Maine History

Volume 22 | Number 3 Article 2

1-1-1983

Constitutional Problems in Maine During the Civil War

David M. Gold

DAVID M. GOLD

CONSTITUTIONAL PROBLEMS IN MAINE DURING THE CIVIL WAR ERA, 1857-1872

Most studies of Civil War constitutionalism focus on the United States Supreme Court and on acts of the national government, but the Civil War was also a constitutional crisis for the states. State judiciaries had to face problems posed by the *Dred Scott* case concerning the political rights of blacks; challenges to personal liberty laws raised by Northerners who sought to appease the South; threats from patriotic mobs to the civil liberties of dissenters; issues involving the power of government to tax and spend at a time of mounting public indebtedness. Between 1857 and 1872, the Maine Supreme Judicial Court produced a number of notable opinions addressing these and other constitutional questions stemming from the national crisis.

The United States Supreme Court's *Dred Scott* decision of 1857 provided the first occasion for the Maine court to pass upon an issue raised by the sectional confrontation. In the principal opinion of that case, Chief Justice Roger B. Taney wrote that the authors of the Declaration of Independence and the Constitution had not intended for United States citizenship to be open to the degraded black race. Although the Maine legislature declared the Supreme Court's decision to be "not binding in law or conscience," *Dred Scott* clearly imperiled the political rights of Maine's blacks, who had been voting under the state constitution's grant of suffrage to all male United States citizens at least twenty-one years old. Some Republicans proposed amending the constitution to protect the Negro franchise; but the state senate, acting under an unusual constitutional provision requiring the supreme judicial court to render advisory opinions upon request of the

legislature or executive, decided first to ask the court whether "free colored persons, of African descent," resident in the state for the prescribed period, could vote under existing law.[1]

Given the composition of the court, the answer was a foregone conclusion. Four of the eight judges had been Republicans as early as 1855, and at least one more later joined them. Two, Seth May and Woodbury Davis, boasted long records of antislavery activity, including membership in the Liberty party. John Appleton, who would be appointed chief justice during the war, was a friend and correspondent of abolitionist senator Charles Sumner. Of the two Democratic members of the bench, one, Richard Rice, had belonged to the Hamlin wing of his party before the future vice president turned to the Republicans.[2]

The initial question for the court was, or should have been, whether it was bound by the *Dred Scott* decision. Since in addition to its pronouncements on black citizenship the United States Supreme Court had in effect held that Congress had no power to keep slavery out of the western territories, this question was crucially important to Republicans, who were committed to forestalling the spread of slavery. If the decision were indeed binding, then, as one Southern paper declared, "Southern opinion upon the subject of southern slavery . . is now the supreme law of the land and opposition to southern opinion upon this subject is now opposition to the Constitution, and morally treason against the Government." By the same token, if Taney's position on black citizenship were the supreme law, then of course blacks had no right to vote under the Maine Constitution.[3]

Only Democratic Judge Joshua Hathaway maintained that *Dred Scott* determined the question before the court. He argued that the constitutional provisions stipulating

John Appleton, 1804-1891

that members of Congress be United States citizens and giving Congress the power to establish uniform rules of naturalization together mandated uniformity of citizenship laws. The Supreme Court had the power to settle conflicts among state citizenship laws, he continued. It had done that in *Dred Scott,* and as long as the *Dred Scott* decision stood, only those blacks who themselves or whose ancestors had come from Africa as free men could be citizens and vote.[4]

The majority ignored the matter of *Dred Scott's* conclusiveness and hardly took note of the decision at all.

In a fairly short opinion probably designed to minimize controversy and unite the court as much as possible, Judge Rice and four colleagues relied on the familiar theory that for individuals born in the United States, national citizenship derived from state citizenship.[5] One of the most important tests of state citizenship was the right to vote. While women, children, and some other citizens did not have the right, Rice could think of no instance where suffrage had been granted by a state to non-citizens. Observing that the Maine Constitutional Convention of 1820 had rejected a proposal to explicitly exclude Negroes from the franchise, Rice concluded in circular fashion that since blacks in Maine could vote and since voting was a primary test of citizenship, Maine's blacks were state and therefore national citizens who were guaranteed the right to vote by the state constitution.[6]

Davis and Appleton refused to concur in an opinion that let the *Dred Scott* decision stand unmolested and left the door open for other states to undermine blacks' claims to citizenship simply by prohibiting them from voting. They insisted that *Dred Scott* was not binding on the Maine court – Appleton arguing that the Supreme Court's nine separate opinions, only three of which specifically denied black citizenship, did not constitute an authoritative statement of the law, and Davis contending that suffrage was a state question which federal courts had no power to settle.[7]

Both judges also attacked the historical foundations of Taney's holding. Drawing upon a wide range of sources, Appleton demonstrated that birth and allegiance rather than race or political privilege had always and everywhere been regarded as the chief criteria of citizenship. Then, examining the Articles of Confederation, various state constitutions and the debates surrounding their ratification, and judicial and legislative material bearing

on the issue, he showed that free blacks had been American citizens between the Revolution and the adoption of the Constitution. Close study of the Constitution itself and the subsequent diplomatic practice of the United States government convinced Appleton "that there is no prohibition in the Constitution of the United States, expressed or implied, to free men of African descent becoming citizens of a state, and as such . . . citizens of the United States."[8]

An astute lawyer, Appleton went on to prove Taney wrong on the chief justice's own grounds. In arguing that the Declaration of Independence and the Constitution had been written for the benefit of whites only, Taney purported to show that public opinion at the time of the nation's founding had been favorably disposed toward slavery. Even if Taney were correct, said Appleton, the point was irrelevant because "the necessary degradation of the slave affords no reason for the denial of citizenship to the free man." But Taney was not correct. No historical facts were better established, wrote Appleton, than that during the Revolutionary period blacks had served in the army, taken the oath of allegiance, held real estate, and been regarded and continued to be regarded as citizens in at least several of the states. "If these things be so," he continued, "and that they are so cannot be denied or even doubted, and if they had been known to the learned Chief Justice, his conclusions would have been different, for he says, 'every person and every class and description of persons, who *were at the time of the adoption of the constitution recognized as citizens of the several states, became also citizens of this new political body*.' His published opinion, therefore, rests upon a remarkable and most unfortunate misapprehension of facts, and his real opinion upon the actual facts must be considered as in entire and cordial concurrence with that of his learned dissenting associates [Curtis and McLean]."[9]

