Conclusion

Conventional accounts of American political development identify three regime moments. Institutions of rights protection are thought to have been established at the founding. The enactment of the Civil War Amendments then shifted responsibility for rights protection from the states to the federal government. Finally, the passage of New Deal legislation redefined and expanded the spectrum of rights that governments are responsible for protecting. The results of this study demonstrate the need to supplement this interpretation. Alongside these changes in the level and scope of governmental responsibility for rights protection, one can also identify regime moments associated with changes in the institutions through which rights are protected. In particular, it becomes possible to point to a republican regime moment in the late eighteenth and early nineteenth centuries, a populist regime moment at the turn of the twentieth century, and a judicialist regime moment in the middle of the twentieth century.

Rather than being content with identifying these regimes, I have also sought to explain their origins, to describe the way in which public officials ordinarily secured rights in each period, and to evaluate the effectiveness of each of the various institutions.

We have seen that these regimes were in part the product of social and economic developments that forced a reassessment of existing political forms. They can also be attributed to the efforts of individuals who sought to implement institutional reforms. But the direction and shape of these reforms cannot be explained solely, or even primarily, by reference to these social and economic developments or individual efforts. Rather, these regime changes were animated by transformations in the realm of ideas, and in particular by distinctive conceptions of how best to represent public opinion, provide for deliberation, and secure popular compliance. At each of these regime moments, leaders of intellectual opinion determined that contemporary principles of governance were ill suited to
address current demands. After considering various alternative arrangements, they reconstituted political institutions on a different foundation.

The republican regime therefore emerged out of the founding of state and national institutions in the late eighteenth and early nineteenth centuries. Republicanism understood that legislators were best capable of representing the public voice, representative assemblies were the ideal forum for deliberating about rights, and statutes were the best means of securing compliance with legal guarantees. Consequently, public officials during this period rejected the idea that rights could best be secured either through direct democratic institutions or through judicial institutions that were relatively immune from popular influence.

This understanding was then challenged by a populist regime that emerged out of deliberations in state constitutional conventions in the first two decades of the twentieth century. Populism was rooted in a belief that representative institutions were dominated by particular interests and therefore were incapable of representing the public will. Accordingly, populism understood that the public voice could best be expressed through direct democratic institutions, deliberation would ideally take place among the general public, and individuals would be most likely to comply with laws that they had initiated and approved.

Finally, in the middle of the twentieth century, a judicialist regime emerged out of a series of colloquies among federal and state judges and the faculty of the nation’s law schools. Judicialism originated in a belief that representative institutions were overly susceptible to momentary ill humors and therefore were generally incapable of deliberating in the public interest. Judges were presumed to be best qualified to pronounce the public voice, the courtroom and judicial chambers were thought to provide the ideal forum for deliberation, and judicial decisions were uniquely capable of commanding popular compliance and support.

I have also shown that these regimes produced not only a distinctive set of institutional arrangements but also a particular mode of institutional behavior. There were any number of instances during these periods when legislators, judges, convention delegates, or citizens preferred a policy on its merits but refrained from taking action because to do so would have violated regime principles. Public officials were guided, therefore, not only by an understanding of their powers and their interests but also by a consideration of the proper role and behavior of their institutions. Even when these norms did not actually prevent departures from regime principles, they marked certain behavior as deviant and forced individuals to defend these actions.

Republicanism therefore understood that legislators were primarily responsible for securing rights, but it also influenced the behavior of other public officials. Although judges possessed the authority to overturn laws that violated provisions of bills of rights, they generally declined to exercise this power on the view that the protection of rights was the proper domain of the legislature. Likewise, delegates to constitutional conventions were often in a position to enact constitutional amendments that would remove rights from the legislative
purview, but they ordinarily refrained from doing so in the belief that this would improperly restrain the operation of the political process.

In similar fashion, populism introduced the initiative and referendum as a means by which the people could secure rights directly, but it also influenced the behavior of a number of public officials. Convention delegates who had previously refrained from constitutional legislating now overcame this reluctance and began to protect rights by enacting constitutional provisions. Legislators still possessed the power to secure rights by enacting statutes, but in an increasing number of cases they declined to do so out of deference to direct democratic institutions. Finally, although judges occasionally assumed responsibility for protecting certain rights in this period, they also began to defer the resolution of many issues to popular institutions.

Judicialism, which was implemented almost entirely through changes in behavioral norms, influenced the actions of each of the major governing institutions. Judges, who had once consciously refrained from deciding cases on constitutional grounds in order to preserve opportunities for legislative participation, now relied almost exclusively on constitutional decisions in order to prevent them from being modified by legislative action. Legislators, although they still had the power to secure rights by enacting statutes, increasingly declined to exercise this power out of deference to the courts. Similarly, although citizens retained the formal power to regulate rights through the initiative process, they were increasingly prevented from doing so by the prevailing climate of intellectual opinion and the force of judicial decisions.

