Republican Institutions as Keepers of the People’s Liberties

One searches in vain for systematic evaluations of rights protection in the nineteenth century. So accustomed are we to equating the protection of rights with decisions of the U.S. Supreme Court that conventional accounts usually begin no earlier than the second quarter of the twentieth century, when the U.S. Supreme Court began to apply the federal Bill of Rights to the states. As a result, scholars are apt to conclude, along with Robert Rutland, that:

Not until the Fourteenth Amendment spread its broad umbrella did the Bill of Rights assume the guardianship role its authors intended. The 140 years between ratification of the First Amendment and Near v. Minnesota span a period when almost all the civil liberties of individuals were denied to citizens who were also abolitionists, religious zealots, suspected Confederate sympathizers, foreign-born members of the Industrial Workers of the World (or even obstreperous native IWWers), pacifists, conscientious objectors, supporters of the newborn Soviet Union, labor leaders, or suffragettes.¹

Even among the relatively modest number of scholars who have turned their gaze to the state courts, the view still predominates “that courts did not actively protect these rights in any substantive sense,”² and that they were “supine” with respect to the guarantee of a fair trial, among other rights.³

This conventional narrative is unsatisfying for several reasons. Most importantly, as we have seen, it looks in the wrong place for evidence of rights protection. According to Suzanna Sherry: “In the modern world, the search for state protections of liberty generally conjures up an image of state courts using state constitutions to prevent infringement of such core civil liberties as freedom of the press and security from unreasonable searches and seizures.” But “the absence of modern civil liberties cases in those reports does not mean that the past is barren, only that we are looking for the wrong thing.”⁴ Connecticut Supreme Court Justice
Ellen Peters argued, similarly, that “we should cast a wider net to discover the variety of ways in which substantive rights were protected in state courts in our early years,” other than through constitutional decision making. Although Sherry and Peters are concerned primarily with the way in which state courts protected rights in nonconstitutional ways, the next step is to investigate the record of state legislatures in protecting rights, which was the dominant method during this period. It is important, therefore, in determining how well rights were protected in the eighteenth and nineteenth centuries, to take account of the full range of ways in which institutions can secure rights. This includes occasions when legislatures enacted statutes that secured rights, as well as instances when structural arrangements prevented the passage of statutes that would have violated rights.

The conventional account is also deficient in that it does not take account of the various ways in which rights can be violated. As a result, it fails to distinguish between violations of rights that are attributable to the existing institutional arrangement and violations that are a product of an immature popular conception of rights. As Lawrence Friedman argued: “We tend, of course, to look at the past through the lenses of today. It is natural, then, to ask why this or that was missing in the nineteenth century. The nineteenth century had its own viewpoint. To understand the period, we have to look at civil rights and civil liberties as contemporaries saw them.” Because nineteenth-century attitudes and expectations “were considerably more limited than twentieth-century expectations,” it would be improper to hold institutions responsible for the inability to provide a level of protection for rights that would match current expectations.

It is important, in particular, to acknowledge that there are several categories of rights. Certain rights are of a constant character, in that they were recognized throughout the era; others are of an evolving character, in that they were only recognized in the course of the era; and others, finally, are of a variable character, in that their status shifted constantly throughout the period. To distinguish between rights in this manner, it should be emphasized, is to place no less importance on the failure to protect rights of any kind. Rather, this enables us to separate the relative contributions of popular understanding of rights, on the one hand, from the role of institutional arrangements, on the other hand.

We are led, therefore, to raise different analytical questions, depending on the type of right at issue. The relevant question with regard to constant rights is: To what extent did legislatures prevent them from being violated and provide for their extension as circumstances dictated? The important question with respect to evolving rights is somewhat different: To what extent did legislatures succeed in recognizing these rights in a suitable fashion? Finally, with respect to variable rights, the relevant question becomes: To what extent did legislatures provide a forum for registering and deliberating about various changes in public opinion?

Clearly there is room for debate over which rights should be placed in which categories. One would also expect some disagreement over the proper standard for judging the level of protection of these rights. Because it would be unwise to
demand more precision than a subject permits, it is appropriate to acknowledge
the force of these objections and proceed by advancing the most reasonable judg­
ments that the evidence will support.

FREEDOM TO WORSHIP

None of the four states permitted actual violations of the freedom to worship dur­
ing this period. The principal issue with which legislatures were concerned was
the proper way to extend this right to provide exemptions from ministerial taxes,
militia service, Sabbatarian laws, and religious oaths, as well as to give practical
meaning to the general guarantee of religious liberty in the context of various
public institutions.

Freedom from Ministerial Taxes

The aspect of religious liberty that sparked the most intense and sustained con­
troversy during this era was the right to be exempt from paying taxes to support
an established church. Michigan and Oregon were spared these discussions,
because by the time they drafted their constitutions, religious liberty was thought
to preclude state support of religion. Both the Virginia and Massachusetts con­
stitutions initially interpreted religious liberty in a more narrow fashion, however,
and popular opinion in those states only gradually evolved to a broader under­
standing. In both states, legislation served as the primary vehicle for recording
this evolving interpretation.

Virginia was the first of these states to disestablish. The Virginia General
Assembly took a significant step in the direction of securing religious liberty in
1776 at the very first session held under its new constitution. At the urging of
memorials from a number of churches, and with the support of Thomas Jeffer­
son, the legislature repealed all acts that made “criminal the maintaining any
opinions in matters of religion . . . or the exercising any mode of worship what­
soever,” and it suspended for one year all laws that required taxes for the support
of the clergy. As a result, “no taxes for religious purposes were ever paid in Vir­
ginia after January 1, 1777.” Subsequent memorials led to a series of tempo­
rary suspensions of the tax, and finally, in 1779, the legislature “confirmed what
the acts of 1776, 1777, and 1778 had practically perpetuated,” by enacting a per­
manent repeal of the assessment tax.

The right remained insecure, however, because according to Jefferson,
“although the majority of our citizens were dissenters, . . . a majority of the Legis­
lature were churchmen.” Therefore, when Episcopalian, as well as some Presby­
terian, churches supported a bill in 1784 to renew the old ministerial tax, and the
bill actually proceeded as far as a second reading in the House of Delegates, James
Madison, one of the leading opponents of the measure, sought to enlist the support
of the citizens of Virginia. Madison succeeded in postponing a third reading of the bill until the November 1785 session, and in the meantime, he secured the passage of a resolution directing that the proposed bill, along with a list of its legislative supporters and opponents, be distributed throughout the state. The wisdom of Madison’s strategy soon became apparent. He wrote to James Monroe in May 1785:

The printed bill has excited great discussion, and is likely to prove the sense of the community to be in favor of the liberty now enjoyed. I have heard of several counties where the representatives have been laid aside for voting for the bill, and not a single one where the reverse has happened. The Presbyterian clergy, too, who were in general friends of the scheme, are already in another tone, either compelled by the laity of that sect or alarmed at the probability of farther interference of the Legislature, if they begin to dictate in matters of religion.13

As a result of the flood of ensuing petitions and memorials, as well as the shift in the attitude of Presbyterian leaders, the assessment bill was defeated. In the wake of the defeat, Madison took the opportunity to introduce what is now referred to as Jefferson’s Statute for Religious Freedom, which passed both houses by a significant margin. It declared: “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs.”14

Several vestiges of establishment remained, however, most notably the continued Episcopal ownership of the glebe lands that supported the parish ministers. Accordingly, after a series of further memorials, the General Assembly in 1799 proceeded to declare that the continued possession of these lands was no longer consistent with the prevailing interpretation of the religious liberty clause in the declaration of rights.15 But although this act invalidated all Episcopal Church claims to the properties, it did not call for the sale of any particular glebe lands,16 and it was not until 1802 that the General Assembly ordered all the glebe lands to be sold, thereby completing the process of disestablishment.17

At this point, one of the parish wardens sought to prevent the sale of his lands, and he pleaded his case before the Virginia Court of Appeals. If not for what has been called “a marked intervention of providence,” the previous extensions of the right to religious liberty would have been overturned.18 The president of the court, Justice Edmund Pendleton, had prepared an opinion that would have voided the 1802 law as an improper encroachment on the churches’ right to the land. But “the opinion was not delivered, as he died the night before it was to have been pronounced.”19 The ensuing appointment of Justice St. George Tucker produced a reconfigured court that reversed itself and left undisturbed the disestablishment legislation.20

The road to disestablishment in Massachusetts was much longer, and the right to be exempt from paying ministerial taxes was achieved with greater difficulty.
Support for disestablishment was not as strong in Massachusetts as it was in Virginia; therefore it took more time for religious dissenters to persuade a majority of the people of the injustice of the state-supported system. In addition, once this view had obtained the support of a majority of the citizens and legislators, their efforts to secure religious liberty were hampered by a variety of constitutional and judicial actions.