Davis presented a similar although much shorter brief on the foundations of citizenship and the status of blacks in the early days of the republic. But he would not for a moment concede, even for the sake of argument, that Taney's premises might have been valid. Instead, with all the fervor of the deeply religious, former Liberty party lawyer that he was, he argued that the Constitution was an antislavery document incorporating the natural-rights ideals of the Declaration of Independence. The contrast with May, also an old Liberty hand, was striking. No less opposed to slavery than Davis, May nevertheless believed that the Constitution sanctioned the "peculiar institution," at least in the Southern states.[10] But Davis adhered to the constitutional interpretation formulated by Salmon P. Chase and other Liberty men in the 1830s and '40s that took the Declaration as its starting point. The old idea of freedom for a privileged class at the expense of others could never have inspired or justified the Revolution, wrote Davis; if the Declaration had been a mere "compact of [the Negro's] oppressors for their own advantage . . . a decent respect for the opinions of mankind should have kept its authors silent." But the Declaration was no such thing. Rather, it was "a heroic utterance of great truths, for all men," so understood and intended by the Founding Fathers, who anticipated a general emancipation of the slaves. Davis noted that the Constitution's framers had carefully avoided using the word *slavery* in the document. Quoting Madison, he observed that the word *service* had been used instead of *servitude* in the so-called fugitive slave clause so that slavery could eventually be abolished without a constitutional amendment.[11]

Appleton's and Davis's opinions represented more than a judicial refutation of the *Dred Scott* decision. They also symbolized the strength of the Northern and especially the Republican commitment to the American ideal of equality before the law. As Herman Belz has remarked, the North

went to war not simply to preserve the Union, but also to maintain that ideal: "Government operating through majority rule and founded on the idea that all men were created equal, so that none should be governed without his consent, was the basis of the republican system that northerners identified with the Constitution and the Union." Both Appleton and Davis arrived at the conclusion of racial equality from the premise that government could not legitimately discriminate among different classes of the populace on *any* grounds. According to Appleton, all popular governments rested on the great principle of *"the equality of all before the law"*: "The Cornish miner burrowing in the earth, the princely nobleman in his palatial residence, or the beggar at his gate, are all alike members of the same civil community – fellow subjects and fellow citizens." Similarly, Davis regarded racial discrimination by the state as a form of class oppression. Under a free government, he said, the majority had no more license to abuse a racial minority than a privileged aristocracy had to trample upon the rights of the people as a whole.[12]

Maine's Democrats ridiculed their supreme court's response to the *Dred Scott* decision, but the Republican candidate for governor applauded it, singling out Appleton's opinion as "one of the most complete and best fortified arguments which has ever emanated from any bench." However, as the election of 1860 approached, Republicans began to blunt the edge of their militancy in the hope of appealing to a broad spectrum of voters. This tactical shift displeased some members of the party. Appleton wrote to Congressman Israel Washburn that "The idea of ignoring the distinctive doctrines of the Republican party and then going before the people simply for the spoils is utterly absurd." But the party nominated Lincoln over the more radical William H. Seward and toned down the provocative language of its 1856 platform.

As war clouds gathered, some Republicans in Maine and elsewhere began to wonder whether they should not make concessions to Southern feelings, perhaps by repealing Northern personal liberty laws. These laws, designed to protect free Northern blacks from slave catchers in pursuit of fugitives and to limit slave hunting on Northern soil, had limited practical effect; but as one historian has remarked, "their greatest significance lay in their use, by both sides, as symbols around which clustered all of the emotional issues which separated the two antagonistic sections of the Republic."[13]

Following the fiercely contested return of Anthony Burns from New England to Virginia under the federal Fugitive Slave Law[14] in 1855, the Maine legislature, which twelve years earlier had rejected a personal liberty law, passed a statute forbidding state judges to take cognizance of cases arising under the federal act and providing that no state officer "shall, in his official capacity, arrest anyone" claimed as a fugitive slave. Despite the strength of antislavery sentiment in Maine, the law encountered opposition from the first as an unwarranted affront to the South and a threat to the Union. Democratic Governor Samuel Wells felt that the expense of trying to recover a runaway so far from the South deprived the law of any practical effect. "But in any event," he told the legislature, "all such laws are objectionable. They indicate a disposition to escape from our constitutional obligations. We ought not to expect to enjoy all that is agreeable in our national relations, while we repudiate what is uncongenial to our tastes. We should never give our consent to a law, which is not required by strong necessity, when it is directly calculated to create an animosity between the inhabitants of different states."[15]

In 1857 the statutes of Maine underwent a general revision, resulting in a rearrangement and rewording of the several sections of the personal liberty law and the

addition of a statute requiring county attorneys to aid at public expense anyone arrested as a fugitive slave. The revised law provided that "No sheriff . . . or other officer of this State, shall arrest or detain, or aid in so doing, . . . any person on account of a claim on him as a fugitive slave." Unlike the original personal liberty law, this statute did not expressly limit its effect to the actions of state officers "in their official capacity." In 1861 Governor Israel Washburn denied that either the 1855 or the 1857 law had been passed in an attempt to evade constitutional duties; but in light of the imbroglio caused by the omission of the limiting phrase in 1857, he urged a reexamination of the revised law. Accordingly, on February 13 the House of Representatives referred the question of constitutionality to the state supreme court.[16]

By now the court was even more strongly Republican than at the time of *Dred Scott*, former Whig governor and early Republican Edward Kent having replaced Hathaway. However, as Appleton wrote to Charles Sumner, there seemed to be "a strange anxiety on the part of some of the Court to find something wrong at home." With seven Southern states having already declared themselves out of the Union and even some Republicans pressing for repeal of the personal liberty law, such anxiety was understandable. A majority of the court found the 1857 version of the personal liberty law unconstitutional. Chief Justice John Tenney and associates Cutting, May, and Goodenow contented themselves with declaring the act in conflict with that part of the Fugitive Slave Law requiring all good citizens to aid in the law's execution. Because the revised Maine statute omitted the phrase "in his official capacity," they said, it prohibited state officers from rendering such aid even as private citizens. Therefore it contravened the federal act and was unconstitutional under the supremacy clause of the United States Constitution.[17]

