Constitutions establish a general framework within which rights are protected, but in order to fully appreciate the way in which rights are secured at any given time, we should look beyond the formal institutional arrangements and study the actual behavior of public officials. It is important, in particular, to identify the norms that govern legislative, judicial, and citizen behavior, as well as the manner in which these individuals actually behave in the course of securing rights.

From the founding period until the close of the nineteenth century, legislators understood that they were primarily responsible for the protection of rights and that statutes were the principal means by which rights were secured. Judges generally refrained from removing questions from the political process. Their role consisted largely of superintending the forms of government and legislation and of rendering decisions that rested on statutory or common-law rules. Finally, the collective citizenry was prevented from deliberating over rights. Although a number of motions were entertained during this period to permit issues to be resolved directly by the people or their representatives assembled in constitutional conventions, these proposals were, more often than not, rejected on the ground that they improperly removed issues from the political process.

THE ROLE AND BEHAVIOR OF LEGISLATORS

The design and powers of the legislature underwent significant changes in the course of the eighteenth and nineteenth centuries. The earliest constitutions reflected legislative supremacy in their formation and content. In many states, legislatures drafted and ratified the constitution, retained responsibility for selecting the members of the executive and judicial branches, and encountered few limitations on their lawmaking power. It was not until well into the nineteenth
century that many legislatures ceded the power to revise their constitutions, that legislators were stripped of their power to select the members of what were now seen as coordinate branches, and that significant procedural and substantive restrictions were imposed on the legislative process.\(^1\)

What remained unchanged throughout this period, however, was a view—shared by legislators, judges, and citizens—that legislatures were best positioned to secure individual rights. Of the various public officials who might be charged with this responsibility, legislators were thought to be most capable of representing the popular understanding of rights; legislative assemblies were considered the proper forum for deliberating about the content of rights; and statutes were seen as providing the most effective means of securing their protection.

It was thought, in the first place, that legislators represented the reflective, rather than the reflexive, judgment of the public with respect to securing rights. More importantly, legislators were considered superior to others who might be charged with this task. It may have been true, as numerous pamphlets proclaimed during this period, that the people were the best governors, but the general public was not considered capable of providing adequate security for individual rights. As Delaware Supreme Court Chief Justice James Booth argued, in an 1848 opinion that was quoted widely throughout the country:

> Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues.\(^2\)

Similarly, although judges were qualified by their education and training to interpret the law, they were too distant from popular opinion to be charged with sole responsibility for determining the rights to which individuals were entitled. In contrast, legislators provided a proper mix of responsiveness and reflection. Representative elections ensured that legislators could be held accountable to popular opinion, and therefore that they would be sufficiently responsive, but the rules and requirements of the legislative process ensured that their actions would be informed by a certain degree of reflection.

Furthermore, legislatures were thought to be well positioned to respond to changing conditions. The general understanding was that popular views of rights would evolve over time, and certain methods for securing rights would undoubtedly prove more effective than others. Neither constitutional conventions nor courts possessed the requisite flexibility to implement these changes. Conventions
met too infrequently to take account of changing circumstances, and their decisions could be overturned only by a subsequent constitutional amendment or convention. In the words of Alfred Hanscom, a delegate to the Michigan Convention of 1850: “If the Legislature make mistakes they are easily corrected; if we [the convention delegates] make them the mischief is incalculable.” Judges, it is true, assembled more frequently than constitutional conventions, but judicial decisions suffered from the same inflexibility as constitutional provisions. Insofar as they rested on constitutional grounds, they could be overturned only by a subsequent constitutional decision or amendment. As Michigan Justice Sanford Manning noted in an 1858 opinion: “When the power in the legislature to pass a law is called in question, and there is a reasonable doubt as to the power, it is better the court should err in favor of the power than against it; as the error in that case may be more readily corrected by the people, through their representatives, than in the other, which would require an amendment of the constitution.”

Legislators, because they met frequently, and because they could modify their previous decisions rather easily, were thought to possess a decided advantage over these other institutions.

Legislatures were also thought to be uniquely qualified to provide security for rights. To be sure, rights secured through constitutional provisions or judicial decisions were endowed with a certain degree of permanence, because these acts were so difficult to overturn. But insofar as public officials were concerned not merely with obtaining legal protection for rights but with guaranteeing their actual security, they believed that legislative statutes possessed an advantage over these other methods. The view was that citizens were particularly inclined to respect rights that were secured through statutes because they had an indirect role in making them and therefore felt a certain pride in preserving and upholding their guarantees. Of the two most prominent nineteenth-century foreign analysts, Alexis de Tocqueville was the first to take note of the particular capacity of statutes to generate popular compliance, commenting in the 1830s that “however annoying a law may be, the American will submit to it, not only as the work of the majority but also as his own doing; he regards it as a contract to which he is one of the parties.” James Bryce remarked later in the century that “It is the best result that can be ascribed to the direct participation of the people in their government that they have the love of the maker for his work, that every citizen looks upon a statute as a regulation made by himself for his own guidance no less than for that of others.” As a result, legislative assemblies could assume with some confidence that their efforts to secure rights would be no less permanent than actions taken by constitutional or judicial institutions, and in fact that they were more likely to be effective in providing practical security for these rights. As the Virginia General Assembly noted in the closing section of the 1786 Statute on Religious Freedom:

[T]hough we all know that this Assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the Acts of
succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this Act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.7

Legislatures, then, were thought to be responsive to popular opinion, adept at taking account of changing circumstances, and capable of providing security for legal guarantees. Moreover, they possessed these qualities in their proper measure. As a result, they were charged with taking appropriate action to secure individual rights, which meant in practice that they were responsible for translating general principles into particular legal guarantees and for remedying violations of these guarantees.

