The most remarkable aspect of the judicialist regime is the virtual absence of any reflection on its effectiveness. To be sure, law reviews are filled with critiques of particular justices, courts, and opinions. With slightly more digging one can uncover critiques of judicial competence in entire areas of the law. But there are few analyses of the success of the entire enterprise of entrusting judges with the protection of rights.

This lack of reflection is surprising for several reasons. One might expect that the extensive criticism of particular judicial decisions would lead to more sustained reflection about the general fitness of courts to protect rights. But as Robert Nagel has written, “serious criticism of the courts’ actual performance” is often expressed in tandem with “the widespread belief that judges are personally and institutionally competent.” In general, “commentators pay almost no attention to the possibility, certainly suggested by the barrage of criticism, that both judges and adjudication are unsuited for the broad task being urged upon them.”

The relative absence of critical inquiry is also surprising in light of the fact that it is only recently that courts have come to be seen as the best keepers of liberties. Throughout much of American history, the dominant understanding has been precisely the opposite, and as late as 1943, Henry Steele Commager could still maintain that legislators were on balance better keepers of the people’s liberties than judges. One might well expect that the novelty of the modern view would inspire at least some reflection about whether the current preference for courts is an ephemeral product of twentieth-century circumstances or a more enduring judgment.

To the extent that scholars have engaged in such reflection, the resulting studies have generally fallen short of qualifying as institutional analyses. In the first place, we have generally failed to distinguish the effects of institutions from the effects of federalism. It is not uncommon to find instances in which federal
courts have protected certain rights more effectively than have state legislatures, and on the strength of this observation to conclude that judges are generally superior to legislators. But it is possible that the greater effectiveness of federal judges in protecting rights in these cases owes more to their federal than to their judicial character.3

In addition, we have not always distinguished the role of institutions from the role of public opinion. It is not difficult to find instances in which certain rights have been protected more effectively in the late twentieth century, when courts are primarily responsible for their protection, than they were in the early nineteenth century, when legislatures were entrusted with their protection, and to conclude from this that courts are superior to legislatures. But as Michael Klarman noted, “little effort has been devoted to identifying and elaborating the background historical forces that rendered possible the postwar revolution in civil rights and civil liberties jurisprudence.”4 As a result, it is important to leave open the possibility that the improved record of rights protection in the modern age is due to the more mature conception of rights that exists today rather than to the fact that courts are now responsible for their protection.

Furthermore, we have not always distinguished the role of institutions from the role of different standards of evaluation. There is a natural tendency to assume that the manner in which rights are currently secured, at a time when courts are responsible for their protection, is inevitably superior to the manner in which rights were previously secured, and therefore to conclude that judges are superior to legislators. But as Nagel has argued, the conclusion that courts have succeeded in protecting rights better than legislatures “papers over important difficulties in defining ‘success.’ ”5 It may be the case that courts have merely protected certain rights in a different manner from legislatures rather than that they have provided a superior level of protection.

Finally, we have not always distinguished between the broad claim that courts protect rights better than legislatures and the particular claim that courts protect certain rights more effectively under certain circumstances. Even after controlling for different levels of government, changes in popular conceptions of rights, and varying standards of evaluation, it is still possible that courts will be shown to protect certain rights more effectively than legislatures. But the fact that courts provide better security for rights in certain cases “does not justify a routine or pervasive judicial program of protections of the kind that now exists.”6 It is important to leave open the possibility that judges may not necessarily be superior to legislators in all cases, but they may be particularly well suited to protecting certain rights in certain situations.7

What is needed, therefore, is an institutional analysis of the judicial record of rights protection between 1940 and 1990. Once we take account of the shortcomings in existing studies, it becomes possible to structure the analysis in such a way as to yield a set of more more nuanced conclusions about the capacity of judges to secure rights. In particular, it is helpful to concentrate on state institutions, to
compare the records of state courts and state legislatures, to identify cases in which courts have actually secured a higher level of protection for rights, and to examine a broad range of rights and circumstances.

FREEDOM OF WORSHIP

The meaning of religious liberty was contested in several ways in the latter half of the twentieth century. Questions arose as to whether public funds could support parochial schools, and to what extent; whether religious materials could be introduced into public schools and other public places; and finally, whether individuals could be exempt from general laws on account of their religious beliefs.