Throughout most of the seventeenth and eighteenth centuries, the relationship between church and town in Massachusetts was governed by laws that on the surface required each town to financially support a minister but in practice “granted almost complete religious freedom.” In fact, during the colonial period, the “legislature had ample authority to liberalize the ecclesiastical statutes and had done so from time to time.”21 Thus in the 1720s the legislature granted explicit exemptions for Baptists and Quakers who could produce certificates of membership in one of those societies, and then in the 1770s it provided even more liberal exemptions.22

When the Massachusetts Constitution of 1780 was adopted, it actually had the effect of limiting the rights of religious dissenters.23 In the first place, the constitution directed the legislature to require “the several towns . . . to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers . . . in all cases where such provision shall not be made voluntarily.”24 Additionally, although the constitution provided that certain persons could be exempt from this requirement, the clause was “so laden with quasi-statutory provisions that the General Court, unlike its provincial predecessor had only the most peripheral opportunity to enact useful interpretative legislation that would meet the changing needs of the times.”25

In the next several decades, the Massachusetts General Court made several efforts to enlarge the rights of religious dissenters. In 1797 it enacted a law to “exempt the people called Quakers from paying taxes for the support of public worship.”26 It then provided another measure of liberalization in 1800, by exempting members of all other denominations who regularly attended the worship services of an incorporated religious society.27

The precise extent of these statutes remained unclear, however. Some argued that the legislature intended to permit dissenters to apply their tax money even in the case of an unincorporated parish, which was the status of many of the dissenting sects. Accordingly, in 1810 Thomas Barnes, a minister of one of these unincorporated societies, tried to recover the tax money to which he claimed he was entitled under the law. But the Massachusetts Supreme Court concluded that the legislature had not intended to go quite this far in securing religious liberty. When Chief Justice Theophilus Parsons examined the act of 1800, he argued: “Certainly no conclusion can be drawn from it, that the statute intended to exempt any citizen, except Quakers, from contributing to the support of some public Protestant teacher.”28 To those who argued that such an establishment offended the guarantee of freedom to worship according to one’s conscience,
Parsons responded that this “seems to mistake a man’s conscience for his money.” In his view, the results of such a disestablishment would be disastrous for the polity: “Civil government, therefore, availing itself only of its own powers, is extremely defective; and unless it could derive assistance from some superior power, whose laws extend to the temper and disposition of the human heart, and before whom no offence is secret; wretched indeed would be the state of man under a civil constitution of any form.” In what therefore constituted a significant defeat for religious dissenters, Parsons ruled that Barnes and similarly situated ministers could not receive the tax money that their parishioners had paid.

Public opposition to this ruling was so swift and strong that the Massachusetts General Court responded in its next session by enacting the Religious Freedom Act of 1811. This law, which for all practical purposes proclaimed “the right of every man to have his ministerial taxes paid to his own religious society, corporate or not,” held that any properly ordained minister could receive the taxes paid by the members of his society, and that any citizen could so designate his taxes merely by filing a form with the town clerk. “After the passage of the Religious Freedom Act of 1811 the commonwealth no longer supervised the quality of religious instruction. The sects were placed on an equal basis with the Congregationalists in the matter of supporting their own ministers. They could choose their own ministers and decide on their own qualifications.”

When the Massachusetts Supreme Court heard a challenge to this law in 1817, the justices were presented with a number of reasons why they should uphold their previous decisions and interpret the law narrowly. Chief Justice Isaac Parker acknowledged that there would be financial and moral “mischief to be dreaded” from the “breaking up of the parochial religious establishments, by authorizing any number of individuals to withdraw themselves, in the easy and loose way which is provided in this act.” In a major break from previous decisions, however, he upheld the legislature’s interpretation of the freedom of worship clause. Parker argued that although the law might well have the effect of reducing the level of virtue in the populace, the appropriate avenue for redress was through the legislature. “[O]ur duty is to give effect to such acts of the legislature as they have the constitutional authority to make, without regarding their evil tendency or inexpediency. Subsequent legislatures may correct the proceedings of their predecessors, which may be found to have been improvident or pernicious. And if a law, however complained of, is suffered to remain unrepealed, the only legal presumption is, that it is the will of the community that such should be the law.”

Several additional steps were taken to complete the process of disestablishment in Massachusetts. In 1824, in response to the entreaties of Trinitarians, Baptists, and Universalists, the General Court enacted a religious liberties act that made it even easier for religious societies to grant tax exemptions. All that remained was to repeal the offensive constitutional provision altogether, which was accomplished through a constitutional amendment ratified in 1833.

This survey of the process of disestablishment in Virginia and Massachusetts
yields several conclusions. In the first place, the right to be exempt from supporting an established church was not secured through judicial review of legislation. In both states, the courts were the primary defenders of the existing establishment, and disestablishment was not achieved until changes in judicial personnel led the courts to reverse their earlier decisions. Nor was this right secured primarily through constitutional provisions. The Massachusetts Constitution of 1780 actually served as an obstacle to legislative efforts to liberalize religious freedom laws, and the most significant gains in Massachusetts and Virginia were achieved without resort to the constitutional amendment process. Finally, the legislative actions that were in fact responsible for securing this right did much to vindicate the view that rights would be protected primarily through the political process. Madison, for one, believed that freedom of religion in the states "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious belief in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest." According to Judge John Noonan, this was "[e]xactly so in Massachusetts. The multiplicity of sects was the chief obstacle to religious establishment. The split of the Congregationalists into Trinitarians and Unitarians, the Universalist defection from the Unitarians, the increase of the Baptists, and the appearance of Catholics all led to changes promoting religious freedom."

The Right to Be Exempt from Military Service

Along with paying taxes, the duty to take up arms in the defense of the state has long been viewed as inherent in citizenship, and as a result, it was no small decision to exempt individuals from fulfilling this fundamental duty. In fact, though, eighteenth- and nineteenth-century legislatures consistently determined that the freedom to worship included the right of conscientious objectors to be exempt from service in the militia.

There was actually very little dispute over the general question of whether conscientious dissenters should be exempt from militia service, and each of the states enacted statutes that guaranteed this basic right. The more contentious issues concerned how best to secure the right in particular circumstances. The first question to be addressed was which sects could apply for exemptions. Thus the initial Massachusetts Act of 1775 excepted only the Quakers, but in 1793 this was amended to include the Shakers. The Michigan Legislature provided exemptions for the Quakers and the Shakers. The Virginia General Assembly also exempted the Mennonites.

The next question was which members of these societies could qualify for an exemption. In 1781 the Massachusetts General Court determined that any individual who sought an exemption should provide a certificate from the town selectmen attesting to the fact that he was a conscientious objector. Then in 1809 the General Court provided that each objector would have to produce a certificate
from his religious society attesting that he “is a member of our Society, and that he frequently and usually attends with said Society for religious worship, and we believe is conscientiously scrupulous of bearing arms.”