Legislators assumed responsibility, in the first place, for giving practical meaning to the general principles that were expressed in declarations of rights. It was one thing for constitution makers to stipulate that “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments,” or that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” But in order for these exhortations to have any practical effect, legislatures had to enact statutes that defined these terms and applied them to particular situations. As the Virginia Court of Appeals explained in an 1851 decision that required the judges to interpret a series of laws: “If we trace our legislation on this subject from the revolution down to the present day, it will be apparent ... that its whole purpose was and is to carry into practical operation the 8th section of the bill of rights which guaranties to every one accused of crime a speedy trial, and thereby secures him against protracted imprisonment.”8

More importantly, legislatures were responsible for remedying violations of these legal guarantees, which meant that they either repealed old statutes or enacted new statutes, depending on the circumstances. In some cases, these guarantees were breached by legislatures themselves, which enacted statutes inadvertently, with no knowledge that they would have the effect of depriving certain individuals of their rights. To secure rights in these cases simply required the legislature to acknowledge its error and rewrite the statute. For instance, in 1783, when the Virginia General Assembly became aware that it had mistakenly stripped Quakers and Mennonites of their citizenship, it promptly repealed the offending provisions.9

In other cases, statutes were enacted in haste, without the benefit of adequate consideration of their consequences. To secure rights in these cases required legislatures to undertake the requisite amount of deliberation and to repeal the offensive law. Thus, in 1855 in the midst of a heavy influx of Catholic immigrants, the members of the Massachusetts General Court enacted a law that had the effect of
forcing Catholic schoolchildren to read from a version of the Bible with which they were not comfortable. But in 1862, after a number of Catholics called attention to the injustice of the law, and after legislators had an opportunity to reflect on these petitions, the General Court amended the act so that it would be more acceptable to members of all religious faiths.10

Still other statutes had the effect of violating rights by virtue of the fact that they were inconsistent with evolving standards of justice. In these cases, legislatures secured rights by rewriting statutes so that they conformed to the popular understanding. In 1799, for instance, the Virginia General Assembly noted that the Virginia Declaration of Rights declared religion to be a matter of conscience, yet previous legislatures had enacted laws that “admit the church established under the regal government, ... have bestowed property upon that church; have asserted a legislative right to establish any religious sect; and have incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom.” Consequently, the legislature enacted a statute to “repeal certain acts, and to declare the construction of the bill of rights and constitution concerning religion.”11

In some instances, rights were violated by judicial decisions that failed to conform to evolving standards of justice. In an 1808 case, for instance, the Massachusetts Supreme Court ruled that defendants in libel cases could not present evidence that would attest to the truth of their statements. Then, in 1825, it reaffirmed this holding. Chief Justice Isaac Parker wrote that “this is certainly the common law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this Court.”12 Yet one year later, the Massachusetts General Court accepted the invitation to alter the common-law rule, and it enacted a statute that recognized the right of individuals to demonstrate the truth of their statements that were charged as libelous.13

It is important, therefore, to distinguish between the belief that legislatures are incapable of violating rights and the belief that legislatures are best capable of remedying violations of rights. Few public officials in the eighteenth and nineteenth centuries would have subscribed to the first statement. They were fully aware that legislatures were prone, though no more nor no less than any other institution, to disregard the guarantees contained in declarations of rights. But when these officials reflected upon the institution that was best suited to remedy these violations, they turned to the legislature.

THE ROLE AND BEHAVIOR OF JUDGES

The power of state supreme courts to invalidate legislative statutes was established early in the history of the Republic. State judges were reviewing the constitutionality of legislation well before U.S. Supreme Court Chief Justice John Marshall defended the power of judicial review in the 1803 case Marbury v.
In fact, “the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal” was the 1782 case *Commonwealth v. Caton*, in which the Virginia Court of Appeals invalidated a legislative act that had passed the house of delegates but had not been approved by the senate. The Massachusetts Supreme Judicial Court also announced early in its history that it possessed the power to review legislation, and in 1814 the court made use of this power for the first time in overturning a statute that affected only one person. By the middle of the nineteenth century, when the supreme courts of Michigan and Oregon began operation, judicial review was well entrenched. As Henry St. George Tucker, president of the Virginia Court of Appeals, proclaimed in 1837: “The power of the judiciary to decide on the constitutionality of a law is too firmly settled to be now questioned.”

The fact that state courts could declare legislation unconstitutional tells us little, however, about the manner in which courts actually secured rights. In addition to looking at the powers that courts formally possessed, it is important to understand the way in which judges conceived of their role in the political system. When judges in the nineteenth century reflected on the way that rights were best secured, they were apt to conclude that this task was best performed by legislatures, and that, save for exceptional cases, judges should refrain from removing questions from the political process.

This judicial posture is best illustrated by a series of opinions delivered by the justices of the Michigan Supreme Court in an 1856 case, *The People v. Gallagher*, where, in the course of sustaining a law that restricted the sale of alcohol, the justices engaged in a spirited debate over which institution was best suited to secure rights. The dissenting justices in this case contended not only that this particular legislative act violated “the natural rights of citizens” but also that legislatures were, in general, unfit to secure individual rights. In their view, any government that permitted legislatures to define rights could no longer “be justly deemed republican or free.”

Nor can those composing the minority be any longer certain of protection by government, or have the least security for the enjoyment of any rights which they may respectively possess; on the contrary, they must stand in no better attitude, irrespective of the fundamental principles and maxims of free government, than that of the most abject slaves to the majority, and at all times entirely dependent on the will, whim or caprice of the senators and representatives whom they may elect, for every right and for every privilege, political, civil or religious, they may enjoy.

A majority of the justices, however, rejected the view that this particular act violated the rights of any individual, and they went on to contest the claim that legislatures were incompetent to secure rights. There was, to begin with, “the great practical difficulty of defining, with any degree of certainty, what these rights are.” But over and above this question was another matter: “How, and by
whom, are they to be settled and defined? In the distribution of power, this duty belongs to some department; if to the legislature, then the question is settled against the defendant; if to the judiciary, then there is this practical difficulty, that the legislature has no criterion by which they can test the validity of their own acts, until the judicial will shall have been expressed."

