Keeping the People's Liberties

Dinan, John J.

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The idea that judges might play a prominent role in the protection of rights was not unprecedented in the nineteenth and early twentieth centuries. During this period, judges had occasionally protected rights by issuing constitutional decisions that rested on interpretations of bills of rights. Some judges had even gone so far as to suggest that the political process was incapable of securing certain rights. In general, though, constitutional decision making was confined to particular areas of law and was not thought to represent the ordinary form of judicial behavior. Moreover, to the extent that certain judges sought to remove issues from the political process on a routine basis, this behavior was discouraged.

In the course of the twentieth century, a different view took hold. Whereas constitutional decision making was once thought to be occasionally appropriate, it now became the ordinary means of securing rights. Whereas legislative protection of rights had once been considered the norm and legislative failure the exception, legislatures were now deemed to be generally incompetent to secure rights. Furthermore, it was no longer necessary for judges to justify instances of constitutional decision making, because this type of behavior was now accepted and even encouraged by leaders of intellectual opinion.

The emergence of this judicialist regime of rights protection between 1940 and 1990 differed in several ways from previous regime changes. In the first place, this transformation did not originate in the states, but rather at the national level—in the leading national law schools and in the decisions of the U.S. Supreme Court. Nor did it emerge out of deliberations among and within political institutions. In particular, there were none of the constitutional conventions that heralded the start of previous regimes; rather, the significant changes occurred primarily in the academy and in the realm of thought. Nor, finally, was this regime implemented at a precise moment, as was the case with previous regimes; instead, it took hold gradually over a long stretch of time.
Because this regime emerged at the national level, an account of its origins should focus on developments in the nation as well as in particular states. The fact that professors, rather than public officials, supplied its principal theoretical grounding suggests, furthermore, that such an account will benefit more from a reliance on journals of law than from a reliance on journals of constitutional convention proceedings. Finally, because the implementation of the regime was such a gradual and lengthy process, it is important to reconstruct the debate over regime principles not by including every significant contribution but by presenting only the most cogent and influential arguments.

CRITIQUE OF THE OLD REGIME

At the turn of the twentieth century, the republican regime had come under attack from populist reformers who were concerned with the incapacity of republican institutions to secure a particular set of rights (namely, the right to social and economic security), and who eventually undertook a reevaluation of republican principles. In the period between 1920 and 1940, the republican regime, as modified by the subsequent populist reforms, came under attack from a different front. In particular, republican institutions were charged with providing inadequate security for another set of rights (civil liberties). This, in turn, led to a similar reassessment of republican principles.

More than any other events, the First World War and, to some extent, the Second World War were responsible for the reevaluation of existing institutions of rights protection. As Osmond Fraenkel wrote, from the vantage point of the Second World War, “Since modern war occasions vast alteration in civil life, it is not strange that the prosecution of war tends to restrict civil liberties.” The First World War brought a significant number of such restrictions, as both Congress and the state legislatures enacted a series of laws banning sedition and anarchy. The war’s end, far from bringing a halt to this type of legislation, produced a “disheartening” outpouring of laws designed to stamp out dissent, sedition, and syndicalism.

This ferment of legislative activity and subsequent restrictions on civil liberties had several consequences. In the first place, they led to a newfound concern for the protection of civil liberties. According to Leon Whipple, “the phenomena of conscription and the punishment of conscientious objectors, of the postal censorship, of new laws that sent economic or social radicals to jail for twenty years or more, of the ‘deportation delirium’ challenged liberal-minded men to a new study of the meaning of civil liberty.” Perhaps the most prominent of these men was Zechariah Chafee, who produced a series of law review articles and monographs that tried to distinguish between proper and improper regulations of civil liberty.

This concern also led in 1917 to the creation of the Civil Liberties Bureau of the American Union Against Militarism, the precursor of the American Civil
Liberties Union (ACLU). “I don’t think anyone had ever called anything civil liberties in the United States before we did,” recalled Roger Baldwin, the founder of the organization. As a result, “For the first time civil liberties became a central political issue debated in the nation’s highest chambers and in the nation’s press.”

These early civil libertarians were concerned initially with protecting the free-speech rights of political and religious dissenters, because these were most immediately threatened in the post–First World War era. But when Whipple was commissioned by the ACLU in 1927 to produce a national study of civil liberties, he detected a growing concern not only for these particular rights but also for a broad range of civil liberties.

The true note of the period is an increased interest in and a vigorous defense of civil liberty. There has been a growing sense that we had too complacently accepted liberty as an inheritance, won by our forefathers, and somehow mysteriously embodied in the parchment of constitutions. This new interest in civil liberty arose partly out of a new realization of its essential value in our complex industrial age; partly out of the common experiences of the social reformers; partly because of the increased number of cases in which liberty was sacrificed to the interests of powerful conservative groups. Something had to be done to resist stifling encroachments and to extend the bounds of liberty for new classes and purposes.

Perhaps the most important consequence of this newfound concern for civil liberties was that leaders of intellectual opinion were led to reassess the suitability of existing institutional arrangements. Although civil liberties organizations sought initially to press their case within the legislatures and in the court of public opinion, the failure of legislatures to secure adequate protection for these liberties eventually led to dissatisfaction with the republican model of rights protection. As a result, by the 1920s, civil libertarians had begun to focus their attention on courts rather than legislatures as the means by which these liberties might be secured.

At the same time that this growing awareness of civil liberties was leading to a reevaluation of the traditional reliance on legislatures for their protection, developments in the field of jurisprudence were indirectly producing the same result. Legal thinkers, beginning with Massachusetts and later U.S. Supreme Court Justice Oliver Wendell Holmes, began to argue that law could no longer be understood as the product of legislation and formal rules, as it had been throughout the nineteenth century. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” Holmes argued in an 1897 article in the *Harvard Law Review.* To continue to describe law as the process of applying legislative statutes to concrete cases, Jerome Frank suggested several decades later, would be to discount the knowledge that “formal law frequently
conceals what judges do in fact and what makes them do it.”

