Maine Law Review

Volume 52 | Number 2 Article 5

February 2018

The Tradition of Sustantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence

David M. Gold

THE TRADITION OF SUBSTANTIVE JUDICIAL REVIEW: A CASE STUDY OF CONTINUITY IN CONSTITUTIONAL JURISPRUDENCE

David M. Gold

THE TRADITION OF SUBSTANTIVE JUDICIAL REVIEW: A CASE STUDY OF CONTINUITY IN CONSTITUTIONAL JURISPRUDENCE

*David M. Gold**

I. INTRODUCTION

Until the 1970s, scholars routinely asserted that courts in the late nineteenth century initiated a radical reinterpretation of due process of law in their attempt to stem an onrushing tide of legislation designed to regulate business activity. Alfred H. Kelly and Winfred A. Harbison expressed the conventional wisdom in their widely-used constitutional history textbook when they wrote:

> What business needed was a means whereby the prevailing doctrine of *laissez-faire* economic theory could be written into constitutional law as a positive protection against "unreasonable" legislation.
>
> . . . [B]etween 1873 and 1898, the Supreme Court revolutionized the historic interpretation of due process of law and thus established the Fourteenth Amendment as the specific constitutional authorization for the doctrine of vested rights.[1]

This protection-of-business theory of due process development originated with the efforts of socialist and progressive commentators of the early twentieth century to discredit what they saw as a "revolutionary" transformation of due process from a term of "nominal significance in American constitutional law" into a bulwark of property.[2] Marxist theoretician and lawyer Louis B. Boudin contended that courts had perpetrated a "great revolution in our political institutions" through their interpretation of due process.[3] Where the phrase had once meant fair procedure, wrote Boudin, it had now been contorted to ensure natural justice, as understood by the courts.[4] By assuming the power to review the substance of laws, the courts had arrogated legislative functions to themselves at the expense of the people and their elected representatives.[5] Socialist muckraker and historian Gustavus Myers pointed out the reason for this doctrinal revolution: the great railroad corporations had taken control of the state and federal judiciaries had become the "sovereign power."[6]

Progressive intellectuals assailed the judiciary in similar terms. Yale University president Arthur T. Hadley, an expert in railroad law and economics, declared that judicial construction of the Fourteenth Amendment had given corporations

---

* Ohio Legislative Service Commission; B.A., 1972, History and Political Science, SUNY Binghamton; J.D., 1976, M.A., 1977, and Ph.D., 1982, Ohio State University.

1. ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 470 (5th ed. 1976).
2. CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 411 (2d ed. 1932).
3. Louis B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238, 270 (1911).
4. *See id.*
5. *See id.* at 265-70.
6. GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 528 (1912).

"large powers and privileges" and placed them beyond popular control.[7] Alabama attorney, archeologist, and linguist Charles Wallace Collins claimed that the Fourteenth Amendment had been "practically appropriated by the corporations" so that it operated "to protect the rights of property to the detriment of the rights of man."[8] Constitutional scholars, including Edward S. Corwin and Charles Grove Haines, lent their support to the themes purveyed by Collins and company. Neither Corwin nor Haines engaged in unrestrained corporation-bashing or class-conflict theorizing, but both maintained that a major transformation in the meaning of due process had occurred since the 1870s and that the Fourteenth Amendment had become the constitutional bastion of property rights.[9]

The protection-of-business thesis enjoyed a long reign, although the rather crude class-conflict interpretation of some of the early critics gave way to more subtle analyses. Scholars argued that substantive due process resulted from the wide-spread acceptance of laissez-faire economic theory in the late nineteenth and early twentieth centuries and that the similar social backgrounds of many business leaders and judges led them to adopt like attitudes toward regulatory legislation.[10] But in one form or another, the view that laissez-faire constitutionalism and its chief doctrinal component, substantive due process, arose as a means of protecting business from governmental control remained the standard one until the 1970s.[11]

Since the late 1960s, historians have challenged the protection-of-business theory. They have pointed out, first, that most regulatory legislation in the late nineteenth and early twentieth centuries survived judicial scrutiny at both the state and federal levels.[12] Second, they have argued that laissez- faire constitutionalism stemmed from Jacksonian egalitarianism. State favoritism toward corporate enterprise—in the form of subsidies, tax exemptions, and other privileges—and not the regulation of business, had led courts to strike down economic legislation while developing broader concepts of due process.[13] By the 1990s, the revisionist inter-

---

7. HAINES, *supra* note 2, at 340 (quoting Arthur Twining Hadley, *The Constitutional Position of Property*, 64 INDEP. 836-37 (1908)).

8. CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 137-38 (1912).

9. *See* Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909); HAINES, *supra* note 2, at 293-311.

10. *See* BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION 5-13, 142-44 (1942); KELLY & HARBISON, *supra* note 1, at 470, 482.

11. *See, e.g.*, CLYDE E. JACOBS, LAW WRITERS AND THE COURTS 45-58 (1954); SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 126-64 (The University of Michigan Press 1964) (1956); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 102-05, 115-35 (1960); ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 50-62 (1968); PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 718-25 (1975); ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, AMERICAN CONSTITUTIONAL LAW 356-59 (6th ed. 1978). The traditional view is still current in constitutional law texts and treatises. *See, e.g.*, 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.2 (3d ed. 1999).

12. *See* JOHN E. SEMONCHE, CHARTING THE FUTURE 424-25 (1978); Melvin I. Urofsky, *State Courts and Progressive Legislation during the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985) [hereinafter Urofsky, *State Courts*]; Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, SUP. CT. HIST. SOC'Y YEARBOOK, 1983, at 53 [hereinafter Urofsky, *Myth and Reality*].

13. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); David M. Gold, *Redfield, Railroads, and the Roots of "Laissez-Faire Constitutionalism,"* 27 AM. J. LEGAL HIST. 254 (1983); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975).

pretation had become so common, complained one skeptical scholar, that it had replaced the traditional view.[14]

If the great bulk of economic legislation passed muster, then what was the laissez-faire constitutionalism perceived by both contemporary critics of the courts and later historians, including revisionists? Melvin I. Urofsky, after studying Supreme Court and state court decisions of the Progressive era, suggested that it never existed; he concluded that the story of a reactionary Supreme Court was a myth created by muckraking writers who focused on decisions they disliked and ignored the majority of cases that sustained reforms.[15] Other historians have not gone so far. Paul Kens notes that the existence of laissez-faire constitutionalism cannot be proved or disproved simply by counting up cases.[16] Reformers attacked the Supreme Court, writes Kens, because the Court set up hoops for them to jump through, making itself the final arbiter of the reasonableness of legislation.[17] Kens concludes that the Supreme Court's narrow interpretation of the police power and its use of "substantive due process to review the content of state legislation," beginning in 1877, did indeed add up to "a revolution in constitutional law," a revolution influenced by "laissez faire individualism."[18]

Kens has expanded upon this theme in his biography of Supreme Court Justice Stephen J. Field.[19] According to Kens, Field represented the "radical individualist" as opposed to the "reformist" wing of the Jacksonian legacy.[20] Field believed that government should neither confer special privileges upon corporations nor inhibit the activities of corporations simply because they had grown powerful. Rejecting the assertion that Field felt ill at ease with corporate power, Kens argues that Field formulated substantive due process doctrine for the purpose of removing governmental obstacles to corporate conduct.[21]

William Wiecek, too, lends support to the idea that laissez-faire constitutionalism, with substantive due process as its "doctrinal credo," emerged in the late nineteenth century as a means of protecting business from governmental regulation.[22] Wiecek writes that the "legal classicism" of the time arose from a fear of disorder and social disintegration and concomitant threats to vested rights.[23] By the 1870s, the antebellum tradition of higher law in which courts invoked natural law to limit legislative power over property was defunct. In searching for constitutional text in which to anchor their control over legislatures, judges hit upon due process of law. State courts led the way between 1885 and 1900, but thereafter

14. *See* Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937*, 35 AM. J. LEGAL HIST. 70 (1991) [hereinafter Kens, *Source of a Myth*]. *See also* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 266-75 (1997) [hereinafter KENS, JUSTICE STEPHEN FIELD].

15. *See* Urofsky, *Myth and Reality, supra* note 12, at 69.

16. *See* Kens, *Source of a Myth, supra* note 14, at 72.

17. *See id.*

18. *Id.* at 77. Lawrence M. Friedman explains the "constitutional madness" of the late nineteenth century in similar terms. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 361 (2d ed. 1985).

19. *See* KENS, JUSTICE STEPHEN FIELD, *supra* note 14.

20. *Id.* at 9, 266-75.