Israel Washburn, 1813-1883

Davis and Rice penned more interesting and forceful opinions focusing on the constitutionality of the Fugitive Slave Law itself. Once again in sharp contrast to May, who simply observed that the United States Supreme Court had already upheld the statute, Davis even questioned whether the law's constitutional foundation, the fugitive slave clause, really could be applied to slaves at all. That provision, he argued, elaborating on his earlier response to *Dred Scott,* did not use the word *slavery*. Rather, it referred to "person[s] held to service or labor" – that is, to free persons, such as sailors and apprentices, and not to articles of property. While the framers no doubt meant to apply the clause to slaves, he continued, "they did not mean to use language that could *properly* be applied to slaves. There was no inadvertance or mistake. They *meant* to use language that *could not* be applied to slaves, because they believed that slavery was speedily to be abolished."[18]

But even if the clause did pertain to slaves, Davis went on, the Fugitive Slave Law violated the Constitution in several respects. It called for what was in effect a summary extradition hearing; but instead of being extradited for trial, the prisoner was to be turned over *"to a private claimant*, who may sell him at auction the moment he crosses the line of a slave State." Such a law, subjecting a person to the loss of his liberty without a trial by jury according to common-law rules, was "unconstitutional and void." Davis further argued that by making the determination of the fugitive slave tribunal final and unappealable, the federal statute violated the constitutional guarantee of habeas corpus. Finally, he insisted that the commissioners provided for in the law to hear fugitive slave cases could not constitutionally exercise judicial power because they had been endowed with neither the requisite tenure during "good Behavior" nor the fixed salary that would ensure their independence.[19]

Judge Rice, the sole Democrat still on the bench,[20] adhered to his party's position that the Fugitive Slave Law was valid. He brushed aside objections based on habeas corpus with the observation that the purpose of a habeas writ was merely to determine "whether the process by which the party is held has been issued by competent authority, in conformity with the law, and is sufficient in form." (He did not say how even the summary procedure provided for in the law could be assured in view of the finality of the fugitive slave court's decision.) He also denied that the federal act deprived fugitives of trial by jury. Noting the preliminary nature of the prescribed process, whose sole purpose was to return escaped parties to the jurisdictions from which they had fled for disposition there, Rice naively (or disingenuously) maintained that it would "impugn the integrity of the governments to which the fugitives are returned" to accuse them of failing to protect the rights of restored captives.[21]

The Davis-Rice debate over the constitutionality of the Fugitive Slave Law was in a sense irrelevant since, as Davis acknowledged, the United States Supreme Court had already sustained the statute. But there remained the question of whether Maine's personal liberty law conflicted with either the Fugitive Slave Law or the Constitution. Expanding upon the opinions of Tenney, Cutting, Goodenow, and May, Rice contended at length that the personal liberty law by its terms forbade state officials to aid in the execution of the federal act even as private citizens. The Maine law, he concluded, "was manifestly intended to obstruct and hinder the restoration of fugitive slaves, and is in both its letter and spirit repugnant to [the fugitive slave clause] of the Constitution of the United States."[22]

With the concurrence of Davis and Kent, Judge Appleton responded to Rice's "nice criticisms, hair breadth distinctions, and forced constructions." The personal liberty law's legislative history and its placement in the revised statutes together with other laws defining the duties of state officers clearly showed that it was meant to refer to such officers *as officers,* and not as private citizens, Appleton argued. Therefore, it did not conflict with either the Fugitive Slave Law or the fugitive slave clause and was constitutional.[23]

Unlike its Rhode Island counterpart, which bowed to pressure and repealed its personal liberty law, the Maine legislature quickly responded to the judges' opinions by amending the act to meet the majority's objections.[24] A month later the Confederate bombardment of Fort Sumter rendered the issue moot. The controversy over the personal liberty law faded away, overshadowed by more pressing questions about the very nature of the Union and the conduct of the war.

President Lincoln made it clear that he did not believe the Southern states had a right to secede, and he acted energetically to put down the "insurrection" against federal authority. Soon after the firing on Fort Sumter he proclaimed a blockade of Southern ports. As an act of war, the establishment of the blockade seemed to imply recognition of the Confederacy as a belligerent power under international law. But in its European diplomacy the administration insisted that the conflict was merely a domestic insurrection and that foreign countries would have no legal justification for granting the Confederacy belligerent status. The rebellion assumed a dual character: "The Union Government *treated* the Confederate forces as belligerents, even though it did not intentionally *recognize* their belligerency in any direct, formal manner."[25]

Although the status of the Confederacy under international law was primarily a problem for the national government, the question also arose in the state courts thanks to the exploits of Captain Raphael Semmes of the Confederate navy. Under orders to disrupt Northern commerce, Semmes slipped the steamer *Sumter* past the federal blockade at New Orleans on June 30, 1861, and four days later looted and burned his first victim, the Bangor-owned *Golden Rocket*.[26] The merchantman's owners had insured their vessel before the war in both Maine and Massachusetts, each policy containing a clause exempting the insurers from liability for loss by "capture." Liability thus hinged on the definition of *capture*, and that in turn depended on the legal status of the Confederate government.

Although they entailed no specific constitutional provisions and so did not turn on constitutional law in the narrow sense, the *Golden Rocket* cases did involve basic constitutional questions: Did the Confederate government exercise legitimate political authority? What was the legal status of military and naval forces acting under its orders? Some of America's most brilliant lawyers argued these points in the *Golden Rocket* litigation. In Massachusetts, Richard Henry Dana, Jr., who had successfully represented the government in the momentous *Prize Cases*,[27] and future United States Supreme Court justice Horace Gray, Jr., insisted on behalf of the shipowners that the word *capture* as used in insurance policies had a technical meaning, referring only to acts of government. But the *Sumter*, they said, was a pirate ship, acting under the commission of an illegitimate government, and therefore did not come within the clause exempting the insurance company from liability. Responding for the defendant company, former Supreme Court justice Benjamin R. Curtis rejected the narrow definition of *capture*. Any taking of a ship, whether by a government or by pirates, was a

capture, he argued; in any event, the Confederate government was a *de facto* government, so the taking of the *Golden Rocket* by the *Sumter* was not piratical.[28]

The Massachusetts court agreed with Dana and Gray that the word *capture* must be used in its technical sense in construing insurance policies, but it found that even as a term of art, *capture* referred to any unlawful taking. Therefore, even if the *Sumter* was a pirate, the exemption clause relieved the insurance company of liability. Furthermore, the court accepted Curtis's characterization of the Confederate polity as a *de facto* government, thereby recognizing at least the quasi validity of Confederate commissions.[29]