A final question concerned which duties dissenters would have to fulfill in the absence of performing military service. The Massachusetts General Court determined that objectors should “pay their full proportion of all expenses for raising men . . . together with an addition of ten per centum.” The Virginia General Assembly determined that religious societies should bear the cost of providing “proper substitutes to serve in their stead.” By the time of the Civil War, the price of a substitute had increased, and religious societies were no longer responsible for bearing the costs. The General Assembly found that the individual should pay “the sum of five hundred dollars, and in addition thereto, the further sum of two per cent of the assessed value of said applicant’s taxable property.”

To the extent that courts were involved in securing this right, their role was confined to applying these statutes in particular cases. When Stacy Fletcher of Massachusetts appealed his denial of an exemption in 1815, the Massachusetts Supreme Court ruled that, “[b]y the statute,” applicants were required to produce certificates stating that they “frequently and usually” attended society meetings; but Fletcher’s society had stipulated only that he did “attend” those meetings. The court ruled, therefore, that he could not be exempt from service. Another Massachusetts Quaker, John Lees, produced a certificate that included the “frequently and usually” clause but omitted the last clause, in which the elders of the society would normally state “that they believe he is conscientiously scrupulous of bearing arms.” Lees acknowledged as much, but he urged the court to provide a more liberal interpretation of the right. The court concluded, however: “It is . . . certain that the legislature, who passed the law, were not of this opinion.” These clauses were required for a particular purpose: to guard against fraud and the granting of inappropriate exemptions.

The Right to Take an Alternative Oath

At first glance, the right of religious dissenters to give alternative oaths or affirmations does not appear to be as significant as various other aspects of religious liberty. In fact, though, oaths had far-reaching implications in the eighteenth and nineteenth centuries. They determined who could hold public office, serve on a jury, execute any number of legal duties, and testify in court. When one also considers the seriousness with which oaths were treated in this era, it is no surprise that legislatures were frequently called upon to deliberate over who could qualify for exemptions, under which circumstances, and with what consequences.

The first question to be settled was whether religious dissenters had a right to serve on juries and in other legal capacities. The legislatures of Virginia, Michigan, and Oregon provided from the start that anyone could give an alternative oath in a legal proceeding, and that individuals who were opposed to taking an oath of any
kind could give an affirmation instead. The Massachusetts General Court gradually evolved to this position. In 1798 it enacted a law that permitted Quakers to take an alternative oath as jurors or witnesses, and in 1811 it extended the right to apply to the “discharge of any office, place, or business, or on any other lawful occasion.” Then, after the Massachusetts Supreme Court made clear in 1812 that “both in the statute respecting jurors, and in the latter statute, where the more general provision is made, it is only the case of Quakers scrupulous of taking oaths, in which the legislature have authorized an affirmation to be received instead of an oath,” the General Court provided that “any person” with religious scruples could “affirm in the manner provided by law for the denomination of Quakers.”

It was quite another matter to provide that religious dissenters could testify in court, and in fact this right was only gradually secured in the course of the nineteenth century. Religious oaths were thought to be essential to ensuring the integrity of an individual’s testimony, and great risk attached to the removal of this guarantee, in the view of many. Thus Jefferson wrote in his Notes on the State of Virginia: “The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor breaks my leg.” When he went on to consider whether the loss of the religious sanction would impair the truthfulness of testimony in court, however, he was willing to acknowledge the force of this objection. “If it be said, his testimony in a court of justice cannot be relied on,” he wrote, “reject it then, and be the stigma on him.” Despite these concerns and what Virginia Justice John Scott described as the “great value” placed on “the obligation of an oath,” each state legislature gradually guaranteed the right of dissenters to testify without taking the required oath.

Although a witness could not be declared incompetent on account of religious beliefs, it remained to be determined whether he could be questioned about his religious views and thus have his credibility impugned in the eyes of the jury. In the course of the nineteenth century, legislators decided that this too was inherent in the right to worship, and they enacted statutes to secure this extension of the right.

On one final question, whether atheists could testify, the Massachusetts General Court, for one, was unwilling to interpret the right in such an expansive manner. The Massachusetts Supreme Court ruled in an 1848 case that neither the constitution nor any statute protected individuals who did not believe in any god, and the Massachusetts General Court declined to interpret this right in a different manner. Justice Samuel Wilde noted: “It would indeed seem absurd, to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief.”

Freedom of Worship in the Schools

Some of the most heated debates over religious liberty arose in connection with education. Questions arose, in particular, as to whether public funds could support
religious schools, whether religious material could be used in public schools, and whether legislatures could regulate the operation of religious schools. As the nineteenth century progressed, these questions were increasingly answered in the negative, and in nearly every case, the advances for religious liberty were secured through legislation.

Religious liberty could be threatened, in the first place, by the appropriation of public funds to support religious schools. In Massachusetts the prohibition on the use of funds for this purpose was secured through a constitutional amendment in 1855, but in the remaining states it was secured through legislation. The Virginia General Assembly enacted a series of statutes in the 1830s and 1840s to prohibit the appropriation of state funds to theological academies or institutions. In similar fashion, the Michigan legislature provided that “No school district shall apply any of the money received by it from the primary school interest fund or from any and all other sources for the support of any school of a sectarian character.”

Religious liberty could also be threatened by the use of religious or sectarian books in the public schools. The debate concerned not so much whether the Bible would be read in the schools (this practice was largely unchallenged in the nineteenth century) but which version would be used and in which fashion. As Samuel Spear noted in an 1878 essay, two Bibles were used in America: “The English version, sometimes designated as the King James’s Bible, and the Douay version. The former is the Bible of Protestantism, and the latter the Bible of English-speaking Catholics. . . . Neither uses the Bible of the other.”

Nowhere did this issue generate more passion than in Massachusetts, the birthplace of the modern public school system under Horace Mann. At the inception of the state public school system in 1827, the Massachusetts General Court provided that school committees “shall never direct to be purchased or used, in any of the town schools, any school books which are calculated to favor the tenets of any particular sect of Christians.” Controversy erupted in the 1850s, however, when Catholic attendance in the public schools increased dramatically, and Protestants responded by securing the enactment of a law that directed school committees to “require the daily reading of some portion of the Bible in the common English version.” Although many school committees continued to adhere to the spirit of the 1827 law and to be sensitive to the diverse religious faiths of their students, the Boston schools were the scene of one notorious deviation from this policy. In an incident that attracted a great deal of attention throughout the state, a ten-year-old Catholic boy, Thomas Wall, was beaten in 1859 for refusing to follow his teacher’s orders to read from the Protestant Bible, and the teacher was subsequently acquitted at trial of any wrongdoing.

Catholics secured a reversal of this policy in Boston largely through the political process. The uproar over the Wall case led to the election of the first Catholic to the Boston school committee and the subsequent repeal of the offensive rules. Religious liberty in the public schools was secured on a statewide
level when Catholics succeeded in persuading the legislature of the injustice of the 1855 law. In 1862, on account of the force of these arguments, as well as the strong participation of Catholics in the Union army during the Civil War, the General Court revised its Bible-reading law to omit any mention of the “English version,” to provide that the Bible should be read “without written note or oral comment,” and to direct that the school committee “shall require no scholar to read from any particular version, whose parents or guardian shall declare that he has conscientious scruples against allowing him to read therefrom.”68 One Catholic newspaper opined: “This is a long stride from the Know-Nothingism of 1854, the remnants of which seem to have been pretty nearly disposed of by the Civil War.”69 In 1880 the General Court further revised the law to provide that students could be excused not only from reading out of a particular version with which they disagreed but also from “tak[ing] any personal part in the reading.”70