For all the controversy generated by these questions, however, there were surprisingly few occasions on which the courts provided a markedly higher level of protection for religious liberty than did legislatures. In most cases, judicial activity was confined to upholding and applying rights that had been secured by legislative statutes. To be sure, in several areas, courts and legislatures regulated rights in a slightly different manner, but it is not clear that the judicial interpretation was preferable to the legislative interpretation, and in some cases the legislature appeared to provide the higher level of protection.

Courts consistently interpreted the ban on religious establishment in a different manner from legislatures. For one thing, courts prohibited the appropriation of public funds for religious schools. For years, legislatures had regulated this right; some interpreted the religious establishment clauses of their bills of rights to permit public aid for school transportation, textbooks, and assorted supplies, and others determined that only certain forms of assistance, such as transportation aid, were appropriate. But in the 1960s and early 1970s, the supreme courts of Oregon, Michigan, and Massachusetts assumed responsibility for protecting the right and ruled that several of these forms of assistance, most notably textbook aid, were constitutionally invalid.

Courts also banned the introduction of religious materials into schools and other public places. Throughout the nineteenth century, legislatures had retained responsibility for drawing appropriate distinctions in this area. They had enacted statutes to prohibit schools from using sectarian books, to forbid teachers to comment on religious materials, and to provide student exemptions from any religious activities that discomforted them. In the 1960s and 1970s, however, judges determined that religious liberty could be protected only by prohibiting prayers, meditation, and moments of silence altogether, such as when the Massachusetts Supreme Court overturned a series of school prayer and meditation statutes. Judges also proscribed religious-oriented materials in other public places, such as when the Oregon Supreme Court ruled that a concrete cross could not be erected on the public property of the city of Eugene.

In evaluating the judicial record in these religious establishment cases, it is
clear that in certain states and on certain questions, courts enunciated a different understanding from that of legislatures. It would be difficult, however, to determine which of these positions—the separationist position generally advanced by judges, or the accommodationist position usually maintained by legislators—is a superior interpretation of the guarantee of religious liberty. One would be especially hard-pressed to give a decided edge to either the judiciary or the legislature in view of the ongoing debate among legal scholars and the judges themselves as to which interpretation is preferable. At the least, the question remains open as to whether legislators or judges secured rights more effectively in these cases.

When we turn to religious free-exercise cases, we find that the judicial and legislative records are quite similar and that there is little reason to prefer one institutional forum to the other. For the most part, judges merely upheld and applied statutory guarantees in particular circumstances. Thus the Massachusetts Supreme Court sustained a zoning statute that required that special accommodation be given to churches and religious organizations, and the Michigan Supreme Court upheld a law that permitted Sabbatarians to be exempt from employment on Saturdays.

To be sure, judges occasionally required more expansive exemptions than legislatures. For instance, the Massachusetts Supreme Court held that the legislature must provide exemptions from school immunization requirements not only for members of recognized churches but for all persons who conscientiously object to such practices on religious grounds. Similarly, the Michigan Supreme Court required employers not only to refrain from discriminating on the basis of religious beliefs but also to actively accommodate Sabbatarians in scheduling time slots. Additionally, although the Massachusetts Supreme Court declined to grant a religious exemption from marijuana laws, the Oregon Supreme Court was willing to make an exception to laws prohibiting the ingestion of peyote.

Many exemptions, though, were granted by legislatures. Legislative statutes were the vehicle for exempting students from general immunization laws and from other school activities. Legislatures also exempted Sabbatarians from Sunday-closing laws, as long as they agreed to rest on another day. They also exempted religious organizations from general antidiscrimination laws and medical personnel from being required to perform abortions.

In some of these cases, it should be noted, legislatures were quite solicitous of the interests of minority religions. For instance, as part of a law regulating the slaughter of animals, the Massachusetts General Court stipulated that nothing in the act “shall prohibit, abridge, or in any way hinder the religious freedom of any person or group, and, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter shall be exempt from the provisions.” Moreover, in some of these cases, legislative exemptions were granted only after the judiciary had failed to do so, such as when the Massachusetts General Court recognized an exemption for Jewish shopkeepers from Sunday-closing laws after the state supreme court declined to do so.
It is apparent from the sheer number of these exemptions that legislatures were often quite competent to redress the grievances of religious groups whose members were few in number and whose beliefs met with little favor in the general populace. This became even more clear in the wake of the U.S. Supreme Court's decision in the 1990 case *Oregon v. Smith*, when attention began to be focused on the respective records of courts and legislatures in securing the right to free exercise of religion. According to James Ryan: “[T]he evidence demonstrates that faith in the courts in this area is misplaced, and that religious groups and individuals fared better in the legislature than in the courts before the *Smith* decision. Indeed, perhaps the most lasting and helpful legacy of the case will be that it finally dispelled the mistaken notion that courts were the leading institutional protectors of religious liberty.”