When these justices compared the capabilities of these departments to secure rights, they concluded that legislatures were at least as competent as courts, if not more so.

It would be pretty difficult to assign any reason why they are not as safe in the hands of one department as another. It may be true that legislative bodies, acting from temporary impulses, without sufficient time for discussion and deliberation, are more likely to be influenced by the highly excited condition of the public mind than courts of law. But the elements of the two bodies are the same—their motives the same: both are acting for themselves and their immediate constituents, to whom they are accountable; besides, over half a century’s experience has demonstrated beyond cavil that the apprehension of evil upon this ground, if any apprehension ever existed, is utterly unfounded. Great wrongs may undoubtedly be perpetrated by legislative bodies, but this is only an argument against the exercise of discretionary power. It weighs nothing, for no government can exist without the existence of that power somewhere.

The majority opinion was the view that predominated throughout the nineteenth century. Although judges occasionally deviated from this position and argued that rights could be secured only through judicial enforcement, these were exceptions to a dominant norm that discounted any judicial superiority in protecting rights.

It did not necessarily follow that judges played an insignificant role in the protection of rights. Although judges were not inclined to substitute their understandings of rights for those of the legislature, this did not exhaust the possible judicial contributions to rights protection. Judges might protect rights indirectly by superintending the forms of republican government and of legislation. They could also protect rights directly by deciding cases on the basis of statutory or common-law rules. Only in rare cases, however, did they secure rights by striking down laws that ran afoul of provisions of bills of rights.

Judges superintended the forms of republican government in several ways. One of their chief responsibilities was to safeguard the separation of powers. The view was that rights were most secure when each governing institution exercised only those powers for which it was best suited. Threats to the separation of powers, and thus to the security of individual rights, could take a variety of forms. Occasionally, legislatures tried to reduce judicial duties or salaries, or they attempted to assume judicial powers, for instance, when the Virginia General Assembly “proposed to reopen and annul in whole or in part a judgment rendered
by a court of competent jurisdiction.” The Virginia Court of Appeals ruled in 1878 that this was “an attempted exercise of judicial power” and that “[i]t is now too well settled to admit of serious dispute that the legislative department can no more exercise judicial power than that the judicial department can exercise legislative power.” Justice Joseph Christian concluded: “That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.”

Equally offensive were legislative efforts to give powers to the judiciary that properly belonged to the legislative or executive departments. Accordingly, when the Massachusetts General Court enacted a law that directed the judges on the Massachusetts Supreme Judicial Court to appoint election supervisors, Chief Justice Horace Gray reasoned that these positions were “strictly executive,” and as a result: “We are unanimously of the opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the Constitution of the Commonwealth.”

Judges were also concerned with superintending the forms of legislation. The general understanding was that rights were secure insofar as laws were the product of adequate deliberation and publicity and insofar as they were generally applicable. Laws that did not benefit from proper deliberation were thought to be more likely to have unintended and harmful consequences for individual rights. Likewise, when laws were not debated in a public forum, there was a greater chance that they could infringe on liberties. Finally, laws that were directed at particular individuals or groups were also suspect, on the ground that they were more likely to sacrifice the public interest for special and local interests.

As a result, judges struck down laws that were introduced at such a late date in the legislative session that they could not have been accorded adequate consideration. The purpose of these decisions, according to Thomas Cooley’s *Treatise on Constitutional Limitations*, was “[t]o prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or, at least, the affording of opportunity for that purpose.” But another object was to enable the people to better secure their rights, by providing them with “an opportunity to be heard upon proposed legislation affecting their interests.” Michigan Justice Allen Morse argued:

The legislative journals, referring as they do to the titles of all bills introduced, give some warning to the people of measures introduced. The right of petition and protest has ever been recognized as one of the established privileges of the people in a free country; and they have a right to notice of proposed legislation, and an opportunity to express their assent or dissent. If there was no constitutional inhibition against such practice, bills might be introduced upon the last days of the session, and rushed at once through both houses, without any chance for the people to be heard before their passage, or to rectify the action until another biennial session of the Legislature.”
Judges also enforced constitutional provisions that required that each law contain only one subject that was accurately described in its title. These provisions were designed, in part, to prevent logrolling, but they were also intended to ensure that individuals had adequate opportunity to prevent the passage of legislation that was injurious to their rights. In particular, these provisions were designed "to prevent imposition being practiced upon unsuspecting members, by procuring their votes for bills with fair titles, which contain objectionable matters unconnected with the subject expressed in the title." The purpose was "to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits." When "clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect," the inevitable result was that the people's representatives were rendered incapable of deliberating about the consequences and preventing the passage of offensive laws.

Judicial enforcement of these subject-title provisions also served to protect rights in a more direct manner. At times, individuals appealed their convictions on the ground that the laws they were accused of violating were hidden in the statute books in such a way that they were not even aware that their behavior was illegal. In what could be described as a rejection of the adage that ignorance of the law is no excuse, courts occasionally overturned these convictions and struck down the offensive laws. In 1881, for instance, a Michigan man who had been drinking in public was convicted of violating a particular provision of a liquor regulation act. He argued, however, that he had no way of knowing from the title of the act that what he had done was illegal. The Michigan Supreme Court agreed: "By no reasonable construction can the purpose of this section be said to be embraced within the title of the act. The punishment of a person for being drunk, without reference to where he obtained the means of intoxication, can have no possible connection with the object of the act as set forth in its title." The court concluded: "It is nothing more nor less than the insertion, in the body of the act, of a clause creating and punishing a misdemeanor entirely foreign to the ostensible purpose of the statute as entitled. No person reading the title would dream of any such provision being contained in the act." In another case, a Michigan man who was accused of taking indecent liberties with a minor was charged under a statute entitled "An act to provide for the punishment of crimes in certain cases." The Michigan Supreme Court ruled that this title gave "no hint as to the character of the act to be punished," and it discharged the defendant.