In Virginia, this particular aspect of the right to worship was secured in several ways throughout the course of the nineteenth century. Beginning in the 1840s, the General Assembly provided that in local school districts, “no books shall be used nor instruction given in the public schools, calculated to favour the doctrinal tenets of any religious sect or denomination.”71 With the advent of a statewide school system in 1870, the first superintendent of public schools, William Ruffner, announced that the question of Bible reading “was to be left for determination to the direction of local authorities,” within proper bounds and as long as students could receive exemptions. As the historian Sadie Bell explained: “The historic position of the legal separation of church and state was not to be marred by a legal incorporation of anything that would tend to establish a definite alliance between church and state,” but “where the people wished to co-operate in permitting the Church to exert a religious influence in education, it was to be allowed.”72

To be sure, some dissatisfied parents in the nineteenth century occasionally took to the state courts to seek further exemptions, but judges routinely declined to overturn legislative determinations. For instance, the town of Woburn, Massachusetts, directed that each school day begin with a Bible reading, but that “any scholar should be excused from bowing the head, whose parent requested it.”73 In 1866, one student’s father refused to request an exception, and when the student disobeyed the rule and was dismissed from school, her father challenged the dismissal in court. The Massachusetts Supreme Court ruled, however, that because the town rule provided exemptions for students with religious scruples, it was consistent with the current statutory guarantee and therefore did not encroach on religious freedom.74

In 1898 the Michigan Supreme Court heard a similar challenge to a Bible-reading provision in the Detroit public schools, and the court deferred in similar fashion to the legislative judgment. The judges were impressed by the fact that under the Michigan statute, as in Massachusetts, the teachers were not permitted to comment on the reading, nor were the students required to sit through the reading if their parents requested an exemption.75
Religious liberty could be threatened, finally, by laws that sought to regulate the operation of religious schools. In the second half of the nineteenth century, an increasing number of Catholics began to send their children to diocesan schools, and Protestants tried on several occasions to prevent them from doing so by introducing legislation that sought to impose a variety of onerous regulations on religious schools. Significantly, these bills were routinely defeated, due in large part to the operation of institutional arrangements and rules of legislative procedure that were designed to obtain the reflective, rather than the reflexive, voice of the public.

The first of these offensive bills was introduced in the 1855 session of the Massachusetts General Court and would have required that all private school teachers receive the approval of the town school committee. As Robert Lord and John Sexton noted, “One can imagine the reception that would have been given to a Catholic nun who appeared for examination.” The bill received the support of a majority of the Massachusetts House of Delegates, but it was rejected by the Senate and failed to become law.

Another oppressive bill was introduced in the same session, and the patrons tried to mask its true intent by burying its contents in an unrelated child-labor bill. When one senator unwittingly tried to attach a controversial rider to the bill, however, the supporters were forced to acknowledge its actual purpose. As one of the patrons argued: “The bill has a further object, a peculiarly American object. It is true we did not wish to bring that object out fully to view. We wished to bring that object out as quietly as we could, for it is a subject that has occasioned the committee more difficulty than any that has come before them this year, and this object was, if we must say it, to break up the Catholic schools.” The resulting publicity and subsequent deliberation were instrumental in preventing the passage of this bill as well.

A third effort to unduly restrict the Catholic schools came in the form of inspection bills that were introduced in the 1888 and 1889 sessions of the Massachusetts General Court. These bills sought to require government approval of all private schools, textbooks, teachers, and student progress and to levy fines on any individual who tried to induce parents to remove their children from the public schools. Introduced in an atmosphere of great excitement, the bills were then considered by a legislative joint committee, which proceeded to hold a total of twenty hearings. With the appropriate time for reflection and deliberation, and after several distinguished Protestant leaders spoke against the bills, virtually all the offensive provisions were withdrawn. In fact, “[l]ong before the hearings were ended, the bill was already condemned by public opinion.”

Sabbatarian Legislation

At the beginning of the nineteenth century, virtually no states granted exemptions for individuals who observed the Sabbath on the seventh day rather than the first
day, which was the custom of the majority of religious observers. By the close of the nineteenth century, however, the right of individuals to be exempt from Sabbatarian laws was protected in a number of circumstances, and in nearly all cases this came about through the passage of legislation.

The movement for the reform of Sabbatarian laws began in the 1840s, when William Lloyd Garrison issued a call for an American Anti-Sunday-Law Convention that was held in Boston and was addressed to “the friends of civil and religious liberty.” Garrison called attention to what he believed was a contradiction between “the right of every man to worship God according to the dictates of his own conscience” and the fact that “in all the States, excepting Louisiana, there are laws enforcing religious observance of the first day of the week as the sabbath, and punishing as criminal such as attempt to pursue their usual avocations on that day.”

Accordingly, the convention recommended to “all friends of religious liberty throughout the country the presentation of petitions to the next Legislature, in every State in which such laws exist, and protesting against their enactment as an unhallowed union of church and state.”

During the course of the nineteenth century, nearly all the state legislatures responded by enacting statutes that embodied the general spirit of this resolution. Thus the Massachusetts General Court declared: “Whoever conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, shall not be liable to the penalties . . . for performing secular business and labor on the Lord’s Day if he disturbs no other person.” A number of states provided more specific guarantees. For instance, the Michigan Legislature provided a series of exemptions from general laws for those who observed the Sabbath on the seventh day. For one thing, it directed that no conscientious observer “shall be compelled to defend any civil suit in the justice’s courts of this State on that day.” In addition, although barbers were generally prohibited from working on Sundays, the legislature exempted all individuals “who conscientiously believe the seventh day of the week should be observed as the Sabbath, and who actually refrain from secular business on that day.”

Judicial activity in this area was generally confined to applying these statutes to particular circumstances, such as when the Michigan Supreme Court upheld the exception for barbers in the face of arguments that it applied only to a particular class of citizens. But when litigants pleaded with courts to provide further exemptions that had not been granted by the legislature, judges routinely declined to do so. Thus in 1876, in a case involving a Jewish storekeeper, the Massachusetts Supreme Court agreed with the ruling of the Superior Court that the law “could not be extended so as to permit the act of keeping open a shop upon the Lord’s day.” Nor would the court permit a Jewish shopkeeper to open his store on Sunday, even if it was kept open solely for the purpose of selling kosher meats to others of the Jewish faith.
Freedom to Worship in the Context of Marriage, Prison, and Public Expression

At the start of the republican era, a number of laws were in place that required marriages to be performed by Protestant ministers. It was not uncommon, therefore, for Catholic priests or ministers of other faiths to be brought into court and charged with performing illegal marriages. As public opinion evolved throughout the course of the century, however, legislatures enacted a series of statutes that provided exemptions for Quakers, Shakers, Mennonites, Catholics, and Jews. Thus in 1784, in passing a law that was typical of those enacted across the country, the Virginia General Assembly responded to a series of memorials from religious dissenters by stipulating that “it shall and may be lawful for the people called quakers and menonists, or any other christian society that have adopted similar regulations in their church, to solemnize their own marriages.”

Then, in the middle of the nineteenth century, the growing reliance on religion for rehabilitative purposes prompted legislatures to address the question of religious liberty in yet another context. Because the ministers who regularly presided at the chapels of prisons and reform institutions were overwhelmingly Protestant, some people began to feel that this constituted a denial of religious liberty to juveniles and criminals. They were concerned, in particular, that “Freedom of conscience and of worship was a boast of Massachusetts, but for the Catholic inmates of her public institutions at that time it simply did not exist.”

Thus in 1859 the Michigan Legislature acted to protect the rights of religious dissenters by ensuring that when an inmate wanted assistance, “the clergyman of his choice shall be admitted to visit such inmate.” Likewise, in 1875 the Massachusetts General Court responded to a series of memorials by providing that “No inmate of any prison, jail, or house of correction in this Commonwealth shall be denied the free exercise of his religious belief and liberty to worship God according to the dictates of his conscience.” In 1879 the General Court extended this guarantee to apply to the state’s charitable and reform institutions as well.

