Keeping the People's Liberties
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Published by University Press of Kansas

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Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights.

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The primary intent of the architects of the judicialist regime was to alter the role and behavior of federal and state judges. Indeed, between 1940 and 1990, judges assumed primary responsibility for deliberating about rights, and constitutional decisions came to be viewed as the principal means of securing their protection. Once loosed, the judicialist spirit was not easily cabined and also began to influence the way in which other individuals conceived of their roles. Although legislators continued to enact statutes to secure some rights, they began to defer the resolution of an increasing number of issues to the courts, and when they did engage in independent interpretation of rights, they were frequently rebuffed. Similarly, although citizens still sought to regulate some rights through the initiative process, these efforts met with an increasingly hostile reception from judges and leaders of intellectual opinion.

THE ROLE AND BEHAVIOR OF JUDGES

Judges had played a prominent role in securing individual rights in the years prior to the judicialist regime, but this had taken the form primarily of issuing statutory and common-law decisions. Some judges continued during this period to decide cases in this manner, in an effort to preserve opportunities for legislative regulation of rights. Moreover, some members of the legal community continued to support and encourage this kind of decision making.1

Thus judges occasionally chose to decide cases on statutory rather than constitutional grounds. When in 1945 the Virginia Supreme Court considered a defendant’s claim that his right to a speedy trial had been abridged, the court concluded that the commonwealth had indeed failed to comply with the relevant statute, and it ordered the defendant released. The virtue of deciding the case on
statutory rather than constitutional grounds, according to Justice Edward Hudgins, was that this would permit the legislature to alter the rule if it proved unworkable. Hudgins argued, “If the statute, as written, permits guilty parties to escape justice, this fact should be brought to the attention of the General Assembly which alone has the authority to legislate.” In similar fashion, when the Virginia Supreme Court addressed the question in 1988 of “whether the public and, derivatively, the news media, have a constitutional, common-law, or statutory right of access to the records in a civil case,” Justice Richard Poff concluded, “We find it unnecessary to conduct a constitutional analysis.” Relying instead on an 1820 statute that declared that “[t]he records and papers of every court shall be open to inspection by any person,” Poff determined that individuals were in fact entitled to examine trial records in civil cases.

A number of judges continued, in similar fashion, to eschew constitutional decision making and to rely on common-law interpretation to secure rights. As Oregon Justice Robert Jones noted, in a 1983 case that required the court to interpret the meaning of the constitutional guarantee of a right to counsel, the practice of refraining from constitutional decision making carried certain advantages. He argued: “[T]his court is called upon from time to time to specify the procedure by which a guarantee is to be effectuated. Such specifications are not the same as interpretations of the guarantee itself, that is to say, they may not always and in all settings be the only means toward its effectuation but may be adopted or replaced from time to time by decisions of this court or by legislation in the light of experience or changing circumstances.” Similarly, in 1989, when the Oregon Supreme Court recognized individuals’ right to solicit signatures in private shopping malls, the decision was grounded in an interpretation of the common law. Justice Jones noted that, although several other state courts had decided the issue on constitutional grounds: “We will not join in that debate, however, without first examining the parties’ rights on a sub-constitutional level. Our practice is to refrain from constitutional holdings unless ordinary legal principles cannot resolve the dispute.” He argued: “Avoiding needless constitutional rulings is not a technical nicety of judicial etiquette. If there is no duty to decide the constitutionality of a law, there is a duty not to decide it. This rule prevents premature foreclosure of opportunities for legislators who are better equipped to consider and choose among different policies.”

In addition, judges occasionally chose to rely on their inherent rule-making power in lieu of constitutional interpretation. Massachusetts Justice Paul Reardon argued in a 1966 case that extended the right to counsel to encompass probation revocation hearings: “We need not rest our conclusions on this matter upon constitutional grounds. . . . We base our decision upon the application of Rule 10 of the General Rules.” The virtue of securing rights on the basis of judicial rules, according to these justices, was that this best preserved opportunities for either courts or legislatures to respond to various and changing circumstances. As the Oregon Supreme Court concluded in a 1960 decision, “We believe that all courts
of this state have inherent power to appoint counsel for an indigent person accused of a crime when it is established that a need for counsel exists and provided that the situation is not met by one of the statutes of which we have taken notice.”