**FREEDOM OF EXPRESSION**

Wartime concerns over free-speech rights were in large part responsible for the creation of the judicialist regime, and it is no surprise that free-speech issues generated a fair amount of controversy throughout the era. Disputes arose over whether individuals had a right to decline to take loyalty oaths, to refuse to testify at legislative hearings, to assemble peaceably, to disseminate controversial political or religious views, to distribute obscene or indecent materials, and to be accorded special journalistic privileges. The judicial record on these issues is a mixed one. In one group of cases, judges provided a markedly different as well as an undeniably superior level of protection. In another set of cases, judges protected rights in a different but not necessarily superior manner. In a final group of cases, the courts actually provided an inferior level of protection.

Courts provided a decidedly better level of protection for the free-speech rights of political dissenters in times of political excitement. In the first place, judges secured the right of individuals to be exempt from loyalty oaths. In the 1930s, and then again in the 1950s, fears of communism led state legislatures to enact loyalty-oath laws that applied to public employees, teachers, and members of a variety of professions. Although a number of courts declined to overturn these loyalty oaths, judges were on the whole more likely than legislators to secure this right. Thus in 1966 the Oregon Supreme Court invalidated a statute that required all public school teachers to subscribe to a loyalty oath, and in 1967 the Massachusetts Supreme Court sided with an MIT math professor in his challenge of a law that required oaths by teachers in private institutions as well.

Courts also secured more effective protection, in similar circumstances, for the privilege against self-incrimination. In the 1950s fears of communism generated a number of legislative hearings that were designed to ferret out communist sympathizers from the ranks of the teaching, law, and medical professions. In several cases, state courts ruled that these hearings violated an individual's privilege
against self-incrimination. Thus the Massachusetts Supreme Court held in 1951 that a trial judge could not ask a defendant whether he was a communist, and in 1955 that a teacher could not be discharged for refusing to answer questions concerning his membership in the Communist Party.

Courts also provided a superior level of protection for the free-speech rights of politically unpopular groups. Perhaps the most controversial group during this period was the Jehovah’s Witnesses, whose members fared much better in the courts than in legislatures. The Massachusetts Supreme Court, in particular, invalidated a number of laws and ordinances that restricted the Witnesses’ ability to distribute their pamphlets. Labor unions were another highly unpopular group in a number of these states, and they occasionally fared better in the judicial chambers than in the assembly halls. For instance, in Virginia and Michigan, courts secured the right to picket in the face of hostile legislatures. Finally, courts were generally more protective of the right of political dissenters to assemble peaceably. When members of the Socialist Party were effectively prevented by a city ordinance from speaking in the Boston Common, the Massachusetts Supreme Court ruled that the ordinance offended constitutional guarantees. Similarly, when African Americans in Danville, Virginia, were prevented from demonstrating by a city parade ordinance, the Virginia Supreme Court held the requirement unconstitutional.

Courts in these cases protected rights in a way that was both different from and superior to legislatures, but it is not so easy to render a judgment in the case of the right to distribute obscene or indecent materials. Courts were certainly active in overturning legislative regulations in this area. Both the Massachusetts and the Oregon supreme courts voided movie-licensing ordinances. Several courts also overturned general prohibitions on obscene materials, as well as bans on specific books and movies. Finally, courts delivered decisions overturning a variety of other laws regulating obscenity and indecency, including an Oregon Supreme Court decision that struck down a ban on the public and reckless use of obscene language, a Massachusetts Supreme Court ruling that invalidated a ban on nude dancing, and a Massachusetts ruling that overturned a law under which a man had been prosecuted for taking seminude photographs of his fifteen-year-old stepdaughter.

Although it is undeniable that courts regulated obscenity and indecency in a different manner from legislatures, reasonable persons can disagree as to whether these decisions constituted an overall advance for liberty. Thomas Emerson concluded that, “Taken as a whole, the Court’s decisions [in the area of obscenity] have resulted in some notable gains for the system of freedom of expression.” But Harry Clor is one of several scholars who have expressed doubts about the success of the judicial enterprise in regulating this right, and he has been joined by several state justices. At the least, the question remains open as to whether courts actually provided a superior level of protection in this area.