In one final area, that of religious liberty for atheists, state legislatures retained responsibility for regulating the right but failed to provide a high level of protection. The particular question before eighteenth- and nineteenth-century legislatures was whether laws that prohibited blasphemy were consistent with religious liberty. In most cases, these laws were retained, albeit in a more moderate form than in previous years. Thus in 1782 the Massachusetts General Court reenacted its blasphemy law, but it omitted the penalty of “boring through the tongue” in favor of imprisonment. In one notorious instance in Massachusetts in 1835, one man was even convicted under this law. When Abner Kneeland challenged his conviction in the state supreme court, Chief Justice Lemuel Shaw deferred to the legislature’s view that the antiblasphemy law conformed to the guarantee of religious freedom, and the General Court failed to alter this interpretation. Neither the judges nor the legislators of Massachusetts, it would appear, were willing to
define religious liberty in such a way as to include the right of atheists to express their views in public.

FREEDOM OF EXPRESSION

The precise understanding of free speech in the republican era has been the subject of much debate. At a minimum, it meant that legislators were privileged from arrest in the performance of their official duties and that prior restraints of publications were prohibited. Aside from this, there were remarkably few efforts to define the meaning of free speech in particular circumstances. The few free-speech issues that did arise were resolved by legislatures, although the record is a mixed one.

The federal Sedition Act of 1798 provided the first threat to free expression, and at least one state legislature responded by better securing free-speech rights. Alongside Madison's Virginia Resolution, which made a case for the unconstitutionality of the law, the Virginia General Assembly enacted a statute that protected all legislators from arrest in the performance of their duties.

Another national controversy, this time concerning the abolition of slavery in the mid-1830s, provided the impetus for another state statute, which on this occasion served to restrict rather than to expand liberty. In response to "a powerful, concerted effort of propaganda [that] had been launched against the Southern way of life by the abolition societies of the North," Virginia was one of several southern states that enacted laws that directed all "incendiary publications" to be burned and their subscribers fined.

In one final area, concerning the right of defendants in libel cases to demonstrate the truth of their statements, legislatures provided a significant liberalization of free-speech rights. In a series of decisions in the early part of the nineteenth century, the Massachusetts Supreme Court adhered to the common-law rule that prohibited defendants from presenting this evidence. Thus in 1808 a Boston man posted signs around the city claiming: "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down." The lawyer for the accused did not deny the charges, but he sought to "prove the truth of the matters charged in the libel," for he was confident that he could show that Hayward had in fact defrauded his client, tricked him out of money, and "had in many instances acted unfairly." But the trial judge adhered to the common-law rule and denied the motion, and his decision was upheld by the state supreme court. In 1825 Chief Justice Parsons reaffirmed this interpretation: "[T]his is certainly the common law doctrine, and it never has been repealed by any decision of this court." The rule had "stood before the public nearly twenty years, and successive legislatures must be presumed to have acquiesced in its wisdom and policy, or it would have been altered by statute."
In its next session, however, the Massachusetts General Court accepted the judicial recommendation that the legislature declare its intention on the subject. It enacted a statute that provided: “In every prosecution, for writing or for publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication, charged as libellous.” Nor was the Massachusetts experience exceptional. The Oregon Legislative Assembly was one of a number of state legislatures to secure this free-speech right in the course of the nineteenth century.

THE GUARANTEE OF A FAIR TRIAL

The nineteenth century featured a number of discussions of the precise meaning of the right to a fair trial. Some of these issues, such as the admissibility of evidence, testimony, and witnesses, were considered the proper domain of the judiciary. In general, however, legislatures were responsible for defining the most important fair-trial rights, such as the protection against double jeopardy, the privilege against self-incrimination, the right to retain counsel, the right to obtain a public and speedy trial, and the guarantee against improper searches and seizures. On the whole, legislatures established a commendable level of protection for these rights.

The Right Not to Be Twice Placed in Jeopardy for the Same Offense

Legislatures frequently secured the guarantee against double jeopardy, but as in most of these cases, the important question was not whether to protect the right but rather under which circumstances and in what manner to do so. Thus the Massachusetts General Court provided in its Revised Statutes of 1835 that “A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits.” A person could be retried only when he had “been acquitted by reason of a variance between the indictment or complaint and the proof, or by reason of a defect of form or substance in the indictment or complaint.” In 1848 the Virginia General Assembly enacted a law that contained nearly identical language. The Michigan Legislature followed suit in its Compiled Laws of 1871. Finally, the Oregon Legislative Assembly secured this right in its 1864 Code of Criminal Procedure, and it provided further that an acquittal on a charge of a “crime consisting of different degrees” shall serve as a bar to further prosecution for any degree of the crime. As Jay Sigler noted, the virtue of “placing double jeopardy on a statutory or common law base” was that it made “alteration of the doctrine to suit policy needs much easier than where it may be enshrined in a constitutional provision.”
The Privilege Against Self-Incrimination

The privilege against self-incrimination was secured in nearly all the state constitutions, but the challenge was to define this general guarantee in particular circumstances. Once again, state legislatures were primarily responsible for securing the right, which they did by guarding against the two principal ways that the right could be violated.

The right could be violated, in the first place, if defendants were induced to confess to a crime on the basis of promises or threats. Accordingly, legislatures enacted statutes that prohibited the use of coerced confessions. The Oregon Legislative Assembly stipulated that a defendant’s confession “cannot be given in evidence against him, when made under the influence of fear, produced by threats.”¹¹⁸ The Michigan Legislature, when it became apprised of the problem of coerced guilty pleas, directed judges to determine whether guilty pleas were made “without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to . . . order a trial.”¹¹⁹ As the Michigan Supreme Court noted in an 1878 case: “The Legislature of 1875, having in some way had their attention called to serious abuses caused by procuring prisoners to plead guilty when a fair trial might show they were not guilty, or might show other facts important to be known, passed a very plain and significant statute designed for the protection of prisoners and of the public.”¹²⁰

The right could also be violated when defendants were forced to testify against themselves. Legislatures secured this aspect of the privilege against self-incrimination in two distinct ways in the nineteenth century. Prior to 1859, every state legislature protected the right by preventing defendants from testifying in their own behalf. Although it is difficult in the modern era to comprehend how such a prohibition could actually protect individual rights, early-nineteenth-century legislatures defended this arrangement on the ground that “if we were to hold that a prisoner offering to make a statement must be sworn in the case as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation.”¹²¹

As the century progressed, public opinion evolved to the point that this came to be seen as a denial rather than a protection of a defendant’s fair-trial rights. In 1859 Maine became the first state to permit defendants to testify in their own defense,¹²² and other states soon followed suit. In 1861 the Michigan Legislature permitted any defendant “to make a statement to the court or jury.”¹²³ The Massachusetts General Court provided in 1866 that a defendant could testify in all cases.¹²⁴ The Virginia General Assembly gradually granted defendants the right to testify. In 1872 it determined that defendants could testify in cases of assault, battery, and trespass,¹²⁵ then in 1882 it permitted testimony in a host of other circumstances,¹²⁶ and finally in 1886 it provided that defendants could testify in all
cases. By the close of the century, all but one state legislature had secured the right in this fashion. As Joel Bodansky argued: “The extent to which the testimony of such persons is today accepted as a matter of course may obscure the fact that, at one time, the extension of competency provoked bitter controversy and was regarded by contemporaries as one of the most significant procedural reforms of the day.”

This new arrangement opened the possibility, however, that defendants who chose not to exercise their recently obtained right to testify could be tainted by that choice. It was at this point that legislatures began to enact statutes to ensure that a defendant would not be affected by his decision not to testify. The Virginia General Assembly provided, for instance, that a defendant’s “failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney.” The Massachusetts General Court enacted a similar guarantee. As the Massachusetts Supreme Court explained: “[T]he Constitution of the Commonwealth declares that no subject shall be compelled to accuse or furnish evidence against himself. The statutes allowing persons charged with the commission of crimes or offenses to testify in their own behalf were passed for their benefit and protection, and clearly recognize their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them.”