21. *See* KENS, JUSTICE STEPHEN FIELD, *supra* note 14, at 8-9, 266- 75.

22. WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT 124 (1998).

23. *Id.* at 79-88.

retreated in the face of legislative resolve. However, the United States Supreme Court picked up the slack and enshrined substantive due process in federal constitutional law as a limitation on state regulatory power.[24]

There is a significant measure of truth in the new protection-of-business interpretation of laissez-faire constitutionalism and substantive due process, as there was in the old. Many businessmen and jurists feared the social turmoil and activist legislatures of the turbulent post-war period. Some courts displayed a conspicuous hostility toward certain types of economic legislation, particularly labor laws.[25] But the revisionist insight that laissez-faire constitutionalism originated in an older tradition of Jacksonian egalitarianism remains, in Wiecek's words, "valid beyond cavil."[26] Wiecek challenges revisionism as incomplete, not inaccurate.[27] Furthermore, despite the measure of truth in the protection-of-business theory, there is an explanation for the rise of substantive due process that has nothing to do with any antiregulatory animus on the part of the courts. It is based on a constitutional tradition of substantive judicial review.

Haines and Corwin both wrote in detail about the sources of substantive judicial review—the review by courts of the content of laws enacted in accordance with proper legislative procedure—locating them in early American constitutional thought.[28] Rather than seeing substantive due process as part of a larger tradition of substantive judicial review, however, they perceived a radical reinterpretation of due process. Some revisionists, on the other hand, have noted a continuity in due process thinking from pre-Civil War times to the postbellum era,[29] but even among revisionists there is a tendency to view late nineteenth-century substantive due process as innovative and in some instances pernicious. Herbert Hovenkamp relates substantive due process to a laissez-faire moral philosophy that predated the Civil War, but he does not question the novelty of substantive due process itself.[30] In his seminal article on Thomas M. Cooley and laissez-faire constitutionalism, Alan Jones sought to rehabilitate Cooley's reputation by dissociating him from later judges, especially Supreme Court Justice David J. Brewer, who "range[d] far afield in their definitions of 'due process of law.'"[31] More recently, Edward Keynes, while stressing the ancient English origins of substantive due process and the pre-Civil War appearance of the concept in a few American cases

---

24. *See id.* at 124-36.

25. *See* MORTON KELLER, AFFAIRS OF STATE 404-08 (1977); WIECEK, *supra* note 22, at 127-32; JACOBS, *supra* note 11, at 50-58, 64-85.

26. WIECEK, *supra* note 22, at 108.

27. *See id.*

28. *See* HAINES, *supra* note 2 at 340. *See generally* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

29. *See* BENEDICT, *supra* note 13, at 323-31; GILLMAN, *supra* note 13, at 53-60, 86-99, 106-07. James W. Ely, Jr., sees an antebellum substantive due process emerging from the concepts of vested rights, just compensation, and public purpose. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 (1999).

30. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 67-69, 171-82 (1991).

31. Jones, *supra* note 13, at 761. Jones characterized Justice Brewer as a defender of "class privilege and concentrated corporate power," *id.* at 752, but Brewer has since undergone a reinterpretation similar to the one Jones applied to Cooley. *See generally* MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837-1910 (1994).

and treatises, has regarded these appearances primarily as precursors of a phenomenon that flowered only after 1873.[32]

The aura of novelty fades, however, when substantive due process is seen as part of a larger tradition of substantive judicial review. By the middle of the nineteenth century, courts had grown accustomed to using judicial review to pass upon the political judgments of legislatures.[33] But courts did not employ judicial review to radically restructure government-business relations. Roscoe Pound posited the existence of a deeply rooted "taught legal tradition" in accordance with which judges sought to adjust human relations on the basis of principles and of rules logically derived from them.[34] Judges trained in the tradition made their adjustments incrementally, adapting the law to economic change gradually, without seeking to advance the interests of particular groups in society.[35] In a recent study focusing on grants of corporate charters, public aid to corporations in the form of subsidization and eminent-domain privileges, and lawsuits against corporations, Peter Karsten points out that nineteenth-century judges did not generally join in the popular and legislative "Hymn to Growth."[36] Believing that corporations required careful watching more than encouragement, the courts tended rather to affirm "ancient legal principles" in defense of "the public good."[37]

If judges generally shared a commitment to established legal principles and methods of deciding cases, a commitment that resisted social and economic pressures, then constitutional revolutions should have been rare, and the presumption should be against their occurrence. Was there, then, a judicial-review revolution in the era of laissez-faire constitutionalism, as has generally been maintained? That courts in the late nineteenth and early twentieth centuries engaged in substantive judicial review is beyond question. As Kens observes, the fact that courts let most laws stand does not mean that they refrained from reviewing their substance.[38] However, the exercise of this power was not a radical departure from judicial tradition. This becomes clear when one examines all the guises in which substantive judicial review appeared. Most scholars have identified substantive judicial review with substantive due process of law, which placed certain fundamental rights beyond the reach of legislative action. But due process was only one constitutional basis for judicial examination of the substance of legislation. Anyone who looks only at due process doctrine will miss the other forms substantive judicial review took, from the early nineteenth century through the twentieth, and will

---

32. *See* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY 6-14, 20-29, 100-28 (1996).

33. *See* William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

34. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 81 (1938).

35. *See* POUND *supra* note 34, at 81-137; Roscoe Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 366-68 (1940).

36. Peter Karsten, *Supervising the "Spoiled Children of Legislation": Judicial Judgments Involving Quasi-Public Corporations in the Nineteenth Century U.S.*, 41 AM. J. LEGAL HIST. 315, 315 (1997).

37. *Id.* 315-16. William J. Novak has also described an American legal tradition based upon the maxim *salus populi suprema lex est*, but he sees a radical break with that tradition in the rise of substantive due process, beginning with liquor-law cases in the 1850s and building up to a profound transformation of basic concepts of law and society after 1877. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 184-88, 244-48 (1996).

38. *See* Kens, *Source of a Myth*, *supra* note 14, at 72, 77-78, 97.

therefore likely understate the venerability of this judicial power and overestimate the "revolution" in postbellum constitutional law.

Furthermore, students of the history of substantive judicial review must modify their method of analyzing the subject. They generally base their analyses on selected cases from state courts around the country, or on decisions of the United States Supreme Court, or on judicial biographies. But studying substantive judicial review through choice examples from scattered jurisdictions can make the exceptional appear to be the norm. A concentration on the Supreme Court can be misleading, because the Supreme Court had few occasions to consider regulatory legislation before the Civil War. Biographical studies focus on the thought of individuals, who may or may not be representative. In this Article, I use a different approach, examining more than a century's worth of decisions of the Supreme Judicial Court of Maine. Such an analysis of cases in an individual jurisdiction over an extended period of time avoids the problem of selectivity and likely distortion inherent in other methodologies.

A single study of this sort has its own problem of selectivity, of course, and therefore must be suggestive rather than conclusive. However, Maine is an appropriate jurisdiction with which to start. For much of the nineteenth century, Maine was a middle-sized state in both geographical extent and population. Even at century's end, by which time the addition of large Western and Midwestern states had significantly lowered Maine's rankings, Maine exceeded ten other states in area and fourteen in population.[39] Economically, nineteenth-century Maine presented the intriguing picture of a long-settled, developed eastern state with a frontier as rough-and-ready as any found in the west, although its folk heroes were lumberjacks and sailors rather than cowboys and sodbusters. Maine's forests, rivers, and Atlantic shoreline made it the nation's leading lumbering and shipbuilding state for decades, and one of the great commercial fishing states as well. Maine did not develop heavy industry to match that of the mid-Atlantic and Midwestern states, and the increased use of steel contributed to the decline of Maine's shipbuilding industry as the century closed. However, the pulp and paper industry took its place. Maine ranked seventh in papermaking in 1879, third in 1900.[40] Light industry played a major role in Maine's economic life; around 1900, Maine was among the leaders in production of woollen and cotton goods, shoes, and canned and preserved fish. The state ranked twenty-first among the forty-five states in value of manufactured goods produced.[41]

Maine's major metropolis was Portland, which in the middle of the century aspired to rival Boston as a commercial center. Although the grandiose dreams of John A. Poor and other boosters never came to fruition, Portland did become a major regional trading center after the completion, with the aid of municipal credit, of the Grand Trunk railway system in the 1850s. In the 1890s Portland also became the hub of a booming tourist business. The hotel, convention, and retail

39. Maine's territorial ranking at various times can be extrapolated from generally available figures on states' sizes and their dates of admission to the Union. *See* ENCYCLOPEDIA BRITANNICA, *Maine*, 689 (14th ed. 1964) (regarding population statistics)

40. *See generally id. at 690-91* (discussing the evolution of and trend in Maine's economic growth).