In one final area of freedom of expression, courts provided an inferior level
of protection. From the 1960s through the 1980s, judges were frequently impor­
tuned to recognize journalists’ right to decline to divulge their sources, but they
consistently refused to establish such a right, on either constitutional or com­
mon-law grounds. Accordingly: “The failure of the common law to recognize
a news reporter’s privilege has led journalists to seek statutory relief.” Legis­
lators turned out to be generally quite receptive to these arguments, and certainly
more receptive than judges. In fact, over half the states enacted statutes that
secured this right. Moreover, when courts construed these statutes narrowly, as
they did on several occasions, some legislatures enacted broader statutes to over­
turn these decisions and to make it clear that they intended to create a broad
claim of immunity.

THE GUARANTEE OF A FAIR TRIAL

Legislatures did not enact any statutes during this period that actually violated an
individual’s right to a fair trial. Most of the controversies centered around the
best way to expand existing guarantees. Public officials deliberated over whether
to provide indigent defendants with court-appointed lawyers and free trial tran­
scripts and how best to guarantee the privilege against self-incrimination, prevent
coerced confessions, provide public and speedy trials, and prevent improper
searches and seizures.

Because these rights were elevated to constitutional status through a series
of federal and state court decisions, there is a tendency to conclude that judges
provided a superior level of protection than did legislators. This assumes, how­
ever, that rights can be protected only through judicial constitutional decisions.
In fact, most of these rights had already been secured through statutes or inter­
pretations of the common law. The Oregon Supreme Court provided some indi­
cation of the extent of these statutory protections in a 1943 opinion:

The statutes of this state, like those of all the states in the Union, contain
many provisions designed to safeguard the rights of a person accused of
crime. Upon being arrested he must without delay be taken before a magis­
trate (s.26-1515, 26-1521, 26-1519, O.C.L.A). The magistrate must imme­
diately inform him of the charge against him and his rights to the aid of
counsel (s.26-1547); he must be allowed a reasonable time to send for coun­
sel (s.26-1548); the magistrate must then proceed to examine the case (s.26-
1549); the witnesses must be examined in the presence of the defendant, and
may be cross-examined in his behalf or against him (s.26-1555); the magis­
trate must inform the defendant that it is his right to make a statement in rela­
tion to the charge against him, but that he is at liberty to waive making a
statement, and that his waiver cannot be used against him at the trial (s.26-
1556); upon the conclusion of the examination the magistrate, if he finds that
there is sufficient cause to believe the defendant guilty, must make a written order holding the defendant to answer the same, which order must designate the crime (s.26-1570); and make out a commitment accordingly, and the defendant must be delivered into the proper custody together with the commitment (s.26-1571).54

When we turn to compare the legislative and judicial records of protecting fair-trial rights, we find that in one group of cases, judicial decisions merely elevated to constitutional status rights that had previously been secured by other means. In a second group of cases, judicial decisions secured rights somewhat more quickly than legislation, but not in a significantly different manner. Finally, in one area, judicial decisions provided a decidedly different type of protection from legislation, but it is unclear whether they secured the right in a superior manner.

In the first place, judicial decisions that constitutionalized the privilege against self-incrimination generally confirmed a right that had already been established on a statutory and common-law footing. For nearly a century, legislatures had prevented induced or coerced confessions and provided that defendants could refuse to testify and not be tainted by that choice. Where legislatures had not acted, judges had interpreted common-law principles to require the exclusion of involuntary confessions. As the Oregon Supreme Court noted in a 1965 case, “The Oregon decisions excluding involuntary confessions have based the exclusion upon common-law rules of evidence, codified into an Oregon statute.”55

The rights to a speedy trial and to a public trial were also placed on constitutional grounds by judicial decisions in the 1960s, but neither was thereby secured for the first time. Legislatures had already guaranteed the right to a speedy trial in a variety of ways. Massachusetts and Michigan ordered defendants to be let out on bail if they were not tried within a certain period, and Oregon and Virginia ordered them to be forever discharged.56 In adjudicating claims that the right had been violated, judges had rested their decisions nearly exclusively on statutory grounds. As Oregon Justice Hall Lusk wrote in one 1959 case, “We do not reach the constitutional question, as we are of the opinion that, under the statute properly construed, the motion to dismiss the indictment should have been allowed.”57 The right to a public trial was secured in Virginia and Massachusetts in similar fashion.58

