Keeping the People's Liberties
Dinan, John J.

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Populist Institutions and the Protection of Rights

The most significant institutional development between 1900 and 1940 was the introduction of the initiative and referendum as an additional means by which citizens could secure their rights. As Herbert Croly wrote:

Instead of continuing the attempt to make government by Law democratic, they are trying really to organize popular government and make it effective. They have fallen back on the power behind the Law. They are proposing to withdraw from Law the responsibility under which it has been suffering, and to exercise this responsibility themselves. They are proposing to take the Law into their own hands. Instead of embodying their program in a constitution which either accomplishes too much or not enough, they propose to retain the power to legislate and to prevent legislation from being adopted. The local democracies have suddenly decided or discovered that they themselves are free men worthy of confidence—even if their agents are not.

The populist spirit also had an effect on the way in which other individuals conceived of their role in protecting rights. Although legislators continued to secure some rights by enacting statutes, as they had done throughout the nineteenth century, they also began to defer more frequently to popular judgments and became less active in redressing grievances. Judges were also influenced by the populist ethos, but in a complex manner. For the most part, judges continued to secure rights in the same way that they always had, by issuing statutory and common-law decisions and superintending the forms of legislation. In certain cases, however, they departed from this traditional practice and began to issue constitutional decisions that removed rights from the political process. Significantly, this behavior was recognized as deviant, and in fact was partly responsible for the enactment of the populist reforms that eventually enabled the people to bring a halt to these decisions.
THE ROLE AND BEHAVIOR OF CITIZENS

In light of the grandiose predictions on the part of the supporters and critics of direct democracy, the actual record did not live up to its billing. The initiative did not replace the legislature, nor did it render the judiciary irrelevant. Nevertheless, it had a significant effect on the way in which citizens conceived of their role in protecting rights. For the first time, as Oregon Governor George Chamberlain argued, the people assumed responsibility "not only for laws which are written in our statute-books and which ought not to remain there, but for failure to enact those laws which ought to be enacted. . . . Blame for bad laws was accustomed in those days to be visited upon the legislature, but now responsibility rests with the people themselves."2

In the first place, the initiative and referendum enabled the people to overturn statutes that were the product of inadequate reflection. To be sure, the mere presence of direct democratic institutions increased the probability that legislatures would undertake a reasonable amount of deliberation. Even so, occasions would inevitably arise when legislators would fail, for any number of reasons, to consider the deleterious consequences of proposed bills. In these cases, the people would be well positioned to render a more reasoned judgment. A prime example occurred in 1921, when the Massachusetts General Court enacted a law that required all movies to be licensed by the commissioner of public safety, who was charged with regulating their moral content and upholding standards of decency.3 Shortly after the law was passed, citizens began to express concerns about the wisdom of vesting this public official with such power, a requisite number of signatures was secured to force a referendum on the bill, and at the 1922 election, the voters secured its repeal by a large margin.4

Direct democratic institutions also permitted the people to overturn statutes that were insufficiently representative of the popular will. Again, the mere presence of the referendum went some way toward guaranteeing that legislators would remain attuned to public opinion. Nevertheless, there were bound to be cases in which legislatures would fail to measure public opinion adequately, and the people could rely on the initiative process to register their views. The initiative was used for just such a purpose in Oregon, when in 1899 the legislature enacted a law that permitted prosecutors to proceed to trial by filing information against a defendant rather than securing a grand-jury indictment. Although the legislators apparently believed that this measure would better secure individual rights, in that the grand jury had come to be viewed by many people as an increasingly arbitrary institution, it turned out that the citizens had a different view of the matter. Accordingly, in 1908 the citizens initiated and approved a ballot proposition that reinstated the right not to be prosecuted for a crime without first having been indicted by a grand jury.

The people also relied on the initiative to secure rights when legislators proved to be more responsive to their own particular interests than to the public
interest. Prototypical cases included the failure of legislators to expand the suffrage in a timely manner, to redraw electoral district lines in an equitable fashion, and to regulate the conduct of elections. In each of these instances, legislators’ self-interest in maintaining their offices occasionally prevented them from enacting laws that were consistent with the general welfare. The initiative not only reduced the probability that legislators would succumb to this temptation, but if the legislature failed to resist the temptation, it also provided a vehicle by which the people could secure enactment of the necessary laws.

