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

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

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Notes

PREFACE


1. THE THEORY AND DESIGN OF REPUBLICAN INSTITUTIONS


The contrary position—that the members of the founding generation thought that bills of rights would be secured through judicial enforcement—is frequently advanced but ill supported. Virtually the only evidence for this proposition is a letter from Jefferson to Madison, in which he held that one argument in favor of a declaration of rights was the “legal check which it puts into the hands of the judiciary” (*Papers of James Madison*, 12: 13), as well as Madison’s speech in the First Congress while introducing the bill of rights, where he noted that the judiciary would come to consider itself “in a peculiar manner the guardians of those rights” (*Papers of James Madison*, 12: 207). The only other statement of this kind of which I am aware is a comment from an anti-Federalist writer who argued during the Pennsylvania ratification debates that there would be no way to limit congressional power under the new constitution, “unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and

There is a reason, however, why the first two quotations, especially the one from Madison, are so ubiquitous in the literature. To my knowledge, there is not a single other instance in which Madison argued that the judiciary would be expected to interpret the bill of rights nor in which any other participant in the drafting and ratification of the bill of rights thought that a bill of rights would serve this purpose.


12. Ibid., 100.


14. The inaugural Michigan Constitution of 1835 contained a bill of rights, but it was eliminated in the Constitution of 1850, only to reappear in the Constitution of 1908. The Virginia Declaration of Rights of 1776, the Massachusetts Declaration of Rights of 1780, and the Oregon Bill of Rights of 1857 were retained throughout the century.


22. Massachusetts Constitution (1780), Art. 12, in ibid., 3:1891.


24. Ibid., 177.


32. Massachusetts Constitution (1780), Art. 18, in ibid., 3:1892.

33. Massachusetts Constitution (1780), Art. 7, in ibid., 3:1890.

34. Virginia Declaration of Rights (1776), s. 16, in ibid., 7:3814.


38. Ibid., 455–462.


40. Oregon Constitution (1857), Art. IV, s. 20, in ibid., 5:3004.

41. Oregon Constitution (1857), Art. IV, s. 22, in ibid.

42. Oregon Constitution (1857), Art. IV, s. 21, in ibid. For similar provisions in other state constitutions, see Michigan Constitution (1850), Art. IV, s. 20, 25, in ibid., 4:1948, 1949; Virginia Constitution (1851), Art. IV, s. 16, in ibid., 7:3840.


44. Virginia Constitution (1870), Art. XII, in Thorpe, Federal and State Constitutions, 7:3898.


48. Virginia Constitution (1829), Art. III, s. 4, in Thorpe, Federal and State Constitutions, 7:3823; Oregon Constitution (1857), Art. IV, s. 5-6, in ibid., 5:3003; Michigan Constitution (1835), Art. IV, s. 3, in ibid., 4:1933.

49. Virginia Constitution (1851), Art. IV, s. 5-6, in ibid., 7:3837–3838.


2. REPUBLICAN INSTITUTIONS AND THE PROTECTION OF RIGHTS

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7. *Virginia Acts of Assembly, 1785*, c. 34, s. 3.


19. To be sure, there were significant differences in the way that judges behaved at different times during the nineteenth century. For one thing, state judges exercised judicial
review relatively infrequently in the first part of the nineteenth century, and not until after the Civil War did they begin to overturn legislation on a routine basis (Charles Grove Haines, *The American Doctrine of Judicial Supremacy* [New York: Russell and Russell, 1932]). Additionally, at the beginning of the century, judicial review was considered to be a device for protecting the people from their governors, but by the second half of the century it had come to be regarded as a means of protecting the people from themselves (William E. Nelson, “Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860,” *University of Pennsylvania Law Review* 120 [1972]: 1166). It has also been shown that judicial opinions prior to 1850 were informed by an instrumental conception of law, which was subsequently replaced by a formalist view of law (Morton J. Horwitz, *The Transformation of American Law, 1780–1960* [Cambridge: Harvard University Press, 1977]). Finally, it has been argued that the first half of the nineteenth century was characterized by a jurisprudence of the head, whereas the latter half of the century saw the emergence of a jurisprudence of the heart (Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* [Chapel Hill: University of North Carolina Press, 1997]). These differences notwithstanding, when early- and late-nineteenth-century judges reflected on the respective roles of legislators and judges in protecting rights, they arrived at conclusions that were sufficiently similar and at the same time sufficiently distinct from the conclusions of twentieth-century judges, that it is possible to speak of a norm of nineteenth-century judicial behavior.