Judges were also concerned, particularly toward the end of the nineteenth century, with enforcing constitutional provisions prohibiting the passage of special or class legislation. These rules, which were originally introduced to protect legislatures from being overrun by petitions for divorces, name changes, and incorporations, also came to be seen as an indirect guarantee of individual rights.
The dominant view of bans on special legislation, according to Michigan Justice Samuel Douglass, was that they were intended to deprive the legislature of a discretion that was “likely to be capriciously, improvidently, and sometimes unjustly exercised, and to leave only the power to enact general laws.” In the course of overturning a law that required meat peddlers (but not other similarly situated merchants) to buy licenses, the Michigan Supreme Court took the opportunity to discuss the purpose of bans on class legislation. The court explained: “This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised.”

The vast majority of judicial decisions, it should be emphasized, did not require any form of constitutional interpretation at all. In fact, many volumes of the nineteenth-century state court reports do not contain a single constitutional decision. Rather, judges decided cases on the basis of interpretations of statutes or common-law rules. As Judith Kaye has argued: “In state courts, the grand tradition has been not of constitutional but of common law decisionmaking.” What distinguished common-law and statutory judging from constitutional decision making was that these rulings did not remove questions from the political process. Rather, they preserved the opportunity for legislatures to enact new statutes, which could either clarify the legislative intent on a particular matter or modify a common-law rule that proved unworkable.

In a significant number of cases, therefore, judges secured rights simply by applying statutory guarantees in particular circumstances. Thus, in one case, the Massachusetts Supreme Court ruled that a religious dissenter who had been prevented from serving on a grand jury was entitled by statute to be empaneled and to be permitted to take an alternative oath. In several other cases, the Massachusetts Supreme Court ruled that a statute permitted defendants in a criminal case to remain silent at trial and not be tainted by that choice. Similarly, the Michigan Supreme Court overturned the conviction of one man, whose friends had been excluded from his trial, on the ground that this practice violated a statute that stipulated that “every court shall be public.” To provide one final example, the Michigan Supreme Court relied on a statute in one case to prevent a witness from being questioned about her religious beliefs. The court noted that Michigan had a constitutional provision directing that no person shall be rendered “incompetent to be a witness on account of his opinions on matters of religious belief,” but that the statute “goes much farther” and states that no witness shall be “questioned in relation to his opinions thereon.” Accordingly, “it was clearly incompetent to question the witness in this case, in reference to her belief in a God.”

When legislators had not yet addressed an area of the law, courts frequently relied on common-law rules to sort out the rights to which individuals were entitled. In 1867, for instance, the Virginia Court of Appeals turned to the common
law to determine the admissibility of one man's confession. After learning that a constable, shortly after arresting the defendant, had urged him that he "had better tell all about it," Justice William Joynes determined that under common-law rules, the subsequent confession should be considered to have been "induced" and therefore inadmissible.\textsuperscript{44}

On occasion, judges also relied on statutes and common-law principles to introduce new understandings of rights. Thus, in one case, it was unclear to the Virginia Court of Appeals whether the General Assembly had intended to provide a particular fair-trial guarantee. Acknowledging that the statute books were unclear, the court opted to construe the law to require this procedure. President Richard Moncure wrote: "If I am wrong, the Legislature, now in session, can correct the error."\textsuperscript{45}

To be sure, in the course of their deliberations nineteenth-century judges had frequent occasion to interpret bills of rights. In general, though, they treated these provisions in a manner that is quite distinct from the modern understanding. Although the state court reports yield several cases in which judges interpreted bills of rights as legal principles that served to restrict legislative deliberations, the prevailing view was that bills of rights contained maxims that could be interpreted by legislators and citizens, as well as judges. Their chief value lay in their ability to guide and inform deliberations over rights, rather than to provide a rule of law for resolving particular questions.

Massachusetts Chief Justice Lemuel Shaw had occasion, in an 1837 opinion, to advert to the purpose of frames of government and bills of rights. He argued: "In construing this constitution, it must never be forgotten, that it was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times; but that it was rather intended, after an organization of the government, and distributing the executive, legislative and judicial powers, amongst its several departments, to declare a few broad, general, fundamental principles, for their guidance and general direction."\textsuperscript{46} It was important, therefore, that those who sought to interpret bills of rights appreciate the spirit in which they were drafted. They should be viewed "as the annunciation of great and fundamental principles, to be always held in regard," rather than as "precise and positive directions and rules of action."\textsuperscript{47} They were "not first prepared and drawn up by and for a people who were then, for the first time, establishing political and civil institutions," and as a result, each provision should "be expounded under the broad light thrown upon it by this constant reference, tacit or express, to established laws and institutions."\textsuperscript{48}

The prevailing view, then, was that bills of rights did not admit of precise judicial interpretation and enforcement and therefore could not serve as a rule of constitutional law that could restrain legislative deliberations. The Massachusetts Supreme Court explained, in an 1859 case in which it was called upon to interpret a provision of the federal Bill of Rights: "This, like similar provisions in our own Declaration of Rights, declares a great general right, leaving it for other more
specific constitutional provision or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights."

As the Virginia Court of Appeals noted in an opinion handed down in 1871: "[W]hile these declarations of general principles must be recognized and followed, both in legislation and in the administration and execution of laws, we must give to each one of them a reasonable rather than a literal construction; certainly such a construction as will make each consistent with the others, and carry out most effectually the object and design of the whole instrument."