These decisions had once been considered the norm and constitutional interpretation the exception, but in the middle of the twentieth century, judges reversed course and began to rely primarily on constitutional decision making to secure rights. Statutory and common-law decisions were appropriate insofar as legislatures could be entrusted to secure rights, but once the view took hold that representative institutions were generally incapable of deliberating responsibly, it became necessary to remove rights from legislative control. Laurence Tribe therefore argued, in one of the most influential constitutional casebooks of the era, that although the common law contained a number of principles that could be relied on to secure rights, these principles were of “questionable origin as sources of a constitutional guarantee. More importantly, they are widely understood to be subject to legislative modification or even extinction.” As a leading survey of state constitutional law noted, “Although common law rulings are always subject to legislative reversal, constitutional decisions give the court the final word.”

Constitutional rulings were also preferred because they prevented judges from exercising their discretion in an errant manner. Implicit in the traditional reliance on statutory and common-law interpretation was the view that judges could usually be counted on to apply these principles in a responsible manner. But the judicialists, although they were generally inclined to trust judges rather than legislators to secure rights, did not necessarily believe that all judges would secure an adequate degree of protection for rights. In their view, constitutional decisions were significantly more effective than statutory or common-law decisions in binding judges to reach appropriate conclusions. Thus, after conducting a study of the nineteenth-century record of state courts in protecting freedom of speech, one legal commentator took note of the fact that “[c]ontroversies that clearly presented issues of freedom of speech and press were sometimes decided without a single reference to pertinent constitutional provisions.” In his view, this represented a “lost opportunity.” “Whether this was due to intentional avoidance of constitutional questions or to mere inadvertence, the practice hardly enhanced the value of state safeguards.” The fear was that these statutory or common-law decisions could not be counted on to provide the requisite security for rights. As one of the leading surveys of state constitutional law concluded: “That a police power decision reaches the same result that a constitutional decision would have reached is not enough. It is inadequate, first, because it leaves nothing behind to bind future courts to pursue a constitutional analysis. A police power decision that reaches a legitimate result today could just as easily result in a police power decision that reaches an illegitimate result tomorrow.”

Late-twentieth-century judges were not the first to rely on constitutional
decision making. But judges in previous eras had reserved these decisions primarily for cases in which representative institutions were deemed incompetent, such as when legislators were gripped by a momentary passion or were prevented by their own self-interest from deliberating responsibly. The distinctive aspect of the judicialist era was that judges now began to issue constitutional decisions on a routine basis. Consequently, although defenses of the traditional style of statutory and common-law decision making occasionally appeared in majority opinions in this period, they were increasingly consigned to passages in dissenting opinions.

Accordingly, judges began to rely on constitutional decision making to effectuate general guarantees of rights. The Massachusetts Supreme Court was one of a number of courts during this period to rely on the search-and-seizure clause of the Bill of Rights to prevent improperly seized evidence from being admitted in trials. In one 1985 case that extended the exclusionary rule to encompass certain automobile searches, it was left to the dissenting opinion to take note of the novelty of the decision: “[T]he court creates an exclusionary rule under art. 14 for the first time in the history of the Commonwealth. The court finds in art. 14 a rule that has remained undiscovered since 1780 and that has been specifically rejected when asserted.”

In a similar case decided by the Virginia Supreme Court in 1980, the majority noted that the guarantee against improper searches and seizures had been provided for years by a statute that “made it a misdemeanor for any law enforcement officer to search without a warrant,” and that when the issue had arisen in Virginia in previous years, “the exclusionary rule was rejected.” The court even mentioned “with interest the ‘disenchantment’ of some members of the [United States] Supreme Court with this rule,” but it concluded, nevertheless, that “[o]ur own philosophical misgivings are irrelevant, and we will of course continue to apply the rule as construed from time to time by the Supreme Court.” Although these disagreements were expressed to no avail in these cases, they served to highlight the distinctive nature of the modern approach to securing rights, one that rests on constitutional rather than statutory or common-law interpretation.