Although there was some disagreement about the precise content of this school of legal realism that emerged in the 1930s, Karl Llewellyn believed that all could agree, at least, on “[t]he conception of law in flux, of moving law, and of judicial creation of law.”

All told, the legal realist movement had a variety of purposes, none of which was directly connected to promoting a heightened role for the courts in securing civil liberties. In fact, the aim of most legal realists was not to encourage but rather to limit judicial creativity. Developments in the realm of jurisprudence inevitably have an effect, however, on students and practitioners; or, as Holmes argued, “Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.”

Moreover, the most important effects are not always those that are immediately intended by the theorists. In this case, one of the long-term effects of the legal realist movement was to call attention to the creative power of judges and to alter the legal curriculum to reflect the importance of this judicial creativity. We are all realists now, and in a variety of respects, but perhaps most importantly in the sense that law professors no longer turn initially to legislative statutes in order to understand the rights to which individuals are entitled. As Oregon Supreme Court Justice Hans Linde noted, in the wake of the realist movement, first-year law students are now taught the “identity between the law in operation and the role of the courts,” with the result that “questions of constitutional law and questions of the role of the Supreme Court are generally treated as the same thing.”

As for judges, even if they would not go quite as far as U.S. Chief Justice Charles Evans Hughes and proclaim that “the Constitution is what the judges say it is,” they have at least come to think of themselves, rather than legislators, as the principal creators of law and rights.

Another long-term development, the nationalization of civil liberties, provided a final, indirect spur to a reassessment of the traditional reliance on legislatures for the protection of rights. For a number of years, and for a variety of reasons, Americans had been increasingly inclined to consider themselves members of one national community rather than of numerous state and local communities. But the first several decades of the twentieth century brought calls for a centralization of governmental functions that were more frequent and more bold than in previous years. By the late 1930s, Harold Laski could refer to “the obsolescence of federalism,” and George Benson could write: “Perhaps the most critically defective part of our present system is the state government. Constitutionally, politically, and administratively the states are the core of American government—but at times there seems discouraging evidence that the core is rotting.”

In subsequent decades, the view took hold that state polities were generally incapable of protecting a whole host of rights. According to John Kincaid:
“[S]tates came to be associated more with coercive deprivations of rights than with protections of individual rights, while the federal government came to be seen as a potential liberator of persons from the tyranny of small places.”  

Underlying many of these concerns was, of course, the issue of race, and the belief that a number of state communities were incapable of protecting the civil rights of African Americans. In William Riker’s formulation: “If one approves the goals and values of the privileged minority, one should approve the federalism. Thus, if in the United States one approves of Southern white racists, then one should approve of American federalism. If, on the other hand, one disapproves of the values of the privileged minority, one should disapprove of federalism. Thus, if in the United States one disapproves of racism, one should disapprove of federalism.”  

As a result, a growing number of citizens began to join Monrad Paulsen in concluding that “[i]f our liberties are not protected in Des Moines the only hope is in Washington.”  

The view that the national community could secure rights more effectively than state communities was important in its own right. But the shift in the level of government to which individuals looked for the preservation of their liberties also had significant implications for the institutions on which citizens came to rely for the security of those liberties. In particular, because the United States is a government of enumerated rather than reserved powers, Congress lacks the clear statutory authority under which the state legislatures are empowered to protect rights. As a result, the choice of the nation over the states as the proper level of rights protection led necessarily to a reliance on courts rather than legislatures as the institution that could secure rights. What is significant for an institutional analysis of rights protection, therefore, is not so much that citizens began to turn to Washington rather than Des Moines to redress their grievances. The crucial difference was that they had at one time traveled primarily to the statehouse in Des Moines to secure their rights, but when they turned to Washington, the inability, and in some cases the unwillingness, of the legislature to redress their grievances drove them instead to the courthouse.  

The concern for the protection of civil liberties, the influence of the legal realist movement, and the nationalization of civil liberties—all these combined in the mid-twentieth century to bring about a challenge to the reliance on representative institutions to protect rights. Individuals had previously turned to the courts in particular cases and in particular legal areas for the preservation of their rights, but they had never viewed the courts as the chief protectors of their rights. The demise of the Lochner-era U.S. Supreme Court in the late 1930s had the effect, however, of altering the popular image of courts as obstacles to the protection of rights, and several decisions even raised the possibility that courts might play a prominent role in safeguarding individual rights. Bills of rights also enjoyed a renaissance during this period. They were no longer viewed, as they had been in the early part of the twentieth century, as “stationary and, relatively speaking, retrogressive” documents but rather as important guarantees of liberty. In 1938
the American Bar Association established its Committee on the Bill of Rights; in 1939 The Reader's Digest, which had never before mentioned the Bill of Rights, published two articles on the subject, and three of the original thirteen states belatedly ratified the federal Bill of Rights; in 1940 a number of state legislatures for the first time established bill-of-rights weeks; and in 1941 the sesquicentennial of the U.S. Bill of Rights led to the founding of a number of organizations dedicated to the commemoration of bills of rights.29

Still to be determined, though, was whether these developments would lead to a mere revision or a wholesale replacement of republican principles. One prominent body of thought held that, although the republican regime was deficient in several important respects, its core principles were still generally valid. According to this view, legislative failures existed, but they were confined to particular occasions when the political process did not afford full, effective, or informed representation.