It was not uncommon, therefore, to find judicial opinions that were informed by provisions in bills of rights but that ultimately rested on statutory or common-law grounds. Thus, when Judge Paul Carrington of the Virginia Court of Appeals determined in 1799 that a district court could not order a group of defendants to pay a joint fine, he drew upon a variety of supporting evidence. He concluded: "Therefore, whether I consider the case upon principle, the doctrines of the common law, or the spirit of the Bill of Rights and the act of Assembly, I am equally clear in my opinion . . . that their judgment is erroneous, and must be reversed."

Although the reluctance to rely on bills of rights to overturn legislative judgments was the norm during this period, it coexisted alongside important exceptions. In several circumstances, especially in the latter half of the nineteenth century, judges determined that rights could be better protected through constitutional decisions than through statutory or common-law rulings, and in these cases deference to legislative determinations was suspended.

For one thing, legislatures were occasionally deemed incapable of deliberating responsibly about rights during periods of social or political agitation. A prime example of this kind of legislative failure occurred in the 1850s, when, in their haste to restrict the production and sale of alcohol, legislators occasionally disregarded the guarantee against improper searches and seizures. Both Massachusetts and Michigan enacted Prohibition laws in the early 1850s that empowered magistrates to issue warrants and seize liquor solely upon the complaint of ordinary citizens. Both state supreme courts ruled, however, that these laws constituted an impermissible violation of individual liberty. Chief Justice Shaw identified a number of defects in the Massachusetts law. The question he faced was whether "the measures, directed and authorized by the statute in question, are so far inconsistent with the principles of justice, and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and constitution of the Commonwealth, that it was not within the power of the legislature to give them the force of law, and that they must therefore be held unconstitutional and void." He concluded that "The Court are all of opinion that they are.” Michigan Justice Sandford Green identified similar problems with his state's Prohibition law, and the Michigan Supreme Court arrived at a similar verdict.
Similarly, in the 1870s, in their haste to root out political corruption and dueling, several legislatures failed to provide adequate safeguards for the privilege against self-incrimination. In particular, the supreme courts of Massachusetts and Virginia held, in a pair of similar cases, that the legislatures had failed to properly secure the right. The question in Massachusetts was whether a senate committee could compel an individual to testify about corruption in the state police force. At issue in Virginia was whether a grand jury could force someone to furnish evidence about a duel he had witnessed. Although both legislatures maintained that these practices did not violate the privilege against self-incrimination because the witnesses’ testimony could not be used against them, neither court accepted this argument. The Massachusetts Supreme Court concluded: “The terms of the provision in the Constitution of Massachusetts require a much broader interpretation.” It was not enough to provide that testimony could not be used to prosecute someone; the bill of rights stipulated that individuals could not be forced to provide this testimony in the first place.

In addition, state courts delivered a number of opinions that rested on constitutional grounds but did not fit neatly into any particular category. The Massachusetts Supreme Court overturned several statutes, for instance, that ran afoul of the bill of rights by permitting prosecutors to try defendants without first obtaining a grand jury indictment, as well as a statute that sought to prohibit naturalized citizens from voting within the first thirty days after becoming a citizen. The Michigan Supreme Court struck down a law that permitted the state attorney general to prosecute defendants in any county throughout the entire state, in what Judge Cooley noted was “a remarkable case on the law and on the facts.” One case, which was decided by the Virginia Court of Appeals in 1884, represents the only instance in which one of these courts invalidated a law on the ground that it violated the right to free speech. The General Assembly had enacted a law that sought to “prohibit the active participation in politics of certain officers of government,” and a county school superintendent had been fired for attending a political rally, but the court held that the law violated the free-speech clause of the bill of rights, and it overturned the conviction.

In general, though, cases such as these represented exceptions to a general norm that encouraged legislatures to assume responsibility for deliberating over rights and discouraged judges from taking actions that would prevent legislatures from exercising this responsibility. The dominant understanding of the judicial role was expressed by Judge Cooley, who in his casebook counseled judges not to “run a race of opinions upon points of right, reason and expediency with the law-making power.” He argued: “The courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights.”
THE ROLE AND BEHAVIOR OF CITIZENS

Republicanism admitted of a variety of meanings in the nineteenth century. It could refer to a polity that fostered a concern for the public good rather than self-interest. It could also refer to the qualifications for voting, in which case a state would be considered more or less republican depending on the extent of its suffrage. At the most fundamental level, however, republicanism referred to a regime that was governed by indirect rather than direct representation, or, as James Madison argued, by “the total exclusion of the people, in their collective capacity, from any share” in the administration of the government.63

Eighteenth- and nineteenth-century state governments qualified as republican in this final sense, in that they lodged primary responsibility for rights protection in the legislature rather than in the collective citizenry. Citizen participation was confined to representative elections, and the people were precluded from voting directly on legislation. As a result, legislatures could not refer bills to the people for their approval, nor could the people initiate and vote on laws independently of the legislature. Such devices were repeatedly deemed, by judges and constitutional convention delegates alike, to be incompatible with a republican form of government, to provide inadequate deliberation, and to afford insufficient security for individual rights.

The legitimacy of the popular referendum inspired a significant amount of debate in the constitutional conventions held during this period. A number of conventions chose to permit citizens of local governments to vote on where to locate a county seat, whether to set up a public school system, or whether to license or prohibit the sale of alcohol. Several conventions also voted to permit statewide referendums for limited purposes, such as where to locate the state capital, as in Oregon, or whether to permit certain banking regulations, as in Michigan. But convention delegates overwhelmingly rejected the use of the statewide referendum for general purposes. The dominant attitude toward legislative referendums was best expressed by Delaxon Smith, a delegate to the Oregon Convention of 1857. Smith argued: “[W]e might as well include all general and political subjects; we might as well abolish the legislature, and appoint a committee to frame laws for submission to the people; if the legislative power was to be exercised by the people en masse, why incur the expense of a legislative assembly.”64

The issue was debated more often in the courts, where two cases are particularly useful for demonstrating the prevailing view of direct democracy. In 1855, the Michigan Supreme Court considered the validity of a Prohibition law that had been submitted for popular approval and, when the judges divided evenly, overturned the law.65 Then, in 1894 the Massachusetts Supreme Court confronted the same question in the context of a proposed women’s suffrage referendum, and five of the seven justices ruled that such a referendum would be unconstitutional.66

The dissenting justices in both cases, that is, those who voted to uphold the legislative referendums, advanced several arguments. Several of these justices
contended that there was no difference between allowing the people to ratify constitutional amendments and permitting them to vote directly on legislation. Because citizens were permitted to pass direct judgment on constitutional matters, they argued, it made little sense to exclude them from voting directly on legislative matters.