In a second group of cases, the judicial and legislative records are slightly but not significantly different. When courts constitutionalized the right to counsel in the 1960s, they expanded on the current legislative understanding, but not by a dramatic margin. For a number of years, legislatures assumed responsibility for securing the right to counsel for indigent defendants.59 They steadily increased the crimes for which counsel was provided, first guaranteeing counsel in capital crimes, then in certain felony cases, and finally in misdemeanor cases
when the judge deemed it appropriate. They then provided these defendants with more effective representation, by gradually increasing the amount of compensation for court-appointed attorneys. They also provided counsel at increasingly early stages of the trial process, such as at lineups and arraignments. Finally, they occasionally assisted indigent defendants by providing them with free transcripts for pursuing appeals.

In cases in which legislatures had not secured the right, judges relied on their rule-making powers to ensure that counsel was appointed in appropriate circumstances. Thus Oregon Justice George Rossman noted in one 1960 case, "The fact that we do not believe that Art. I, s. 11, Oregon Constitution, confers power to appoint counsel does not mean that courts lack power to appoint counsel for the poor." In similar fashion, Michigan Justice Theodore Souris noted in a 1967 case: "[E]ven before Gideon, this Court required, by rule adopted in 1947, that in every felony prosecution the accused be advised of his right to have the assistance of counsel and, if financially unable to employ counsel, that counsel be appointed for him upon his request. Whatever the nature of the right, constitutional or rule, [the defendant], accused of a felony, was entitled to be represented."

Consequently, when the courts elevated the right to counsel to constitutional status in the 1960s, they did not secure the right for the first time. Constitutional decisions had the effect of mandating counsel for a greater number of crimes (such as for violations of municipal ordinances) and at a greater number of stages of the trial process (such as during probation revocation hearings). But overall the courts did not regulate this right in a significantly different fashion from legislatures.

In one final area—the guarantee against improper search and seizure—the courts provided a significantly different but not necessarily superior level of protection. Prior to the 1960s, most state legislatures sought to prevent unreasonable searches through a series of statutory rules. They were concerned with limiting the purposes for which search warrants could be obtained, providing detailed requirements for obtaining a warrant, and prohibiting certain types of searches altogether. But perhaps the most important aspect of this approach was the means by which legislators chose to enforce these provisions. They concluded that the best way to prevent improper searches was to hold public officials liable for violating these guarantees. The view was that the right was best enforced by arranging incentives in such a way that the personal interest of the public official in avoiding liability coincided with the public interest in preventing improper searches.

When courts constitutionalized this right in the 1960s, the principal effect was to alter the manner in which the right was guaranteed. Acting at first at the direction of the U.S. Supreme Court and then on their own initiative, state courts implemented the exclusionary rule as the primary means of securing the right. In 1980 Virginia Justice George Cochran had occasion to compare the two approaches. The new approach, he noted, held that "evidence obtained in violation of the Fourth
Amendment proscription of unreasonable searches and seizures may not be used against an accused.” This was quite different from the traditional approach, he noted, which relied on a statute that “made it a misdemeanor for any law enforcement officer to search without a warrant. An offending officer was liable to the victim in compensatory and punitive damages and, upon a second conviction, forfeited his office.”

It cannot be denied that the judicial approach to securing this right differed significantly from the legislative approach. The evidence is less conclusive on the question of whether judges actually secured the right more effectively. In 1970 Dallin Oaks conducted one of the most extensive surveys of the evidence but was still unable to provide a definitive answer: “The data contains little support for the proposition that the exclusionary rule discourages illegal searches and seizures, but it falls short of establishing that it does not.” In subsequent years, scholars have conducted additional studies, analyzed the methodology of previous studies, and measured the effectiveness of alternative means of securing the right. But “[t]o date, no empirical researcher has been able to determine with any certainty whether the rule has a deterrent effect.” At the least, the question remains open whether the judicial or the legislative interpretation provided greater security for the right.

THE RIGHT TO EQUAL PROTECTION UNDER THE LAW

The conventional understanding that courts protect civil rights better than legislatures is generally confirmed. It is important, however, to be more specific about the particular conditions under which this holds true. In certain states and during certain eras, judges did in fact secure civil rights better than did legislators. In most cases, however, there was little difference between the legislative and judicial record, and the majority of civil rights in this period was secured through statutes rather than through constitutional decisions.