This view found its clearest expression in 1938 in footnote four of the U.S. Supreme Court's opinion in United States v. Carotene Products.30 Authored by Justice Harlan Fiske Stone’s law clerk, Louis Lusky, the footnote outlined a series of instances when courts should play a prominent role in superintending legislation.31 Judicial scrutiny would be in order in the case of “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”32 Of particular concern were laws that imposed restrictions on voting rights, the dissemination of information, political organizations, or peaceable assembly. Heightened scrutiny would also be appropriate in cases in which “prejudice against discrete and insular minorities” had the effect of “curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities.”33

This challenge to the republican regime was a moderate one that presumed that the political process would ordinarily be expected to remedy violations of rights. Courts would defer to legislatures “unless there is some reason for assuming that the processes of the legislature are inadequate.”34 This approach “assumed the supremacy of the elected branches of government and of limited judicial review. . . . The Justices would not be substituting their values for that of the legislature.”35 In the belief that legislatures were generally capable of securing rights, this approach differed from republicanism only in its view that legislative failures were likely to be more frequent than had previously been supposed.

Another view soon took hold, however, that was more severe in its critique of republicanism and that challenged the principles that formed the core of the republican regime. According to this line of reasoning, legislatures did not merely fail on occasion to secure rights; rather, they failed frequently and in dramatic fashion. In this view, legislatures were inherently ill suited for the business of securing rights; this task should, instead, become the province of the judiciary, which could issue constitutional decisions based on interpretations of bills of rights.

This strong critique of republicanism was expressed most clearly by Justice
Robert Jackson in 1943 in the Supreme Court’s decision in the compulsory flag-salute case, *West Virginia Board of Education v. Barnette*. Several years earlier, in the case of *Minersville School District v. Gobitis*, the Court had let stand a similarly framed Pennsylvania flag-salute law, in part on the ground that, as Justice Felix Frankfurter had argued, this was “a field where courts possess no marked and certainly no controlling competence,” and “to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.” Frankfurter had written: “Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.” After several justices publicly repudiated their votes in the *Gobitis* case, the Court revisited the issue and reconsidered the view that the political process was the proper forum for the vindication of rights. In his majority opinion in the *Barnette* case, Justice Jackson quoted the relevant section from the *Gobitis* opinion and responded: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

This would become one of the most oft-quoted Supreme Court opinions over the next fifty years and would supply the intellectual grounding for the judicialist regime, but it was left to future judges and law professors to articulate the precise extent to which the new regime sought to supplant republicanism. Some individuals went so far as to claim that legislatures were generally inferior to courts, and that statutes and common-law decisions should be presumed to be inferior to constitutional decision making. The argument was even advanced that rights were not only generally safer in the courts but were in fact the exclusive domain of judges, and that, “as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement.” Despite these various formulations, there was widespread agreement on several points. At the least, it was understood that “decisionmaking by electorally accountable institutions should no longer be presumed to be superior to that by the judiciary,” and that “there are some phases of American life which should be beyond the reach of any majority, save by constitutional amendment.”

**ADVENT OF THE JUDICIALIST REGIME**

The judicialist regime was implemented in three stages. In the first period, comprising roughly the 1940s, the federal courts issued a series of constitutional
decisions that sought to remove free-speech rights from the political process, and these decisions were enforced by state courts, albeit at times unwillingly. In the second period, which lasted from 1950 until 1970, the federal courts issued constitutional decisions that secured the protection of a broad range of rights, and these decisions were implemented by generally acquiescent state courts. In the third stage, which lasted roughly from 1970 to 1990, state judges adopted the federal approach and began on their own to issue constitutional decisions grounded in interpretations of state bills of rights.

State legislatures had been governed by judicial decisions prior to the 1940s, but these decisions were usually either grounded in common-law principles or designed to ensure that the process of making and applying the law was neither arbitrary nor capricious. Because decisions were cast in this way, legislatures had retained the ability to modify common-law rulings or to redraft deficient statutes. The advent of a new and quite different form of decision making was heralded by a series of free-speech rulings that were delivered by the U.S. Supreme Court in the early 1940s and that departed in significant ways from traditional judicial behavior.43

These decisions were noteworthy because they overturned statutes that had been the subject of extensive consideration in state legislatures. In the past, when the U.S. Supreme Court struck down a state law, it was usually overturning a deviant piece of legislation that had been enacted by a limited number of states. In this round of cases, however, the Court overturned statutes that had been enacted by a number of state legislatures and were the product of extensive deliberation. Thus in one 1940 case concerning the legality of picketing, Michigan Justice Henry Butzel noted that the Michigan Supreme Court had relied since 1898 on a common-law rule to prohibit such activity. Moreover, Butzel wrote, “the legislature has not seen fit to change by statute the common-law conclusion since this court rendered its first opinion prohibiting all picketing.” He concluded: “Although the question has been presented to the legislature, no law permitting peaceful picketing has been enacted.” In light of a pair of recent U.S. Supreme Court decisions, however: “The right of peaceful picketing has been upheld as an exercise of the right of free speech by the highest court in the land. Our legislative inactivity is no answer for denying a right secured by the fundamental law of the United States.”44

Similarly, in the course of considering a challenge to a city ordinance by a member of the Jehovah’s Witnesses, Massachusetts Justice Stanley Qua noted that the ordinance was a long-standing one that had been upheld by the Massachusetts Supreme Court in several recent decisions. But because these decisions had just been “disapproved by the Supreme Court of the United States” in a ruling that had “been reinforced by other recent decisions of that court,” and because it was difficult to “distinguish this case in principle” from these recent holdings, the Massachusetts court had no choice but to overturn the ordinance.45 In a similar case decided later that year, Justice Qua explained: “Notwithstanding the former decisions of this [Massachusetts] court . . . we feel that recent decisions
of the Supreme Court of the United States require the conclusion that this ordinance is unconstitutional as an unwarranted interference with the freedom of speech and of the press."

