a historical investigation into the manner in which rights have been protected in the American polity. The fundamental questions to be answered are the following. First, how have rights been protected at various times in American history? Which institutions have been viewed as most capable of protecting rights at any given time; what have been the role and behavior of legislators, judges, and citizens; and what have been the various mechanisms by which rights have been secured? Second, to what extent have each of these institutions been effective in securing rights? How well have the various institutions prevented violations of rights, how well have they provided for the extension of rights in response to changing circumstances, and how well have they provided for the recognition of rights that were only discovered in the course of American history?

Keeping the People’s Liberties is an account of this inquiry. I have chosen to examine the extent to which rights have been protected in state institutions. The states, after all, were primarily responsible for securing rights for the greater part of American history, and they continue to be the site of deliberations over many rights. They also permit a consideration of a variety of institutional arrangements, in that they have an extensive tradition of constitutional amendment and revision, as well as the only experience with direct democratic institutions.

Because it is neither feasible nor desirable to analyze the records of all fifty
states, and because it would be inappropriate to generalize from the experience of one case, I have chosen to examine four states: Massachusetts, Michigan, Oregon, and Virginia. These states are sufficiently representative of the American polity, in that each has served as a beacon in legislative, popular, judicial, or constitutional matters. They are also sufficiently diverse—on the basis of geography, political culture, and institutional design—to permit distinctions to be drawn when appropriate.

This inquiry into these states’ legislative statutes, judicial decisions, convention debates, and initiative records between 1776 and 1990 has led me to identify three principal regimes of rights protection and to conclude that in two of these regimes, which encompass the greater part of American history, rights were not protected primarily through judicial enforcement of bills of rights. During a republican regime, which had its origins in the initial state constitutions and predominated throughout the nineteenth century, rights were secured primarily through representative institutions and the political process, particularly through the passage of legislative statutes. In the first two decades of the twentieth century, a populist regime was introduced through a series of constitutional amendments and revisions. The ideal institutions of rights protection during this period were the initiative and the referendum, which were thought to provide the best expression of the views of the collective citizenry. Not until the middle of the twentieth century can we identify the emergence of a judicialist regime, which was instituted primarily through changes in the realm of thought and which holds that rights are best protected through judicial enforcement of bills of rights.

The overriding purpose of this investigation is not merely to identify these various institutional arrangements but to evaluate their capacity to secure rights. That is, by examining particular eras in which certain institutions were primarily responsible for protecting rights, we can gain some empirical knowledge about the general tendencies of these institutions. Contrary to the conventional understanding that courts are the sole institutions capable of keeping the people’s liberties, it turns out that legislators, citizens, and judges are each capable of securing particular rights in certain situations. The challenge is to identify these rights and to define these circumstances and, in the process, to further our knowledge of who are the best keepers of the people’s liberties.

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