Direct democratic institutions permitted the people, finally, to secure rights in cases in which legislators proved inordinately responsive to special interests. This was perhaps the most common type of legislative failure during this era, and it produced a number of ballot propositions. Thus when railroad and other business groups succeeded in preventing the passage of a comprehensive workmen’s compensation plan in Oregon, the people resorted to the initiative process to secure their rights. Similarly, when the liquor interests wielded their influence to prevent the enactment of a women’s suffrage law in Oregon, the initiative provided a vehicle by which the people could secure this right.

The constitutional convention offered an additional avenue through which citizens could secure rights independently of legislatures. In the nineteenth century, the people had largely refrained from resolving issues through constitutional action, just as they refrained from making use of direct democratic institutions. In the populist era, however, the people and their representatives in constitutional conventions exercised no such restraint. In fact, as James Dealey noted in 1915, the constitutional convention was viewed, along with the initiative, as one of the primary governing institutions during this period. He argued, “If general tendencies in the making of constitutions may be condensed into a sentence, we may say that the governmental powers of the states are centering into their electorates, which voice themselves through the ballot and the constitutional convention.”

To be sure, a number of convention delegates continued to adhere to the view that rights were best protected through representative institutions. Thus Roswell Bishop proclaimed in the Michigan Convention of 1907 that “representative government is not a failure.” He argued: “If the people of the state cannot trust their representatives to legislate for them and must tie their hands in advance, then the principles that lie at the very foundation of our government stand upon a false basis.” Similarly, some delegates still maintained that legislatures were the ideal forum for conducting discussions and forging compromises. Michigan delegate Henry Walbridge argued that the legislature “is where subjects of this kind and character can receive adequate consideration, not in the hurried manner this Convention must do its work.” Finally, several delegates still put their faith in statutes as the best vehicle for securing rights and cautioned that constitutional provisions lacked the flexibility of legislation. As Gordon Robertson argued in the Virginia Convention of 1902: “I have never known the Legislature to pass any
law involving any great right—take for instance the married woman’s law or any law, I care not what—when it has not become apparent within a few years that that law does not meet the requirements of the case, does not fully carry out the objects which its promoters had in view. . . . These sorts of things have to be amended until experience teaches us they need no further amendment.”

In general, though, these men were fighting a rearguard battle against a majority of delegates who were not as sanguine as their predecessors about the capacity of republican institutions to secure their rights. In a pair of articles published in 1891, Frances Newton Thorpe and Ellis Oberholtzer surveyed the work of several contemporary conventions and took note of the attitude that had begun to take hold among constitution makers. Thorpe noted, “The perusal of these new constitutions suggests that the people have lost confidence in their state legislatures.” Meanwhile, Oberholtzer discerned “a tendency toward taking our laws in bulk from a convention instead of in small lots each year from a legislature.” This was the view that predominated throughout the first several decades of the twentieth century.

Whereas republican-era delegates had disclaimed any greater wisdom or purity than legislators, the view predominated in the populist era that convention delegates were on the whole more trustworthy and capable. Oberholtzer noted, “The legislatures of the States are filled with men who, with the rarest exceptions, are of mediocre ability.” But: “The conventions, chosen more rarely and for a rather unusual purpose, have up to this time been kept comparatively free from those who are ‘party men’ in the bad sense, politicians who are seeking personal profit.” Charles Beard agreed. He thought that convention delegates, “being elected for the particular purpose and usually composed of more disinterested citizens than the ordinary legislature, gave special attention to building defences against the unscrupulous manipulators who were sure to find their way into the state assemblies.” Arthur Holcombe reached a similar conclusion—“that the constitutional convention, considered as an organ of state government, has been more successful than the legislature”—which led him to raise the question “whether the legislatures might not do more satisfactory work if their organization and procedure more closely resembled that of the conventions.”

As a result, efforts to engage in constitutional legislating encountered none of the stigma that had previously attached to this activity in the nineteenth century. Proposals to amend the constitution so as to restrict the legislature had once been considered deviant and required special justification, but by the twentieth century no apologies were necessary. When Michigan delegate Louis Tossy was charged with “doing work that should be in the hands of the legislature,” he responded with an unabashed defense of constitutional legislating: “Mr. Chairman, it seems to me that that is a pretext that has been offered and will be offered as long as this Convention holds. . . . I believe that we ought to have the courage of our convictions in regard to this matter, and with the belief that we ought to legislate, if you desire to call it legislation, I hope that the [measure] will prevail.”
Consequently, convention delegates were emboldened to propose constitutional amendments in a variety of areas, including the right to health insurance, unemployment compensation, an old-age pension, a minimum wage, and one day’s rest in seven, among others. No longer would delegates presume that this behavior was in any way improper. They were convinced that they were at least as qualified as legislators, if not more so, to regulate rights, and that constitutional provisions were generally preferable to statutes as vehicles of rights protection.