These Supreme Court decisions were also distinguished from previous rulings by the effect of their holdings. When Courts had previously invalidated statutes, they had usually done so on the ground that legislatures had regulated rights in an arbitrary fashion. As a result, legislatures had been able to rewrite the laws to remedy the defects. These new rulings had the effect of removing entire areas from legislative regulation altogether. Virginia Justice Henry Holt noted, for instance, that the Virginia Supreme Court was bound to apply a pair of recent U.S. Supreme Court decisions that proclaimed a right to distribute pamphlets without a license, but he took the occasion to comment on the distinctive nature of the rulings. The U.S. Supreme Court had directed that one statute be overruled, Holt pointed out, "not because arbitrary discretion was vested in the Chief of Police, but because it struck at the freedom of the press by subjecting it to license and censorship." Holt argued, with respect to another decision, that "the court did not base its decision upon the fact that arbitrary power was vested in the Chief of Police but said that 'to require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of constitutional guarantees.'"

By the end of the 1940s, therefore, a number of areas of free-speech law had been effectively removed from legislative control. State judges who had previously been concerned primarily with interpreting statutes and common-law principles now turned their attention to following the constitutional decisions of the U.S. Supreme Court. Thus when the Virginia Supreme Court was presented with a challenge to an antipicketing law, Justice Archibald Buchanan noted, in what became an increasingly common refrain during this era: "That question is to be determined by reference to the decisions of the Supreme Court of the United States, which has the final say."

Although these decisions demonstrate the growing influence of judicialist principles in the 1940s, the regime transformation was still incomplete by the end of the decade. In the first place, judicialist principles had not yet been embraced by most state judges. When these judges were forced to surrender control over an area of law that had previously been governed by statutes and common-law rules, they often did so reluctantly. Thus Michigan Justice Butzel acknowledged in one case concerning the rights of Jehovah’s Witnesses: "It is unnecessary to discuss the merits of the claims of the respective parties for a Federal question has been raised and we are bound to follow the prevailing opinions of the United States Supreme Court as expressed in the later Jehovah Witness Cases, in an interpretation of the provisions of the United States Constitution, even though we may be in accord with the dissenting opinions filed in those cases."

The judicialist regime also remained incomplete because legislatures still retained control over most rights. In the vast majority of areas of the law that were
not yet occupied by the U.S. Supreme Court, the state courts jealously guarded their traditional reliance on statutory and common-law decision making. For instance, in 1949 the Michigan Supreme Court was called on to determine in one case whether an individual had a right to a grand-jury indictment. Justice John Dethmers noted that the state court had held in a prior case “that the Constitution of the State of Michigan left the subject free to legislative control, that the legislature rightly could and did provide for criminal prosecutions by information, and that such procedure constitutes due process of law.” Dethmers saw no reason to override the legislative judgment. He argued: “We are not persuaded that we are, as yet, constrained by the relevant holdings of a majority of the United States supreme court to hold that the Fifth Amendment applies to the States.”

From 1950 to 1970, the U.S. Supreme Court, under the leadership of Chief Justice Earl Warren, began to regulate an increasing number of rights on the basis of constitutional rules, and the judicialist regime spread its influence beyond the area of free-speech rights. Provisions of the federal Bill of Rights that had not previously been incorporated into the Fourteenth Amendment were now applied to the state legislatures, and the Supreme Court fashioned an ever more detailed and complex set of rules to govern these rights. The state supreme courts during this period essentially read the U.S. Reports and transmitted them into law. The state legislatures read the state reporters and reacted accordingly.

Repeatedly during this period, the traditional reliance on statutory and common-law judging was superseded by constitutional decision making. In a typical case, Oregon Justice Arno Denecke noted: “The Oregon decisions excluding involuntary confessions have based the exclusion upon common-law rules of evidence, codified into an Oregon statute.” According to these rules, he concluded, the evidence in this particular instance would ordinarily be admitted. Recent U.S. Supreme Court decisions had declared, however, that “the right to remain silent at a police interrogation is a federal constitutional right.” Consequently, the confession was excluded from trial.

In similar fashion, after the U.S. Supreme Court ruled in 1961 that the Fourth Amendment required that states exclude evidence obtained through an improper search or seizure, Massachusetts Chief Justice Raymond Wilkins was forced to reject the state legislature’s effort to adhere to the traditional statutory rule on which it had relied to secure this right. In light of Mapp, Wilkins argued: “We are unable to accept this argument. The Mapp case seems to foreclose any State fashioning the incidents of the exclusionary rule within the bounds of due process. We, accordingly, look to federal law.” Likewise, in a 1966 case concerning free-speech rights, Oregon Justice Ralph Holman wrote: “It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state’s power to limit federal First Amendment rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United
States Supreme Court.”57 As Massachusetts Justice Herbert Wilkins later explained in reference to obscenity questions, throughout the 1940s and 1950s the Massachusetts Supreme Court generally decided these cases by “reading challenged books and determining on their own—largely apart from constitutional considerations—whether they were ‘obscene, indecent, or impure.’” But this changed in the 1960s when constitutional considerations were “forced on the court by decisions in Washington.”58

Whereas state judges in the 1940s greeted these decisions with surprise and mild disagreement, in the 1950s and 1960s judges displayed scattered instances of hostility. Oregon Justice James Brand concluded one 1957 opinion by noting: “We are forced, not by our own reasoning, but by the necessary implications of the decision of the United States Supreme Court.”59 At the conclusion of one free-speech opinion, Massachusetts Chief Justice Qua noted: “Of course we acknowledge the binding force of these [U.S. Supreme Court] decisions while they remain the law. But we prefer not to be irrevocably committed to them as representing the true construction of our own Constitution.”60 If they were left to their “own choice,” he suggested, the justices might prefer to permit the legislature to regulate the right in a different manner.61 In one exclusionary-rule case in Michigan, Justice Dethmers referred to an opinion by Justice Holmes that predicted that, if present trends on the U.S. Supreme Court continued, he could see “hardly any limit but the sky to the invalidating of [the rights of states].” Dethmers added: “Little could he have thought, however, that in 40 short years the limit of the sky would have been so foreshortened that astronauts would be setting foot on the moon and judicial activists would perhaps go to even further reaches to put under foot precedents making constitutional interpretations.”62 Even in these cases, however, state judges ordinarily acquiesced in the implementation of judicialist principles. Dethmers concluded: “It avails little, then, to postpone decision in this Court.... It is not hard to read the handwriting on the wall, by whatever hand it may have been written.”63