21. Ibid., 248.
22. Ibid., 255.

The justices on the Indiana Supreme Court conducted an extended discussion of the role of the judiciary in securing rights. Justice Samuel Perkins, writing for the majority, argued that the judiciary was properly charged with safeguarding the provisions in the bill of rights, which “were inserted in the constitution to protect the minority from the oppression of the majority, and all from the usurpation of the legislature” (6 Ind. 501, 521). Justice William Stuart responded, however, that the protection of rights “does not fall exclusively within our jurisdiction. With the rights themselves the people have also prudently retained in their own hands the means of redress. They are ever ready to vindicate them at the ballot box or by revolution, as the case may require. Among our people revolution has attained perfection. The evils or errors which afflict the body politic are intelligently investigated and traced to their source. The remedy is simple and effectual. A constitutional convention of eminent citizens is the substitute for the armed mob of other countries. If the powers hitherto delegated are too great consistently with the private rights of the citizen, they are quietly abridged. If insufficient to afford protection, they are enlarged and molded to meet the circumstances. So that revolution should begin with the people, and not with the Courts” (ibid., 526–527).

In similar fashion, Justice William Wright of the New York Court of Appeals noted
in an opinion delivered a decade after Wynehamer: "No one, heretofore, has questioned, on constitutional grounds, the validity of such an enactment, or called upon the judiciary to declare it void, and, perhaps, would not at this time, except as emboldened by the inconsiderate dicta of some of the judges in the case of Wynehamer v. The People." He argued: "Men are not to violate legislative enactments, and expect from courts immunity and protection instead of punishment. . . . It is the exercise of a judicial function, of the most delicate nature, to declare an act of the legislature void, and it is not to be expected that courts will assume it unless the case be plainly and clearly in derogation of constitutional limitations; nor is it to be expected that they will be zealous or astute to find grounds to thwart or defeat the legislative will, or resort to subtle or strained constructions to bring a statute into conflict with the organic law. . . . Errors or mistakes in legislation are not to be referred to the judiciary for correction, or its aid invoked, by men chafing under the restraints of particular statutes, to nullify the legislative power" (Metropolitan Board of Excise v. Barrie, 34 N.Y. 657, 668–669 [1866]).

24. See, for example, the comments of Virginia Court of Appeals Justice Alexander Rives: "No doubt, therefore, exists that the Assembly duly considered and decided for themselves this constitutional question, and that the passage of the law is to be taken as their judgment that there is nothing in it in conflict with the constitution of the United States or the constitution of this State. This fact truly admonishes us to the greater caution in our deliberations and the closer scrutiny in our reasonings; but it cannot exonerate us from the duty of following our convictions where, by the constitution, public interests and private rights are made to abide our independent judgments in the last resort" (Taylor v. Stearns, 59 Va. [18 Gratt.] 244, 270 [1868]). See also Nelson, "Changing Conceptions of Judicial Review," 1178–1185.


33. Ibid.


52. *Jones v. The Commonwealth*, 5 Va. (1 Call) 557, 559 (1799).


55. *Emery’s Case*, 107 Mass. 172 (1871).


67. Ibid., 595.


70. Ibid., 589.


72. Ibid., 367.

73. Ibid., 417.

74. Ibid., 368.

76. Ibid., 744.
77. Ibid., 96.
78. Ibid., 89–90.
79. Ibid., 745.
82. Ibid., 542.
83. Ibid., 380.
84. Ibid., 419.
85. Ibid., 420.
86. Ibid., 447.
87. Ibid., 424–425.
88. Ibid., 587–588.