Judges also relied on constitutional decision making to extend existing legal guarantees. In 1982, for instance, the Oregon Supreme Court joined a number of other courts in recognizing a right to equal treatment without regard to sex. Both the majority and the dissenting justices acknowledged the novelty of the ruling, which overturned an outdated law that provided public benefits to certain women but not to similarly situated men. Writing for the majority, Justice Betty Roberts noted that “[w]e are free in Oregon to begin our analysis of gender based laws on a clean slate,” and she proceeded to overturn the statute and order benefits to be extended to both men and women. In his dissenting opinion, however, Justice Edwin Peterson defended the traditional style of judging. He was particularly troubled by the fact that by rendering a constitutional decision the court thereby prohibited the legislature from responding to changing circumstances. He argued:
“The effect of this court’s opinion is to enact a new law. . . . The point is not only that courts are forbidden to legislate, we lack the resources to make legislative decisions. Though we may possess judicial ingenuity, we have no knowledge of the fiscal implications of our opinion, and little knowledge of its other implications. . . . The legislature convenes in two months, perhaps earlier. It has the power to avoid almost every adverse effect of invalidation, even those occurring before it convenes. That is its constitutionally-appointed job, and we should let them do it.” Had Peterson been sitting on the bench only a half century earlier, his view of the judicial role would have formed the basis of a majority opinion from which there would likely have been no dissent. In the judicialist regime, this view placed him in a distinct minority.

A final distinctive aspect of judicial behavior during this period concerned the way in which constitutional decision making was received by leaders of intellectual opinion. When judges in previous eras had relied on bills of rights to overturn legislative judgments, they had been roundly criticized for removing matters from legislative control. By the middle of the twentieth century, this behavior was supported and even encouraged by legal scholars. As Oregon Justice Hans Linde noted, with respect to the relationship between the legal academy and the U.S. Supreme Court: “Today’s theorists are at least as doubtful about the Supreme Court’s premises. The difference is that, unlike their fathers in the trade, they do not aim to test and displace the Court’s conclusions but to save them.”

THE ROLE AND BEHAVIOR OF LEGISLATORS

Legislative behavior was influenced by the judicialist regime in several ways. In the first place, so many areas of the law were now occupied by judicial decisions that when legislatures did secure rights, this frequently took the form of responding to judicial rulings rather than engaging in independent deliberation. Moreover, when legislatures sought to protect rights in areas that were unoccupied by courts, the resulting statutes were viewed as providing less security for rights than judicial decisions. Finally, in the few cases in which legislators sought to secure rights in a different manner from courts, these efforts were frequently overturned by judges who were unwilling to countenance infringements on their domain.

To be sure, legislatures did not suddenly and completely cease to secure rights in the middle of the twentieth century. They continued to enact statutes to secure some rights, and this behavior was occasionally supported by leaders of legal and intellectual opinion. Nevertheless, the deliberation in which legislators partook in the judicialist era differed in kind from the deliberation that characterized the nineteenth and early twentieth centuries. When legislators deliberated over rights in previous years, they engaged in independent discussion of the meaning of constitutional guarantees, often unencumbered by judicial rulings. As a growing number of rights came to be governed by constitutional rulings, however,
legislative discussions began to be conducted in the shadow of judicial decisions. As a result, legislators came to be concerned less with debating the most reasonable means of interpreting a constitutional guarantee than with satisfying or responding to a judicial interpretation of a constitutional guarantee.

Accordingly, legislatures deferred increasingly to the courts for the protection of rights and were generally content to enact appropriate laws in response to court decisions. By the late 1960s, William Keefe could identify a number of reasons “why legislatures are not suited to offer continuing leadership in state politics,” not the least of which was the increased activity of the judiciary. He argued, “It can fairly be said that the Supreme Court in the early 1960s contributed at least as much as governors, political interest groups, or political parties to shaping the agendas of state legislatures.”

On any number of issues during this period, state legislators essentially read the U.S. and State Reports and transmitted them into law. Thus Oregon was one of a number of states that was preoccupied during this period with following judicial interpretations of the free-speech clause of the Bill of Rights. As Justice Ralph Holman of the Oregon Supreme Court noted in a 1968 opinion, “It is obvious that the legislature has experienced some difficulty in keeping up with the rapidly changing United States constitutional concept of what constitutes obscenity.”