Judicialist principles were not fully implemented until the 1970s and 1980s, when state judges ceased to object to the U.S. Supreme Court’s constitutionalization of rights, and in fact began on their own to deliver constitutional decisions based on state bills of rights. This phenomenon of independent state constitutional interpretation has been extensively documented and has received, with justification, a great deal of attention.64 There has been a tendency, however, to focus on the consequences of this development only in the context of federal-state relations. Viewed from this perspective, of course, one could draw a sharp distinction between the period prior to 1970, in which federal courts were the primary agents of the expansion of rights, and the years after 1970, when state courts began to participate in this expansion. There is a danger, though, that an excessive focus on this shift from federal to state responsibility could mask what is, from another perspective, a continuous transfer of responsibility from legislative to judicial responsibility for rights protection.65
State courts in the nineteenth and early twentieth centuries had on various occasions interpreted their bills of rights to restrict legislative deliberations. But it was not until the 1970s, after state judges had witnessed the judicialist approach on display in U.S. Supreme Court rulings, that they began as a matter of course to interpret their bills of rights as a bar to legislative action. Justice Hans Linde of Oregon and several other state judges were in the vanguard of this movement, and U.S. Supreme Court Justice William Brennan provided encouragement in a 1977 article that urged state courts to "step into the breach" to secure rights left unprotected in the federal courts.

The Oregon Supreme Court was perhaps the most active in constitutionalizing areas of law that had previously been governed by federal constitutional decisions or by state statutes and common-law rules. The Oregon Supreme Court actually began to rely on its own bill of rights in the 1960s, when it voided a movie censorship ordinance as well as a local policy of providing free textbooks to parochial-school students. By the 1970s and 1980s, with some prodding from Justice Linde, the Oregon Supreme Court had begun turning first and frequently to the Oregon Constitution in order to secure rights against legislative encroachment.

The Massachusetts Supreme Court, which had in previous eras been one of the leaders in crafting a jurisprudence based on statutory and common-law interpretation, became in this period one of the most active in issuing constitutional rulings. Under the leadership of Chief Justice Edward Hennessey, the court suggested in several opinions in the 1970s that the Massachusetts Declaration of Rights could provide greater protection than the federal Bill of Rights for individual liberties. Beginning in 1975, the Massachusetts Supreme Court relied on these provisions to overturn the death penalty, nude-dancing ordinances, and the state policy against funding abortions, as well as to enunciate a broad exclusionary rule and strict search-and-seizure requirements.

The Michigan Supreme Court, although not quite as active as the courts in Oregon and Massachusetts, also began in the mid-1970s to turn to its own bill of rights, especially in the area of criminal procedure and search-and-seizure rights. Justice James Brickley argued in 1983: "We have, on occasion, construed the Michigan Constitution in a manner which results in greater rights than those given by the federal constitution, and where there is compelling reason, we will undoubtedly do so again."

The Virginia Supreme Court was the least inclined to interpret its bill of rights to constitutionalize areas of the law. Although the Virginia Commission on Constitutional Revision argued in 1969 that there was "no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians," the court did so infrequently. During this period, the justices engaged in interpretation of the Virginia Bill of Rights on several occasions, but they did not invalidate any statutes solely on these grounds.

These states varied, then, in the extent to which they embraced the judicialist
approach. These differences should not obscure the fact, however, that all these state legislatures were governed in this era by judicialist principles, in the form of U.S. Supreme Court decisions that were enforced by state courts. Independent interpretation of state bills of rights on the part of several state courts meant only that some state legislatures were restrained by their state supreme courts in additional areas. For all practical purposes, legislatures had yielded control over rights protection by the 1970s. Courts became the chief institution, and constitutional decisions became the primary vehicle, for keeping the people’s liberties. As John Kincaid argued: “The U.S. Supreme Court, therefore, has effected more than a legal change in rights protection and more than a change in the locus of rights protection. It has helped to effect a cultural change in the way Americans understand rights, and it is this new understanding that is finding its way into state court interpretations of state constitutional rights. In this respect, activist state courts are not filling a vacuum; they are consolidating a revolution.”

PRINCIPLES OF THE JUDICIALIST REGIME

The emergence of the judicialist regime can be attributed, in part, to a set of specific circumstances, in particular, the growing concern for the protection of civil liberties in the aftermath of the First World War. It can also be understood as the product of the efforts of individuals such as Justices Brennan and Linde, who introduced a new form of judicial behavior in order to better secure these liberties. The regime change was not completed, however, until members of the legal community sought to sustain the judicialist project by articulating a set of principles that could legitimate these actions. Through a series of dialogues within the legal community, the traditional understandings of representation, deliberation, and compliance were challenged and eventually supplanted by understandings that were more consistent with the behavior in which judges were engaging during this period.

Representation

It became quite common in the judicialist regime for state judges to view the judiciary as the only institution that was capable of representing the considered judgment of the public. According to Oregon Justice Walter Tooze, “The duty of seeing that [rights] are protected and preserved inviolate falls squarely upon the shoulders of the judiciary.” Likewise, Massachusetts Chief Justice Joseph Tauro argued in one death-penalty case that “public opinion, while relevant, is not conclusive in assessing whether the death penalty is consonant with contemporary standards of decency.” In his view, only the courts were qualified to identify these standards. As Chief Justice Hennessey of Massachusetts argued: “Oppressed, disfavored or unpopular minorities would be the victims of any loss
of judicial independence. The minorities rely on the independence of the courts to secure their constitutional rights against incursions of the majority, operating through the political branches of government. Dependent or subservient courts render nugatory the fundamental constitutional protections which are the heart of our liberties.”