Other dissenters, including Massachusetts Justice Oliver Wendell Holmes, voted to uphold the legislative referendum because they objected to a theory of representation that precluded the people from exercising direct sovereignty. The notion that the people could exercise only an indirect influence over public affairs seemed to Holmes, for one, to be “an echo of Hobbes’s theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning against the power of the Legislature has been taken by later decisions states that theory in language which almost is borrowed from the Leviathan. . . . Hobbes urged his notion in the interest of the absolute power of King Charles I, and one of the objects of the Constitution of Massachusetts was to deny it.”

But these arguments represented the minority view. The dominant understanding was that the legislative referendum was incompatible with the principles of republican government. In the first place, referendums were thought to be “a most flagrant violation of the constitution and our representative system of government.” According to Justice Samuel Douglass of Michigan: “[T]he power of enacting general laws cannot be delegated—not even to the people. There is nothing in the constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American government which sanctions it; no single adjudication of a court of last resort, in any state, which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the government.”

The majority also argued that there was a crucial difference, which the dissenters conspicuously failed to grasp, between the expression of popular opinion through representative elections and the ratification of constitutional amendments, and its expression through direct review of legislation. As Massachusetts Justice Waldridge Field argued, the founders provided a number of opportunities for citizens to express their opinions. “They apparently relied upon frequent elections, when the officers were elective; upon the right of meeting and consulting upon the common good; upon the right of petition and of instructing their representatives; upon impeachment; and upon the right of reforming, altering, and totally changing the form of government when the protection, safety, prosperity, and happiness of the people required it.” However, the people “reserved to themselves no direct power of supervision.” In similar fashion, Justice Douglass argued:

[B]efore any proposed measure can become a law it must first struggle for ascendancy at the ballot box, amid the numerous issues involved in all
political contests. It must pass through the ordeal of public and deliberate discussion in the legislature. It must receive the sanction of the concurrent vote of a majority, or, having been returned with the governor’s veto, of two-thirds of the members of the two houses of which the legislature is composed—votes cast by men who are not the mere deputies of their immediate constituents, but the representatives of the whole people, and bound to act for the general good; who are responsible to the people for their action, and may be held to that responsibility. Public opinion will prevail, and pass into public law; but it will be enlightened, deliberate, permanent and organically expressed public opinion. It is this opinion alone which the constitution designed should govern. Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rulers on the one hand, and of irresponsible, numerical majorities on the other.71

The purpose of restricting public opinion to institutional channels was, therefore, not to limit the rule of the majority, as Holmes and the dissenters suggested, but rather to ensure that the majority will was expressed in such a way as to secure rights most effectively. Referendums threatened the security of rights, in the first place, because they deviated from the principle that rights were best protected by allocating powers to the institution best suited for exercising them. As Michigan Justice Abner Pratt argued: “It is, beyond all question, well for the stability and safety of the government, as well as for those ‘rights, privileges, and institutions which have been established under it, that this law-making power . . . cannot be delegated by a legislature at will, or whenever a majority of the members of that body may be disposed corruptly, or for want of moral courage, to avoid legislative responsibility.”72 Additionally, as Justice Douglass argued, referendums removed the protection for individual rights that was afforded by institutional deliberation. “[I]f the legislature may transfer this power and this responsibility to the people, where are the checks which the constitution intended to provide against hasty and inconsiderate legislation? Where are the securities against arbitrary and irresponsible power? We may be subjected to the dominion of the popular majority of the hour—a majority whose opinion must be formed without legislative discussion or deliberation—a majority responsible to no one, because it has no superior.”73 The inevitable result of such a system would be, Justice Pratt argued, that “our boasted system of representative government is to be perverted, and a collective democracy, the most uncertain and dangerous of governments, to be arbitrarily subjected in its stead.” No American citizen, “out of a mad house,” could be desirous of instituting such a system.74 In general, then, judges and convention delegates believed that statewide referendums departed from republican principles, and they prohibited their use.

The people had one other opportunity to take part in securing rights, through their participation in the constitutional amendment and revision process. Citizens
had the opportunity to call constitutional conventions, to select convention delegates, and to pass judgment on the proposed revisions. Significantly, though, the people consistently refrained from making use of the constitutional revision process to substitute popular conceptions of rights for legislative determinations. This is not to say that there were no temptations to remove issues from the legislature, nor that there were no instances of constitutional legislating. What is remarkable is the number of occasions on which these proposals were rejected, either by the convention delegates or by the people, on the ground that this practice departed from republican principles. Constitutional legislating was frowned upon, and those who sought to break with this norm did so hesitantly and were required to justify their behavior.

Practically every nineteenth-century constitutional convention addressed the question, with respect to some issue or another, of whether convention delegates or legislators were better positioned to determine the rights to which individuals were entitled. But several issues—the questions of whether to regulate the sale of alcohol, abolish the death penalty, or eliminate the grand jury—inspired these debates with particular frequency. These matters were debated constantly in representative elections and in legislative assemblies, and they were inevitably introduced into constitutional conventions as well. It is significant, however, that proposals to constitutionalize these issues were consistently rejected, on the view that they were best resolved by legislatures rather than in constitutional conventions.