3. REPUBLICAN INSTITUTIONS AS KEEPERS OF THE PEOPLE’S LIBERTIES

3. Lawrence M. Friedman, “State Constitutions and Criminal Justice in the Late Nineteenth Century,” in ibid., 278.
7. Ibid. David J. Bodenhamer has argued, along the same lines: “When discussing rights of the accused, it is tempting to draw a direct line of descent from the colonial period to contemporary America. The language of rights is similar, but not its substance. Due process of law held a sharply different meaning for the seventeenth and eighteenth centuries than it does for the twentieth” (Bodenhamer, Fair Trial: Rights of the Accused in American History [New York: Oxford University Press, 1992], 28).
8. For petitions in favor of disestablishment, see Virginia Legislative Petitions: Bibliography, Calendar, and Abstracts from Original Sources: 6 May 1776–21 June 1782, comp. Randolph W. Church (Richmond: Virginia State Library, 1984), 31, 38, 43, 46, 47, 48, 49, 55, 65. For petitions supporting the existing establishment, see pp. 52, 65.
11. Ibid.
13. Quoted in ibid., 135.
16. Turpin v. Lockett, 10 Va. (6 Call) 113 (1804).
17. Virginia Acts of Assembly, 1802, c. 5.
22. Jacob C. Meyer, Church and State in Massachusetts from 1744 to 1833 (Cleveland: Western Reserve University, 1930), 59.
23. Ibid., 107.
29. Ibid., 408.
30. Ibid., 405–406.
32. Cushing, "Disestablishment in Massachusetts," 186.
33. Meyer, Church and State in Massachusetts, 157–158.
35. Ibid., 345.
40. Massachusetts Acts of May, 1793, c. 1, s. 3.
41. Michigan Territory Laws, 1825, "An Act to Organize the Militia."
42. Virginia Acts of Assembly, October, 1777, c. 1.
43. Massachusetts Acts of 1809, c. 108. Likewise, Virginia in 1783 determined that an objector should produce a "testimonial" that "he is really and bona fide one of the people called quakers" (Virginia Acts of Assembly, 1783, c. 22).
44. Massachusetts Acts of January, 1781, c. 21, p. 42.
47. Commonwealth v. Fletcher, 12 Mass. 441, 442 (1815).
49. In one area, religious oaths for officeholders, the right was secured through constitutional action. The Massachusetts Constitution of 1780 provided that all state officials were required to declare their belief in the Christian religion, renounce and abjure any allegiance to every other foreign power, and to declare that no foreign person, prince, or prelate should have "any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical or spiritual within this Commonwealth." Once public opinion had evolved to the point that it was seen as appropriate to repeal the second part of the clause, which excluded Catholics from serving in office, as well as the first part of the clause, which affected all non-Christians, these changes could be achieved only through constitutional action, which was taken in the Massachusetts Convention of 1820 (Robert Lord and John Sexton, History of the Archdiocese of Boston, 3 vols. [New York: Sheed and Ward, 1944], 1: 774–780).
50. Virginia Acts of Assembly, May, 1779, c. 7; Michigan Compiled Laws, 1857, s. 4334, 4335; Statutes Passed by the Legislative Assembly of the Territory of Oregon, 1850, p. 182.
57. In 1779 the Virginia General Assembly directed that individuals reluctant to take the required oath could still be “deemed as competent a witness” (*Virginia Acts of Assembly, May*, 1779, c. 7). The Massachusetts General Court passed such an act in 1825 (*Massachusetts Acts of 1824*, c. 91). The Michigan Legislature stipulated in 1842 that “[n]o person shall be deemed incompetent as a witness . . . on account of his opinions on the subject of religion” (*Public Acts of Michigan*, 1842, no. 18). The Oregon Territorial Legislature provided in 1853 that no person could be “disqualified from being a witness on account of the want of religious belief” (*Oregon Territory Laws*, 1853, p. 111).
58. In 1842 the Michigan Legislature provided that no witness could be “questioned in relation to his opinions” on the matter of religion (*Michigan Laws of 1842*, no. 18). Accordingly, the Michigan Supreme Court applied the statute in an 1858 case to prohibit a subject from being questioned at any point on her religious views. “We think, therefore, it was clearly the intention of the legislature to prevent the first step, and every subsequent step, in all inquiries of this kind” (*The People v. Jenness*, 5 Mich. 318, 319 [1858]). When called to decide this question, the Virginia Court of Appeals noted that although the common law had permitted such questions, this had been “wholly abrogated by our Bill of Rights, and the act for securing religious freedom” (*Perry v. The Commonwealth*, 44 Va. 632, 611). In similar fashion, the Massachusetts court noted that one was “not to be questioned as to his religious belief” (*Commonwealth v. Smith*, 68 Mass. 516, 516 [1854]).
64. *Massachusetts Acts of 1827*, c. 143, s. 7.
67. Ibid., 601.
71. *Virginia Acts of Assembly, 1846–47*, c. 33, s. 5. See Bell, *The Church, the State, and Education in Virginia*, 356–357.
72. Bell, *The Church, the State, and Education in Virginia*, 426.
74. Ibid., 129–130.

Although this aspect of the right to worship was secured in these states through legislation rather than adjudication, it should be noted that in several other states around the

77. Ibid., 2:586–587.
78. Ibid., 3:129–130.
82. Ibid., 335.
83. *Massachusetts General Statutes of 1860*, c. 84, s. 9. See also *Michigan Compiled Laws of 1857*, par. 1580; *Virginia Code of 1908*, s. 3800.
90. In Virginia, exemptions were made for Quakers and Mennonites (*Virginia Acts of Assembly, October, 1780*, c. 16) and for all Christian dissenters (*Virginia Acts of Assembly, October, 1784*, c. 76). In Massachusetts, exemptions were made for Quakers (*Massachusetts Acts of 1834*, c. 177, s. 6) and for Jews (*Massachusetts Acts of 1893*, c. 361). In Michigan, exemptions were made for Quakers and for all other dissenters (*Michigan Compiled Laws of 1857*, c. 107, s. 17). In Oregon, exemptions were made in 1845 for all denominations (*Oregon Territory Laws, 1843–1849*, p. 36).
91. *Virginia Acts of Assembly, October, 1784*, c. 76, s. 3. For a discussion of the memorials, see Church, *Virginia Legislative Petitions*, 323; James, *Documentary History of the Struggle for Religious Liberty in Virginia*, 118–120.


109. Ibid., 312.


113. *Massachusetts Revised Statutes*, c. 123, s. 4, 5.