41. *See* G. W. Stephens, *The Industrial Development of Maine*, *in* MAINE 661-685 (Louis C. Hatch ed., 1973) (1919). *See also* ENCYCLOPEDIA BRITANNICA, *Maine*, 434 (11th ed. 1961).

trades flourished with the influx of summer visitors. At the same time, Portland superseded Lewiston as Maine's chief manufacturing city; industrial expositions and other forms of promotion helped continue a modest growth in light industry into the twentieth century.[42]

Maine's state and local governments reflected national trends in the ups and downs of business promotion, especially in the subsidization of railroads after the Civil War. Between 1830 and 1889, the state legislature enacted seventy-seven special laws authorizing local governmental aid to railroads; forty-three were passed in the years 1866-1873.[43] Challenges to governmental attempts to foster industry after the Civil War led the Maine court to issue several classic laissez-faire opinions, and during the Progressive era, the court had to deal with labor and environmental laws and the regulation of utility rates. Maine is therefore constitutionally, territorially, demographically, and economically an excellent subject for a case study of substantive judicial review.

II. SUBSTANTIVE JUDICIAL REVIEW IN MAINE BEFORE 1868

Antebellum courts overturned legislation reluctantly, but they took for granted their power to review its content. Even in *Commonwealth v. Alger*,[44] in what is generally regarded as a classic argument for a wide-ranging police power, Chief Justice Lemuel Shaw of Massachusetts repeatedly wrote that the legislature's power was to enact *reasonable* laws, not *any* laws that might regulate property.[45] Although Shaw did not say explicitly that courts had the power to strike down unreasonable laws, his emphasis on the constitutional limitation of reasonableness would have been meaningless if courts had lacked the power. As Shaw had written in an earlier opinion, in a limited government with a written constitution, the judiciary clearly had the authority "to declare that a particular enactment is not warranted by the power vested in the legislature, and therefore . . . is . . . void."[46] Courts based their authority to review the content of legislation in part on the principle that government could act only for the general welfare and not for the special benefit of particular private interests.[47] For example, when confronted with a challenge to a municipal bylaw that prohibited unlicensed individuals from carting refuse on the grounds that it was monopolistic, the Supreme Judicial Court of Massachusetts stated: "If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good."[48] After explaining how reasonableness should be determined, the court found the bylaw to be reasonable.[49]

---

42. *See* 2 EDWARD CHASE KIRKLAND, MEN, CITIES AND TRANSPORTATION 192- 222 (1948); Robert H. Babcock, *The Rise and Fall of Portland's Waterfront, 1850-1920*, 22 ME. HIST. SOC'Y Q. 63, 79-87 (1982).

43 . *See* Carter Goodrich, *Local Government Planning of Internal Improvements*, 66 POL. SCI. Q. 411, 414 (1951).

44. 61 Mass. (7 Cush.) 53 (1851).

45. *See id.* at 85-86.

46. Wellington et al., 33 Mass. (16 Pick.) 87, 96 (1834). *See also* Thorpe v. Rutland & Burlington Railroad, 27 Vt. 140, 154 (1854) (a leading police powers case holding that the legislature was competent to adopt "unjust or unreasonable laws" but explicitly finding that the challenged statute was reasonable).

47. *See* GILLMAN, *supra* note 13, at 49-53.

48. Vandine, 23 Mass. (6 Pick.) 187, 190 (1828).

49. *See id.* at 190-92.

Courts also relied on the theory that American legislatures had only such powers as were delegated by the constitutions under which they operated. In the celebrated case of *Taylor v. Porter*,[50] in which the New York court overturned a statute that granted eminent-domain privileges to builders of private roads, the court observed that the legislature was not supreme and that when it stepped beyond the bounds established by the constitution, its acts were void.[51] The majority and dissenting judges in *Taylor* agreed that private property could not be taken for private use under the eminent-domain power; in disagreeing over whether the taking of property for private roads served a public purpose, both sides tacitly assumed that the power to decide whether a purpose was public rested with the judiciary. The New Jersey court faced the issue directly, explicitly rejecting the contention that the legislature had the final say on whether a particular purpose was public.[52]

The majority in *Taylor* also suggested that a proper regard for natural rights justified substantive judicial review.[53] The Supreme Court of Indiana, nullifying a statute in 1855, squarely rested its power of substantive judicial review on natural-rights theory.[54] Several courts, most famously the New York court in *Wynehamer v. People*,[55] invoked substantive due process to invalidate laws before the Civil War.[56]

Between the time Maine attained statehood in 1820 and the adoption of the Fourteenth Amendment in 1868, the Supreme Judicial Court of Maine asserted or implied that it had the power to review the substance of legislation on all these grounds. The judges who rendered the decisions hailed from a variety of social and political backgrounds.[57] Between 1820 and 1852, when the court consisted of three and then four members, ten men served as justices.[58] Most were Democrats, some of them ardent and politically active Jacksonians, but at least two had been Federalists in Congress and a third was a Whig. Most came from comfortable economic circumstances, the sons of prosperous farmers or merchants, but Ezekiel

---

50. 4 Hill 140 (N.Y. 1843).

51. *See id.* at 148.

52. *See* Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 727 (1832).

53. *See* Taylor v. Porter, 4 Hill at 146.

54. *See* Beebe v. State, 6 Ind. 501, 502 (1855).

55. 13 N.Y. 378 (1856).

56. *See id.* at 383. *See also* Benedict, *supra* note 13, at 326 n.139, and GILLMAN, *supra* note 13, at 53-54 (regarding citations to other cases).

57. The biographical information on Maine judges here and elsewhere in this Article comes from several sources. Charles Hamlin published a series on the Supreme Judicial Court, with profiles of many of the judges, under the title *The Supreme Court of Maine*. *See* Charles Hamlin, *The Supreme Court of Maine* (pts. 1-6), *in* 7 THE GREEN BAG: AN ENTERTAINING MAGAZINE FOR LAWYERS 457 (1895), 7 THE GREEN BAG 504, 7 THE GREEN BAG 553, 8 THE GREEN BAG 14 (1896), 8 THE GREEN BAG 61, 8 THE GREEN BAG 111. *The Report of the Maine State Bar Association for 1920 and 1921* includes informative reminiscences and a list of all the judges to that point with citations to proceedings held upon their retirements or deaths. *See* MAINE STATE BAR ASS'N, THE FIRST CENTURY OF THE JURISPRUDENCE OF THE STATE OF MAINE 242-51 (1921). The *American National Biography*, the *Dictionary of American Biography*, and the *National Cyclopedia of American Biography* contain entries for some of the judges, the first and second with citations to sources. *See* AMERICAN NATIONAL BIOGRAPHY (1999); DICTIONARY OF AMERICAN BIOGRAPHY (1928-36); NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY (1898-1984).

58. *See* Hamlin (pt.1), *supra* note 57, at 462-64.

Whitman, the third chief justice, had been orphaned as a young child and raised in poverty.[59]

After statehood, the original court consisted of Chief Justice Prentiss Mellen, a Federalist and leader of the Portland bar, and two Republican associates, William Pitt Preble and Nathan Weston, Jr.[60] Mellen, the son of a well-to-do Congregationalist minister, received the appointment as a reward for supporting statehood for the strongly Jeffersonian District of Maine. Weston's father was active in commerce and politics, but Weston himself kept a low political profile. Preble loved politics more than law. After abandoning the Federalists in 1814, he held various public positions, though he was too irascible to reach high elective office, and became an avid Jacksonian. Preble resigned from the bench in 1828, to be replaced by another Jacksonian politician, Albion K. Parris. Weston succeeded Mellen as chief justice in 1834.[61] Democrats predominated on the court until the political realignment of the 1850s.

With the judicial reorganization of 1852, the court grew to seven members;[62] it would later fluctuate between seven and eight. The turbulent politics of the 1850s intruded upon the court, causing instability in the middle of the decade. By 1857, however, the new Republicans had acquired a strong grip on every branch of state government, which they would hold for decades. After Richard Rice's resignation in 1863, there would be no more Democrats on the court until the appointment of Artemas Libbey in 1875, when the parties agreed that the minority should be represented on the bench.[63] The Republicans were a varied lot, however, made up of ex-Whigs and ex-Democrats from every level of society. They included former Whig governor Edward Kent, son of a wealthy Federalist merchant of New Hampshire, and Jonathan G. Dickerson, scion of a prominent family of New Hampshire Democrats and a former leader of the Wildcat faction of the party in Maine; Charles Danforth and Charles G. Walton, self-made men of humble birth who had worked their way up through the ranks in law and politics; and Woodbury Davis and Seth May, temperance and antislavery activists. The differing political outlooks of this diverse group of men sometimes surfaced in their judicial opinions, but all the justices shared the "taught tradition"[64] of the law, including the evolving tradition of judicial review.