Similarly, the Virginia General Assembly, which had enacted statutes throughout the twentieth century to provide counsel for indigent defendants, resolved in 1972 that “there is now pending in the Supreme Court of the United States a case in which a person charged with a misdemeanor seeks to require the appointment of counsel in such cases” and that “prompt action will be required should the Supreme Court of the United States rule that counsel is required in such cases.” The legislature directed a commission to determine “the most appropriate method of providing such counsel,” and it revised its right-to-counsel statute in the following session.

Even when the judiciary had not yet addressed an issue, legislators were still less likely to enact statutory guarantees than they had been in previous eras. This was in part an inevitable by-product of the heightened role of the judiciary, which was now considered to be the proper institution for addressing individual grievances. At a time when legislatures were considered to possess fewer attributes than courts, it is not surprising that elected representatives began to defer more frequently to judicial decisions for the protection of rights.

Legislative deference was also a natural consequence of the diminished respect for statutes as instruments of rights protection. As Tribe argued, “‘legislative rights’ are creatures of the majority, theirs to give, and theirs to take away. The ultimate authority of such rights must yield more readily to other asserted interests of government than would rights ascribed to the Constitution itself.” It is not surprising, therefore, at a time when constitutional decision making was increasingly viewed as the preferred manner of securing rights, that legislatures were less inclined to assume responsibility for securing rights.
Finally, in the few cases in which legislators did engage in independent interpretation of constitutional guarantees, they were roundly rebuffed by the courts. Two examples from Massachusetts are particularly pertinent, one dealing with the ban on cruel and unusual punishment and the other concerning the guarantee of religious freedom.

The question of whether the imposition of the death penalty violated the constitutional ban on cruel and unusual punishment provoked a series of particularly sharp disagreements between the Massachusetts General Court and Supreme Judicial Court throughout the 1970s. Prior to 1975, the Massachusetts Declaration of Rights had never been interpreted to forbid capital punishment, but in a series of decisions handed down between 1975 and 1977, the Massachusetts Supreme Court proceeded to invalidate the state’s death-penalty statute. Chief Justice Joseph Tauro noted in 1975: “We believe that the right to life is fundamental and, further, that this proposition is not open to serious debate. Aside from its prominent place in the due process clause itself, the right to life is the basis of all other rights and in the absence of life other rights do not exist.” The court held that the death penalty did not comport with the contemporary meaning of “cruel and unusual punishment,” and, consequently, it was deemed unconstitutional.

The Massachusetts General Court responded in 1979 by enacting a revised death-penalty law and defending its authority to maintain an interpretation of the Bill of Rights that differed from that of the state supreme court. The legislature argued that capital punishment was an area in which the representatives possessed more competence than the justices: “It is hereby declared that the value of capital punishment as a deterrent for crime is a complex factual issue the resolution of which properly rests with the general court, which has evaluated the results of statistical studies in terms of the local conditions with a flexibility of approach not available to the courts, and that the general court has so found and defined those crimes and those criminals for which capital punishment is most probably an effective deterrent.” Not only did the legislature believe that it was more competent to decide this question, but it also thought that it was the more legitimate decision maker. “It is hereby further declared that the ability of the people of the commonwealth to express their preference through their duly elected representatives must not be shut off by the intervention of the judicial department on the basis of a constitutional test intertwined with an assessment of contemporary standards and that the judgment of the general court weighs heavily in ascertaining such standards in this commonwealth. It is hereby further declared that in a democratic society, legislatures, and here, in this commonwealth, the general court is the body constituted to respond to the will of the people.” Finally, the legislators contended that the proposed statute was the product of their considered and deliberate judgment. “It is hereby further declared that the following proposed legislation is the result of long study and review of the work and experience of other jurisdictions which have satisfied all those norms demanded by the Supreme Court of the United States to safeguard against all of
the elements of arbitrariness and capriciousness condemned by said court in former state death penalty statutes.”

In the end, the Massachusetts Supreme Court was unpersuaded by this statute/brief presented to it by the legislature. Referring once again to the importance of the natural right to life as well as to the constitutional guarantee against cruel and unusual punishment, Chief Justice Edward Hennessey’s majority opinion overruled the 1979 death-penalty statute on the ground that it would inevitably be applied arbitrarily.