The Right to Retain Counsel

The right of individuals to retain counsel was interpreted literally at the close of the eighteenth century; it meant that a defendant could retain the counsel of his choice. This was not an insignificant guarantee; it was, after all, a right that was “not always recognized in early English criminal cases.” It did not mean, however, that an accused was “entitled, as of right, to have counsel assigned by the court to advise him relative to his plea.” In the course of the nineteenth century, however, legislatures interpreted this right in an increasingly expansive fashion. Legislatures first sought to secure the right more effectively, a number of legislatures provided that counsel should be appointed for indigent defendants, and finally some legislatures decided that counsel should not only be appointed to represent these defendants but also be compensated for their efforts.

Legislatures first sought to secure the right to counsel in a meaningful fashion. In 1864, for instance, the Oregon Legislative Assembly enacted a law that held that defendants must be informed of and given adequate opportunity to exercise their right to counsel. “When the defendant is brought before a magistrate upon an arrest, either with or without warrant, or on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel before any further proceedings are had.” Furthermore, the magistrate “must allow the defendant a reasonable time to
send for counsel, and adjourn the examination for that purpose." Only when
counsel was present could the magistrate "proceed to examine the case."134

Several state legislatures then directed courts to appoint counsel for indigent
defendants, in certain circumstances. Thus in 1820 the Massachusetts General
Court directed that all capital defendants be provided with counsel,135 and in
1877 it provided that counsel could be assigned to represent inmates of state
reform schools at criminal trials.136 The Michigan Legislature was one of several
state legislatures that permitted magistrates to appoint counsel for paupers
accused of a broad range of crimes, on a case-by-case basis.137

Appointed counsel often represented indigents on a pro bono basis, but some
legislatures decided to expand the right even further by directing that counsel
should be compensated for their efforts. In 1850, for instance, the Michigan
Supreme Court considered whether a lawyer was entitled to recover $50 for his
expenses in defending a pauper, but it ultimately found no warrant for his
claim.138 The Michigan Legislature responded in 1859 by enacting a statute that
directed all counties to provide compensation. The statute provided that "Whenever
any person charged with having committed any felony or misdemeanor shall
be unable to procure counsel and the presiding judge shall appoint some attorney
to conduct the defense, the attorney so appointed shall be entitled to receive from
the county treasurer . . . such an amount as the presiding judge in his discretion
shall deem reasonable compensation."139

To be sure, defendants occasionally urged courts to overturn their convictions
on the ground that the legislature had not gone far enough in extending this right.
Judges routinely declined to act, however, in the absence of specific statutory pro-
visions. In considering one such request, the Massachusetts Supreme Court
noted: "In an indictment for murder, counsel are assigned to the prisoner by the
court, under the provisions of the [statute], and are expected to serve without pay,
if the prisoner cannot furnish compensation; and no such prisoner has gone unde-
fended on this ground. There is no provision of statute for assigning counsel to
one indicted for a less offence."140 The courts therefore deferred to legislatures on
this subject, and as William Beaney noted, "most states have tried to solve the
counsel problem by statute, rather than by constitutional interpretation."141

The Right to Obtain a Public and Speedy Trial

The right to a public trial was also secured through legislation. In 1846, for
instance, the Michigan Legislature provided: "The sittings of every court within
this state shall be public, and every citizen may freely attend the same."142 This
statute was invoked in several instances to secure a defendant's rights. In one
case, a trial judge directed a court officer to "see that the room is not over-
crowded, but that all respectable citizens be admitted," and as a result, a number
of friends of the accused were denied admission. In an effort to sort out the rights
to which this man was entitled, the Michigan Supreme Court examined the constitutional guarantee as well as the relevant statute. It concluded: “This statute has been in force since 1846. It voices the sentiment of the people at the time the Constitution of 1850 was adopted. It gives expression to what is there meant by a public trial.” Accordingly, the court held that this particular defendant’s trial “was accomplished in violation of his constitutional and statutory right to a public trial.”

The right to a speedy trial was also secured in several states through legislation, and in a particular manner. For instance, in 1814 the Virginia General Assembly provided that in the case of treasons and felonies, defendants would be released if they were not indicted and tried within a certain time, provided that the delay was not caused or desired by the prisoner. In 1847 the legislature extended the right to apply to “any person held in prison on any charge of having committed a crime.” As President James Keith of the Virginia Court of Appeals explained in an 1895 opinion:

To my mind, the legislature has taken ample and most satisfactory steps to secure to the accused his constitutional right of a “speedy trial,” not by limiting or confining the legislature as to the mode of procedure by which it has been thought wise to guard at once the rights of the prisoner and the interest of the Commonwealth, but by providing that there shall be no undue delay in taking the successive steps in the procedure. Thus, in section 4001 the accused is discharged from imprisonment “if a presentment, indictment, or information be not found or filed against him before the end of the second term of the court at which he is held to answer,” . . . [and] he shall be forever discharged if four terms of the county, corporation, or hustings court shall pass without a trial. . . . These are means which the legislature has thought sufficient to secure a “speedy trial” within the meaning of the constitution—that is, a trial without delay.

The logic underlying these provisions was that rights were not self-executing. The best way to secure a right was not to specify a rule and then exhort officials to abide by it but rather to arrange institutions and incentives in such a way as to make it in the interest of public officials to protect rights. In this instance, the public interest in effectively prosecuting the case was linked with the defendant’s interest in securing a speedy trial, and it was therefore not only the duty but also in the interest of public officials to guarantee the right.

The Guarantee Against Improper Searches and Seizures

The constitutional guarantee against improper search and seizure was secured in the nineteenth century in a manner that is quite foreign to the modern mind. In order to evaluate the extent to which this right was secured in this era, it is important to uncover this traditional approach and to understand its logic.
The first way in which legislatures sought to protect this right, as Akhil Amar, among others, has argued, was to limit the use of search warrants.\textsuperscript{147} Whereas it is customary today to conceive of search warrants as a protection against arbitrary searches, individuals in the nineteenth century were prone to view warrants as dangerous to liberty. According to Telford Taylor: “It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from regarding the warrant as a protection against unreasonable and oppressive searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods.”\textsuperscript{148}

Accordingly, legislatures imposed strict limitations on the procedures by which warrants were obtained.\textsuperscript{149} In 1847, for example, the Virginia General Assembly directed that all warrants would normally be in effect only in the “day time” and must designate “the place and property or things to be searched for.”\textsuperscript{150} In addition, most states restricted the purposes for which a warrant could be obtained. Thus the Oregon Legislative Assembly stipulated: “A search warrant cannot be issued but upon probable cause, shown by affidavit,” and the magistrate was required to “examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing.”\textsuperscript{151}

Legislatures were not content to rely on parchment rules to secure this right, however. Although the modern view holds that the way to enforce the guarantee is to exclude illegally obtained evidence at trial, nineteenth-century legislatures determined that the right could best be secured by permitting individuals to bring civil suits against officials who conducted improper searches.\textsuperscript{152} Civil suits offered a remedy for all citizens who were the victims of improper searches, not just those who were brought up on criminal charges. In addition, the threat of a civil suit was thought to provide a much stronger incentive for public officials to refrain from conducting improper searches. Accordingly, rights were protected by arranging the law in such a way that the interest of the official in avoiding a suit coincided with the interest of the citizen in avoiding an improper search. In fact, throughout the nineteenth century, “The idea of exclusion was so implausible that it seems almost never to have been urged by criminal defendants, despite the large incentive that they had to do so, in the vast number of criminal cases litigated in the century after Independence. And in the rare case in which the argument for exclusion was made, it received the back of the judicial hand.”\textsuperscript{153} Thus in 1841, in a decision that served as a model for other states throughout the nineteenth century, the Massachusetts Supreme Court ruled that the guarantee against improper searches and seizures did not require the exclusion of evidence. Justice Samuel Wilde noted: “If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers
seized as evidence, if they were pertinent to the issue, as they unquestionably were."¹⁵⁴