The Right to Nondiscrimination on Account of Race

At particular points in the judicialist era, the supreme courts of Oregon, Virginia, and Massachusetts each provided a higher level of protection than did the legislatures for the right to nondiscrimination on account of race. The Oregon Supreme Court secured the rights of Asian Americans on several occasions immediately following the Second World War. In 1947 the court overturned a law that had the effect of denying a barber’s license to a Filipino man, and in 1949 the justices overturned a statute that restricted the right of aliens to own land. In Virginia the state supreme court secured the rights of African Americans against oppressive legislation on several occasions in the 1950s and 1960s. In 1959, in the wake of the U.S. Supreme Court’s decision in Brown v. Board of
Education, the Virginia Supreme Court secured the right to attend integrated schools by overturning a statute designed to “prevent the enrollment and instruction of white and colored children in the same public schools.”77 In 1963 the court secured the right to equal treatment in public accommodations when it overturned a pair of statutes that mandated segregated seating at the Richmond Symphony and at Richmond’s Parker Field baseball stadium.78 Finally, in Massachusetts, the state supreme court provided a slightly higher level of protection for the rights of blacks in the early 1970s, but the institutional differences are less dramatic in this instance. The Massachusetts General Court actually took the first step toward securing the right to attend integrated schools in 1965, when it enacted a statute that sought to eliminate “racial imbalance in the public schools.”79 The act, which was upheld by the state supreme court, required all school committees to identify any instances of racial imbalance and to devise plans for remedying them.80 In subsequent years, however, the legislature sought to modify this law in several ways, first by providing that no student could be transported to a school outside of his or her district without the consent of his or her parents, and then by prohibiting any student assignments on the basis of race. In both cases, the Massachusetts Supreme Court held that the statutes were constitutionally infirm.81

Apart from these decisions, which were delivered during periods of political or social excitement, legislation was the ordinary means by which civil rights were secured and extended.82 The legislatures of Michigan and Massachusetts had enacted civil rights statutes in the nineteenth century, and they continued to amend these laws to respond to the public desire for more extensive guarantees and stricter penalties for violating them. Oregon and Virginia implemented these guarantees for the first time during this period. Statutes were enacted in all these states in order to prohibit discrimination in employment.83 Legislatures also banned discrimination in public accommodations.84 Finally, legislatures prohibited discrimination in housing, private organizations, loans, and educational institutions, among other areas.85 For the most part, the judicial role was limited to upholding these statutes or enforcing them in various circumstances.86

The Right to Nondiscrimination on Account of Sex

Women sought to secure the right to nondiscrimination in several ways during this period. In the first place, they desired equal treatment with regard to employment, political participation, and the receipt of governmental benefits. At the same time, they demanded legal recognition and accommodation of their special circumstances, such as pregnancy and maternity.87 Each of these goals was pursued and obtained almost entirely through the legislative process. To be sure, courts contributed in certain respects to the recognition of these rights, but they did not provide a markedly superior level of protection.88

It was through legislation that women secured the right to nondiscrimination
in salary and employment, such as when the Massachusetts General Court acted in 1945 to prohibit wage differentials based on sex, and then in 1965 to prohibit sex discrimination in employment. Likewise, legislation was the means by which women secured the right to participate fully in public life, such as when the Virginia General Assembly in 1952 permitted women to serve on grand juries. Finally, legislatures occasionally secured women’s rights by taking account of their different circumstances, such as when the Oregon Legislative Assembly prohibited employment discrimination on the basis of pregnancy. In some of these cases, moreover, legislatures secured these rights only after courts had declined to do so. For instance, after the U.S. Supreme Court in 1948 refused to recognize a woman’s right to serve as a bartender, the Michigan Legislature secured the right by enacting the appropriate statute.

It is not that the courts were inactive in regulating women’s rights, but there were few cases in which they secured an important advance for women against an intransigent legislature. That is, to the extent that courts invalidated laws, they were not so much overruling legislative determinations as they were overcoming legislative inertia, for instance, when the Oregon Supreme Court overturned an outdated law that extended certain benefits to men but not to similarly situated women. In addition, in the few cases in which courts overturned laws that represented the considered judgment of the legislature, the rights were generally insignificant. It is unclear, for instance, how much weight to accord to a Massachusetts Supreme Court decision that proclaimed a right for high school boys to participate on girls’ athletic teams.