The Massachusetts General Court was no more successful in its effort to interpret the religious-freedom clauses of the state and federal constitutions. This dispute was sparked in 1980 when the state supreme court overturned a 1979 statute that provided that each school day would begin with a moment of voluntary prayer from which any student who so desired could be excused. At its 1982 session, the legislature modified the law and submitted the new version for the court’s approval. In the revised statute, the legislature provided that students could offer a “meditation” instead of a prayer, and it defended its interpretation of the constitutional guarantee of religious freedom. The legislature stipulated that “[s]uch prayer shall not establish a religion in Public Schools, just as the prayer by the Chaplains of the Senate and House of Representatives, and the Crier of the Supreme Court, does not establish [a] religion in our government.”

The Massachusetts Supreme Court was unmoved by this argument. The justices detected little difference between this statute and the one they had previously rejected. Moreover, they dismissed the idea that legislators were competent to interpret the constitution. The court argued that the legislature, “by asserting that the school prayer bill ‘shall not establish a religion in Public Schools, just as the prayer by the Chaplains of the Senate and House of Representatives . . . does not establish [a] religion in our government,’ attempts to invade the rightful province of the judiciary to adjudicate whether a law conflicts with the requirements of the Constitution.”

THE ROLE AND BEHAVIOR OF CITIZENS

Although citizens during this period occasionally made use of the initiative and referendum in the same way as they had previously—to overcome failures of legislative representation or deliberation—the advent of judicial responsibility for rights protection brought changes in the purposes for which these institutions were employed, as well as in the way these institutions were viewed by leaders of intellectual and legal opinion.

As long as legislatures exercised primary responsibility for defining and securing rights, citizens concentrated on evaluating and responding to legislative acts. As a result, initiatives and referendums were invariably proposed for the purpose of restricting legislative deliberations or overturning legislative statutes.
When responsibility for securing rights was transferred from legislators to judges, citizens naturally turned their attention to the courts and began to introduce initiatives for the purpose of restraining and responding to judicial decisions.

It is not surprising, therefore, that initiatives and referendums proposed during this period were geared more toward judicial than legislative acts. Consequently, the rights that judges were most concerned with interpreting in this period were also the most prolific sources of initiative activity. Oregon was one of several states in which voters sought to regulate fair-trial rights in a different manner from judges. The 1986 Oregon Victims’ Rights Initiative modified several rules of criminal procedure, increased the number of prosecutorial peremptory challenges, and generally enhanced the rights of victims in the trial process. Similarly, voters in Oregon and Michigan relied on the initiative to respond to judicial interpretations of the right to privacy. Michigan voters used the initiative to ban state-funded abortions in 1987, and in Oregon, similar propositions were defeated in 1978 and 1986, as were a pair of 1990 propositions that would have prohibited virtually all abortions and required parental notification. Citizens also relied on the initiative to respond to judicial interpretations of the guarantee against cruel and unusual punishment, such as when Oregon voters tried to reinstate capital punishment in 1978 and then succeeded in 1984. Finally, although judicial decisions with respect to obscenity and busing were not the subject of initiatives in any of these four states, they generated a significant amount of initiative activity in other states during this period.

What truly distinguished citizen behavior in the judicialist regime from that of previous eras was the way that these initiatives and referendums were received by judges and academics. Whereas direct democratic institutions had once been viewed as a means through which citizens could legitimately express their views, they were now viewed with suspicion and were considered to be more likely to oppress than to secure rights.

To be sure, the populist spirit was not entirely extinguished. Several judges actually argued that initiatives were more likely than legislative statutes to represent the popular will. Michigan Justice Harry Kelly noted in a 1956 opinion that “the initiative and referendum are recognized as instruments of democratic government, widely used and of great value.” U.S. Supreme Court Justice Hugo Black, perhaps the most ardent judicial supporter of direct democracy during this period, argued in similar fashion that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.” He contended that initiatives were entitled to more deference than legislation, “[b]ecause here, it’s moving in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get.”