Finally, I have shown that the record of rights protection in each of these regimes can further our understanding of the capacity of various institutions to serve as guardians of rights. As we have seen, the principal theoretical debate over the last two centuries concerns the viability and desirability of entrusting rights protection to republican institutions. Throughout the nineteenth century, representative institutions were thought to be generally capable of protecting rights, but this view has been challenged in the twentieth century by those who would bypass these institutions and rely on either the collective citizenry or the judiciary. The data collected in this study permit an assessment of these claims and lead to several conclusions.

It turns out that representative institutions generally achieved a commendable level of rights protection: they prevented encroachments on existing rights, permitted the recognition of newly discovered rights, and provided a forum for deliberating over rights whose status has been contested. To be sure, these institutions occasionally fell short of securing adequate protection for rights, but these failures were confined to a particular set of cases. Legislators were frequently incapable of regulating the suffrage in a reasonable manner because they were interested in maintaining their offices. In addition, they did not always succeed in resisting momentary passions and were therefore occasionally incapable of securing civil rights and liberties in crisis times.
The principal occasions on which populist institutions provided a higher level of protection for rights than representative institutions were cases when legislators’ self-interest prevented them from deliberating reasonably about rights. On the whole, however, direct democratic institutions did not secure a degree of protection for rights that was markedly higher than that achieved through representative institutions. Moreover, in periods of political and social agitation, these institutions were shown to be insufficiently deliberative and to provide inadequate security for rights.

The principal occasions on which judicialist institutions secured rights in a markedly superior manner to representative institutions were periods of social and political ferment, at which time judges, on account of their greater insulation from momentary ill humors, proved to be better positioned than legislators to protect civil rights and liberties. In general, though, there was little difference between the way that rights were protected through judicial decisions and through legislative statutes. Courts and legislatures were either partners in the protection of rights, or courts secured a level of protection that was only marginally higher or lower or slightly more or less accelerated than that achieved by legislatures. Moreover, on other occasions, judges were prevented from providing adequate security for rights because of their insulation from popular opinion or their inattentiveness to the practical effects of their decisions.

To advance these conclusions about the capacity of legislators, citizens, and judges to serve as guardians of rights is, in one sense, to exhaust the role of political science. From another perspective, though, political science can be thought to have a broader purpose. It might be concerned not only with identifying the consequences of arranging institutions in particular ways or of pursuing certain modes of institutional behavior but also with providing guidance to the officials who are responsible for maintaining these institutions. Accordingly, we would be remiss if we did not consider the implications of these findings for the individuals who are entrusted with the protection of rights.

Generally, this analysis suggests that an ideal regime of rights protection would combine the advantages of each of these institutions. Rather than viewing the protection of rights as the peculiar responsibility of any single institution, it might be considered the province of a variety of institutions.

In particular, it appears that legislators in the past assumed and lived up to their responsibility for securing rights, and it would be appropriate in the present to fortify their resolve to continue to perform this role. Although elected representatives are currently disfavored as agents of rights protection, to the point that representatives themselves are not convinced that the protection of rights falls within their domain, it was once thought that there were numerous advantages to resolving these questions through representative institutions. A reacquaintance with this tradition and an awareness of its virtues might go some way toward demonstrating that legislators, no less than other officials, are properly charged with and, in most cases, quite capable of keeping the people’s liberties.
Citizens could also glean some lessons about the consequences of securing various kinds of rights through direct democratic institutions. The people might be led, in particular, to engage in further reflection about the occasions when direct democratic institutions are likely to secure rights and when they are prone to infringe on rights. Rather than viewing initiatives and referendums as either invariably hostile to the protection of rights or inherently preferable to representative institutions, this analysis suggests that direct democratic institutions can contribute to the protection of rights in a limited set of cases. As a result, citizens might do well to rely on these institutions primarily in circumstances when elected representatives are rendered incapable, by virtue of the strength of their own interests, of acting in the general welfare.

Finally, judges, who have become accustomed to relying on constitutional decision making as the primary, and even the exclusive, vehicle for protecting rights, might gain a renewed appreciation for the virtues of other institutional mechanisms for securing rights. In particular, they might be led to engage in more extensive deliberation about the circumstances when rights are likely to be best secured through statutory or common-law decisions or through constitutional decisions. Rather than routinely grounding their decisions in interpretations of constitutional provisions, judges might conclude that constitutional decision making is best employed on occasions when representative officials are prevented, by the force of momentary passions, from securing the public interest.

For political scientists to raise and seek answers to these questions is not a novel enterprise. It hearkens back to the inquiries into “Who Are the Best Keepers of the People’s Liberties” that were conducted by James Madison and other members of the founding generation. Over the past two centuries, people have increasingly concluded that these questions are no longer worth asking, or at least that they have long since been resolved on the side of judicial enforcement of bills of rights. But this study has exhumed a variety of other ways in which rights have been protected, including a republican regime that possessed anchor as well as sail. In the end, something more than a reburial may be in order.
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