This attitude is perhaps best illustrated by a series of debates in the Massachusetts, Michigan, and Virginia Conventions over the wisdom of amending the constitution to prohibit public appropriations to religious charities, hospitals, and associations. These amendments, which were eventually enacted in both Massachusetts and Virginia, departed significantly from the tradition that had governed nineteenth-century conventions, and as a result, they inspired a good amount of reflection about the proper role of constitutional conventions in securing rights.

Some delegates opposed these amendments on the ground that legislators were quite capable of making reasonable judgments about how best to secure freedom of worship in particular situations. William Feiker of Massachusetts argued: “I believe in a representative democracy and the Legislature as a fair and honest representation of the people. Some people harp upon and criticize its action, and some people say it is subject to prejudice and narrow-mindedness and that it lacks discretion; but I do not believe this. Great questions have been settled fairly and on the merits of the case. Can it be shown that in this case the Legislature has betrayed its trust?”

Moreover, some delegates still believed that legislatures were a superior forum for resolving questions of this kind. George Anderson of Massachusetts argued: “I cannot easily accept the proposition that in the important work of education we are so torn by distrust of each other, by a subterranean but yet existent jealousy of each other’s religious convictions, that we cannot trust the Legislature to deal in the important work of combining public funds and private funds in the tremendously important work of education.”

These institutional concerns were eventually overcome, however, by a majority of delegates who were convinced that legislators could no longer be trusted to deliberate responsibly. Massachusetts delegate Frederick Anderson argued that the virtue of enacting this constitutional amendment was that “it takes the last irritating, debatable question out of politics.” W. F. Dunaway of Virginia concluded similarly:

It is said that we have never had this provision before. “Why not leave the Legislature free as it has always been?” I think, sir, that the transgression of our Constitution and the act for establishing religious freedom is something of recent growth in the Commonwealth of Virginia, and that is the reason why this great principle has never been raised for discussion in a previous Constitutional Convention of Virginia.
We are confronted by altered conditions to-day. There are new institutions growing up in our midst and new claims made upon the public treasury. I would restrain the Legislature, because if they pass these acts . . . it is committing a wrong. The principle for which I contend is fundamental. It is inalienable, and therefore is entitled to a place in a Constitution.\textsuperscript{23}

THE ROLE AND BEHAVIOR OF LEGISLATORS

Legislatures were held in such low regard at certain points in the early twentieth century that some commentators were led to speculate about whether they might be superseded altogether. Dealey argued: “The relative importance of legislatures is therefore decreasing, not in a few but in all the states, and that, too, in spite of the fact that legislatures are much more democratic than formerly. . . . A powerful executive with ordinance privileges, a convention meeting periodically, and the use of the initiative and referendum as in Oregon, certainly seem to leave no pressing necessity for a legislature.”\textsuperscript{24} Likewise, Frank Parsons predicted that with the advent of direct democracy there was no need for the legislature to play any more than a minor role. Under such a system, “The Legislature becomes the emergency ruler and the universal advisor—the most important advisory body in the commonwealth.”\textsuperscript{25} Allen Eaton believed that “Unless the people and their representatives resolve to work together the time is not far off when there will be a new issue in Oregon and that issue will be the abolition of the Legislature. Such a statement may seem absurd, but it is not an unlikely result. Indeed, such a proposal has been seriously made by some of the Oregon press and under the present conditions there would seem to be no difficulty in getting a petition for this purpose. It would undoubtedly receive an astonishing support.”\textsuperscript{26} Gilbert Hedges was of the same mind-set. At a time when the citizens of Oregon were considering a proposal to adopt a unicameral legislature, he predicted: “Should the State Senate be abolished the next step will be the elimination of the House of Representatives. . . . Should a State government without a legislature be held to be a republican form of government, the city councils and boards of aldermen will go, and the initiative method of enacting laws at the polls will become absolute and supreme.”\textsuperscript{27} As the Oregon Supreme Court concluded, “In time the people may strip the legislature of every power it once enjoyed, leaving it but a place in memory, and themselves exercise directly within the state all of the powers formerly committed to the legislature.”\textsuperscript{28}