Two early decisions laid the foundation for the jurisprudence of judicial review in Maine. In both *Proprietors of the Kennebec Purchase v. Laboree*[65] and *Lewis v. Webb*,[66] the legislature sought to undo judicial decisions through retroactive laws. The court had no difficulty striking down the acts with reasoning that applied equally to substantive and procedural challenges to state laws. Chief Justice Mellen, the author of both opinions, adverted to general principles of justice, the declaration of natural rights in the state constitution, and the constitutional provision that restricted legislative power to the adoption of reasonable laws.[67]

59. *See id.* at 470-72.
60. *See id.* at 462-65.
61. *See id.* at 467.
62. *See id.*
63. *See id.* at 464.
64. POUND, *supra* note 34.
65. 2 Me. 275 (1823).
66. 3 Me. 326 (1825).
67. *See* Proprietors of the Kennebec Purchase v. Laboree, 2 Me. at 288-92; Lewis v. Webb, 3 Me. at 336-37.

He regarded the definition of reasonableness as a matter of natural law, judicially discovered, and in one of the cases explicitly held that the special legislative act on behalf of a litigant was "neither just or reasonable."[68] (Preble, who missed the argument of this case, took the pains to append a note on the importance of the principles involved and his concurrence with Mellen's opinion.)[69]

The measures tested in *Laboree* and *Lewis* were blatant attempts by the legislature to upset settled rights and to intervene in private disputes through retroactive laws. When faced with challenges to regulatory acts, however, the court almost always deferred to the legislature. *Lunt's case*[70] involved a challenge to the state's police power to regulate the sale of liquor. The defendant claimed, among other things, that a statute prohibiting the sale of alcoholic beverages without a license violated his natural right, protected by the Maine constitution, to acquire, possess, and protect property.[71] Focusing on the legislative power to enact reasonable laws, the court thought it "strange" that anyone would doubt the legislature's authority to license sellers of so baleful a commodity as liquor.[72] In any event, the reasonableness of a law was a matter for legislative judgment. The court would "not say that there may not possibly be exceptions to the generality" of this proposition, but it was "not disposed to consider them as among the probabilities of legislation."[73]

In *Lunt's case,* the Maine court laid the foundation for a practically unlimited police power, but it also appeared to reserve the right to invalidate unreasonable police legislation in extreme cases. Other judicial statements in support of a far-reaching police power may be found in cases dealing with railroad regulations,[74] improvements to navigable rivers,[75] and liquor laws.[76] There appears to be only one case before 1868 in which the court questioned the validity of a law enacted under the police power.[77]

As noted earlier, review of the reasonableness of police regulations was only one of several forms of substantive judicial review. While the Maine court generally deferred to the legislature's police power, keeping the right of substantive review in reserve and almost out of sight, in other areas it clearly claimed the power to review the substance of legislation. While the court sustained the exercise of the police power against claims that regulation of property amounted to a

---

68. Lewis v. Webb, 3 Me. at 336. In *Lewis v. Webb,* the court based its decision primarily on the separation of powers provided for in the Maine constitution. It held that property could not be transferred from one person to another without either the consent of the owner or the judgment of a court. *See id.* at 331-37.

69. *See id.* at 337.

70. 6 Me. 412 (1830).

71. *See id.* at 412-13.

72. *Id.* at 414.

73. *Id.*

74. *See, e.g.,* Inhabitants of Veazie v. Mayo, 45 Me. 560, 564 (1858).

75. *See, e.g.,* Moor v. Veazie, 32 Me. 343, 358 (1850).

76. *See, e.g.,* Gray v. Kimball, 42 Me. 299, 307 (1856); Preston v. Drew, 33 Me. 558, 560 (1852).

77. *See* State v. Noyes, 47 Me. 189, 215-17 (1859) (declaring unconstitutional a statute intended to facilitate the change of trains by passengers on the grounds that the legislature could pass laws for the public convenience, as opposed to public safety, only when private rights would not be impaired).

taking without compensation in violation of the state constitution's eminent domain provision,[78] the justices unequivocally insisted that the judiciary and not the legislature had the authority to determine whether a particular taking of private property was for a public purpose. Even in *Moor v. Veazie*,[79] where the court proclaimed that it could not question the reasonableness of legislation, the justices reserved the power "to examine and decide upon" the character of a taking and announced that it "would not be bound by any declaration of the Legislature, that the property was taken for public use."[80]

The definition of "public use" or "public purpose" played an important role in the rise of laissez-faire constitutionalism, often in the context of mill acts. Some of these laws dated back to the seventeenth and early eighteenth centuries. They generally required that gristmill owners grind grain for all comers, regulated the rates millers could charge, and granted mill owners eminent domain privileges.[81] The laws protected and encouraged mill owners by allowing them to take the property of others across the stream from their own for dam construction, or to overflow the lands of others by backing up the streams, without fear of ruinous lawsuits.[82] They were justified on grounds of public necessity.[83] For example, the preface to the Virginia Act of 1667 declared that:

> [I]t would conduce much to the convenience of this country, both for the grinding of corne and of neere roads if mills were erected at convenient places, which diverse persons would willingly doe, if not obstructed by the perverseness of some persons not permitting others, though not willing themselves to promote so publique a good.[84]

By 1830, however, some of the mill acts, and corporate charters that granted similar privileges, were being used to encourage manufacturing, and courts and legal commentators had begun to question whether the acts and charters filled a public need in the more developed society of the nineteenth century.[85] After 1830, profligate public investment in private canal and railroad companies, the mismanagement of many ventures, and a dramatic rise in public debt led to a wave of state constitutional amendments prohibiting governmental aid to private enterprise.[86] In Maine, an amendment of 1848 prohibited the state from lending its credit to private corporations, though this did not stop municipalities from investing ex-

78. *See* Wadleigh v. Gilman, 12 Me. 403 (1835). The court later held that virtually nothing short of a deprivation of title constituted a "taking" under the eminent-domain provision. *See* Cushman v. Smith, 34 Me. 247 (1852).

79. 32 Me. 343 (1850).

80. *Id.* at 361.

81. *See, e.g.*, A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH CAROLINA: NOW IN FORCE AND USE (1751), *reprinted in*, 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA 1669-1751, 18-19 (1977)). *See also* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 16-19 (1885).

82. *See* 1 NICHOLS, THE LAW OF EMINENT DOMAIN §§ 1.22[8]-1.22[11] (1999).

83. *See* Joseph K. Angell, *The Law of Water Privileges*, 2 AM. JURIST & L. MAG. 25, 30-31 (1879).

84. *See* 2 WILLIAM WALLER HENING, THE [VIRGINIA] STATUTES AT LARGE 260-61 (1810).

85. *See, e.g.*, Stowell v. Flagg, 11 Mass. 364 (1814); Wolcott Woollen Mfg. Co. v. Upham, 22 Mass. 292 (1827). *See also Restrictions Upon State Power in Relation to Private Property* (pt. 4), 1 U.S.L. INTELLIGENCER & REV. 91, 95 (1829); Angell, *supra* note 83, at 30-32.

86. *See* CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890, at 51-165 (1960).

travagantly in railroad companies. (In 1878, another amendment would place a ceiling on municipal debt.)[87]

In this atmosphere, the Maine court came close to overturning the State's Mill Act, which, said the justices, "push[ed] the power of eminent domain to the very verge of constitutional inhibition."[88] The Act authorized mill owners to build dams that could flood other people's property and established a procedure to determine yearly damages.[89] In *Jordan v. Woodward*,[90] the owner of a sawmill claimed the incidental right to use the pond created by his dam.[91] When competitors who owned the flooded land tried to use the mill pond for their own purposes, preventing the miller from keeping his logs there, the miller sought an injunction.[92]

Neither side actually contested the constitutionality of the Mill Act, but the court, growing wary of excessive governmental aid to private business interests, raised the issue on its own.[93] The court noted that early in the country's history, when mills were public necessities and capital was scarce, special legislation to protect millers had been justified.[94] But times had changed, and if the question were new, it might well be doubted that the Mill Act was consistent with the eminent domain clause of the state constitution.[95] Although the court would not overturn an act so long acquiesced in by the citizens of Maine,[96] neither would it interpret the Act's provisions to extend the privilege of mill owners to use the property of others. The court refused to enjoin a landowner from using his property in any manner that did not affect the miller's statutory right to control the mill stream's water level.[97]

By stating that the Mill Act had once been justified but had lost its warrant due to changing economic circumstances,[98] the court was really questioning the reasonableness of thinking that the Act still served a public purpose. In doing so, the court engaged in reasoning of the type normally associated with legislative deliberations. And although this particular Act enjoyed the shield of "great antiquity,"[99] the court indicated that new legislative efforts to aid private enterprise would be closely scrutinized and possibly invalidated.[100]

The Maine court set a precedent of sorts with *Jordan v. Woodward*. After the Civil War, as judicial deference to legislatures appeared to be reaching a limit, several state courts severely criticized the mill acts, either striking them down or

87. *See id.* at 132-34. *See also* KIRKLAND, *supra* note 42, at 466-93; MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 144, 148 (1992).