In Maine Dana and Gray again represented the shipowners, with John A. Peters, future chief justice of the state, as local counsel. And Curtis once more appeared for the insurance company, assisted by James S. Rowe, a leader of the Bangor bar.[30]

Only two judges accepted Dana and Gray's argument that the taking of the *Golden Rocket* had been piratical and therefore not a capture as understood in contracts of insurance. A majority found for the insurance company on the ground that the taking, whether or not piratical, had been a capture and thus within the exemption clause. Judge Davis agreed with the majority, but characteristically would not let it go at that. Examining the issues at length in the only officially reported opinion in the case, he rejected the position of Curtis and the Massachusetts court (and, as it turned out, of the Supreme Court of the United States) that the *Sumter* enjoyed "enemy" status because it had been commissioned by a *de facto* government. The Confederates were indeed "enemies," he said, but they were also traitors whose seizures of American ships were acts of piracy as well as acts of war. "The fact that [the officers and crew of the *Sumter*] were

citizens of States that have revolted, and are engaged in civil war, did not change the nature of their acts, except to add to their enormity," Davis declared. "The commission under which they acted was itself piratical . . .." Rather than absolving them from the crime of piracy, the fact that the *Sumter's* men had acted under the authority of a *de facto* Confederate government simply added to their guilt.[31]

It did not strain credulity to label a Confederate naval captain an enemy and a traitor; Semmes, after all, had taken up arms against the United States. But the government also had to contend with civilian opponents behind the lines. Antiadministration newspapers roundly condemned President Lincoln for suspending habeas corpus, ordering military arrest, and taking other measures inimical to individual liberty. Historian James G. Randall concluded that "There was no real censorship, and in the broadest sense the press was unhampered though engaging in activities distinctly harmful to the Government."[32] But the administration did endeavor to muffle its most vociferous critics by denying peace papers the use of the mails and in some instances shutting them down for limited periods. To an extent, the government also relied on popular pressure to stifle dissent. In August, 1861, soldiers returning from the Union disaster at Bull Run helped stir up public anger at the carping and sniping of antiwar editors. The first mob attack on a newspaper occurred on August 8 in Concord, New Hampshire, where a crowd of soldiers and civilians destroyed the office and equipment of the *Democratic Standard.* A few days later, rioters in Maine demolished the office and press of the *Bangor Democrat.*[33]

The weekly *Democrat* and its short-lived sister paper, the *Bangor Daily Union*, were run by Marcellus Emery, an outspoken Breckinridge supporter. Emery's disloyal political and editorial activities outraged the citizens of

Bangor, some of whom threatened violence against the person and property of the paper's proprietor. One of the city's "leading men" (probably the wealthy businessman and former mayor Rufus Dwinel) fueled popular passions by offering to indemnify for loss of time or recovery of damages anyone participating in an attack on the *Democrat's* office. On August 12, inspired by the affair in Concord four days before, a mob entered Emery's office while he was out to dinner and threw all his equipment and supplies from a fourth-story window into the street. The editor appeared in time to see his property going up in smoke, and he barely escaped personal violence.[34]

Emery resumed publication of the *Democrat* in January, 1863, but did not dare sue the rioters until the war had ended. Finally, in 1866 he brought an action in Waldo County, far from the scene of destruction. Judge Rufus Tapley, a well-known lawyer who had been appointed to the bench in 1865 after briefly commanding a volunteer regiment during the war, presided at the trial. The defendants argued that under the circumstances of 1861, the virulently antiadministration *Democrat* had been a public nuisance (that is, an act or object adversely affecting the common rights or interests of the general public) which the public had a right to abate. Emery of course protested that reducing unpopular opinion to the status of a nuisance meant obliterating free speech and a free press. Sympathetic towards the rioters, Tapley had the delicate task of explaining how the constitutional guarantees undergirding free government could be subordinated to the law of nuisance.[35]

Lincoln had justified strong governmental measures that interfered with civil liberties by observing that the rebels had used the First Amendment as a shield for "a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause." His measures might have been unconstitutional in ordinary times, he thought,

but not when used to preserve the very Union for which the Constitution had been composed. Similarly, Tapley insisted that a newspaper publisher could not use constitutional liberties to destroy constitutional government. "Freedom of thought, freedom of speech and freedom of the press, have long been considered a part of republican institutions and necessary ingredients of them," he said; "but this freedom has never been an unlimited, unrestricted right to speak, write and publish without accountability. The press enjoys no such privilege now or at any other period in the history of this country. Its constitutional guarantee is not to trample upon the rights of the individual; neither is it to destroy the very government which upholds, and confers upon it its privileges."[36]

Under the circumstances, the phrase "to destroy the very government" implied a charge of treason. Now Emery was not being tried for treason, or for anything else; indeed, he was the plaintiff in the case. But Tapley insisted that a publisher who used the press to give aid and comfort to the enemy was guilty of treason and that his paper was a public nuisance liable to abatement. Tapley closed his charge to the jury by recalling the national predicament of August, 1861: the South had seceded, seized federal property, attacked Fort Sumter, defeated the Union forces at Bull Run. "All saw that *divided* in sentiment and effort we must fail, and our glorious inheritance perish in our own hands. All saw that our safety lay in a *united,* patriotic, self-sacrificing spirit of loyalty and patriotism." Tapley thus invited the jury to find that Emery had been a traitor. They accepted, bringing in a verdict against just two of the rioters for destroying property not necessary for the *Democrat's* publication and otherwise finding that "The Bangor Democrat of 1861 was a public nuisance, and should have

been suppressed." On appeal the full bench reversed, but the basis of its decision can only be guessed at since no opinion was officially reported. Eventually the parties settled out of court.[37]

Other cases involving First Amendment rights grew out of the rashness of Southern sympathizers who expressed joy at the assassination of President Lincoln. In Skowhegan, one Nathaniel W. Morse publicly praised Booth's "spunk," and was forced by a group of irate citizens to take back his words and cheer the flag. Morse sued for trespass and the jury returned a verdict in his favor – for one cent.[38]

A similar but more celebrated case arose near Newport, where a man named Prentiss admitted his happiness at Lincoln's death, saying, "He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning." Later that day some angry townsmen, led by a deputy sheriff who thought he had authority to arrest the incautious copperhead, manhandled Prentiss, detained him for several hours in the local hotel, and released him only after he swore to support the Constitution. Prentiss sued, complaining that his constitutional rights had been violated and that he had suffered physical harm (a dislocated hip) and emotional injury. He also demanded punitive damages.