Although this view of representation was greeted with near universal acceptance in the judicialist regime, it represented a significant departure from the republican view, which presumed that legislatures most accurately reflected popular opinion, as well as from the populist view, which considered initiatives and referendums to be the best gauge of popular opinion. A variety of factors contributed to this changing conception of representation, but perhaps the most important were a reinterpretation of the principles of the founding era, a reassessment of the representative character of legislatures, and a newfound appreciation for the ability of judges to divine the popular will. Although the new understanding prevailed, it did not go unchallenged by the defenders of republican principles, and the subsequent debates highlighted the new and the old views of representation.

The eighteenth- and nineteenth-century founding of state and national institutions was subject to a variety of reinterpretations throughout the years. Republicanism emphasized the primacy of indirect representation in the founding design. It understood the early state conventions to have designated representative institutions as best suited to obtain the reasonable expression of public opinion on most matters. Populism emphasized the role of popular ratification and direct representation in the constitutional structure. It focused on the importance of public opinion in governing institutions and believed that its direct expression was inherently reasonable. Judicialism, by contrast, attached great significance to the concern of the founding generation to create courts and bills of rights that would produce decisions that were reasonable, even if they were reached independently of public opinion. In particular, as Ralph Lerner argued, the founders were thought to have believed “that the courts would stand in a closer relation to the deliberate will of the people as expressed in the Constitution than would the representatives of the people. The Courts would be peculiarly fit to discover in the Constitution what the will of the people was.”

When the judicialists turned to the historical record, they were further fortified in their belief that legislatures were incapable of providing effective representation. To rely on legislatures to secure rights, according to Ronald Dworkin, “assumes, for one thing, that state legislatures are in fact responsible to the people in the way that democratic theory assumes. But in all the states, though in different degrees and for different reasons, that is not the case. In some states it is very far from the case.” Adherents to the judicialist regime pointed to a “widespread feeling among the electorate that for various reasons the legislature had ceased to be truly representative of the wishes of all the people and had become frequently a tool for certain favored classes or interests.” Also “contributing to
this feeling of nonrepresentation was the patent under or over representation of many localities in the state or federal legislature arising from the failure properly and periodically to reapportion the seats in that body." The judicialists claimed, in particular, that legislatures frequently failed to represent the interests of various minority groups. As Jesse Choper argued: "[t]he experience of history strongly suggests that vesting the majority with the ultimate power of judgment, although far from being calamitous, would not sufficiently protect minority rights."90

One possible response to these particular deficiencies might have been to reform the legislative process to make it more representative—to devise procedural rules to thwart special interests, to provide more equitable apportionment procedures, and to fashion institutional arrangements to address the underrepresentation of minorities. But the judicialists were uninterested in pursuing this approach; they argued that these problems were indicative of a more general and fundamental failure on the part of legislatures. In their view, institutional reforms were unlikely to address the full extent of the "malfunctioning in the political process," which included "the routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens."91 In addition, the historical record clearly "demonstrate[d] the shortcomings of the political process in affording adequate security for fundamental personal liberties."92 The prevailing view, as summarized by Erwin Chemerinsky, was that "[w]ithout judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives."93

Consequently, whereas the republican regime relied on institutional arrangements such as separation of powers and bicameralism to secure the "sober second thought" of the public, the judicialists turned to the courts. According to Choper:

Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism. The Court's aloofness from the political system and the Justices' lack of dependence for maintenance in office on the popularity of a particular ruling promise an objectivity that elected representatives are not—and should not be—as capable of achieving.94

The defenders of the old regime, who mounted a series of rearguard assaults on this new view of representation, did not deny that the judicialists had identified an important element of the founding. They charged, however, that the judicialists focused on the fear of tyrannical majorities to the exclusion of other concerns that informed the design of state and national institutions. They argued that a more balanced appraisal would acknowledge that the founders had relied
primarily on political institutions to represent the public will. Nor did the defenders of republican principles deny that there were a number of instances in which the political process had failed to secure rights. They contended, however, that these examples gave no warrant for concluding that majorities were generally unrepresentative. As Henry Steele Commager wrote in 1943: “Nor is there any persuasive evidence from our own long and complex historical experience that majorities are given to contempt for constitutional limitations or for minority rights. Our majorities, state and federal alike, have been, to a remarkable extent, stable, law-abiding, and conservative.” Finally, the critics of the new regime did not deny that judges might occasionally represent the popular will more effectively than could the people’s elected representatives, but they argued that the judicialists ignored the real and oft-demonstrated possibility that such efforts could also lead to judicial decisions that lacked popular support and therefore were not representative in any real sense.

These arguments were ultimately unsuccessful, however, in stemming the judicialist advance. Due in large part to the legacy of the U.S. Supreme Court’s decision in *Brown v. Board of Education*, which Robert Nagel argues was “the fulcrum on which the world of judicial review was made to move decisively,” the view became widespread that courts were generally more representative than legislatures. The view of representation that prevailed in the judicialist regime thus stood in stark contrast to that of previous eras. Whereas republicanism maintained that deficiencies in legislative representation were minimal and could be addressed through existing institutions, judicialism held that these failures were frequent and fundamental and necessitated a new form of representation. The judicialist view stood in even more stark opposition to the populist understanding. Judicialism held that legislatures were unrepresentative, not because they were too distant from their constituents, as the populists claimed, but because they were too responsive to the electorate and therefore incapable of representing the public effectively.