In retrospect, of course, it is clear that the demise of the legislature was greatly exaggerated. Legislaturess were not eliminated, nor did they abdicate complete responsibility for securing rights. They continued, for instance, to give practical meaning to general guarantees of rights. Thus the Massachusetts General Court determined during this period that the freedom to worship required that legal protection be accorded to a variety of activities. As a result, the legislature
provided that individuals could sell kosher meats on Sundays, as long as they
closed their shops on their preferred day of religious observance, and that pro-
duce shops could remain open when a Jewish holiday fell on a Sunday. Statutes
were also enacted to protect the religious freedom of prisoners and members of
religious organizations seeking to hold extracurricular meetings in public school
buildings.

Legislatures also sought to devise more effective means for securing rights.
For instance, when members of the Virginia General Assembly heard complaints
from a number of citizens who “were being harassed and humiliated by having
their houses, vehicles and baggages searched, upon mere suspicion, by officers
and other persons seeking to discover infractions of certain laws,” they
responded by requiring search warrants to meet specific and demanding require-
ments and levying stiff penalties on individuals who violated these rules.

In addition, as the public understanding of rights evolved during this period,
some citizens continued to turn to the legislature to seek their protection. For
instance, legislatures enacted statutes that limited the number of hours that
employees could be required to work in a day or a week, and thereby recognized
the right to reasonable working conditions. Thus Massachusetts, which in the
nineteenth century had enacted a law mandating a ten-hour day and a sixty-hour
week for women and children, gradually reduced the workweek even further and
made appropriate accommodations for specially situated workers.

Moreover, legislatures continued to respond to judicial invitations to clarify
their intent on various subjects. Until Samuel Warren and Louis Brandeis wrote
their famous article in the 1890 edition of the Harvard Law Review entitled “The
Right to Privacy,” few persons thought that privacy merited legal protection.
But in one of several suits brought in the wake of this article, a Michigan woman
argued that her right to privacy prohibited a cigar manufacturer from advertising
the “John Atkinson cigar,” which was named after her recently deceased hus-
band. The Michigan Supreme Court took note of the fact that “prominence was
given to this subject” by the Warren-Brandeis article, in which “[t]he right to pri-
vacy in a broader sense than before known to the common law is asserted.” The
justices concluded, however, that if such a right did deserve recognition, it should
come as a result of legislative action. Should this ruling meet with dissatisfaction,
Justice Frank Hooker noted: “[I]t is only necessary to call attention to the fact
that a ready remedy is to be found in legislation. . . . The law does not remedy all
evils; it cannot, in the nature of things; and deliberation may well be used in con-
sidering the propriety of an innovation such as this case suggests.” The Virginia
General Assembly was one of many state legislatures that responded by enacting
such a statute, which in this case declared that any person who used a picture or
name for advertising purposes without permission could be found guilty of a mis-
demeanor and forced to pay damages to the person wronged.

Although legislators therefore continued to play a role in securing rights in the
populist regime, this role was reduced in significant respects. In particular, because
legislators were no longer viewed as the legitimate interpreters of the popular will, they began to protect rights in a provisional manner, either by relying on the legislative referendum or by deferring to the popular initiative and referendum.

The introduction of the legislative referendum meant that legislators who lacked confidence in their ability to interpret a right could now defer responsibility by enacting statutes that took effect only if approved by the people. Throughout the better part of the nineteenth century, this option had not been available to legislators, because the referendum had been considered inconsistent with the principles of republican government. But the populist regime required obeisance to the direct expression of the popular will. Thus, when the Michigan Supreme Court considered the validity of a particular referendum at the close of the nineteenth century, Justice Allen Morse was the only member of the court to oppose the law, on the traditional ground that “[t]his would be a convenient thing for a Legislature wishing to shirk responsibility,” but “[o]ur system of State government under the Constitution is not a pure democracy, but a representative one.”

A clear majority of the justices disagreed with Morse and concluded that the legislative referendum was entirely consistent with a democratic form of government and, moreover, was actually superior in several ways to ordinary legislation.