In his charge to the jury, Judge Kent displayed a greater sensitivity toward the First Amendment rights of dissenters than had Tapley in the *Democrat* case. "Under the Constitution," he declared, "every citizen may freely speak, write and publish his sentiments upon any subject . . . . He may use the most shocking, indecent and revolting language, towards his own father, towards the Government, anywhere, at any time . . . ." If freedom of speech were abused, said the judge, the offender would be responsible, but only to the person injured, and then only

after a determination of liability according to legal procedure; "no individuals have a right to take the law into their own hands, and inflict punishment upon him." Kent ruled that Prentiss was entitled to full compensation for the injury to his person, regardless of how vexatious his language had been. But in regard to emotional injuries and to punitive damages, he permitted the jury to consider the provocation under which the defendants had acted. Prentiss's doctor having admitted that the dislocation of the hip might have been due to rheumatism, the jury awarded Prentiss only $6.46. On appeal the state supreme court sustained the verdict.[39]

Physical resistance to the war effort seems to have been limited in Maine to a single fruitless attempt by a mob of about fifty men to prevent execution of the federal conscription law (the Enrollment Act) of 1863. Many more opposed the draft vocally, and respected legal minds believed that in adopting it Congress had overstepped its authority, interfered with state control over the militias, and impaired individual liberty. Neither the United States Supreme Court nor the Maine Supreme Judicial Court had to pass on the constitutionality of the conscription act, but the Maine bench seized the first opportunity to make it known that it would reject any constitutional challenges to the draft. In response to an inquiry from the governor concerning the payment by municipalities of the draft commutation fees provided for in the conscription act, the court observed that Congress had authority under the Constitution to declare war, raise military forces, suppress insurrections, and adopt any measures necessary and proper for exercising this authority. "In a great national emergency, when the national unity and republican institutions are in peril," said the court, Congress "has the right to command all the resources of the nation, and the lives of its citizens, to prevent.. that fearful anarchy,

which would be so imminent, if its dissolution should become an accomplished fact."[40]

The federal law which the court thus upheld allowed a drafted man to avoid service permanently by procuring a substitute (until the next call for troops) by paying a three hundred dollar commutation fee. These provisions aggravated problems plaguing the military mobilization effort since the outbreak of the war. Towns had been offering bounties to encourage enlistment, even though they lacked legal authority to do so, and the legislature periodically had to rectify the situation with statutes ratifying such municipal actions. The size of the bounties increased when localities, anxious to meet assigned quotas and thus avoid local drafts under the Militia Act of 1862 and the Enrollment Act of 1863, inaugurated a bidding war for volunteers. Some towns also contributed toward the hiring of substitutes, the cost of which increased dramatically after Congress repealed the commutation section of the draft act in 1864.

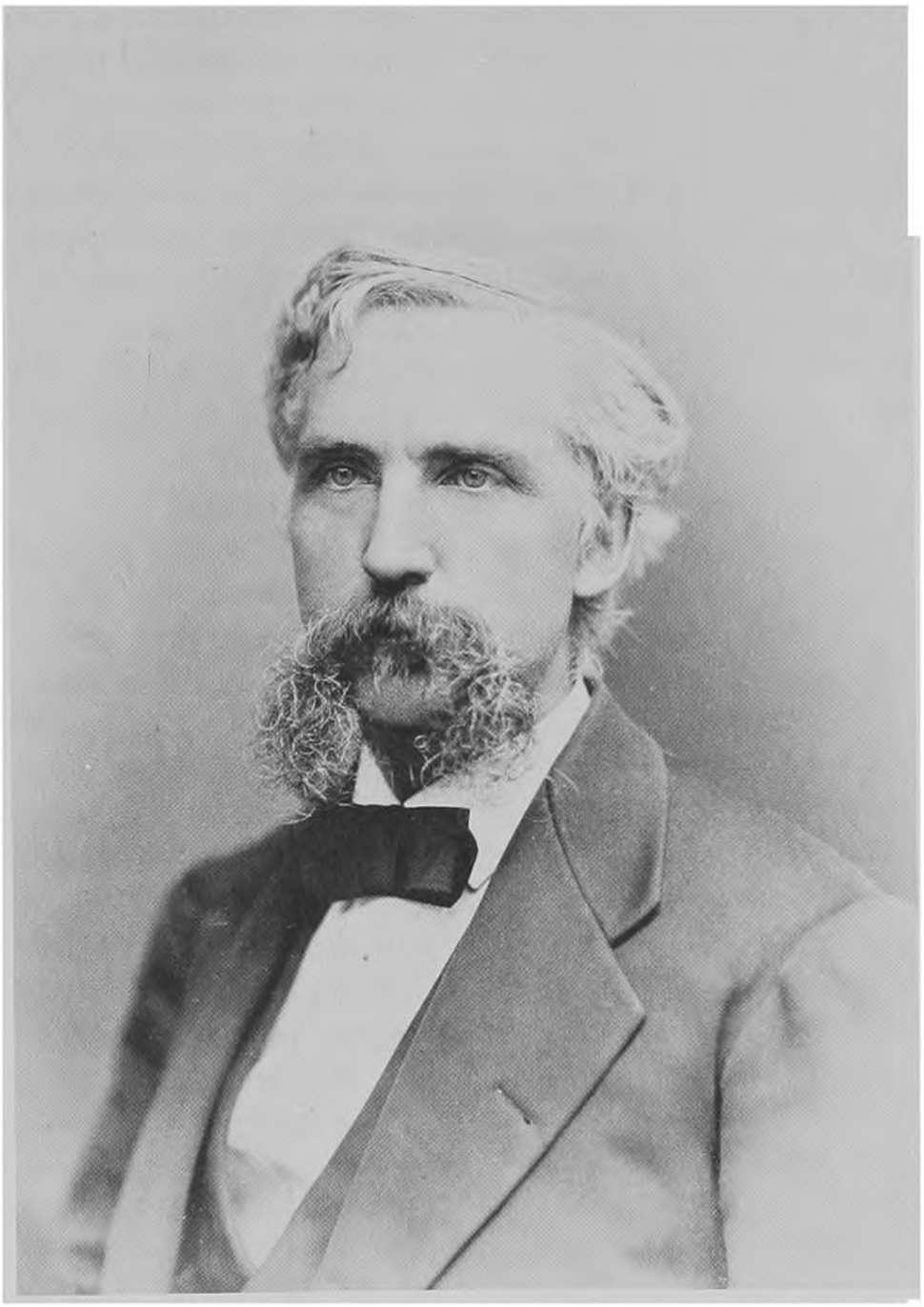
As bounties and the price of substitutes skyrocketed, so did municipal debt. During the first year of the war, Maine's cities and towns paid out just over $200,000 in bounties. From the July, 1862, call for troops until October of the following year, they paid or pledged nearly $2 million for bounties, commutation fees, and the hiring of substitutes. For the three and a half months between the October 17, 1863, call and the call of February 1, 1864, the cost exceeded $2 million. Finally, the bill for bounties, substitutes, and recruiting expenses from February, 1864, until the end of the war surpassed $4.7 million. The grand total of municipal expenses for these and other war purposes: over $11 million.[41]