**Deliberation**

The judicialist conception of deliberation was perhaps most clearly expressed by Massachusetts Chief Justice Joseph Tauro, who argued in one case that “judges cannot look to public opinion polls or election results for constitutional meaning.”

Passing public passions and emotions (understandable as they may be at times such as these) have little to do with the meaning of the Constitution, as it is written. Referendums, although they serve some purpose, do not pretend to construe the Constitution. They express only ephemeral sentiments, sentiments which are highly variable over time and which may reflect public attitudes shaped by collateral problems and events of the day. Public sentiment
becomes relevant to constitutional adjudication only if it results in a constitutional amendment. . . . Only through an amendment can mass passions affect constitutional meaning and, absent an amendment, the Constitution stands as an unbreachable bulwark for the individual against those mass passions and the political power of the majority.99

According to this view, deliberation would take place primarily among justices, who were trained in the technical arcana of the law; it would take place in the judicial chambers, which permitted discussions of rights unencumbered by political concerns and compromises; and through written opinions, which guaranteed that principled decision making would occur. Deliberation would also take place among the justices and the citizens, who were invited to respond to judicial decisions, but only through the constitutional amendment process.

This view of deliberation is unexceptional in the contemporary age, but it is a striking departure from the understanding that characterized previous regimes. The republican regime presumed that deliberation over rights was an intimately political activity that properly took place within and among political institutions; in the populist regime, deliberation was believed to occur among the general public. The transformation from these older understandings of deliberation to the judicialist view can be attributed to the advent of a new conception of rights, as well as to a reassessment of the deliberative capacities of citizens, legislators, and judges.

The judicialist view of deliberation rested, at bottom, on a belief that rights should be rigidly separated from politics. Political considerations should not enter into the derivation of, the deliberation over, or the means of securing rights. As C. Herman Pritchett characterized the new view of law and politics: “Law is a prestigious symbol, whereas politics tends to be a dirty word. Law is stability; politics is chaos. Law is impersonal; politics is personal. Law is given; politics is free choice. Law is reason; politics is prejudice and self-interest. Law is justice; politics is who gets there first with the most.”100

In one respect, this view of rights was not completely novel. After all, the republican regime did not deny that individuals possessed rights anterior to society. But whereas republicanism held that the political process was capable of determining the precise extent to which and the particular manner in which these rights would be secured, judicialism held that the protection of rights could not depend in any way on political considerations. Dworkin argued, “A claim of right presupposes a moral argument and can be established in no other way.”101 In this view, it was inconceivable that legislators or citizens could deliberate over rights; this was a task that could be performed only by judges. According to Dworkin, “Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself.”102
At the same time that legal philosophers were introducing a new conception of rights, law professors were reconsidering the capacity of legislators and judges to engage in deliberation. They contended that the judicial selection process was designed, in a way that the legislative selection process was not, to ensure that successful candidates were knowledgeable about legal matters. According to Charles Black, “the members of Congress are not selected by a process which has any tendency whatever to ensure possession of the kinds of skill and wisdom needed for constitutional decision.” Legislators “have no guarantee of long tenure, and so have no incentive, and often no opportunity, to acquire the kind of experience wanted by the skilled constitutional judge.”

Moreover, the nature of the judicial and legislative offices ensured that judges would have more opportunities to deliberate over rights. The judicialists believed that “officials outside the judiciary rarely reflect on the meaning of the Constitution,” because “political pressures and expediencies often make it unlikely that Congress, the President, or state legislatures or executives will deal carefully with constitutional issues.”

Finally, the character of the decision-making process was presumed to afford more deliberative opportunities for judges than for legislators. The legislative process was thought to be oriented primarily toward political concerns, whereas the adjudicative process was structured in such a way as to insulate judges from these issues. The view was that legislators “are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people.” Even if the legislative chambers had at one time provided such a forum, “the tradition has disintegrated.” In contrast, the court’s structure made it “peculiarly well suited” to “sorting out the enduring values of a society.” Black summed up this view best: “The suggestion that, in regard to acquiring the qualities and skills needed for weighing constitutional policy, the members of the legislative branch are more advantageously placed than are the judiciary, must, it seems to me, function only as a facade for something else—for the abandonment of constitutionalism as we know it, of the concept of the Constitution as law binding on government.”

The defenders of the old regime responded that these arguments overstated the legal training and technical knowledge that were actually required to partake in deliberation about rights. It was apparent to Commager, for instance, that most of the questions that have evoked judicial nullification of majority will have turned on considerations of policy rather than of law, and that on these questions the legal learning of the legislative and executive departments has been entirely adequate. The supporters of the republican regime maintained that legislators had at one time been quite concerned with ensuring that their actions accorded with constitutional guarantees, and to the extent that they no longer exercised such care, this had occurred only because the view had taken hold that these concerns were the monopoly of the courts.
In addition, the defenders of the republican view charged that the judicialist conception of rights rested on a false dichotomy between legal and political considerations. On the one hand, they were confident that legislators did in fact possess “adequate resources to analyze these constitutional issues;” and on the other hand, they doubted that judges were completely free of political considerations or could in fact be “trusted to act independently, objectively, and dispassionately on questions of constitutionality.” In any case, the critics of the judicialist project argued that the entire enterprise of maintaining a rigid separation between rights and politics was misguided. Rights were often secured as the result of political pressure and compromise, they argued, but this hardly rendered them unstable or illegitimate. The legislative process was a superior forum for deliberation precisely because it could better take account of political considerations than could the judicial process. As Donald Horowitz argued, the courtroom “tends to exclude interested participants” and produce “a reductionist solution”; the “generalist” character of judges “unfits them for processing specialized information”; and adjudication “inhibits the presentation of an array of alternatives and the explicit matching of benefits to costs.”