A number of delegates were guided by prudential concerns. They supported these amendments on their merits but feared that their inclusion in the constitution would reduce the likelihood of securing ratification. Thus Earl Gardiner argued in the Michigan Convention of 1850: “I yield to no one in zeal or fervor in the cause of temperance; but I must say I do not consider this the proper place for any provision this Convention may think proper to adopt on the subject.” He feared that the inclusion of a Prohibition plank would lead many citizens to vote against the whole document, and he did not wish “that the constitution, which has cost us much labor and expense to perfect, shall be risked on any such propositions.”

Other delegates supported the policies contained in these amendments but thought that it was improper to reconsider issues that had already been given an extensive hearing in the legislature. Convention delegates had no premium on honesty or wisdom, they argued, and therefore were in no better position than legislators to address these issues. Thus Edward Moore urged the Michigan Convention of 1850 to defeat a capital punishment plank. “I do not believe it is necessary to place it in the constitution. I hope that it will be left to the legislature.” Henry Fralick agreed: “[I]t belonged primarily to the Legislature. We have a law upon this subject. The question has been fully discussed by the people, and I am perfectly willing that it shall be left to them to act in the matter as their best judgment may direct.”

Still other delegates argued that constitutional amendments lacked the flexibility of legislative statutes. James Kingsley voted against a constitutional
amendment that sought to abolish the grand jury on the ground that it was “too violent a method” and “looks too much like legislation.” He argued: “It will probably be best to leave it to the legislature, and not abolish it. Before another legislature sits here, public opinion may be formed, and the legislature can then decide. They can dispense with the powers of the grand jury in part, and if that works well, they can go further; if it does not, they can reinstate them in the same position they occupy now.” Volney Hascall expressed similar concerns: “[H]is individual opinion was, that very serious objections might be urged against the institution of the grand jury. . . . He was not, however, ready to say that this institution should be absolutely abolished by a positive provision of the constitution. He would rather leave it open to the legislature to abolish it or not.” According to Hascall, the legislature could easily restore the grand jury if the experiment did not work, but if it was abolished by constitutional action, “it could only be restored by an amendment, after much time and great inconvenience.”

Similarly, Robert McClelland favored the abolition of the death penalty, but he preferred to retain the current legislative ban rather than to adopt a constitutional amendment on the subject. He argued: “I would submit whether cases may not arise in which it would be absolutely necessary to take human life. The contingency may never occur; but we may have insurrections or war, rendering it absolutely necessary to be taken away. It is better to leave this to legislative action.” Other delegates were opposed to capital punishment but feared that a constitutional ban would have the unfortunate effect of preventing legislative efforts to reform its abuses. John Botts argued in the Virginia Convention of 1850–1851, for instance, that he was “very much inclined to the belief that capital punishment ought to be abolished.” But he would “greatly prefer” that “the matter should be left entirely to the decision of the legislative department of the government.” In this way, the legislature might undertake to abolish the practice, but “if the experiment did not answer a good purpose, they might return to capital punishment again, if necessary.”

It was one thing for convention delegates to reject proposals to constitutionalize matters such as the prohibition of alcohol, the abolition of capital punishment, or the elimination of the grand jury. These were sufficiently controversial, it could be argued, that they should not be resolved in a constitutional convention but rather should be addressed through the political process. It was quite another matter to contend that guarantees such as the right to a fair trial and the right to worship according to one’s conscience should be defined by legislators rather than by constitutional conventions. In fact, these arguments were not only advanced in these conventions but were frequently influential in preventing the enactment of proposed amendments.

The Massachusetts Convention of 1820, in particular, featured a number of illuminating debates on this question. The convention considered a variety of measures, including proposals to regulate the privilege against self-incrimination, free speech, and religious liberty, all of which were rejected, either by the
people's assembled representatives or by the people themselves. When a motion was made, for instance, to amend the constitution to permit defendants to testify in their own behalf, Delegate Charles Jackson responded that “this was a case for legislative provision. If an instance of injustice should occur, the Legislature would make the provision, and if found inconvenient, it could be repealed.”

When another motion was made to constitutionalize the common-law rule with respect to libel, Jackson again objected: “The resolution therefore does not go far enough in one particular, and goes too far in another. Besides, the present law is on a proper footing, and if the decision should be overruled, it is in the power of the Legislature, by statute, to regulate it at pleasure;” Likewise, the convention decided that the legislature was well equipped to exempt religious dissenters from service in the militia. The dominant view was that “the Legislature would make such exceptions from time to time as they should think proper,” and that it was not “expedient by a constitutional act to deprive the Legislature of the power to make such regulation as experience should show to be necessary.”

The prevailing attitude toward these sorts of amendments was perhaps most clearly expressed in the course of a debate over the best means of securing the guarantee against religious establishment. The Massachusetts General Court had enacted a statute in 1811 that exempted dissenters from paying taxes to support the established church, and the question before the convention delegates in 1820 was whether to elevate this law to constitutional status. Although several delegates evinced a distrust of the legislature—Heman Lincoln, for one, criticized those who would “leave our dearest rights, the rights of conscience, in the power of the Legislature”—and although the delegates eventually recommended an amendment on the subject, the convention debates featured a series of spirited defenses of the capacity of representative institutions to secure rights, and the proposed amendment was defeated at the polls by a significant margin.