After the war many towns, particularly in poor areas of the state, cried out for the state to assume and thereby equalize the burden of municipal war debts. In urging

assumption upon the legislature, Governor Joshua L. Chamberlain asserted that due to the distribution of Maine's wealth and population and the necessity for poor towns to compete with affluent ones to meet their quotas, it had cost some localities six times as much as others "in proportion to their means" to send a soldier to the field. The state supreme court issued an advisory opinion declaring that a proposed remedial bill would violate the constitutional provision setting a debt ceiling for the state, but the people authorized an exception by constitutional amendment and the legislature adopted a limited assumption and equalization scheme in 1868.[42]

Even after partial assumption, Maine's municipalities staggered under a heavy burden of debt, and local officials often refused to recognize bounty claims. In the many instances where claimants were bounty jumpers, substitute brokers, eleventh-hour enlistees, or others who sought to share in the municipal largesse without having faced the perils of battle, the reluctance of local authorities to pay up was especially understandable.[43] The supreme judicial court frequently found grounds for sustaining the towns' refusal to satisfy bounty claims: the town meetings at which bounties had been voted had not been properly called; claimants were not covered by the bounty votes; the votes had not been ratified by the legislature.[44] But the court never held the payment of bounties unconstitutional.

Commutation fees were a different matter. The provision in the federal conscription law that allowed a draftee temporarily to avoid service by paying three hundred dollars made it harder for communities to meet their quotas and drove up the level of bounties. Between July, 1862, and October, 1863, nearly three-quarters of the three-year men drafted in Maine paid the commutation fee. The towns helped them defray the cost



Joshua L. Chamberlain, 1828-1914

of escaping military service by paying out more than $115,000 for commutations. Noting the concern on the part of "many good citizens that serious complications and embarrassments may result to the towns which pledge their credit to raise money to supply these commutations as well as to individuals who advance the money therefor," Governor Abner Coburn asked the court in June of 1863 whether the state constitution permitted towns to pledge their credit or levy taxes for the payment of the fees.[45]

The court answered with a unanimous, emphatic "no." Pointing out that the purpose of the draft was to raise men, not money, the court declared it the duty of every citizen to defend the "government upon the prosperity and perpetuity of which the future hopes of humanity must rest." The conscription act made it the personal obligation of each drafted man to serve in the armed forces, furnish a substitute, or pay the commutation fee. The governor's query therefore boiled down to a question of whether towns could raise money to gratuitously discharge the personal obligations of its citizens. Various statutes empowered towns to spend public money for "necessary town charges," but these the court defined to "only embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute" (the building of roads, the support of schools, the relief of the poor, and so on). Raising money to give away to private citizens so that they could avoid the performance of duties owing to a nation in peril did not fall within the powers conferred by statute. Therefore, the court concluded, towns had no authority to pay commutation fees.[46]

After the war, the Maine court applied the "public purpose" doctrine (that the government constitutionally could use public money only for public purposes) in several commutation and bounty cases, the most significant of which was *Perkins v. Milford.* The town of

Milford had voted to pay two hundred dollars to each man credited to its draft quota, provided that local citizens raised a six hundred dollar fund toward the same end. Subsequently the voters approved refunds to the fund's subscribers, but the town treasurer refused to honor the refund orders when presented for payment. Chief Justice Appleton wrote for the court that the refund had not been legitimized by later legislation, but added that even if it had been within one of the ratification acts, the vote would have been invalid on constitutional grounds. Subscribers to the fund had not expected repayment, he said. Their contributions had been gifts to the town. There being no contractual *quid pro quo*, the refunds would in turn be gifts from the town to the subscribers. The issue then was whether the town could "raise money to give to individuals. This is not a gift for any public purpose. It is a gift as a recompense for past generosity. If a town can give to A, it can give to B. If it can give little, it can give much. If it can give, then every man holds his estate subject to the will of the majority, who can give away as much or as little as they please." The right of the government to impose taxes for public purposes was unlimited, Appleton concluded, but the "constitution gives no authority to raise money to give away . If it did, all protection to property would ceases."[47]

In one of the most important constitutional developments of the postwar period, courts soon carried over the public purpose doctrine from commutation and bounty cases to controversies over municipal aid to selected private enterprises. It then became clear that the doctrine rested on the idea of equality before the law. As Appleton explained in an influential opinion, "Our government is based on equality of right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the State is bound to protect all, it ceases to give that just

protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community." It made no difference that a majority of the town's taxpayers had voted in favor of public aid. Whether enacted by a popularly controlled government or by a privileged elite, legislation favoring particular classes of the population violated the principle of equality. Here, as in *Perkins,* Appleton declared, "All security of private rights, all protection of private property is at an end . . . when the power is given to a majority to lend or give away the property of an unwilling minority."[48]

Thus the Civil War era in Maine closed on the same constitutional note with which it had opened. In his opinion on the *Dred Scott* decision, John Appleton had insisted that American government rested on the principle of "the equality of all before the law." And Woodbury Davis had argued that the authors of the Declaration of Independence meant what they said about equality: that majority rule did not justify majority tyranny. Now, after a war that had ended as a fight for emancipation, and following the ratification of a constitutional amendment making "equal protection" the law of the land, the Maine court reaffirmed the cardinal tenet of the American political creed. By restricting governmental activity to the fulfillment of public purposes, it sought to ensure that democratic political power would not be wielded for the private benefit of some (even if that "some" constituted a majority); and that minorities, whether racial or economic, rich or poor, received the equal protection of the laws.[49]

NOTES

[1]Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-12 (1857); Res. of 15 April 1857, ch. 112, 1857 Me. Res. 60; *Bangor Daily Whig and Courier,* March 12, 1857; Opinions of the Justices, 44 Me. 505 (1857).