114. *Virginia Acts of Assembly*, 1847–48, c. 120, t. 1, c. 11, s. 10, 11.


128. See *Ferguson v. Georgia*, 365 U.S. 570, 577 (1960), for a list of the dates of enactment of these statutes.

134. Oregon Code of Criminal Procedure, 1864, c. 37, s. 379, 380, 381.
141. Beaney, Right to Counsel, 84. For a list of the state statutes on the subject, see pp. 84–87.
142. Howell’s (Michigan) Statutes, 1846, s. 7244.
144. Virginia Acts of Assembly, 1814, c. 74, s. 10.
149. See, for example, Massachusetts Revised Statutes of 1835, c. 142, s. 3.
150. Virginia Acts of Assembly, 1847–48, c. 25, s. 3.
151. Oregon Code of Criminal Procedure, 1864, c. 41, s. 472, 473.
158. Massachusetts Acts of 1869, c. 415, s. 44, 45, 46.
161. The precise extent to which the initial constitutions secured these conventional rights differed dramatically from state to state. Prior to the Civil War, Virginia did not even secure all persons in their natural rights, as demonstrated by the continued enslavement of African Americans. Oregon did not initially recognize a right for African Americans, Chinese, or mulattos to vote; nor did it recognize a right for immigrant blacks or mulattos to own land or bring suit, nor the right of Chinese immigrants to either hold land or work in mines. Michigan declined to provide for Negro suffrage.


165. *Public Acts of Michigan, 1883*, no. 23. In Virginia and Oregon, the right was not secured until the middle of the twentieth century. For a list of the states that secured this right through statute, see Cyrus E. Phillips IV, “Miscegenation: The Courts and the Constitution,” *William and Mary Law Review* 8 (1966): 133 n.2.

166. Legislative deliberation also led some states to deny the right. For instance, in an 1870 law that established the state public school system, Virginia stipulated that blacks and whites should be educated separately (*Virginia Acts of Assembly, 1869–1870*, c. 259, s. 47).


168. Quoted in ibid., 967.


171. Ibid., 207, 209.


175. Ibid., 278–279.


180. They did succeed, however, in persuading all Massachusetts railroads to voluntarily end segregated railcars in 1844 (Kousser, “Supremacy of Equal Rights,” 954–957).


192. Oregon Laws, 1885 (Special Session), p. 5; Michigan Compiled Laws, 1897, s. 1121.


199. State v. Stevens, 29 Or. 464, 473 (1896). The Michigan Supreme Court determined, on the basis of similar reasoning, that women could not serve as prosecuting attorneys, although in this case the court did not overturn a statute; rather, it declined to extend the right in the absence of enabling legislation (Attorney General v. Abbott, 121 Mich. 540 [1899]).


204. Virginia Acts of Assembly, 1867 (Extra Session), c. 118, ch. ccxi, s. 1.


4. THE THEORY AND DESIGN OF POPULIST INSTITUTIONS

1. The choice of the term populism requires some explanation. It does not refer to the Populist movement that emerged in the last several decades of the nineteenth century. Rather, it refers to the strain of the Progressive movement that sought to implement more democratic institutions in the first two decades of the twentieth century. Although in one sense a case can be made for labeling this the progressive regime, in the end it is more helpful to characterize it as the populist regime, because this provides a more accurate description of the intellectual impetus behind these reforms.


22. Quoted in ibid., 2: 1132.


28. Ibid., 121.
33. Ibid., 1:464.
40. Ibid., 322.
46. Eisenach, The Lost Promise of Progressivism, 19.
49. Massachusetts Convention of 1917–1918, 2:140.
50. Ibid., 38.
51. Ibid., 421.
52. Ibid., 3:377, 379.
53. Ibid., 2:947.
54. Ibid., 76.
60. Ibid., 407.
61. Ibid., 796.
62. Ibid., 26.
63. Ibid., 532.
64. Ibid., 167, quoting John Randolph Haynes.
65. Ibid., 268.
67. Ibid., 674.
70. Ibid., 603.
73. Michigan Convention of 1907–1908, 548.
75. Ibid., 55.
81. Ibid., 2:27.
82. Ibid.
83. Ohio Convention of 1912, 2:1883
84. Ibid.
85. Ibid.
86. Ibid.
5. POPULIST INSTITUTIONS AND THE PROTECTION OF RIGHTS