State legislatures also had a number of particular occasions to deliberate over the meaning of this guarantee in practical circumstances, especially in connection with efforts to restrain behavior such as gaming and drinking. In several of these cases, legislatures failed to provide adequate guarantees, and the right was secured instead through judicial decisions. In 1854, for instance, the Massachusetts Supreme Court struck down a Prohibition law that did not sufficiently limit the use of search warrants,¹⁵⁵ and in 1856, the Michigan Supreme Court invalidated a Prohibition act for similar reasons.¹⁵⁶ In both cases, the courts ruled that the legislatures, in their zeal to stamp out liquor, had run afoul of the guarantee, and in both cases, the legislatures responded promptly by amending their laws to better safeguard the right.¹⁵⁷

Except for these instances, legislatures assumed and lived up to the responsibility for securing the right. Thus, when the Massachusetts General Court enacted another Prohibition law in 1869, this time it included appropriate protection against unreasonable searches,¹⁵⁸ and the Massachusetts Supreme Court relied on this statutory guarantee to test the validity of future searches. As the court noted in an 1872 case, “The [statute], in accordance with the principles of the common law and of the fourteenth article of our Declaration of Rights, requires that in cases like this,” certain rules shall be satisfied. Because the search failed to meet the statutory requirements, it was declared void.¹⁵⁹

THE RIGHT TO EQUAL PROTECTION UNDER THE LAW

Although most state bills of rights echoed the promise in the Declaration of Independence that all men are created equal in their enjoyment of rights, the framers of the initial constitutions distinguished carefully between natural rights and civil and political rights. Every person was entitled to his natural rights, regardless of race, nationality, or sex, but the rights to vote, to sue and be sued, to marry, and to own land were conventional rights that were to be secured through legislation, when appropriate. As Delegate John Norvell argued in the Michigan Convention of 1835: “The right to vote was not entirely a natural right. It was a question of expediency.” He contended that: “The right to vote comes by the law of the land. It is a conventional right. The enjoyment of liberty, property, and the pursuit of happiness, is a natural right.”¹⁶⁰ Even at their most deliberative moments in the eighteenth and early nineteenth centuries, few individuals conceived that African Americans, Native Americans, and Asians had a right to citizenship, let alone to attend integrated schools, patronize public establishments, or intermarry with whites. In addition, women were deemed unsuited to enjoy the full rights of citizenship.¹⁶¹

In the course of the nineteenth century, however, public opinion evolved to the point that it supported the recognition of a number of these rights,¹⁶² and
legislation was invariably the vehicle for securing these changes. To be sure, some of these rights were secured through the acts of national institutions, such as the enactment of amendments to the U.S. Constitution and decisions of the U.S. Supreme Court. In general, though, when these rights were secured, as they were to a significant degree in the latter part of the nineteenth century, this took place through the actions of state legislatures.

The Rights of African Americans

The most important right that was recognized in the course of the nineteenth century was the right of African Americans to be accorded equal treatment under the law. One of the first rights to be secured was the right of blacks, mulattos, and whites to intermarry. William Lloyd Garrison’s *Liberator* argued that the existing Massachusetts antimiscegenation law was “a direct invasion of our inalienable rights,” and abolitionists began in 1839 to petition the legislature to repeal the law. In 1841 they secured a majority of votes in the senate and fell only seven votes short in the house. In 1842, when they obtained a majority in both houses, the law was repealed and the right was secured. In 1883 the Michigan legislature recognized the right by repealing the ban on miscegenation and declaring that all previous marriages between blacks and whites would be considered legitimate.

Reformers next turned their attention to securing the right of blacks to attend integrated public schools. This is perhaps the most famous instance of a right that has been secured in the twentieth century through the courts but that was protected in the nineteenth century through legislation. In Massachusetts, the struggle to achieve integrated schools was fought mainly at the town level in the first half of the nineteenth century. Thus African Americans, abolitionists, and sympathetic voters fought for and obtained integration of the Nantucket and Salem schools in the 1840s. Then, in 1845, the General Court took a first step toward establishing the right to attend integrated schools on the statewide level by providing that “any child unlawfully excluded from public school instruction” could sue and recover damages from a school board.

The schools of Boston remained segregated, however, and in 1849 Benjamin Roberts brought suit against the Boston Primary School Committee for illegally excluding his daughter, Sarah, from attending the school closest to her home. Roberts chose as his counsel Charles Sumner, who proceeded to argue the case before the Massachusetts Supreme Judicial Court. Sumner argued, in particular, that the Boston segregation policy offended the Massachusetts declaration of rights. Chief Justice Shaw declined, however, to recognize a right of individuals to attend integrated schools. He argued that the right to nondiscrimination, “as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound.” But this did not mean that Sarah Roberts actually possessed such a right. “Legal rights must, after all, depend upon the provision of law; certainly all
those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.”

When Shaw therefore turned to “the law,” in order “to ascertain what are the rights of individuals, in regard to the schools,” he concluded that “[i]n the absence of special legislation on this subject, the law has vested the power in the [school] committee to regulate the system of distribution and classification.”

In the wake of the Roberts decision, abolitionists and leaders in the African American community accepted the court’s advice and sought to secure legislative recognition of the right. A bill to prohibit segregated schools was introduced into the 1851 legislative session and even obtained some support before being rejected. Conditions proved more favorable in 1855, when a statute was introduced providing that “no distinction shall be made on account of the race, color, or religious opinions, of the applicant or scholar” in public school admissions, and permitting excluded students to recover civil damages. “In the House, the bill was ordered to a third reading with an affirmative shout, not more than half a dozen voting audibly in opposition. The Senate as readily cooperated.” At a banquet held to celebrate the occasion, Charles Slack noted that this was only the latest in a series of legislative successes over the last two decades.

Well, this prejudice against colored children in the public schools has been driven out of sight—thank God for that! It was another of the triumphs which had marked the struggle for the elevation of the colored race in this Commonwealth. First came the abrogation of the laws against intermarriage—not that many desired that privilege, but they could not consent that a mark of inequality should be placed upon either race, white or black; then the “Jim Crow” car was abolished, and the privilege of travel in every public conveyance fully maintained; then the places of amusement were thrown open to the colored race equally with the white; then followed, in Boston, the abolition of the “negro pew” in the City Directory, and the record of all the citizens alike, without distinctions of color or race.

Legislative statutes were also the vehicle in Michigan for establishing the right to attend integrated schools. In this case, the Detroit schools were the primary battleground. In 1842 the Michigan Legislature took the first step toward ending segregation by combining the separate black and white Detroit school districts into a unitary district, whose schools were to be “public and free to all children.” But when the Detroit schools and several other districts remained segregated, the father of one excluded student initiated a lawsuit in 1867 against one of the offending school boards. The legislature acted quickly to amend its statute to make it clear that “all residents of any district shall have an equal right
to attend any school therein." Michigan Chief Justice Thomas Cooley examined the statute and concluded: "It cannot be seriously urged that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established."

Legislation was the means, finally, of securing the right to nondiscrimination in public accommodations. In the antebellum era, several efforts were undertaken in northern states to establish a right to equal treatment on railcars and steamboats, but these met with little success. The Massachusetts Anti-Slavery Societies tried, unsuccessfully, to persuade the Massachusetts General Court in 1842 and 1843 that segregated railway cars ran afoul of the declaration of rights and should be prohibited. Likewise, a Michigan man was defeated in his 1858 efforts to persuade the Michigan Supreme Court to recognize a right to equal accommodations on steamboats.