William Prescott argued, for instance, that there was no need for a constitutional amendment on the subject, because the principle of bicameralism would prevent the existing statutory guarantee from being overturned. “[H]e asked, why was not the legislature to be trusted? A proposition for the repeal of the law of 1811 must go through both branches—both branches must feel the evil of it before it could be repealed.” Likewise, Isaac Parker relied on the principle of representation to maintain these rights. “It was said that that law [of 1811] might be repealed. But there was no instance of a law of this kind, which extended an indulgence to a numerous class of people, being repealed. If it was repealed, it would produce a popular excitement that would require its reenactment. He considered it as permanent.” Moreover, Samuel Wilde argued, the right would actually be secured more effectively through legislation than through a constitutional provision, because the General Assembly was better positioned to respond to changing circumstances. “The reason why it should stand on the footing of a law, was, that if incorporated into the constitution, so that it could not be altered or modified, it would lead to abuses. . . . Was it right to restrain the Legislature
for all future ages from making such modifications of the law as abuses under it might show to be proper?" After comparing the benefits of legislative versus constitutional protection, Walter Dutton concluded in similar fashion:

[These resolutions now propose to engrat into the constitution the second section of the Law of 1811. He was wholly opposed to this, not because he was opposed to the law, but because he was opposed to making it a part of the constitution. The whole difference in his opinion lay between having these provisions in a law, and having them in a constitution. So long as they remained a law, they were subject to revision and modification. Abuses might hereafter exist, which would require to be corrected. The law had been in operation only ten years; a much longer time was necessary to ascertain its bearing and influence. He did not know that any great abuses now existed, but he was not wise enough to foresee that none would exist fifty years hence, nor foolish enough to say that the Legislature should not have the power to correct them when they did exist. It was not wise to attempt to bind by an unchanging law, the ever changing interests and opinions of men; fix forever in one place that which is in its nature mutable and progressive. Laws can always be accommodated to the existing state of things... On the other hand, the constitution is and always ought to be a body of general rules.]

To be sure, nineteenth-century conventions did not always reject constitutional amendments that sought to better secure rights. In some cases, public opinion had advanced to such a point that it was appropriate to place a matter on a constitutional footing or it was necessary to remove constitutional provisions that no longer reflected popular opinion. It should be emphasized, however, that the people were not seeking in these instances to limit the legislature or to substitute a popular view of rights for that of the elected representatives. According to James Willard Hurst, “In most cases such specific enactments of policy did not direct, but merely recorded, the currents of social change.”

In regard to one issue, however, convention delegates believed that they possessed a decided advantage over legislators, and they had few qualms about removing such matters from the political process. Although legislators were thought to be ordinarily competent to deliberate responsibly, their particular interest in maintaining their offices occasionally prevailed over the public interest in extending the suffrage or drawing district lines in an equitable manner. As a result, convention delegates spent a significant amount of time debating and resolving these issues. As Delaxon Smith argued in the Oregon Convention of 1857:

I am satisfied from my experience in this country that the legislative assembly can never—will never—justly and equitably apportion the representation of the several counties of the state if left to them... That is the only paramount reason why I desire to have the constitution settle that matter for the government of legislative bodies. And why will not legislative bodies do it
as well as the convention of the people or delegates? Simply because where
one man is elected to the legislature by a small constituency, if they have an
advantage they want to maintain it. They are unwilling to part with it. And
there is always enough to create a majority of that kind, especially in a new
country like this.  

With this exception, convention delegates were guided by a general hostility
toward constitutional legislating, especially in the first half of the nineteenth cen­
tury. To be sure, this reluctance declined as the century progressed, and in a series
of constitutional conventions held after the 1840s, delegates became slightly more
active in placing procedural restrictions on the legislative process. Then, in the
postbellum era, some state conventions began not only to restrict legislative delib­
erations but also to enact substantive provisions to resolve controversial issues.  
Even after convention delegates began to yield more frequently to proposals to
engage in constitutional legislation, however, there was still a stigma attached to
such behavior. Delegates who proposed such amendments had to justify their
behavior, and they were criticized for deviating from the institutional norm.

Philip Doddridge came perhaps the closest of any of the nineteenth-century
convention delegates to expressing this regime norm. He argued in the course of
the Virginia Convention of 1829–1830 that some matters “should be unalterably
laid deep in the foundations of the Constitution.” For instance, “at no time should
an ex post facto law, or law impairing the obligation of contracts be passed, nor
any provision for suspending the writ of habeas corpus in time of peace, or tak­
ing away the trial by jury, in criminal cases.” But on other matters, he argued, the
convention should remain silent: “[T]o place them on Constitutional foundations,
is to suppose that at no future time and under no possible circumstances, will it
be wise to change them for some other establishments more suited to the times,”
which was a supposition that Doddridge and his contemporaries were, for the
most part, unwilling to make.  

CONCLUSION

It becomes possible, in the end, to identify a set of regime norms that governed
institutional behavior in the eighteenth and nineteenth centuries. To be sure, pub­
lic officials occasionally acted in ways that departed from these norms. It is true,
also, that institutional behavior was not uniform throughout the era or across the
states. Nevertheless, there was a shared understanding that certain constitutional
provisions served as the principal guarantors of rights, that certain institutions
were primarily responsible for securing rights, and that rights would ordinarily
be protected in a particular manner. 

The republican regime is distinguished, in the first place, by its reliance on
constitutional provisions that established the frame of government. The most
effective way to protect rights, according to this view, was to prevent them from being violated. This was achieved by allocating powers to separate institutions, ensuring that each institution performed its proper function, and giving each institution the means to prevent encroachments. Thus institutional principles, such as separation of powers and bicameralism, as well as restrictions on the legislative process, such as subject-title requirements and bans on special and local legislation, were the chief means of promoting effective deliberation and preventing the violation of rights.

Although a number of institutions contributed to the protection of rights, the legislature was entrusted with primary responsibility. Legislatures were thought to be sufficiently representative of the popular will and therefore were viewed as the appropriate forum for resolving claims of rights. Accordingly, judges and constitutional convention delegates generally deferred to the people's elected representatives for the protection of their most important rights.

Finally, statutes were the ideal vehicle for securing rights. On the one hand, statutes were preferable to constitutional amendments and judicial decisions, because these measures were too unwieldy and could be changed only by enacting a constitutional amendment. On the other hand, statutes were preferable to legislative referendums, because these measures failed to provide adequate opportunity for institutional deliberation.