The legislative referendum was thought to be particularly appropriate for laws that were controversial and therefore difficult to enforce. Prohibitory liquor laws were a prime example, and in the first several decades of the twentieth century, legislatures began to rely heavily on the legislative referendum in this area. Thus when the question surfaced during this period, the Virginia General Assembly, which had grappled with the liquor question throughout the nineteenth century, declined for the first time to exercise responsibility for resolving the matter. Instead, it established an elaborate procedure for gauging public opinion. If one-quarter of the citizens petitioned the governor to hold a referendum on the subject, he was to call a statewide election, at which time the voters would approve or disapprove of statewide Prohibition; if a majority of voters approved the proposal, which it turned out that they did, the law would take effect. The advantage of submitting this type of measure to a popular vote, as Michigan Chief Justice John Champlin argued, was that “experience has demonstrated that a prohibitory law cannot be enforced unless the law itself has the moral support of the majority of its electors. If public sentiment is not in favor of such a law, it ought not to be forced upon the public.”

As one might expect, the legislative referendum was not confined to these cases. Charles Morrill noted in the Massachusetts Convention of 1917 that the referendum also served a variety of other purposes: “In some cases, a politic wish to shift responsibility in a difficult situation; in others a democratic deference to the unknown will of the majority; in others, uncertainty as to how the interests of the public would be affected by the measure, or a desire to secure for it the backing of a declared public opinion.” In particular, legislatures during this period employed the referendum to determine whether the right to reasonable work
hours should extend to public employees, as well as whether the right to equal protection required that male and female teachers receive the same salary.

As a result, whereas legislators in the nineteenth century had resolved questions merely by canvassing their constituents, they now felt compelled to refer bills to the people for their resolution. Horace Bartlett of Massachusetts concluded that the legislative referendum was “the most effective instrument for taking the backbone out of legislators that has ever been invented.” Another former member of the Massachusetts General Court, Samuel Collins, agreed. He thought that the chief effect on the legislature had been “to relieve it of practically all responsibility. . . . On any proposition in the legislature which was State wide in its provisions and which any member of the legislature thought might get him in wrong . . . they said: ‘The great cry in this State today is for the people to rule. Now here is an opportunity. We will kill two birds with one stone. We will dodge responsibility and we will let the people rule.’ And I want to say to you, sir, that for an up-to-date, absolutely-on-the-minute surgical operation to relieve the legislature of any backbone, this had the call.”

The presence of the statutory initiative had a similar effect. In previous years, legislators had been able to overcome doubts about their ability to register public opinion by reflecting on the fact that they were the only officials who could act. But with the advent of the initiative, legislators could respond to individual grievances not by enacting the desired statutes but by urging the petitioners to take their case to the people as a whole.

Although it is difficult in the end to gauge the precise effect of the initiative and referendum on legislative behavior, there were some indications, particularly in the first decade of the twentieth century, that legislatures became less likely to assume responsibility for securing rights. Thus in his study of direct democracy in Oregon, Eaton noted that the legislature displayed a tendency to “shift upon the people responsibilities very properly belonging to themselves.” James Barnett noted, similarly, that although the evidence was mixed, “a tendency to avoid responsibility does at times appear in the legislative assembly.” Moreover, this was occurring despite the fact that legislatures were enacting an increasing number of laws. “[A]lthough the increase in the volume of legislation might be interpreted to prove that the assembly does not refrain from action in view of the power of the people to obtain desired legislation independently of the assembly through the initiative, it might as well be interpreted to indicate that the assembly is becoming less conservative and tending to cast the final responsibility for action upon the people in view of their power to nullify undesired legislation by the referendum.”

THE ROLE AND BEHAVIOR OF JUDGES

The relationship between populism and the courts was a complex one, and it is important to distinguish between two kinds of judicial behavior in the populist
era—one that conformed to and another that deviated from regime principles. For the most part, judges were unaffected by the introduction of direct democracy, in that they continued to protect rights as they always had, by superintending the form of legislation and interpreting statutes and common-law principles. In one area, however, judges departed from their traditional behavior and began to interpret state bills of rights in such a way as to overturn legislative judgments and remove issues from the political process. When judges engaged in this type of behavior, they were condemned by citizens and public officials alike, who sought to overturn these errant decisions by bringing to bear the force of public opinion or by relying on the constitutional amendment process.

In many ways, judges in the populist era conceived of their role much the same as they had in previous years. They assumed that legislators were generally competent to interpret general guarantees of rights and that representative institutions were generally capable of securing protection for these rights in particular situations. The role of the judge, then, was to ensure that legislative statutes conformed to constitutional requirements and to apply these statutes in particular situations.