Somewhat more prevalent was the belief that initiatives and statutes should be treated in the same manner. Oregon Justice Arthur Hay argued “that in the construction of statutes there is no essential difference between those enacted by
the initiative and referendum and those enacted in the usual way." He believed that, "On the whole, in view of the jealous regard of the people for the initiative process and of the opportunities which exist for the voters to acquaint themselves with the background and merits of a proposed initiative measure, we are of the opinion that, in the construction of such measures, the courts should indulge the same presumption as to the knowledge of historical facts on the part of the people, as they indulge with reference to acts passed by the legislature."40

The dominant view in this era, however, was that initiatives were generally threatening to rights and should be treated with less deference than legislative statutes. Law professors, in particular, displayed during this period what Lynn Baker described as a "nearly unanimous distrust" of direct democracy.41 Professor Preble Stolz, for instance, argued, "The '90s will be a dismal decade for law reform unless something can be done to rid us of government by the initiative." He thought that "the California Supreme Court was nationally regarded as a leader in law reform," but the "success of the initiative process . . . has had a disastrous influence on law reform in California." He believed that initiatives concerning criminal justice had "effectively destroyed the capacity of the state Supreme Court to be inventive in that area," and even more importantly, they tended to "crowd out other matters that might be on the court's agenda."42 Likewise, Professor Calvin Massey feared for the fate of rights "at the hands of an aroused California electorate indifferent to the integrity of the California Constitution and determined to reduce the constitutional right of some disfavored minority."43 Accordingly, law professors routinely counseled judges to "be prepared to control individuals or groups attempting to use ballot propositions improperly."44

This opposition to direct democratic institutions influenced judicial behavior in several ways. Judges occasionally exercised preelection review of initiative measures and thereby prevented some propositions from even appearing on the ballot.45 Thus in 1990 the Massachusetts Supreme Court refused to permit the citizens to hold a referendum on a gay-rights statute that the Massachusetts General Court had enacted in its 1989 session. Justice Paul Liacos concluded that because the statute pertained to religious matters, it fell outside the bounds of constitutionally permissible referenda.46

Judges also overturned initiatives once they had been approved and taken effect. Thus after Oregon voters approved an initiated statute in 1978 to permit capital punishment,47 it was overturned by the Oregon Supreme Court.48 Even after Oregon voters returned to the ballot box to approve a constitutional initiative to reinstate capital punishment, some commentators continued to urge the court to maintain its opposition to the popular will, although in this case the court permitted the amendment to stand.49 Nor was the Oregon experience atypical. A number of other courts were also active in overturning initiatives during this period. In fact: "Between 1960 and 1980, only two successful California initiatives were not declared unconstitutional in whole or in part by state or federal courts."50
Finally, the constitutional amendment and revision process offered an additional avenue through which citizens could participate in the protection of rights. Prior to the middle of the twentieth century, citizens had enacted constitutional amendments primarily for the purpose of restraining legislatures, and only occasionally to restrict judges. In the judicialist era, although citizens still made occasional use of the constitutional amendment process for the purpose of restraining legislatures, they increasingly began to enact amendments to respond to and overturn judicial decisions.

As a result, constitutional convention debates were increasingly dominated during this period by considerations of what the courts had done. Thus on a number of occasions convention delegates refrained from acting, out of deference to the courts. When a question was broached at the Michigan Convention of 1961–1962 whether to retain a search-and-seizure provision in light of recent U.S. Supreme Court decisions, delegate Marjorie McGowan argued that “[t]his is a matter for the courts,” and a majority of the convention delegates agreed. Similarly, the Virginia Commission on Constitutional Revision concluded in 1969 that it was “wiser to leave it to the courts to decide, in the context of concrete cases, to what extent a right of association is implicit in other constitutional rights and how that right is to be applied to specific factual situations.”

To the extent that conventions did propose to amend or revise the constitution, this was usually for the purpose of ratifying decisions that had already been made by the courts. The Virginia Revision Commission introduced several proposed changes in the Virginia Declaration of Rights by noting: “[C]ertain rights which by judicial decisions have been held implicit in the present Bill of Rights, e.g., the right to a speedy trial and the right of peaceable assembly, are made explicit.” Similarly, in the course of the debate over these proposed amendments in the Virginia General Assembly, delegate James Thomson noted: “In fairness to the House, the basic reason for the amendments that have been included in George Mason’s Bill of Rights ought to be stated. They all stem from court decisions dealing with clauses that were formerly in the Legislative Article that were transferred into the Bill of Rights. The Court had treated them differently because they were in the Legislative Article and said if they were meant to be given the interpretation that was being advocated in those cases they should have been included in the Bill of Rights.”