5. *Oregon Laws, 1911*, c. 3.
9. Ibid., 390.
17. *Debates in the Massachusetts Constitutional Convention, 1917–1918* (Boston: Wright and Potter, 1919), 3:543–618, 674–740. It should be noted that in some cases these measures were proposed for the purpose of restricting courts rather than legislatures. According to Walter Dodd: “A large and important series of provisions now found in state constitutions has been inserted into these constitutions, not for the purpose of limiting state legislative power, but for the direct and express purpose of relieving state legislative power from broad constitutional restrictions as construed by the courts” (Dodd, *State Government* [New York: Century Co., 1922], 144).
19. The Massachusetts Convention amended the constitution to prohibit the appropriation of public funds to any private “college, infirmary, hospital, institution, or educational, charitable, or religious undertaking” (*Massachusetts Convention of 1917–1918*, 1:49). Virginia prohibited appropriations to any “church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society” (*Virginia Convention of 1901–1902*, 1:818).
22. Ibid., 79.
27. Gilbert Hedges, Where the People Rule (San Francisco: Bender-Moss, 1914), 113.
36. Ibid., 383–384.
42. Massachusetts Convention of 1917–1918, 2:888, quoting the Commission to Compile Information and Data.
43. Massachusetts Acts of 1913, c. 822.
44. Massachusetts Acts of 1923, c. 460.
46. Ibid., 887.
49. People v. Quider, 183 Mich. 82, 85 (1914).
57. State v. Butchek, 121 Or. 141, 153 (1927).
59. Ibid., 733–734.
60. Ibid., 740–741.
61. Durham Bros. v. Woodson, 155 Va. 93, 101 (1930). Although this was the normal mode of decision making in these cases, there were some notable exceptions. The Michigan court, for one, fashioned several constitutional rules for deciding search-and-seizure cases (People v. Marxhausen, 204 Mich. 559 [1919]; People v. De La Mater, 213 Mich. 167 [1921]). In addition, the Oregon Supreme Court suggested in dicta in one case that the exclusionary rule that had been adopted by the U.S. Supreme Court for federal cases should “be adopted and followed by the courts of this state” (State v. Laundy, 103 Or. 443, 494 [1922]).
71. With respect to the New York Supreme Court’s invalidation of a workmen’s compensation law in the 1911 case of Ives v. South Buffalo, which was one of the more
prominent liberty-of-contract decisions during this period, Ernst Freund noted that “in a questionnaire sent to some of the most prominent legal minds in the country, he received two replies that favored the Court and seventeen that disagreed” (quoted in Hace S. Tishler, *Self-Reliance and Social Security, 1870–1917* [Port Washington, NY: Kennikat Press, 1971], 121).


6. POPULIST INSTITUTIONS AS KEEPERS OF THE PEOPLE’S LIBERTIES


3. Empirical analyses are somewhat sparse, but several important compendiums of initiatives are Virginia Graham, *A Compilation of Statewide Initiative Proposals Appearing on Ballots Through 1976* (Washington, DC: Congressional Research Service, 1976);


21. Holcombe, *State Government*, 520. In fact, a review of the operation of direct democracy in Switzerland indicates that this has become their primary purpose. “[I]t is a mistake to focus exclusively on victory at the polls. For sponsors of many Swiss initiatives, winning a popular vote is not necessary; and it may not even be an objective. Rather, initiatives are submitted with the intent of offering their withdrawal in bargaining for desired policy changes” (Kris W. Kobach, “Switzerland,” in Butler and Ranney, *Referendums Around the World*, 146).
22. Between 1900 and 1970, populist institutions were used primarily to secure rights in a different manner from the legislature. As will become clear in a later chapter, after that time, these institutions began to be used more often to secure rights in response to judicial decisions.
33. *Oregon Laws, 1923*, c. 1. The law was not scheduled to take effect until 1926, but administrators of both a Catholic and a military school filed suit to challenge its validity. A federal district court in 1924 enjoined the operation of the law, and in 1925 the U.S. Supreme Court ruled that the initiative constituted an invalid interference with “the liberty of parents and guardians to direct the upbringing and education of children under their control” (*Pierce v. Society of Seven Sisters*, 268 U.S. 510, 535 [1925]).
34. Initiatives were also also passed during this period in Arkansas to prevent the teaching of evolution, in 1928, and to require Bible reading in the public schools, in 1930.


42. *Oregon Laws, 1939*, c. 2. The measure was invalidated by a ruling of the Oregon Supreme Court in 1940, which relied on a set of recently decided U.S. Supreme Court cases that held such regulations to be impermissible violations of free-speech rights (*American Federation of Labor v. Bain*, 165 Or. 183, 212 [1940]).


50. For example, Oregon’s criminal syndicalism law was enacted by the legislature in 1930 and invalidated by the U.S. Supreme Court in *De Jonge v. Oregon*, 299 U.S. 353 (1936).


60. Ibid., 303.


66. Ibid., pp. xciv, xcvi.
70. This was subsequently overturned by a decision of the California Supreme Court (Buell, “Development of Anti-Japanese Agitation,” 70, 74).
77. Ibid., 768.
78. It was later declared unconstitutional by the U.S. Supreme Court in *Reitman v. Mulkey*, 387 U.S. 369 (1967).
80. Ibid., 118.
86. Wilcox, *Government by All the People*, 161–162.

90. Initiatives to relocate the state capital were approved in Oklahoma in 1912 and Alaska in 1976, and rejected in North Dakota in 1932.