The Right to Nondiscrimination on Account of Sexual Orientation, Age, and Disability

Gays and lesbians sought to secure a variety of rights during this period, but they were primarily concerned with repealing antisodomy laws and obtaining the right to nondiscrimination in employment, housing, and accommodations. To be sure, these efforts inspired a great deal of controversy and were unsuccessful in many states. In general, though, legislatures have been at least as receptive to these arguments as have the courts, if not more so.

With respect to the right to engage in consensual sodomy, the only one of these states to secure that right is Oregon, where it was achieved through the legislative repeal of an antisodomy statute. This experience, it should be noted, is typical of states across the country. Where the right has been secured, as it has been in nearly half the states over the last thirty-five years, legislative statutes have been the usual vehicle. State courts “have been reluctant to take the decision to decriminalize sodomy away from the legislature,” and in fact, judges have consistently declined to recognize the right through constitutional decisions. Kentucky is the only state in which the right has been secured through a judicial decision, as a result of a state supreme court ruling in 1993.
that overturned an antisodomy law on the ground that it offended the state constitutional right to privacy.103

Homosexuals have been less successful in their efforts to eliminate discrimination in housing, employment, and public accommodations, but again, legislation has been the primary means by which these rights have been secured. Massachusetts is the only one of the states in our sample that has secured this right, when the Massachusetts General Court in 1989 enacted a statute that provided “that the sexual orientation of a person is an invalid basis for discrimination in areas of housing, employment and the granting of credit,” among other areas.104 Wisconsin was the only other state that explicitly established the right to equal treatment without regard to sexual orientation, and there the right was also secured through a legislative statute.105

With respect, finally, to the rights to nondiscrimination on account of age or disability, these too have been secured primarily through legislation. The 1950s and 1960s produced a series of statutes that prevented age discrimination in employment.106 Then, in the mid-1970s, legislatures enacted a number of statutes to prohibit employment discrimination on the basis of physical disability.107 These laws were later extended to apply to housing, public accommodations, and other forums as well.108

THE RIGHT TO VOTE

By the mid-twentieth century, the suffrage had been formally extended to virtually all citizens, and most voting restrictions had been repealed. Still to be secured, though, was the suffrage for eighteen-year-olds and transients, as well as the right to cast an absentee ballot. Citizens also remained vigilant against legislative failures to secure an equitable apportionment, as well as against legislators’ efforts to limit the suffrage in order to reduce their electoral insecurity. Each of these rights was generally secured through statutes, constitutional amendments, or initiatives, but in several cases they were obtained through judicial decisions.

Courts secured the right to an equal vote in the face of legislative intransigence on several occasions. For the most part, reapportionment was handled through the legislatures, but the Michigan Supreme Court intervened after the 1960, 1970, and 1980 rounds of redistricting to secure an equitable apportionment. As Michigan Justice Thomas Kavanagh explained in a case following the 1960 census: “Some of the veterans of the legislature, along with their predecessors, failed regularly to execute the constitutional oath each had taken to redistrict and reapportion under original section 4 of the fifth article of the Michigan Constitution (1908). They and they alone are responsible for justiciable presentation and consideration of the issue before this court.”109 The court had another occasion to revisit the work of the legislature after the 1970 census, and now
Chief Justice Kavanagh again explained the reason for judicial activity. He noted that in the intervening years, the people had set up a commission to carry out the task of redistricting. But the court concluded: “The activities of the political parties during the 1964 Commission on Legislative Apportionment, and the political shenanigans of both political parties making up the Commission this year, as brought out in oral argument before this Court, convinced a majority of the Court that it would be futile to remand this cause to the Commission for further proceedings. We, having no reasonable alternative, must carry out the constitutional mandate placed upon us by the people of this state.”110 The 1980 census brought yet another judicial decision and a further explanation of the court’s involvement. The court noted that the issue “goes to the heart of the political process in a constitutional democracy. . . . A constitutional democracy cannot exist . . . without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed.”111

Judges provided a higher level of protection for voting rights in one other area, one that pitted the legislators’ interest in maintaining their offices against the right of college students to vote. At issue were statutes that effectively denied students the ability to vote at their college residences. When the Michigan Supreme Court heard a challenge to one such law in 1971, the justices commented on the probable reason for its enactment. “A purported fear of the states involved is that the students would have a significant political impact if they were granted the elective franchise,”112 a fear that was particularly acute at the height of the Vietnam War. The court struck down the law and concluded: “We agree that it is no longer constitutionally permissible to exclude students from the franchise because of the fear of the way they may vote.”113

CONCLUSION

Admittedly, this study falls short of being comprehensive. It would be helpful to examine an even greater variety of rights and to do even more to separate the effects of legislative and judicial institutions from the effects of federalism. Nevertheless, the data lead to several conclusions about the capacity of courts to protect rights.