These arguments were advanced to no avail, however, against a judicialist view of deliberation that represented a significant departure from the understanding that governed previous regimes. Republicanism presumed that legislative assemblies were a suitable forum for deliberating over rights. In their opposition to this view, the populists and judicialists were united. Each believed that rights and politics should be separated and that legislators were therefore incapable of deliberating over rights. But whereas populism sought to eliminate the influence of special interests and political compromises by transferring deliberation to the entire electorate, judicialism preferred that deliberation take place in the isolation of the judicial chambers.

Compliance

Judge Hans Linde provided the best expression of the judicialist view of compliance when he argued that scholars and judges had become overly concerned with “public acceptance of the Court’s decision.” In fact: “Preoccupation with the odds of effective compliance may undervalue the social importance of an announced principle for its own sake, or the social cost of failure to announce it.” According to Linde, “what counts is the principle itself, quite apart from its realization in some concrete situation.” Judges were not only well positioned to express these principles, but, because they possessed a “‘mystic function’ . . . that is inescapable in opinions explicating the Bill of Rights,” they were also uniquely qualified to persuade people to accept these principles and therefore to bring about compliance with them.

This view, although it enjoyed widespread acceptance in the judicialist regime, differed significantly from the republican view, which held that people
would comply with legal guarantees only when they had an opportunity to vote for the legislators who enacted them. The judicialist understanding was even further removed from the populist view, which held that compliance could be achieved only when citizens voted directly on the laws under which they would be governed. This transformation was brought about primarily by the advent of an understanding of compliance that was not grounded in citizen participation, coupled with a reassessment of the capacities of legislatures and courts to promote this type of compliance.

In place of the previous belief that compliance was generated by direct or indirect participation in drafting laws, judicialists argued that compliance depended on the absence of popular participation. This was, in one sense, a natural consequence of the view that rights should be rigidly separated from the political process. Once the view took hold that rights were derived solely from moral principles rather than from political deliberations, it necessarily followed that people were most likely to comply with a law that was grounded in principle, regardless of whether they had participated in its framing, and in fact precisely because they had taken no part. Thus, according to Erwin Chemerinsky, “the judiciary’s method increases the legitimacy of results in particular cases and therefore increases the likelihood that the Constitution will be complied with. The written opinion demonstrates that the result is not arbitrary or just the result of political compromise.” Moreover, the political insulation of the judiciary “helps people to accept that their loss was based on a consideration of principle, not on the fact that they were politically too powerless. If the legislature interpreted the Constitution and ruled against them, it would be much easier to attribute their loss to insufficient clout or political influence.”

The introduction of this new understanding of compliance dovetailed with another development: the view that judges were not only more likely than legislators to proclaim “principled” decisions but also better positioned to persuade people to comply with rulings to which they might initially be opposed. This view assumed that judges and citizens were engaged in a colloquy, in which the “constitutional structure gives the Supreme Court both an incentive and an opportunity to supply educative descriptions of American identity.” Whereas judges in the early years of the Republic educated through their grand-jury charges, modern judges taught through their written opinions. In the oft-quoted words of Eugene Rostow: “The discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.” According to the judicialists, this education would take place even if the citizens did not actively participate in the seminar. As Christopher Eisgruber argued: “The Supreme Court may indeed conduct a ‘vital national seminar’ although attendance is spotty and few students do the reading. For example, even if only aspiring lawyers were to read the Court’s opinions, the Court’s teaching may significantly
influence public opinion. Lawyers exercise considerable power in American society. If the Court were able to inculcate in tomorrow’s most powerful lawyers a disposition to honor constitutional principles, that lesson could provide both the Court and the Constitution with significant protection in a crisis.”

Not surprisingly, supporters of the republican regime challenged this understanding of compliance and defended the traditional view that was rooted in popular consent. The movement away from the traditional view of compliance was worrisome on a moral level, republicans contended, in that participation and consent were integral to sustaining the legitimacy of the lawmaking process. They also objected on practical grounds, in particular on the ground that legal guarantees could be enforced only if they met with popular approval. Alexander Bickel, who was himself sympathetic to the notion of judicial-political colloquies, cautioned that there were limits to the courts’ educative power. Judicial decisions must rest in the end, he argued, on presuppositions “to which widespread acceptance may fairly be attributed.” What is meant “is that the Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.” Moreover, Learned Hand, among others, was skeptical of the ability of judges to carry out such a seminar and, in particular, to don a professorial as well as a judicial robe. “[F]or a judge to serve as communal mentor appears to me a very dubious addition to his duties and one apt to interfere with their proper discharge.”

The judicialist view eventually prevailed over each of these objections. Whereas securing compliance with legal guarantees was a moderate concern for the supporters of the republican regime, and a predominant concern for the populist regime, it was of only slight concern to the judicialists, for whom the enunciation of principles frequently took precedence over the ensuring of compliance. Moreover, to the extent that the judicialists were interested in obtaining compliance with these principles, they articulated a different basis for this compliance than had existed in prior regimes. Citizens would comply with legal guarantees, they argued, not because they participated in the decision-making process but because the decisions conformed with notions of justice, and in the event that the people did not immediately appreciate the justice of these decisions, judges were uniquely positioned to persuade them to adopt this position.

CONCLUSION

These principles of the judicialist regime were first enunciated by U.S. Supreme Court justices in a series of decisions in the 1940s, then debated and defended in the legal academy in the 1950s and 1960s, and eventually embraced by state courts in the 1970s and 1980s. At the center of the judicialist project was an effort to transform the public understanding of the institution that could best represent the public will, deliberate in the general interest, and secure popular compliance.
The legislature, which had been viewed in the republican regime as the proper forum for representation, deliberation, and compliance, and which had been temporarily supplanted in the populist regime by the popular initiative, was now superseded by the courts, which were seen as uniquely capable of divining the popular will with regard to rights, deliberating about their contents, and guaranteeing their security.