91. *Oregon Laws of 1909*, pp. 9–10. Voters in Arkansas (1912), Colorado (1912), and Montana (1976), also approved recall measures, and Colorado voters also applied the recall to judicial decisions.


94. *Oregon Laws, 1909*, c. 2. In 1912 Montana and Oklahoma also used the initiative to transfer this power from the legislature to the citizens.


96. *Oregon Laws, 1911*, c. 5.

97. The law altered the order of the party conventions and primaries and regulated the selection of primary and convention delegates (*Massachusetts Acts of 1933*, pp. 785–791).


100. *Massachusetts Acts of 1969*, pp. 1041–1047. In this instance, however, the Massachusetts Supreme Court ruled that this was as impermissible use of the initiative procedure (*Cohen v. Attorney General*, 357 Mass. 564 [1970]).


102. Alaska voters approved an advisory initiative in 1976 that sought to accomplish the same goal.


105. For the most part, the representative process accurately represented popular opinion on the question of women’s suffrage. In states where a majority of the public opposed women’s suffrage, either the legislature or the people rejected a suffrage amendment. Thus, in Massachusetts and Michigan in the late nineteenth century, the legislatures for many years declined to recommend women’s suffrage amendments, and when amendments were placed on the ballot they were rejected at the polls. In states where a majority of the public supported women’s suffrage, legislators approved the amendment and the people ratified it, as was the case in Michigan in 1918. See generally Susan B. Anthony, Elizabeth C. Stanton, Melinda J. Gage, and Ida H. Harper, eds., *The History of Woman Suffrage*, 6 vols. (New York: Arno Press, 1969), vols. 4 and 5.


107. Ibid., 110–111, 124–125, 179–186. Irregularities were so widespread in the Michigan women’s suffrage election of 1912, for instance, that Governor Chase Osborn was moved to announce: “If the liquor interests defeat the amendment by fraud, proved or suspected, the people of Michigan will retaliate in my opinion by adopting statewide
prohibition; the question seems to be largely one as to whether the liquor interests own and control and run Michigan" (quoted ibid., 181).

108. Women’s suffrage amendments were also defeated at the polls in Oklahoma in 1910, Missouri in 1914, Nebraska in 1914, and Ohio in 1914.


110. Wilcox, Government by All the People, 127.

111. Oregon Laws, 1911, p. 9. Abolishing the poll tax had such strong appeal among the public that in Oregon advocates of the single tax took advantage of this support by combining the single-tax and poll-tax measures into one ballot proposition, which was approved in the 1910 election. Upon realizing that they had been fooled, the voters turned around in the next election and removed the single-tax measure, but kept the ban on the poll tax (Oregon Laws, 1913, p. 7). See Eaton, The Oregon System, 134–136.

112. The voters of California in 1914, Washington in 1922, and Arkansas in 1964 each removed the poll tax through the initiative.


115. The citizens of California (1948, 1960, and 1962), Colorado (1962), Missouri (1922), Oklahoma (1956), and Washington (1962) also voted down specific reapportionment plans in this period. However, in Arizona (1932), Colorado (1932 and 1962), and Washington (1930 and 1956), voters approved initiated measures.


119. Schmidt, Citizen Lawmakers, 265.

120. Public Laws of Michigan, 1953, pp. 438–439. This 1952 plan was challenged on the ground that it still maintained unconstitutional differences in voting power, but it was upheld by the Michigan Supreme Court in Scholle v. Secretary of State, 360 Mich. 1 (1960).

121. The citizens of California (1948, 1960, and 1962), Colorado (1962), Missouri (1922), Oklahoma (1956), and Washington (1962) also voted down specific reapportionment plans in this period. However, in Arizona (1932), Colorado (1932 and 1962), and Washington (1930 and 1956), voters approved initiated measures.

also ruled in the case of Colorado that the use of the initiative did not necessarily render
an apportionment plan immune from judicial review (*Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 [1964]).


128. Ibid., chap. 3.

129. Ibid., chap. 5.


131. Skocpol, *Protecting Soldiers and Mothers*, 211.


139. Ibid., 218.

140. *Oregon Laws, 1911*, c. 3. Likewise, Colorado in 1936 and Arkansas in 1938 and 1956 amended their workmen’s compensation laws to better guarantee the right to safe working conditions. Similar initiatives were presented to the voters but failed to secure a popular majority in Arizona in 1916, Montana in 1914, and Ohio in 1955.

141. Evans, “Oregon Progressive Reform,” 230–231; Eaton, *The Oregon System*, 73. These gains were then preserved in a referendum held in 1914.


145. *Session Laws of Colorado, 1913*, pp. 694–696. One writer noted in 1914: “The opposition to the law in Denver was so bitter that it has not yet subsided. The reactionary and corporation daily papers in Denver were crowded with anonymous articles bitterly attacking it. The principal objections were that it would bankrupt the county; that it would
encourage an influx of pauper parents into the state: that it gave the judges of the courts too much authority over county funds: that it would cost Denver $100,000 to build an expensive workhouse: that the children were to be ‘farmed out’ and horribly maltreated” (Bullock, *Mothers’ Pensions*, 22).