[2]*Bangor Daily Whig and Courier,* Oct. 19, 1855; Austin Willey, *The History of the Antislavery Cause in State and Nation* (Portland, Me.: B. Thurston and Hoyt, Fogg & Donham, 1866; reprint ed., Miami, Fla.: Mnemosyne Publishing Co., 1969), pp. 221, 224-25, 290-91; Edward L. Pierce, *Memoir and Letters of Charles Sumner,* 4 vols. (Boston: Roberts Bros., 1887), 1: 152, 154, 157-58; Charles Eugene Hamlin, *The Life and Times of Hannibal Hamlin,* 2 vols. (Cambridge, Mass.: Riverside Press, 1899; reprint ed., Port Washington, N.Y.. Kennikat Press, 1971), 1: 235. The other members of the bench in 1857 were Chief Justice John S. Tenney (Whig), Jonas Cutting (Whig-Republican), Daniel Goodenow (Republican), and Joshua Hathaway (Democrat).

[3]*Constitutionalist* [Augusta, Ga.], March 15, 1857, quoted in Don E. Fehrenbacker, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), p. 418.

[4]Opinions of the Justices, 44 Me. at 516-21.

[5]The primacy of state citizenship was suggested rather than explicitly advanced in Rice's opinion. According to one historian, most antebellum courts "maintained a judicious silence" on the question "of whether state citizenship flowed from national citizenship or vice versa." Congress finally defined U.S. citizenship in the Civil Rights Act of 1866. The Fourteenth Amendment, ratified in 1868, made all native-born Americans "citizens of the United States and of the State wherein they reside." James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, N.C.: University of North Carolina Press, 1978), pp. 264-65, 341-43.

[6]Opinions of the Justices, 44 Me. at 507-16.

[7]*Ibid.,* pp. 557, 559, 591-92.

[8]*Ibid.,* pp. 556-57.

[9]*Ibid.,* pp. 563, 573.

[10]Seth May to Austin Willey, Feb. 13, 1844, in *Liberty Standard* [Hallowell, Me.], Feb. 29, 1844. Apparently, May also accepted political criteria rather than birth and allegiance as defining elements of citizenship, for he concurred in Rice's opinion rather than in Appleton's.

[11]Opinions of the Justices, 44 Me. at 589, 594.

[12]Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978), p. 42; Opinions of the Justices, 44 Me. at 568, 594.

[13]*Bangor Daily Whig and Courier,* Sept. 7, 1857; John Appleton to Israel Washburn, Feb. 7, 1859, Israel Washburn Papers, Library of Congress; Norman L. Rosenberg, "Personal Liberty Laws and Sectional Crisis, 1850-1861," *Civil War History* 17 (March 1971): 43. For a sample of the debate among Maine Republicans on repeal of the personal liberty law, see the *Bangor Whig and Courier,* Jan. 10, 12, 15, 1861.

[14]Passed as part of the Compromise of 1850 to replace an older and weaker statute, the Fugitive Slave Law authorized a slaveowner to seize an alleged fugitive, take him before a federal judge or judicially appointed commissioner, and upon identification of the prisoner receive a certificate for his return to the state from which he supposedly had fled. To establish his right to the fugitive, a claimant simply had to present an authenticated copy of his testimony in a court in his home state as to the ownership and escape of the slave. The captive could not testify, and all other courts and magistrates were prohibited from interfering with his removal. See Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill, N.C.: University of North Carolina Press, 1970), pp. 3-25.

[15]James M. McPherson, *Ordeal by Fire: The Civil War and Reconstruction* (New York: Knopf, 1982), pp. 79-90; Rosenberg, "Personal Liberty Laws," pp. 28n., 31-34; Maine, *Acts and Resolves,* 1855, ch. 182, p. 207 ("Public Laws") (*Acts and Resolves* contain three separately paginated sections: "Public Laws," "Private Laws," and "Resolves." To simplify retrieval, the appropriate section is indicated after the page number); "Governor Wells' Address," in Maine, *Acts and Resolves,* 1856, p. 393 ("Resolves").

[16]"Governor Washburn's Address," in Maine, *Acts and Resolves,* 1861, p. 85 ("Resolves"). The original and revised personal liberty laws are reproduced in Opinions of the Justices, 46 Me. 561 (1861). See especially Judge Appleton's opinions for the legislative history.

[17]John Appleton to Charles Sumner, April 6, 1861, Charles Sumner Papers, Houghton Library, Harvard University. Tenney and Cutting also found the provision forbidding magistrates to aid in the detention or return of fugitives unconstitutional. May and Goodenow felt that the wording of this statute was such that it applied to magistrates only in their official capacity and was therefore unconstitutional.

[18]Opinions of the Justices, 46 Me. at 609-10.

[19]*Ibid.*, pp. 610-14. For a discussion of these and other constitutional objections to the Fugitive Slave Law, see Campbell, *Slave Catchers*, pp. 26-48.

[20]Rice resigned in 1863 to assume the presidency of the Portland and Kennebec Railroad. The next Democrat to be appointed was Artemas Libbey in 1875. However, former Democrats were appointed in the interim. Joseph G. Dickerson, a Democrat until the Civil War, helped form the Union party in Maine. John A. Peters joined the Democrats when the Whig party disintergrated in the 1850s, but he too switched to the Union party and later became a Republican.

[21]Opinions of the Justices, 46 Me. at 571-72.

[22]*Ibid.*, p. 578.

[23]*Ibid.*, pp. 586, 595.

[24]Rhode Island, *Acts*, 1861, ch. 358, p. 120; Maine, *Acts and Resolves*, 1861, ch. 58, p. 36 ("Public Laws").

[25]David M. Silver, *Lincoln's Supreme Court* (Urbana, Ill., University of Illinois Press, 1956), p. 104; J. G. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana, Ill.: University of Illinois Press, 1951), p. 67.

[26]Semmes recounted the capture and destruction of the *Golden Rocket* in *Memoirs of Service Afloat, During the War Between the States* (Baltimore: Kelly, Piet & Co., 1868), pp. 126-31. In its first two days of action, the *Sumter* took four Maine vessels. Of the eighteen prizes captured by the *Sumter* during its seven-month run as a privateer, eight were from Maine. See *The Cruise of the Alabama and the Sumter* (New York: Carleton, 1864), Appendix No. 1, pp. 239-41.

[27]The *Prize Cases*, in which the Supreme Court upheld the legality of the blockade, are discussed in Silver, *Lincoln's Supreme Court*, pp. 104-18.