A number of other amendments were enacted for the purpose of overturning or restricting the effect of judicial decisions. Not surprisingly, the same decisions that generated popular initiatives in this period—namely, search and seizure, school desegregation, and capital punishment—also produced a significant number of constitutional amendments. Thus in 1952 the Michigan legislature approved, and the people ratified, an amendment that excepted drugs from the sweep of the judicially imposed exclusionary rule. In 1956 Virginia held a limited convention in order to overturn a state court decision that prohibited the transfer of public funds to private schools. Then in 1976 the citizens of Massachusetts
responded to a series of judicial busing decrees by ratifying a constitutional amendment stipulating that “no student shall be assigned to a public school on the basis of race, color, national origin or creed.”

The use of constitutional amendments to respond to judicial rulings was not unprecedented. In particular, citizens in the early twentieth century had occasionally approved amendments for the purpose of overturning judicial decisions. What truly distinguished constitutional activity in the modern period was the ultimate fate of these amendments. Whereas constitutional amendments had always prevailed over judicial decisions in previous eras, there was no longer any such guarantee in the judicialist era.

The prevailing attitude toward constitutional amendments was perhaps best illustrated by the response of the Massachusetts Supreme Court to a constitutional amendment that sought to prevent the courts from invalidating the death penalty. The amendment, which was proposed by the legislature and ratified by the voters in 1982, stated: “No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.” In 1984, however, the Massachusetts Supreme Court ruled that the amendment did not preclude “consideration of the statutory implementation of the death penalty.” Justice Paul Liacos concluded, “Nothing in the arguments for and against the amendment circulated to the voters concerned the total insulation of death penalty legislation from constitutional review.” In the view of a majority of the court, the most recent death-penalty statute offended another provision of the Massachusetts Constitution, the right to a trial by jury.

It was left to the dissenters to point out the full effect of the decision. Justice Joseph Nolan argued: “The court’s interpretation . . . contravenes the desires of the citizens of Massachusetts and the court’s duty to construe laws, when possible, so as to avoid the conclusion that they are unconstitutional.” He believed that “the people made it clear that the capital punishment statute must escape invalidation by any article of the Massachusetts Constitution,” and he was unable to “comprehend how the phrase, ‘[n]o provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death,’ could be interpreted to mean other than that the court cannot invalidate the statute under the State Constitution.”

These arguments were advanced to no avail, however, against a majority of justices who were determined to prevent the imposition of the legislative and popular will. In previous eras, there was little doubt that a constitutional amendment would eventually prevail over a judicial decision. But this was a judicialist age in all respects. Legislative statutes, popular initiatives, and even constitutional amendments would have to yield on occasion to the judicial will.
CONCLUSION

This regime is characterized as a judicialist regime primarily because each institution was infused with a judicialist, rather than a republican or populist, ethos. But it is also possible to distinguish this regime from its predecessors by identifying the constitutional provisions that served as the principal guarantors of rights, the institution that was entrusted with primary responsibility for protecting rights, and the means by which rights were ordinarily secured.

Bills of rights were looked upon as the chief security for liberties during this period. Although this is virtually uncontested in the modern era, the reliance on bills of rights represented a dramatic departure from the republican regime, which placed its faith in constitutional provisions that allocated powers and responsibilities to representative institutions, as well as from the populist regime, which placed its faith in provisions that limited the powers of representative institutions.

The judiciary was entrusted with primary responsibility for securing rights. Although the reliance on courts is also unexceptionable in the contemporary era, it too represented a significant departure from previous eras—both from the republican regime, which understood that legislators were best positioned to secure rights, and from the populist regime, which relied on the collective citizenry. According to the judicialist regime, the public voice would be more consonant with the public good if pronounced by judges than if pronounced by the people themselves or their elected representatives.

Finally, constitutional decision making was thought to provide the most effective protection for individual rights. In previous regimes, security for rights was associated with popular participation in drafting the laws, either indirectly, as in the republican regime, or directly, as in the populist regime. By contrast, the judicialist regime held that rights were best secured when the people had as little agency as possible in their protection, and that this could best be achieved by relying on constitutional decisions that precluded legislative or popular interference.