146. *Laws of Arizona*, 1915, “Initiated Measures,” pp. 10–11. Because the Arizona measure not only provided pensions but also abolished the existing system of poor relief, however, the Arizona Supreme Court held that it violated the dual-subject rule and was therefore unconstitutional (*Board of Control v. Buckstegge*, 18 Ariz. 277 [1916]).


148. Several states enacted pensions for certain groups of disabled persons during this time, and this too was occasionally accomplished through the initiative. Colorado, for instance, enacted annuities for the blind by an initiative approved in 1918.


150. Colorado (1936), Ohio (1933), North Dakota (1938), and Oklahoma (1936) approved old-age pension measures, whereas Nevada (1936) and Washington (1936) rejected them.


152. Ibid., 193.

153. Ibid., 196.


158. *Oregon Laws, 1949*, c. 1. Rounding out the list of states that approved pension plans or pension increases through the initiative during this period were California in 1948, Idaho in 1942, Nevada in 1944, and Washington in 1948; Arizona rejected them in 1944 and 1950.


167. Florida (1944) and South Dakota (1946).
7. THE THEORY AND DESIGN OF JUDICIALIST INSTITUTIONS


8. Quoted in Murphy, World War I and the Origin of Civil Liberties, 154 n.35.

9. Ibid., 249.


20. Quoted in ibid.


26. The lack of assurance that the Congress possessed a national police power, even under Section 5 of the Fourteenth Amendment, contributed in at least one case to the willingness of the U.S. Supreme Court to assume responsibility for the protection of rights. Justice Robert H. Jackson was persuaded to join the majority opinion in Brown v. Board of Education in part because "he gradually came to subscribe to the argument, pressed by one of Warren’s clerks, that Congress lacked the authority under the Fourteenth Amendment to desegregate schools" (Eugene W. Hickok and Garry L. McDowell, Justice v. Law: Courts and Politics in American Society [New York: Free Press, 1993], 200).


33. Ibid.


48. Ibid., 560.
52. Ibid., 456.
55. Ibid., 492.
61. Ibid.
85. See, for instance, Justice James Brand of Oregon, who argued: “So long as the doctrine of separation of powers remains basic in our system, the ultimate power and duty of the courts to construe the constitution must rest with the courts alone. That power should not be lightly whittled away by any rule which recognizes the power of the legislature to authoritatively construe the constitution” (*State v. Kuhnhausen*, 201 Or. 478, 517 [1954]). A per curiam decision of the Michigan Supreme Court argued, likewise: “Interpretation of the State Constitution is the exclusive function of the judicial branch. Construction of the Constitution is the province of the courts and this Court’s construction of a State constitutional provision is binding on all departments of government, including the legislature” (*Richardson v. Secretary of State*, 381 Mich. 304, 309 [1968]).
89. Ibid.


94. Choper, Judicial Review and the National Political Process, 68.


96. Henry Steele Commager, Majority Rule and Minority Rights (New York: Oxford University Press, 1943), 80. It should be noted, however, that midway through the judicialist era, Commager reversed course and joined the defenders of the judicialist regime. See Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (Los Angeles: University of California Press, 1989), 33.


98. Nagel, Constitutional Cultures, 4.


101. Dworkin, Taking Rights Seriously, 147. Dworkin is the chief advocate of this view of rights that has come to dominate the legal profession, but see also David A. J. Richards, Foundations of American Constitutionalism (New York: Oxford University Press, 1989), and, to an extent, Michael J. Perry, The Constitution, the Courts, and Human Rights (New Haven, CT: Yale University Press, 1982).


116. Ibid.
117. Ibid., 237.
118. Ibid., 238, quoting Alexander Bickel.
119. See, for instance, Michigan Justice Talbot Smith’s remarks in a dissenting opinion: “We keep the mightiest armory known to man, the sovereign conscience. It is our duty to give voice to its demands as well as to implement it with our decrees. As Rostow put it: ‘The work of the court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life. The historic reason for this paradox is that American life in all its aspects is an attempt to express and to fulfill a far-reaching moral code. . . . The prestige and authority of the supreme court derive from the fact that it is accepted as the ultimate interpreter of the American code in many of its most important applications’” (Scholle v. Secretary of State, 360 Mich. 1, 80 [1960]).
121. Christopher L. Eisgruber, “Is the Supreme Court an Educative Institution?” *New York University Law Review* 67 (1992): 961, 1004. In similar fashion, Thomas Emerson argued: “[T]he Court should not underestimate the authority and prestige it has achieved over the years. Representing the ‘conscience of the community,’ it has come to possess a very real power to keep alive and vital the higher values and goals toward which our society imperfectly strives” (Thomas I. Emerson, *The System of Freedom of Expression* [New York: Random House, 1970], 14).
123. Rostow, “The Democratic Character of Judicial Review,” 208. In this view, the judicial opinion “is a piece of rhetoric and of literature, intended to educate and persuade. In the clearest possible way, it represents the conception of the judges speaking directly to the people, as participants in an endless public conversation on the nature and purposes of law, in all its applications. It recognizes the special responsibility of judges, appointed for a time as delegates of the people, charged with the duty of doing justice to the men before them, as spokesmen for the people of their common or customary conception of law” (Rostow, “The Court and its Critics,” *South Texas Law Review* 4 [1959]: 160, 163).
8. JUDICIALIST INSTITUTIONS AND THE PROTECTION OF RIGHTS