88. Jordan v. Woodward, 40 Me. 317, 323 (1855). The case was decided by Democrat Richard Rice, who wrote the opinion, Republican John Appleton, a former Whig with pronounced Jacksonian proclivities on legal and economic matters, and Whig John Tenney, who concurred in the result. *See supra* note 57.

89. *See* Jordan v. Woodward, 40 Me. at 318.

90. 40 Me. 317 (1855).

91. *See id.* at 318.

92. *See id.* at 317.

93. *See id.* at 323.

94. *See id.*

95. *See id.*

96. *See id.* at 324.

97. *See id.* at 325.

98. *See id.* at 323-24.

99. *Id.* at 324.

100. *See id.* at 323-24.

upholding them only because of their age or public acquiescence.[101] The Maine court also anticipated decisions involving the validity of expenditures of public funds, an issue that became controversial with the public financing of canals and railroads. Pennsylvania Chief Justice Jeremiah Black's opinion in *Sharpless v. Mayor of Philadelphia*[102] is the best-known exposition of the principle that tax revenues could be used only for public purposes, but the Maine court had taken it for granted in *Hooper v. Emery*[103] sixteen years earlier. A statute of 1837 had authorized towns to use their portions of surplus federal funds returned to the states by Washington as if the money had been raised by taxation.[104] One town voted to distribute its share among local families on a per capita basis.[105] The court, in an opinion by former Democratic United States Senator Ether Shepley, held that such a distribution would violate "'principles of moral justice'"; if sustained, it would justify the use of the taxing power to equalize the distribution of property, and that in turn would subvert "individual industry and exertion" and render private property insecure, in violation of the natural rights provision of the Maine Constitution.[106] Shepley also analogized the taxing power to eminent domain.[107] In language foreshadowing that used in postbellum Maine decisions that have been cited as classic examples of laissez-faire constitutionalism, Shepley declared that "[n]o public exigency can require, that one citizen should place his estates in the public treasury for no purpose, but to be distributed to those, who have not contributed to accumulate them, and who are not dependant [sic] upon the public charity."[108]

The immediate impact of *Hooper v. Emery* was limited. The statute itself was not challenged, and in 1838 the legislature deleted the reference to taxation and expressly authorized a per capita distribution of the surplus funds.[109] The significance of *Hooper,* as of *Jordan v. Woodward,* lay in its articulation of the principle that the substance of laws enacted pursuant to recognized legislative powers was subject to judicial review under the public purpose doctrine.

Decisions of the Maine court before 1868 also foreshadowed substantive judicial review on due process grounds. Although the Maine Constitution did not include the term "due process" until 1963, it did ensure that no defendant in a criminal proceeding would "be deprived of his life, liberty, property or privileges, but by the judgment of his peers or the law of the land."[110] Nineteenth-century courts regarded "law of the land" and "due process of law" as equivalent expressions.

---

101. *See The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L. J. 599, 605 (1949); 3 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 2135-41 (1904).

102. 21 Pa. 147 (1853).

103. 14 Me. 375 (1837).

104. *See id.* at 376.

105. *See id.* at 379.

106. *Id.* at 380.

107. *See id.*

108. *Id.*

109. *See* P.L. 1838, ch. 311, § 3.

110. ME. CONST. art. I, § 6. The Maine Constitution also had a clause guaranteeing a "remedy by due course of law" to every individual injured "in his person, reputation, property or immunities." ME. CONST. art. I, § 19. Despite a hint in *Lewis v. Webb,* 3 Me. 326, 335 (1825), that this provision might be interpreted substantively, the little construction it subsequently received was strictly procedural in nature.

It has been said that "[p]rocedural due process regulates the action of courts; substantive due process scrutinizes the acts of legislatures."[111] As the Maine court's decision in *Inhabitants of Saco v. Wentworth*[112] shows, however, the distinction was not always so clear. In *Wentworth*, the defendant had been convicted by a justice of the peace of selling liquor illegally.[113] A statute precluded the defendant from appealing to a jury court until he had posted bond.[114] The court ruled that the statute contravened the Law-of-the-Land Clause.[115] The law of the land, said the court, "does not mean an Act of the Legislature; if such was the true construction, this branch of the government could at any time take away life, liberty, property and privilege, without a trial by jury."[116]

Wentworth clearly involved a procedural matter, the trial rights of a criminal defendant. In striking down a legislative act as a deprivation of a fundamental right, however, the court used language later associated with substantive due process.[117] If due process could be used to protect the fundamental rights of criminal defendants from legislative interference, it could also be used to guard the vested property rights of law-abiding citizens.

The court made the transition ten years later in *Adams v. Palmer*.[118] A widow who as a minor had released her dower during marriage subsequently sought to recover it.[119] At the time she commenced her action, releases by minors were voidable, but while the suit was pending, the legislature passed a law providing that the "release of dower by a married woman of any age, now or hereafter made, ... shall be valid."[120] The court ruled that the act, if applied to the plaintiff, would unconstitutionally deprive her of her vested property right.[121] If the legislature could take a widow's right to recover dower and give it to the reversioner, wrote Chief Justice John Appleton:

> [T]he tenure by which her rights—by which all rights are held, depend, not on the law as existing when they became vested, but upon the fluctuating will of a legislative assembly. No rights are or can be secure. The arbitrary will of the Legislature controls alike the past and the present, as well as establishes the law for the future.[122]

Ignoring the criminal context of the Law-of-the-Land Clause in the Maine Constitution, the court in *Adams* cited *Wentworth* for the principle that this provision protected vested rights in property. The court observed that "law of the land" did "not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory .... The people would be made to say to the two houses, ... you shall do no wrong unless you choose to do it."[123] In principle, *Adams v. Palmer* closely resembled that "locus classicus"[124]

---

111. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 481 (1982).
112. 37 Me. 165 (1853).
113. *See id.*
114. *See id.* at 166-67.
115. *See id.* at 176.
116. *Id.* at 171.
117. *See id.* at 172-73.
118. 51 Me. 480 (1863).
119. *See id.* at 172-73.
120. *Id.* at 488-89 (quoting P.L. 1863, ch. 215, § 1).
121. *See id.* at 487.
122. *Id.* at 490.
123. *Id.* at 490-91 (quoting Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843)).
124. RAOUL BERGER, GOVERNMENT BY JUDICIARY 254 (1977).

of substantive due process, *Wynehamer v. People*,[125] in which the New York court treated due process as a substantive limitation on the police power.[126]

As cases from *Laboree* to *Adams* reveal, the Supreme Judicial Court of Maine found various doctrinal underpinnings for substantive judicial review before the adoption of the Fourteenth Amendment in 1868. For all their deference to legislative authority and wisdom, the justices never relinquished the right to pass on the substance of at least some types of legislation.

Wentworth and *Adams* may hold additional significance as well. According to John E. Semonche and others, the economic due process cases of the late nineteenth century paved the way for the modern protection of fundamental rights via substantive due process.[127] But the Maine cases suggest that substantive due process protection of property and non-property rights developed simultaneously or even in the reverse order.

III. THE FORMATIVE PERIOD OF LAISSEZ-FAIRE CONSTITUTIONALISM, 1868-1890

During the years that historians have regarded as the formative period of laissez-faire constitutionalism, the Supreme Judicial Court of Maine reaffirmed its long-standing power to review the substance of legislative acts when they infringed on the fundamental rights of citizens. The justices continued to find this power in the public purpose doctrine, whether applied to taxation or to eminent domain, in the natural rights provision of the state constitution, and in due process of law. Those statutes that the court invalidated often, though not always, dealt with governmental attempts to subsidize business enterprises.