In the first place, courts provided a decidedly higher level of protection for civil rights and liberties in crisis times. Because judges were relatively insulated from social and political passions, they were better positioned than legislators to protect the rights of disfavored minorities during these periods. Thus the courts provided better protection for Jehovah’s Witnesses and other political protesters in the 1940s, for Asian Americans in Oregon in the late 1940s, for African Americans in Virginia in the 1950s and 1960s, and for persons seeking to invoke the privilege against self-incrimination in a number of states during the period of heightened fear of communism in the 1950s and 1960s. In these cases, judicial
chambers provided a superior forum than legislative assemblies for undertaking the requisite deliberation and providing adequate security for rights.

Judges also provided a significantly higher level of protection for certain voting rights, such as the right to an equal apportionment and the extension of the suffrage. Just as the initiative and referendum provided citizens with a means of bypassing legislators and securing these rights, judges were personally unaffected by reapportionment and by certain extensions of the suffrage and therefore well positioned to regulate these rights.

In another group of cases, of which the right to counsel would be one example, courts provided a marginally higher level of protection than legislatures. Throughout the twentieth century, legislatures had been steadily providing counsel in an increasing number of cases and at an increasing number of stages in the trial process. When the courts began in the 1960s to extend this right to even more cases and more stages, they thereby accelerated the process by which the right was secured but did not provide a dramatically higher level of protection.

In another group of cases, which includes the vast majority of rights, there was little difference between the judicial and legislative records. Legislatures and courts were equal partners in securing the privilege against self-incrimination, the right to a public and speedy trial, and the right to nondiscrimination on the basis of gender, sexual orientation, age, and disability. In these instances, judicial involvement was confined to upholding and applying rights that were initially secured through legislation.

An additional group of cases encompasses rights that were protected differently in the courts but not necessarily in a more effective fashion. The ban on religious establishment is one example of a right that received dramatically different interpretations in the judicial and legislative branches, but where reasonable persons have disagreed as to which interpretation is superior. Likewise, courts and legislatures reached different conclusions on whether freedom of expression is best secured by permitting the distribution of obscene materials, but it is not evident that one interpretation is clearly superior. Finally, with respect to the guarantee against improper searches and seizures, legislators frequently concluded that the right was best guaranteed by devising institutional arrangements and incentives in such a way as to prevent improper searches. In contrast, judges routinely concluded that the best way to secure the right was to exclude improperly seized evidence from trials. Although social science has not yet resolved the question of whether the legislative or the judicial approach is superior, a significant body of evidence suggests that the exclusionary rule has not demonstrated any marked improvement over the reliance on civil and financial penalties. In each of these cases, it appears that there are various ways to secure certain rights, and there is no overriding reason to prefer the judiciary over the legislature as a forum for deliberating about and selecting among these approaches.

In one final group of cases, the courts actually provided a slightly inferior level of protection for rights, on account of their insulation from public concerns
or their inattentiveness to the effects of their decisions. The courts were frequently unwilling, for instance, to secure journalists’ right to maintain the secrecy of their sources, and even when this right was secured through legislation, judges sought to limit its reach. Likewise, legislators were occasionally more zealous than judges in granting religious exemptions from general laws, such as animal-slaughter and Sunday-closing laws.

In the end, it appears that courts provided a decidedly higher level of protection than did existing institutions primarily during periods of social or political agitation. In particular, it is undeniable that courts provided a superior forum for deliberating about civil rights and liberties in crisis times. In one sense, of course, to conclude that courts can protect rights more effectively than legislatures is hardly a novel finding. Viewed from another perspective, though, this contrasts dramatically with the conventional understanding. In most areas, this study suggests, there is no significant difference between legislative and judicial capacity, and in several areas, legislatures actually provide a higher level of protection.