6. Ibid., 680 n.4.


23. Tribe, American Constitutional Law, 1311.
30. Ibid., 1205–1206 (emphasis supplied).
34. Oregon Laws, 1979, c. 2; Oregon Laws, 1985, c. 3. The death penalty was a frequent subject of initiatives during this period, as measures were also approved in California in 1972 and 1978, Colorado in 1974, and Washington in 1975.
40. Ibid., 498.
47. Oregon Laws, 1979, c. 2.
54. Ibid., 15.
58. Massachusetts Constitution (Amendment no. 111).
59. Massachusetts Constitution (Amendment no. 116).
61. Ibid., 161.
62. Ibid., 163.
63. Ibid., 181–182.

9. JUDICIALIST INSTITUTIONS AS KEEPERS OF THE PEOPLE'S LIBERTIES

5. Nagel, Constitutional Cultures, 57.
6. Ibid., 58.
7. Ibid.
13. Tarr, “Church and State in the States,” 103–106; Lowe v. City of Eugene, 254 Or. 518 (1969). Seven years later, the court revisited the issue and noted that “[t]he cross has never been removed,” but the circumstances of the case had changed significantly. In light of the new circumstances, the court let the cross stand (Eugene Sand and Gravel v. City of Eugene, 276 Or. 1007, 1009 [1976]).
23. Massachusetts Acts of 1960, c. 444, s. 139G.
24. Massachusetts Acts of 1964, c. 216. In 1957 the Massachusetts Supreme Court had rejected the argument of a Jewish shopkeeper that he should be permitted to open his supermarket on Sundays (Commonwealth v. Chernock, 336 Mass. 384 [1958]).


27. For a general analysis of judicial treatment of free-speech issues, see Nagel, Constitutional Cultures, 27–59.


29. For instance, the Michigan Supreme Court upheld a loyalty oath for teachers in 1935 and maintained this position in subsequent years (Sauder v. School District, 271 Mich. 413 [1935]; Gellhorn, The States and Subversion, 196–206).


35. Opinion of the Justices, 332 Mass. 763 (1955). But the court upheld a law that permitted the dismissal of a public school teacher who asserted his privilege against self-incrimination at a U.S. Senate subcommittee hearing (Faxon v. School Committee of Boston, 331 Mass. 531 [1954]).

36. Commonwealth v. Pascone, 308 Mass. 591 (1941); Kenyon v. Chicopee, 320 Mass. 528 (1946). In the late 1940s and 1950s the courts also increased communicative opportunities for magazine distributors and public speakers (Robert v. City of Norfolk, 188 Va. 413 [1948]; Commonwealth v. Jacobs, 333 Mass. 204 [1955]).


46. Emerson, System of Freedom of Expression, 485.


60. See, for instance, Oregon Laws, 1941, c. 456; Oregon Laws, 1961, c. 696.


70. Barry Latzer, State Constitutions and Criminal Justice (New York: Greenwood Press, 1991), 31–50. Michigan and Oregon had already adopted the exclusionary rule on constitutional grounds prior to this era. In the 1960s, all four state courts began to enforce
the rule at the direction of the U.S. Supreme Court. Then, in the 1970s and 1980s, the Michigan, Massachusetts, and Oregon supreme courts implemented versions of the exclusionary rule that were even more stringent than the federal rule.


75. *State v. Ellis*, 181 Or. 615 (1947); *Namba v. McCourt and Neuner*, 185 Or. 579 (1949).


95. This holds true even if we expand our sample to include Congress and the U.S. Supreme Court. Although discussions of the women’s rights movement historically focus on the role of U.S. Supreme Court decisions in the 1970s, the major gains for women’s rights were actually secured through congressional statutes that were enacted in the 1960s. See Jesse H. Choper, “Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights,” Michigan Law Review 83 (1984): 1, 200; Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991), 205-206; Klarman, “Rethinking the Civil Rights and Civil Liberties Revolutions,” 9.
103. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992). The supreme courts of both New York and Pennsylvania overturned their states’ antisodomy laws, but it is not clear that they intended to recognize the right to engage in homosexual sodomy.