The judges who issued these decisions remained a mixed group, though perhaps less so than earlier.[128] Republicans controlled every branch of government almost continuously from the Civil War through the Progressive era, but they came from a variety of social and educational backgrounds. There were men like Chief Justice John A. Peters, the son of a wealthy merchant and shipbuilder and a graduate of Yale, who sat on the bench for twenty-seven years, and Peters' nephew, Andrew P. Wiswell, educated at Bowdoin, whose father was a leader of the bar and who succeeded Peters as chief justice. But there were also men such as Artemas Libbey, Thomas Haskell, Arno King, Sewall Strout, William Fogler, and George Haley, most of them farm boys, all of limited means, all educated in the common schools of their towns, only some of whom made their way to college. In the cases cited in this Article in which these men, whether of privileged or humble background, took part, there were almost no dissents.[129]

In the historiography of laissez-faire constitutionalism, 1868 is a landmark year. It was then that the Fourteenth Amendment, with its due process clause

125. 13 N.Y. 378 (1856).

126. *See id.* at 405-06.

127. *See* SEMONCHE, *supra* note 12, at 425; KEYNES, *supra* note 32, at 212-15.

128. *See supra* note 57 and accompanying text.

129. Maine's judges had no qualms about dissenting when they thought it necessary, but the degree of unanimity on the issues discussed in this paper is startling. In all the cases cited, only a few produced dissents. *See, e.g.*, Opinions of the Justices, 44 Me. 505 (1857) (responding to the *Dred Scott* case); True v. International Tel. Co., 60 Me. 9 (1872), *infra* text accompanying notes 149-55; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473 (1935), *infra* text accompanying notes 197-200.

applicable to the states, became a part of the U.S. Constitution. It was also in 1868 that Judge Thomas M. Cooley's *Constitutional Limitations* appeared in print.[130] According to the traditional view of laissez-faire constitutionalism, Cooley's treatise set forth a substantive definition of due process and supplied "laissez-faire capitalism . . . with a legal ideology . . . ."[131]

Soon after the publication of Cooley's book, the Maine court produced three opinions that historians have seen as classic, pioneering expressions of laissez-faire constitutionalism, all of them written by Chief Justice John Appleton.[132] Appleton's devotion to laissez-faire economic principles is beyond dispute. But neither he nor his associates on the Supreme Judicial Court subordinated constitutional doctrine to business interests or used the power of judicial review to restrict the regulatory power of the legislature.

The laissez-faire opinions of the early 1870s appeared at a time when state governments throughout the nation were granting more and more special assistance to private business enterprise.[133] In Maine, for example, the legislature authorized towns to grant tax exemptions to manufacturing companies, the governor urged state aid to industry, and Portland embarked upon a decade-long debacle in railroad finance.[134]

On a smaller scale, the residents of the Town of Jay voted in 1870 to loan $10,000 to private entrepreneurs to induce them to move their new sawmill and box factory to the town and set up a grist mill.[135] The town needed legislative authorization to implement its decision.[136] In 1871, the Supreme Judicial Court, in an advisory opinion, emphatically denied that the legislature had the constitutional power to permit towns to aid private manufacturers by gifts or loans.[137] The legislature nevertheless authorized the Jay loan just fifteen days later.[138] A group of the town's taxpayers thereupon brought suit to prevent the town from issuing bonds to finance the loan.[139]

In *Allen v. Inhabitants of Jay*,[140] the court declared the authorizing act unconstitutional on several grounds. It found that manufacturing was not a public purpose for which private property could be taken, whether through taxation or eminent domain.[141] It also relied upon Maine's constitutional guarantee of the natural rights of "acquiring, possessing and protecting property."[142] How can property be protected, asked Chief Justice Appleton, if the legislature can authorize the

130. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (1868).

131. TWISS, *supra* note 10, at 18.

132. *See* Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62 (1873); Allen v. Inhabitants of Jay, 60 Me. 124 (1872); Opinions of the Justices, 58 Me. 590 (1871).

133. *See* Goodrich, *supra* note 43, at 430-33.

134. *See* KIRKLAND, *supra* note 42 at 466-68, 478-86. *See also* EDWARD E. CHASE, MAINE RAILROADS 52-58 (1926).

135. *See* Allen v. Inhabitants of Jay, 60 Me. at 125.

136. *See id.* at 127.

137. Opinions of the Justices, 58 Me. 590, 598 (1871).

138. *See* Allen v. Inhabitants of Jay, 60 Me. at 127.

139. *See id.* at 125.

140. 60 Me. 124 (1872).

141. *See id.* at 130.

142. ME CONST. art. I, § 1. *See* Allen v. Inhabitants of Jay, 60 Me. at 142.

transfer of the property of all to a favored few via taxation and subsidization?[143] "All security of private rights, all protection of private property is at an end," he declared, "when the power is given to a majority to lend or give away the property of an unwilling minority."[144] Finally, Chief Justice Appleton, who in *Adams v. Palmer*[145] had given a substantive twist to Maine's law-of-the-land clause,[146] invoked that provision again in the Jay case. This clause, he argued, was meant to protect the individual from "'the arbitrary exercise of the powers of government.'"[147] What could be more "arbitrary than the enforced collection of money from one man to loan the same to another?"[148]

Soon after *Allen v. Inhabitants of Jay,* the court unanimously struck down tax exemptions authorized by the legislature to encourage certain kinds of enterprise. In *Brewer Brick Company v. Brewer,*[149] the court observed that an exemption for one individual or corporation meant the imposition of taxes to the extent of the exemption on the rest of the population, forcing them "to add to the gains of a capitalist without participating therein."[150] "It can never be admitted," declared the justices, "that the constitution of this State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few . . . ."[151]

In *Allen v. Inhabitants of Jay* and *Brewer Brick Company v. Brewer,* the court struck down legislative policies intended to foster industry through loans of public funds and tax exemptions for private enterprises. These decisions reflected the justices' commitment to equality, not to the protection of business interests. But whatever the justices' motivations might have been, and whatever constitutional hooks they might have found on which to hang their decisions, they were engaging in substantive judicial review.

There was one other laissez-faire opinion at this time that merits mention. The case of *True v. International Telegraph Co.*[152] arose when a businessman lost a profit because his telegram accepting a contract offer, sent at the cheaper night rate, was not delivered.[153] The telegraph company had included a clause in its telegram blank that essentially exempted it from liability for failure to deliver night messages.[154] Chief Justice Appleton, noting that "the general liberty to contract is the highest policy," thought the clause enforceable, but not one other member of

143. *See* Allen v. Inhabitants of Jay, 60 Me. at 134.

144. *Id.*

145. 51 Me. 480 (1863).

146. *See id.* at 490.

147. Allen v. Inhabitants of Jay, 60 Me. at 138 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

148. *Id.* Of the justices who participated in *Allen,* all but one concurred in Appleton's opinion. Joseph G. Dickerson concurred in the result for the reason stated in his response to the legislature's inquiry of 1871. *See* Opinions of Justices, 58 Me. 590, 600-06 (1871). There, he had found sanction for the public purpose doctrine in the constitution's requirement that legislation be for the defense or "for the benefit of the people of this State." *Id.* at 601. Laws had to be for the direct benefit of the general public, he said, not for the pecuniary benefit of a select group. *See id.* at 602. A municipality could not constitutionally impose a tax "to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom." *Id.* at 603.

149. 62 Me. 62 (1873).

150. *Id.* at 75.

151. *Id.* at 76.

152. 60 Me. 9 (1872).

153. *See id.* at 10-11.