As a result, judges continued to secure rights indirectly, by enforcing majoritarian restrictions of the legislative process. Thus judges continued to guard against statutes with inaccurate titles and multiple subjects, as well as against statutes that had been enacted without adequate publicity or deliberation. In one case, for instance, the Michigan Supreme Court overturned a law whose title announced that it was “An act relative to the loaning of money and prescribing rates of interest” but that actually permitted the issuance of search warrants “for recovering stolen property from pawnbrokers.”

Judges also remained vigilant for statutes that granted special privileges or aided classes of citizens. The idea was that these laws were suspect because they were more than likely a product of undue influence on the part of a particular group of citizens and therefore a perversion of the majoritarian process. In one case in 1915, for instance, the Oregon Supreme Court overturned an ordinance that imposed a tax on certain peddlers but not on others. Chief Justice Frank Moore concluded that “the business in which the plaintiffs are engaged is identical with that of some of the merchants of Salem . . . except that the plaintiffs do not have a regular place of business in that city,” and as a result, the ordinance was constitutionally invalid.

The courts were also on guard for legislation of this kind that granted certain groups or individuals unfair advantages in the judicial or political process. Thus the Michigan Supreme Court voided one piece of legislation not only because it was an “unwarranted interference in purely local affairs and an invasion of the principles of local self-government” but also because it prevented a popular majority from governing. The view was that members of a general assembly were less likely to possess the requisite “intelligence and judgment” to deliberate responsibly on purely local matters.
Judges were concerned above all with ensuring that laws were not enacted or enforced in an arbitrary fashion. The prevailing view in this period, which was perhaps best expressed by the Massachusetts Supreme Court in a 1914 opinion, was that “Liberty is immunity from arbitrary commands and capricious prohibitions.” Accordingly, the Virginia Supreme Court found “most objectionable” a statute that permitted Prohibition officers, but no other individuals, to receive an automatic change of venue for their trials. The court noted: “It discriminates against all other officials who are equally charged with making arrests for alleged violations of all other criminal laws, and against all other persons who are not officials who may be charged with crime—that is, against all others who are so unfortunate as to be similarly situated.”

It is significant, therefore, that in most of these cases, judges did not intend to overturn the considered judgment of the legislature. Rather they sought to ensure that statutes conformed to accepted standards and principles of legislation. As Howard Gillman argued: “[T]he decisions and opinions that emerged from state and federal courts during the Lochner era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid ‘class’ legislation, on the other—during a period of unprecedented class conflict.” To the extent that courts were more active in this era than in previous years, this could be attributed in large part to “the increase in the number of limitations imposed by the constitutions themselves upon state legislatures,” as well as to changing conditions that required greater supervision of these limitations.

When judges had an opportunity to reflect on the particular rights to which individuals were entitled, they generally proceeded as they had in the nineteenth century—by interpreting statutes and common-law principles. Thus when one man tried to persuade the Virginia Supreme Court that he had been denied his right to a speedy trial, the judges repaired to the statute books. The court took note of the importance of the right to a speedy trial, arguing that it “has been carefully safeguarded by the Constitution of this State and has constituted a part of its Bill of Rights from the earliest history of the Commonwealth, and its enforcement is not less important today than it was then.” The court concluded: “What constitutes a ‘speedy trial’ within the meaning of the Constitution has been interpreted by the legislature in section 4926 of the Code, the substance of which has long been a part of the statute law of this State.” In particular, the legislature had determined that the best way to secure the right was to provide for the release of any person not tried after three terms of the court. Insofar as these statutory requirements had been satisfied, the defendant’s rights were deemed to have been protected.

Similarly, when an Oregon man claimed that he had been denied his constitutional right to counsel, this prompted the Oregon Supreme Court to look to the statute books for guidance. The court concluded that “[a]n aid to the enforcement
of the above constitutional provision is found in Section 1772, Oregon Laws, which provides that, when the accused has been arrested, charged with crime, and is brought before the magistrate . . . the magistrate must immediately inform him of the charge against him and of his right to counsel.”⁵⁷ To the extent that this statutory requirement had been met, the defendant’s rights were deemed to have been adequately secured.

To be sure, there were numerous instances during this period when individuals petitioned judges to overrule statutes on the ground that they ran afoul of provisions in bills of rights. But judges were generally hesitant to do so, in the belief that the legislature remained the proper forum for interpreting bills of rights and determining the best means of securing their provisions.