With the close of the Civil War, state legislatures became more active in securing these rights. In 1865 the Massachusetts General Court prohibited discrimination on the basis of race "in any public place of amusement, public conveyance or public meeting," or other licensed establishment. This was extended in a series of statutes to cover theaters in 1866, skating rinks and other unlicensed establishments in 1885, barber shops in 1893, and assorted other public places in 1895. The penalties were increased at each step of the process. The original 1865 statute imposed a $50 fine on those who were guilty of discrimination, but this was raised to $100 in 1885, to which was added a maximum civil penalty of $300 in 1895. Moreover, the Massachusetts General Court was dedicated to ensuring that these rights were secured in practice. In 1896 the legislature noted with dismay that an Ohio minister "was refused entertainment at reputable hotels in the city of Boston, because he is a colored man, in spite of statute law against discrimination on account of color." It indicated "that a vigorous campaign for statute rights by the persons most aggrieved will meet the hearty approval and co-operation of the two branches of the general court."

The Michigan Legislature enacted a comprehensive statute in 1885 that established a right to equal treatment in "inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theatres, and all other places of public accommodation and amusement," as well as in service as a "grand or petit juror in any court." Violators of either section could be found guilty of a misdemeanor and penalized by fine or imprisonment.

In an analysis of the right to nondiscrimination in Massachusetts, Francis Fox noted that, although in the present era "one is apt to think of civil rights as being predominantly, if not exclusively, the private preserve of the courts," the recognition of the right to equal treatment "has been a legislative march." Fox argued: "When advances were made they were for the most part, legislative
advances. When legislative regressions occurred, they were cured, if at all, by legis­
slative repeal. [The Massachusetts judiciary has] largely cooperated with what­
ever programs and policies the people, through the General Court, have enacted
into law."189 Fox’s analysis of Massachusetts can be said to apply equally well to
the other states.

The Rights of Women

At the start of the republican era, married women did not possess full rights of
citizenship, and women could not practice law, hold public office, or vote in
school board and municipal elections. By the century’s close, however, virtually
all these states had secured each of these rights, and once again, legislation was
the primary means by which these gains were achieved.

In the first place, legislatures removed the disabilities that prevented married
women from exercising the same rights as unmarried women. In 1844 Massachu­
setts became one of the first states to secure the property rights of married women
when the General Court enacted a law affirming that a married woman should
“have the same rights and powers, and be entitled to the same remedies, in her
own name, at law and in equity, and be liable to be sued at law and in equity upon
any contract by her made . . . in the same manner and with the same effect as if
she were unmarried.”190 In similar fashion, in 1880 the Oregon Legislative
Assembly repealed “[a]ll laws which impose or recognize civil disabilities upon a
wife which are not imposed or recognized as existing as to the husband.”191

Women also demanded recognition of the right to practice law. In Michigan
and Oregon, this issue was first raised in the legislatures, which enacted statutes
that secured the right.192 In Massachusetts, this question was first taken up by the
Supreme Court, which concluded in 1881 that the legislature had not stated its
express intention to declare such a right. The court ruled: “It is hardly necessary
to add that our duty is limited to declaring the law as it is, and that whether any
change in that law would be wise or expedient is a question for the legislative and
not for the judicial department of the government.”193 The Massachusetts Gen­
eral Court responded to this invitation at its next session by passing “An Act to
permit women to practise as attorneys at law.”194

The next question was whether the right to equal protection encompassed the
right of women to hold public office. In 1883 the Massachusetts General Court
determined that women could perform most of the duties of a notary public.195
When the question then arose whether women could serve on school committees,
the Massachusetts General Court also voted yes in 1874,196 as did the Oregon Leg­
sislative Assembly in 1893.197 Although the Massachusetts statute was permitted to
stand,198 the Oregon law was deemed by the Oregon Supreme Court to be “plainly
in violation of the provisions of the constitution, and to that extent void.”199

When the question arose, finally, whether women could vote in certain rep­
resentative elections, legislatures again secured the right, although they were
occasionally stymied by judicial decisions. The legislatures of Michigan, Oregon, and Massachusetts enacted statutes that permitted women to vote in school elections. But when the Michigan Legislature moved even further and permitted women to vote in all school, village, and city elections, the Michigan Supreme Court invalidated the statute.

The Rights of Native Americans and Aliens

Neither Native Americans, by tradition, nor aliens, by definition, were vested with the same rights enjoyed by the citizens of the various states. In the course of the republican era, though, legislatures enacted statutes that secured full civil rights for Native Americans, as well as the rights of aliens in particular circumstances.

Because Native Americans did not initially qualify as citizens at the start of the nineteenth century, they were not guaranteed the rights to sue, testify in court, or hold land, let alone vote. But as public opinion evolved, legislatures responded by recognizing each of these rights. The Michigan Legislature directed in 1841: “That any Indian shall be capable of suing and being sued in any of the courts of justice of this State, and shall be entitled to all of the judicial rights and privileges of other inhabitants thereof.” Likewise, the Virginia General Assembly provided in 1867 that criminal proceedings against Indians “shall be as against a white person.” In similar fashion, the Massachusetts General Court enacted a series of statutes between 1859 and 1869 that secured the right. Among other actions, the General Court directed a commissioner to determine the most appropriate means of “conferring civil and political rights in the Indians,” then it conferred citizenship on some Native Americans, and eventually it declared all Native Americans to be citizens of the commonwealth.

Aliens were placed in a slightly different situation, in that they could become citizens merely by following the appropriate naturalization requirements. Even so, legislatures acted in certain circumstances to secure their rights when it was appropriate. Thus the Oregon Legislative Assembly provided in an 1872 law that “Any alien may acquire and hold lands, or any right thereto, or interest therein by purchase, devise, or descent, . . . as if such alien were a native citizen of this State or of the United States.” Likewise, the legislatures of both Oregon and Massachusetts declared that aliens could be admitted as attorneys to the state bar on the same terms and conditions as citizens, as long as they made it clear that they eventually intended to become citizens.

CONCLUSION

Admittedly, this survey of rights protection in the eighteenth and nineteenth centuries falls short of being comprehensive. A complete evaluation would take account of an even greater number of rights and would include other states. In
addition, it would go even further in measuring the extent to which these rights were secured in practice as well as in law. Nevertheless, the existing record is sufficiently rich to support several conclusions about the strengths and weaknesses of republican institutions.

On the one hand, legislatures demonstrated a capacity to secure a reasonable level of protection for a broad array of rights. Legislatures protected virtually all areas of religious liberty, some areas of free speech, and most fair-trial rights. Moreover, as the century progressed, the legislatures of Massachusetts and Michigan secured the legal rights of African Americans to a significant degree, and the legislatures of Massachusetts, Michigan, and Oregon gradually provided rights for women in a number of areas.

On the other hand, legislatures fell short in several areas. There were, of course, some rights that were left unsecured throughout the whole era, such as the rights of atheists in Massachusetts, the rights of women in Virginia, and the rights of blacks in Virginia and Oregon. It is unclear, however, that these deficiencies can be attributed to the prevailing institutional arrangement. The failure to secure these rights was more likely due to an immature conception of rights that prevailed on these particular issues in these states. It is at least an open question whether any other institution would have been more effective in securing the people’s liberties in these cases.

Certain failures can be fairly ascribed to republican institutions. In the first place, legislatures did not always regulate the right to vote in an effective manner, and as a result delegates at constitutional conventions occasionally acted to secure this right. In addition, there were various periods when legislators were dominated by a momentary passion and failed to secure rights that were then protected by the judiciary. This took place in particular during periods of Prohibitionist fervor in a number of these states with respect to search-and-seizure rights.

It is important, though, to stress the limited nature of these deficiencies. Legislatures were incapable of securing rights when their self-interest predominated, as in the case of regulating the suffrage. Additionally, they did not always succeed in resisting momentary passions, as was the case in certain periods of social or political agitation. In virtually all other areas, legislatures demonstrated the capacity to secure a reasonable degree of rights protection.