154. *See id.* at 11.

the court agreed.[155] To the majority, freedom of contract meant little when the lack of competition deprived the public of bargaining power. The majority found telegraph companies to be quasi-public enterprises and the reasonableness of their regulations a matter for the courts and not the companies to decide.[156] And this regulation, said the court, was unreasonable.[157]

The telegraph case did not involve a legislative measure, but it indicates a propensity on the part of a "laissez-faire court," the same court that rendered the *Allen* and *Brewer* decisions, to exercise judicial authority to protect the public from corporate power. Had the exculpatory clause been prohibited by law, even Appleton probably would have upheld the act. In his dissent, he observed that the clause did not conflict with the statutes regulating telegraph companies.[158] A few years later, in the case of *Meader v. White*,[159] he sustained a statute that infringed on liberty of contract by making contracts formed on Sundays unenforceable.[160] In this case, the defendant had refused to pay back money borrowed on a Sunday.[161] "The moral obligation to repay money loaned is the same, whether the loan be made on one day or another," wrote Appleton.[162] But, he added, it was an "unfortunate condition" that the law refused "to aid in the enforcement of a debt justly due" and the defendant was thus "rewarded for his wrong."[163]

When faced with challenges to regulatory legislation, Maine's court, like most courts of the late nineteenth century, interpreted legislative powers over business enterprise very broadly. When the state's dominant railroad line, the Maine Central, based a claim to tax exemptions on the charter rights of several older corporations from which it had been formed by consolidation, the justices vigorously sustained the taxing power of the state.[164] Later, when the Boston & Maine objected to a statute requiring it to build and maintain a highway crossing at its own expense, the court declared: "Corporations created for public purposes and invested with large powers as railroad corporations are, can properly be required to do any reasonable thing and to assume permanently any reasonable duty, which shall promise greater security from the dangers attendant upon the exercise of their powers."[165] In the process, the court explicitly repudiated its earlier holding that the police power did not extend to matters of public convenience.[166]

The Maine court's most "substantive" interpretations of due process in the late nineteenth century came in cases such as *Adams v. Palmer* that had nothing whatever to do with the regulation of business.[167] Moreover, language usually

155. *Id.* at 30.
156. *See id.* at 17.
157. *See id.* at 18-20.
158. *See id.* at 28-29 (Appleton, C.J., dissenting).
159. 66 Me. 90 (1876).
160. *See id.* at 92.
161. *See id.* at 91.
162. *Id.* at 92.
163. *Id.*
164. *See* State v. Maine Cent. R.R., 66 Me. 488, 494, *aff'd subnom.*, Railroad Co. v. Maine, 96 U.S. 499 (1877).
165. Boston & Maine R.R. v. County Comm'rs, 79 Me. 386, 395-96, 10 A. 113, 115 (1887).
166. *See id.* at 393, 10 A. at 114; *see also supra* note 77.
167. *See* Adams v. Palmer, 51 Me. 480 (1863). Furthermore, the court employed egalitarian language in cases that had nothing to do with public aid to private enterprise. *See, e.g.*, Opinions of the Justices, 44 Me. 505 (1857) (responding to the *Dred Scott* decision); Perkins v. Inhabitants of Milford, 59 Me. 315 (1871) (payment of draft commutation fees with public funds).

associated by historians with substantive due process appeared in cases apparently dealing with procedural rights. In an early construction of the Fourteenth Amendment, the court found that a statute that retroactively confirmed a grand jury indictment issued in the interval between repeal and restoration of a court's criminal jurisdiction violated both Maine's Law-of-the-Land Clause and the federal due process provision.[168] The court declared that even a duly enacted law providing for a regular course of judicial process for its administration might deprive persons of rights without due process. If that were not so, the meaning of due process "would be that no person should be deprived of . . . rights . . . unless the legislature should pass an act authorizing it."[169]

The court reaffirmed its substantive understanding of due process in 1885. Although the justices rejected a due process challenge to a law authorizing the judgment creditors of a town to levy on the property of the town's inhabitants, they announced that not every statute was the "law of the land" and not every process authorized by legislation was "due process"; a law or process "must not offend against 'the established principles of private rights and distributive justice.'"[170]

As the period commonly known as an era of substantive due process in the U.S. Supreme Court approached, the Maine court both reserved its right to review the substance of legislation on due-process and other grounds and continued to recognize the legislature's broad power to regulate, but not subsidize, private business enterprise.

IV. JUDICIAL REVIEW AND BUSINESS REGULATION IN MAINE FROM 1890 TO THE NEW DEAL

Scholars for a long time regarded 1890 as a watershed year in constitutional history, the year in which the U.S. Supreme Court adopted a substantive interpretation of due process and ushered in an era of laissez-faire constitutionalism. It is now clear, however, that neither the Supreme Court nor the state courts were antagonistic toward regulatory legislation. Progressive legislatures passed a welter of laws regulating business and the conditions of labor, provoking numerous challenges and opportunities for courts to review the laws.[171] In Maine, most of the regulatory laws that came under fire during the supposed heyday of laissez-faire constitutionalism, from 1890 to the New Deal, survived intact, as the Supreme Judicial Court in those years gave wide latitude to the legislature. However, the court retained its traditional power of substantive judicial review and occasionally used it to invalidate legislation.

The court generally upheld traditional exercises of legislative authority: ordinances prohibiting the sale of slaughtered carcasses without official inspection[172] and requiring that offal be carted only by a municipally approved individual;[173] a liquor law[174] and a statute limiting charges for grinding grain;[175] a grant of emi-

168. State v. Doherty, 60 Me. 504, 510-12 (1872).

169. *Id.* at 509.

170. Eames v. Savage, 77 Me. 212, 222 (1885).

171. *See* FINE, *supra* note 11, at 352-92 (surveying Progressive era regulatory legislation). *See also* KERMIT L. HALL, THE MAGIC MIRROR 196-209 (1989).

172. *See* State v. Starkey, 112 Me. 8, 90 A. 431 (1914).

173. *See* State v. Robb, 100 Me. 180, 60 A. 874 (1905).

174. *See* State v. Frederickson, 101 Me. 37, 63 A. 535 (1905).

175. *See* State v. Edwards, 86 Me. 102, 29 A. 947 (1893).

nent domain power to a railroad company[176] and an innkeeper licensing law.[177] The court also sustained an act creating water districts and empowering them to condemn private water companies,[178] and refused to interfere, except on statutory grounds, with rates established for such companies by the Public Utilities Commission.[179]

Progressive labor laws met no resistance from the Maine court. The justices unanimously upheld the employers' liability act of 1909, which narrowed the scope of the fellow servant rule, and the more comprehensive workers' compensation act of 1915.[180] They impliedly approved a statute requiring weekly payment of wages for certain employees.[181] Furthering another cause dear to the hearts of many Progressives, conservation of natural resources, the court upheld a law requiring licensing of wilderness guides[182] and, in an advisory opinion, approved a proposed measure to regulate the cutting of trees on private, uncultivated land.[183]

In upholding these legislative acts, the Supreme Judicial Court rejected numerous due process and natural rights claims. Between 1890 and 1920, the court tended to define legislative power in terms as broad as any it had ever used in the past. It described the police power as the legislature's power "to provide for the safety, protection, health, comfort, morals, and general welfare of the public" and held that where the public health, safety, or morals were concerned, the police power was superior to vested rights.[184] The state could temporarily contract away its regulatory authority in other instances, said the justices, but even then the surrender of power had to be absolutely clear. The court also adopted a broad definition of public purpose as it related to eminent domain and reaffirmed its pre-Civil War position that a taking under the eminent domain authority meant a taking of title, not mere regulation of property.[185]

The theoretical underpinning for the court's expansive interpretation of legislative power was its view that legislative authority was restricted only by clear constitutional prohibitions.[186] The court rejected opportunities to read constitutional text in a manner that would extend its own power of review. In upholding an ordinance, passed pursuant to statute, that closed certain streets to automobile traf-

176. *See* Ulmer v. Lime Rock R.R., 98 Me. 579, 57 A. 1001 (1904).

177. *See* Inhabitants of Dexter v. Blackden, 93 Me. 473, 45 A. 525 (1900).

178. *See* Kennebec Water Dist. v. City of Waterville, 96 Me. 234, 52 A. 774 (1902).

179. *See, e.g., In re* Island Falls Water Co., 118 Me. 397, 108 A. 459 (1919); *In re* Searsport Water Co., 118 Me. 382, 108 A. 452 (1919); *In re* Guilford Water Co.'s Service Rates, 118 Me. 367, 108 A. 446 (1919).

180. *See, e.g.*, Dirken v. Great No. Paper Co., 110 Me. 374, 86 A. 320 (1913); Mailman v. Record Foundry & Mach. Co., 118 Me. 172, 106 A. 606 (1919); Fish's Case, 118 Me. 489, 107 A. 32 (1919).

181. *See* State v. Latham, 115 Me. 176, 98 A. 578 (1916) (striking down a statute requiring middlemen, who purchased milk for resale or for processing into other products, to pay producers semi-monthly on equal protection grounds but only after commenting that the offensive act was not analogous to laws requiring corporations to pay employees at stated periods).

182. State v. Snowman, 94 Me. 99, 46 A. 815 (1900).

183. *See* Questions and Answers, 103 Me. 506, 69 A. 627 (1908).

184. State v. Robb, 100 Me. 180, 185, 60 A. 874, 876 (1905).

185. *See, e.g., In re* Searsport Water Co., 118 Me. 382, 108 A. 452 (1919); Ulmer v. Lime Rock R.R., 98 Me. 579, 57 A. 1001 (1904); Questions and Answers, 103 Me. 506, 69 A. 627 (1908).