This continued deference to legislative judgment is perhaps best illustrated by a Virginia case dealing with search-and-seizure rights. In this particular instance, one of many persons charged with violating a prohibitory liquor law argued that certain pieces of evidence had been improperly obtained and therefore should be excluded from the trial, in order to guarantee the constitutional prohibition against improper searches and seizures. The Virginia Supreme Court acknowledged the importance of the constitutional guarantee but pointed out that “The Virginia search and seizure act of 1920 was manifestly passed to protect and enforce the rights of the citizens guaranteed to them by article 10 of the Virginia Bill of Rights.”⁵⁸ In particular, the General Assembly had concluded that the most effective way to enforce the right was not to exclude improperly obtained evidence at the trial, but rather to impose financial and civil penalties on the person who had conducted the illegal search. The court therefore concluded: “Had the legislature deemed further penalties necessary for the protection of the citizens against illegal searches and seizures, it would doubtless have prescribed them. Having failed to do so, the duty does not rest upon the courts to inflict additional penalties.”⁵⁹

The court was especially confident in reaching this conclusion because, in doing so, it was following the judgment of a number of other state courts. To buttress their holding, the judges borrowed heavily from several of these opinions, including one from the Georgia Supreme Court that stated:

The office of the Federal and State Constitutions is simply to create and declare these rights. To the legislative branch of government is confided the power, and upon that branch alone devolves the duty, of framing such remedial laws as are best calculated to protect the citizen in the enjoyment of such rights, and as will render the same a real, and not an empty, blessing.

Whether or not prohibiting the courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen’s constitutional right to immunity therefrom, is a matter for legislative determination.⁶⁰
When the Virginia Supreme Court had another occasion several years later to interpret the search-and-seizure law, the judges again deferred to the legislative judgment of how best to secure the right and it again reminded the litigants that the legislature remained the proper forum for remedying any defects in the law. The court noted: “That the language employed is perhaps too broad in its scope may be conceded. But this fault, if fault it be, is not to be corrected by the court, as correction lies within the exclusive province of the law-making branch of the government.”

In similar fashion, the Massachusetts Supreme Court declined to recognize the right of individuals to purchase contraceptives. The current legislative prohibition, which had stood on the books since the nineteenth century, made no distinction based on whether or not the contraceptives had been prescribed by a physician, and one doctor challenged the validity of the law on this ground. The court concluded that “such an exception cannot be read into our statute by judicial interpretation.” If any individual believed that the current law failed to protect his rights adequately, “The relief here urged must be sought from the law-making department and not from the judicial department of government.”

There were, finally, several judicial decisions during this period that departed from this general approach in that they neither enforced limitations on the legislative process nor interpreted statutory and common-law principles. In particular, judges occasionally relied on an expansive interpretation of the due-process clauses of state and federal bills of rights in order to substitute their views of rights for those of legislators. In considering the significance of this final category of cases, it is helpful to distinguish between behavior that is consistent with regime principles and behavior that takes place during a particular era but is inconsistent with the principles of the regime. A closer examination of these cases suggests that this behavior was widely regarded as inconsistent with the spirit of the regime.

In the first place, these decisions were delivered relatively infrequently. Thus in 1891 the Massachusetts Supreme Judicial Court handed down a decision in Commonwealth v. Perry that invalidated an obscure law governing the wages of weavers. But one finds very few of these cases in the populist era. In fact, the Perry case was literally the only instance when the Massachusetts Supreme Court relied on the state bill of rights to overturn a law of this kind. As Henry Lummus argued in the Massachusetts Convention of 1917, “I can find no case in the last twenty-five years in which any labor or social legislation has been held contrary to the provisions of the State Constitution.”

As a number of legal historians have demonstrated in recent years, state courts did not present a significant obstacle to legislative recognition of rights during this period. According to Melvin Urofsky: “In surveying state court decisions prior to World War I involving the basic elements of the Progressive program to protect workers—laws involving child labor, maximum hours, minimum wages, employer liability, and workmen’s compensation—one finds that, with
only a few exceptions, state courts moved consistently toward approval of a wide range of reform legislation. In attempting to enact their program, Progressives, although occasionally delayed in the courts, were not blocked there."\(^{65}\)