[28]Dole v. New England Mut. Marine Ins. Co., 88 Mass. (6 Allen) 373 (1863).

[29]*Ibid.*

[30]Dana and Peters had collaborated before in *Donahoe v. Richards*, 38 Me. 379 (1854), one of the leading cases of the nineteenth century on Bible-reading in the public schools. Rowe had opposed them on that occasion too.

[31]Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 465, 471 (1863). The United States Supreme Court accepted the "*de facto* government" argument put forward by Curtis in *Mauran v. Insurance Co.*, 73 U.S., (6 Wall.) 1 (1867). Caleb Cushing, counsel for the insurance company, submitted the Dana-Gray brief from *Dole*. See also *Dole v. New England Mut Marine Ins. Co.*, 7 F. Cas. 837 (C.C.D. Mass. 1864) (No.

3966), another case arising from the capture of the *Golden Rocket* and involving Dana, Gray, and Curtis as counsel.

[32]Randall, *Constitutional Problems,* p. 520.

[33]Dean Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1965), pp. 130-34.

[34]John E. Godfrey, "Bangor," in *History of the Press of Maine,* ed. by Joseph Griffin (Brunswick: J. Griffin, 1872), pp. 137-39; Louis C. Hatch, ed., *Maine: A History* (New York: The American Historical Society, 1919; reprint ed., Somersworth, N.H.: New Hampshire Publishing Co., 1973), pp. 437-39.

[35]Proceedings of the York Bar in Relation to the Death of Hon. Rufus P. Tapley, 85 Me. 579 (1893); *Bangor Daily Whig and Courier,* Oct. 25, 1866.

[36]McPherson, *Ordeal,* p. 295; *Bangor Daily Whig and Courier,* Oct. 25, 1866.

[37]*Bangor Daily Whig and Courier,* Oct. 25, 1866; Herbert T. Silsby, II, "Chief Justice John A. Peters," Pt. 2, *Maine Bar Bulletin,* Sept. 1971, pp. 22-23.

[38]*Bangor Daily Whig and Courier,* Jan. 21, 1867.

[39]*Bangor Daily Whig and Courier,* April 23, 1867, Silsby, "Peters," p. 23; Prentiss v. Shaw, 56 Me. 427 (1869) (Kent, J.).

[40]Hatch, *Maine,* pp. 494-95; Randall, *Constitutional Problems,* pp. 271-74; Opinions of the Justices, 52 Me. 595-96.

[41]These figures are drawn from a synopsis of the report of a commission appointed by the governor to investigate the question of state assumption of municipal war debts. The synopsis appeared in the *Bangor Daily Whig and Courier,* Nov. 30, 1867. For more on the enormous sums spent by local governments on bounties and related items, see J. G. Randall and David Donald, *The Civil War and Reconstruction,* 2nd ed. rev. (Lexington, Mass.: D. C. Heath & Co., 1969), pp. 328-29.

[42]"Governor Chamberlain's Address," in *Acts and Resolves,* 1868, p. 221 ("Resolves"); Opinions of the Justices, 53 Me. 587 (1867); Hatch, *Maine,* pp. 498-99. According to the *Bangor Daily Whig and Courier,* Jan. 9, 1868, Portland, in Cumberland County, had paid 1.82 percent of its valuation for bounties, while the towns of Penobscot County had paid 8.63 percent.

[43]Bounty jumpers were, as one wartime chief executive explained, "Men . . . base enough . . . to enlist, get their bounty and desert, go to another place, re-enlist, receive another bounty and desert again."

"Governor Cony's Address," in Maine, *Acts and Resolves*, p. 435 ("Resolves"). Substitute brokers were middlemen who contracted with individuals or towns to provide replacements for drafted men. They brought forward all manner of substitutes – "[c]ripples, diseased men, outright half-wits, epileptics, fugitives from workhouse and poor farm" – and made high enough profits to "afford any bribery that might be necessary to get their infirm candidates past the medical examination." Bruce Catton, *This Hallowed Ground: The Story of the Union Side of the Civil War* (Garden City, N. Y.: Doubleday, 1956), pp. 317-18.

[44]Sanborn v. Machias Port, 53 Me. 82 (1865) (bounty vote invalid when notice of town meeting not posted seven days in advance as required by statute); Daggett v. Cushing, 56 Me. 422 (1869) (plaintiff drafted "to serve one year or during the war" not entitled to a bounty voted for "men to serve two years"); Ferrin v. Portland, 53 Me. 458 (1866) (bounty exceeded amount authorized by ratification statute). These cases are merely illustrative; there were many others.

[45]*Bangor Daily Whig and Courier*, Nov. 30, 1867; Opinion of the Justices, 52 Me. 595 (1863).

[46]Opinions of the Justices, 52 Me. at 598-99.

[47]Perkins v. Milford, 59 Me. 315, 318 (1871). See also Thompson v. Pittston, 59 Me. 545 (1871), and Moulton v. Raymond, 60 Me. 121 (1872).

[48]Allen v. Jay, 60 Me. 124, 128, 130, 134 (1872). *Perkins* and *Allen* were contributions to the development of "laissez-faire constitutionalism" in the decades following the Civil War. Traditionally this phenomenon has been seen as rooted in the desire of judges to protect business interests from legislative interference, but recently some scholars have located its basis in the principle of equality. See Alan Jones, "Thomas M. Cooley and 'Laisez-Faire Constitutionalism': A Reconsideration," *Journal of American History* 53 (March 1967): 751-71; Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *Journal of American History* 61 (March 1975): 970-1005; David M. Gold, "Redfield Railroads, and the Roots of 'Laissez-Faire Constitutionalism," *American Journal of History* (forthcoming).

[49]In 1874, the Maine court was faced with another question of equal protection, this one concerning women as governmental officeholders. A majority held that the state constitution prohibited women from occupying certain offices, but three justices dissented. In a fervent defense of female equality, Judge Dickerson admonished, "It should

not be forgotten that we live under the fourteenth amendment, and not under the *Dred Scott* decision." Opinions of the Justices, 62 Me. 596, 603 (1874).

David M. Gold holds a degree in law and a Ph. D. in history from the Ohio State University. He is the author of "Chief Justice John Appleton," which appeared in the Maine Historical Society Quarterly *in the spring of 1979. His dissertation, a biography of Chief Justice John Appleton of Maine, has been accepted for publication in the New York University School of Law series in legal history.*