186. *See* Questions and Answers, 103 Me. 506, 69 A. 627 (1908).

fic, the justices wrote in *State v. Mayo*:[187] "When the legislature has constitutional authority to enact a law, and does enact it, the expediency of its enactment is not to be passed upon by the court. The legislature determines if the law is reasonable, and will promote the public welfare, and its determination is conclusive."[188]

Perhaps the case that best exemplifies the attitude of the court toward legislative activity during the Progressive era is *Laughlin v. City of Portland*,[189] in which a Portland taxpayer questioned the public purpose of a municipal fuel yard that sold wood and coal at cost.[190] The legislative power, ruled the court, must be sufficiently elastic to meet the changing needs of society.[191] Laws that previously had been adequate to secure public welfare might be inadequate now.[192] The woodyard act was not a sign of paternalism or socialism, but simply a new exercise of traditional legislative power.[193] Lauding the *Laughlin* decision a few years later at the centennial celebration of the Maine bar, Associate Justice Albert M. Spear declared that the court was conservative in maintaining substantive principles of law, liberal in eliminating technicalities, and "progressive in applying old rules to new conditions."[194]

This is not to say that between 1890 and 1920 the Maine court never considered the reasonableness of legislation in its decisions. Even in *State v. Mayo* the court observed, first, that the police regulation in question bore a reasonable relation to its supposed purpose, and, second, that even as a matter of policy the ordinance was reasonable.[195] Nor would it be accurate to say that the court never struck down regulatory laws; it did so at least three times in the early twentieth century. In each instance, the court based its decision primarily on the principle of equality, embodied now in the Equal Protection Clause of the Fourteenth Amendment.[196] The court also relied twice upon its power to define "public use" to review the substance of existing or proposed legislation. In each instance, it rejected legislative attempts to aid private enterprise.[197]

---

187. 106 Me. 62, 75 A. 295 (1909).

188. *Id.* at 68, 75 A. at 298.

189. 111 Me. 486, 90 A. 318 (1914).

190. *See id.* at 487, 90 A. at 318-19.

191. *See id.* at 492, 90 A. at 324.

192. *See id.*

193. *See id.* at 493, 90 A. at 325.

194. MAINE STATE BAR ASS'N, *supra* note 57, at 188. *See also* MAINE STATE BAR ASS'N, *supra* note 57, at 156 (remarks of Chief Justice Lucillius Emery upon his retirement).

195. *See* State v. Mayo, 106 Me. 62, 69-70, 75 A. 295, 298-99 (1909).

196. In 1900 the court struck down a statute that denied peddler's licenses to aliens. *See* State v. Montgomery, 94 Me. 192, 207, 47 A. 165, 169 (1900). Two years later, it overturned a law requiring peddlers whose tax on stock came to less than twenty-five dollars to pay a license fee, but exempting those who paid twenty-five dollars or more. *See* State v. Mitchell, 97 Me. 66, 75, 53 A. 887, 890 (1902). In 1916, the court declared unconstitutional a statute that required producers of milk for use in resale or processing into other products to pay producers semimonthly; the court could see no reasonable basis for distinguishing between milk producers and other producers. *See* State v. Latham, 115 Me. 176, 179, 98 A. 578, 579 (1916).

197. In the first case, the court enjoined an electric company from using its delegated power of eminent domain to build power lines over private land for the purpose of supplying manufacturers with electricity. *See* Brown v. Gerald, 100 Me. 351, 61 A. 785 (1905). On the second occasion, the court advised the legislature that the lawmakers could not authorize the public construction of reservoirs if the dominant, though unstated, purpose was to aid private enterprise. *See In re* Opinions of the Justices, 118 Me. 503, 515, 106 A. 865, 872 (1919).

The number of regulatory acts struck down by the United States Supreme Court increased substantially after 1920.[198] However, 1937 is often regarded as a turning point, the year in which Justice Roberts' supposed "switch in time that saved nine" signalled the end of laissez-faire constitutionalism and substantive due process (at least with regard to economic legislation).[199] In Maine, there was no such increase in declarations of unconstitutionality and therefore no dramatic turnabout, although some regulations did fall. In the 1920s, the Supreme Judicial Court invalidated a statute passed for the benefit of loggers[200] and forced the deletion of a building-line regulation from a zoning law.[201] In 1930, it overturned an order of the Public Utilities Commission that would in effect have transferred business from one telephone company to another.[202] In 1935, a divided court struck down as a denial of equal protection a statute requiring the proprietors of milk-gathering stations to post a bond before being licensed.[203] But other economic laws and administrative orders withstood challenge.[204]

In short, during the so-called era of laissez-faire constitutionalism, the Maine court nullified very little economic legislation, and much of that was intended to aid, not regulate, private enterprise. The court neither incorporated laissez-faire economic theory into constitutional doctrine nor exhibited any special solicitude for business interests. It did not, however, relinquish powers of substantive judicial review that dated back to the beginning of statehood.

V. CONCLUSION

In his 1935 Pulitzer-Prize-winning history of American constitutionalism, Andrew C. McLaughlin asserted that the judiciary of the late nineteenth and early twentieth centuries had "assumed burdensome obligations" by giving "a new significance and force to the term 'due process.'"[205] However, he also took note of

---

One commentator, in a study of the attempt by twentieth-century Maine Progressives to secure public development of the state's water power, portrays the Supreme Judicial Court as a stronghold of conservatism, opposed to the idea that reservoirs could be a "public use" and determined to keep Maine's water resources in private hands. *See* Christopher S. Beach, *Conservation and Legal Politics: The Struggle for Public Water Power in Maine, 1900-1923*, 32 ME. HIST. SOC'Y Q. 150, 163-65 (1993). In fact, the court, *per* Chief Justice Appleton, had long before held that reservoirs served a public purpose. *See* Riche v. Bar Harbor Water Co., 75 Me. 91, 96-97 (1883). The particular schemes pushed by the Progressives, however, ran up against the court's longstanding objection to the use of public funds to benefit private business.

198. *See* SEMONCHE, *supra* note 12, at 423-25.

199. 2 ALFRED A. KELLY ET AL., THE AMERICAN CONSTITUTION 487-88 (7th ed. 1991). *See also* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (regarded as the pivotal case ending laissez-faire constitutionalism and substantive due process).

200. *See* Paine v. Savage, 126 Me. 121, 136 A. 664, 667 (1927).

201. *See In re* Opinions of the Justices, 124 Me. 501, 128 A. 181, 185 (1925).

202. *See* Gilman v. Somerset Farmers' Coop. Tel. Co., 129 Me. 243, 151 A. 440, 443 (1930).

203. *See* State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 477 (1935).

204. *See, e.g., In re* Stanley, 133 Me. 91, 174 A. 93 (1934), *aff'd*, 295 U.S. 76 (1935) (denial of common carrier certificate by Public Utilities Commission); Gay v. Damariscotta-Newcastle Water Co., 131 Me. 304, 162 A. 264 (1932) (water rates); Appeal of Bornstein, 126 Me. 532, 140 A. 194 (1928) (labeling of beverage bottle, revocation of license by Commissioner of Agriculture); Hamilton v. Caribou Water, Light & Power Co., 121 Me. 422, 117 A. 582 (1922) (water rates).

205. ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 756 (1935).

"the endeavor of the courts to attach judicial decisions to the principles of the past rather than to inaugurate a revolutionary break in the continuity of constitutional law."[206] The decisions of the Maine court cast doubt on McLaughlin's first statement, but bear out the second. Any burdensome obligations that the court may have acquired resulted more from the increased activity of the legislature than from a new interpretation of due process. In any event, the court did not revolutionize constitutional law. In view of the common perception that the constitutional law of government-business relations underwent dramatic changes between 1868 and 1937, the Maine decisions reveal a surprising continuity of judicial doctrine and behavior from the early nineteenth century through the age of Spencer to the New Deal. Judicial restraint coexisted with the judiciary's long-established power to review the substance of legislation. The Supreme Judicial Court always took for granted the power to strike down legislation on substantive grounds, and always used it sparingly. Even judges devoted to laissez-faire economic theory recognized the legislature's authority to regulate business in the public interest. If the court overturned more laws after 1868, and elaborated upon due process in a substantive manner, it was because more, and seemingly more partial or unreasonable, laws were passed. But the court did not have to invent new powers to do this. It already had at hand a stock of traditional constitutional concepts with which to justify such nullification when necessary—concepts that were neither designed exclusively for nor applied solely to economic legislation and that owed little, if anything, to laissez-faire economic thought.

206. *Id.*