Nor, as legal historians have also shown, did federal court interpretations of the due-process clause of the federal Bill of Rights result in the overturning of a significant number of state statutes.\(^{66}\) To be sure, the Massachusetts Supreme Court in 1915 relied on the U.S. Supreme Court's decision in *Lochner v. New York* to invalidate a nine-hour-day law for railroad workers, on the ground that "the case at bar is indistinguishable from and is governed by *Lochner v. New York*."\(^{67}\) But this was an unusual decision, not only in Massachusetts but across the country. In fact, most state courts "either ignored *Lochner* or distinguished it from the cases before them."\(^{68}\)

These rulings were not only delivered infrequently but were also acknowledged to be inconsistent with established regime principles and roundly criticized as illegitimate. The *Perry* decision engendered significant and severe criticism from leaders of legal and intellectual opinion. Seymour Thompson argued in the next year's edition of the *American Law Review* that "[j]udges who render such decisions are not fit for the offices to which the people have elected them."\(^{69}\) In an article published the same year in the *Harvard Law Review*, Herbert Darling argued that the issue decided by the court in the *Perry* case "is a political question to be discussed in the Legislature."\(^{70}\) At a minimum, these decisions attracted few supporters in the legal community.\(^{71}\)

In fact, most commentators actively discouraged this type of judicial behavior and fully expected populist principles to have an indirect influence—and populist institutions to have a more direct effect—in halting and overturning these decisions.\(^{72}\) Walter Dodd, for instance, was convinced that "[t]he popular will must finally control in any popular government, either through the education of the courts or through an express change in constitutional texts."\(^{73}\) That, according to William Allen White, is precisely what took place in the first few decades of the twentieth century. He argued that these judicial decisions constituted "a fine game of political hide and seek; but democracy has caught and is catching so many of the hiders, that within a decade at the most the game will be played out."\(^{74}\) George Alger therefore argued:

> The forces of reaction . . . find themselves arrayed in defense of a theory of judicial power which is out of harmony with the new programme of democracy.

This programme has for its initial purpose the more direct participation of the people in their own government, and in the selection of their representatives, and in a more direct sense of responsibility by those representatives to the people. . . . The part of this programme which affects the courts is that which seeks to bring them in line with this movement by compelling them to recognize a shift in the balance of power, a necessary change in their
relation to a system which must depend for its strength, its efficiency, and its
growth upon the power to create, and not upon the power to complicate or
prevent.

The Ark of the Constitution is not to be destroyed, the priests are not to
be driven from the temple of justice. But the Ark exists not for the priests
and the Levites, but for an expanding nation. Its safe place is not a temple,
but the hearts of a people whom it guides, protects, and serves.  

CONCLUSION

The populist regime can be generally distinguished from its predecessor in that
its animating spirit was democratic rather than republican. It is also possible to
compare the two regimes by identifying the constitutional provisions that served
as the principal guarantors of rights in each era, the institution that was counted
on to secure the people’s most important liberties, and the manner in which rights
were ideally secured.

In the populist regime, the constitutional provisions that were thought
to provide the chief security for rights were restrictions on representative insti-
tutions. Although the republican regime had relied primarily on institutional
arrangements such as separation of powers and bicameralism to secure individ-
ual rights, these arrangements were no longer thought to be capable of prevent-
ing the passage of oppressive legislation. Nor did citizens in the populist regime
place their faith in bills of rights, which were generally viewed as posing obsta-
cles to the protection of liberty. To the extent that citizens in the populist regime
placed their faith in constitutional provisions—and, to be sure, one strand of
populist thought rejected the importance of constitutions and institutions alto-
gether—they relied on clauses that circumscribed legislative and judicial
power.

The initiative and referendum were the institutions in which people placed
their faith in this era. Whereas the republican regime understood that claims of
right were properly advanced, debated, and resolved in representative institu-
tions, the populist regime held that legislators were too far removed from popu-
lar opinion to deliberate intelligently about rights. Accordingly, rights were
believed to be safeguarded most effectively through initiative campaigns, which
offered a direct and unmediated expression of the popular will. It could be said,
therefore, that the populist regime understood that the public voice would be
more consonant to the public good when pronounced by the people themselves
than by their elected representatives.

Finally, ballot propositions were the ideal vehicles for securing rights. During
the republican regime, legislative statutes were thought to embody the appropriate
measures of responsiveness and reflection; in the populist regime, initiatives and
referendums were viewed as inherently superior means of securing rights. Because they could be enacted independently of the legislature, they were more responsive to the popular will, but because they could not be enacted hastily, they were thought to be the product of adequate deliberation, albeit of a different character from that in the previous regime.