Regulating Business Activity by Means of the Substantive Due Process and Equal Protection Doctrines Under the Georgia Constitution: An Analysis and a Proposal

L. Lynn Hogue
REGULATING BUSINESS ACTIVITY BY MEANS OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION DOCTRINES UNDER THE GEORGIA CONSTITUTION: AN ANALYSIS AND A PROPOSAL*

by
L. Lynn Hogue†

INTRODUCTION

Substantive due process has all the persistence of Original Sin. It is, therefore, not at all surprising that renewed interest in the potentialities of state constitutions generally† has revived interest

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† Professor of Law, Georgia State University College of Law. A.B., William Jewell College, 1966; M.A., University of Tennessee, 1968, Ph.D., 1972; J.D., Duke University, 1974. Professor Hogue is a member of the Bars of Georgia, North Carolina and Arkansas. The author would like to acknowledge the assistance of Madeline Wirt of the Class of 1987, now associated with the firm of King & Spalding in Atlanta, Georgia, who assisted in the preparation of this article.
in substantive due process as a technique for disciplining state
laws regulating business activity.2

By substantive due process,3 I refer to the judicial articulation of
fundamental values which are specially protected against legisla-
tive interference.4 As a subject matter area, the governmental regu-
lation of business activity is of greater than usual temptation to
judicial lawmakers. The selective favoring or protection of a busi-
ness that has been competitively disadvantaged by legislative ac-
tion is attractive because protective actions by the judiciary in this
area work in concert with a basic grain of conservatism. However,
the judiciary is less likely to take steps which cut against the grain,
such as releasing convicted criminals by imposing new procedural
strictures on law enforcement personnel, creating entitlements for
the poor, or making amenities available for prisoners, absent legis-
lationary action.5 Business regulations, alas, are different, as constitu-
tional history teaches.

Before canvassing this brief history of federal and some Georgia
experience with substantive due process, however, let me suggest
to the reader what lies ahead in this article. The development (as
opposed to the evolution) of substantive due process doctrine is
marked by several significant milestones. Only some are empha-
sized here. For example, the principle established in Munn v. Illi-
nois6 that the legislature may only regulate prices for businesses
“affected with a public interest” is absorbed into Georgia law, but
applied with some inconsistency. This article offers some reflec-
tions on the development of substantive due process, which is
marked by a general failure to fashion a coherent and ascertainable
doctrinal framework for the concept of substantive economic or
business rights.

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2 See, e.g., Hetherington, State Economic Regulation and Substantive Due Process
of Law, 53 NW. U.L. REV. 13 (1958); Paulsen, The Persistence of Substantive Due Pro-
cess in the States, 34 MINN. L. REV. 91 (1950); Struve, The Less-Restrictive-Alternative

3 No distinction is made between substantive due process and substantive equal
protection for the purposes of this article.

4 Gerald Gunther’s cautionary observation is worth noting at this point: “In no part
of constitutional law has the search for legitimate ingredients of constitutional inter-
pretation been more difficult and more controversial than in the turbulent history of
substantive due process.” G. GUNThER, CONSTITUTIONAL LAW 441 (11th ed. 1985).

5 E.g., Brennan, State Constitutions and the Protection of Individual Rights, 90

6 94 U.S. 113 (1877) (sustaining the state regulation of grain elevator storage rates).
"Upon this point a page of history is worth a volume of logic."

Although the concept of substantive due process as applied to the regulation of business was largely developed at the state level, it was eventually imported into federal law. A succession of federal Supreme Court cases, which are familiar to all lawyers from introductory studies of constitutional law, provide a necessary backdrop to this analysis — *Lochner v. New York,* and its elaboration of the now discredited "Allgeyer-Lochner-Adair-Coppage constitutional doctrine," *Bunting v. Oregon,* which undercut *Lochner* without a word of acknowledgement, and later *West Coast Hotel v. Parrish,* which sustained a state minimum wage law for women, and *Nebbia v. New York,* which upheld state-imposed maximum and minimum retail prices for milk.

A reacquaintance with these materials illustrates the problem with the revival of interest in substantive due process as a part of the general revival of interest in state constitutional law itself; the unhappy lessons that can be gleaned from the disappointing expe-

8. *E.g., In re Jacobs,* 98 N.Y. 98 (1885) (invalidating a New York law prohibiting the manufacture of cigars and the preparation of tobacco in tenement houses); Wynehamer v. People, 13 N.Y. 378 (1856) (reversed on state due process grounds a conviction for selling alcoholic beverages in violation of state law because the prohibitory statute failed to distinguish between the sale of liquor owned before passage of the act and liquor acquired after its effective date). For an interesting discussion of this process, see C. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954).
11. 245 U.S. 426 (1917).

So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.

*Id.* at 537.
riage with substantive due process at the federal level are too quickly forgotten. It is the thesis of this article that Georgia should not continue the substantive review of laws regulating economic matters unless it is possible to do so with greater success than attended federal experiments in this area. (And unless, of course, required or invited to do so by clearly worded, textually based state constitutional requirements, which is not the case under the Georgia Constitution of 1983.)

I. THE FEDERAL SUBSTANTIVE DUE PROCESS EXPERIENCE

A. Doctrinal Development

Ideas of natural justice and vested rights proscribing an area of business and personal activity beyond the reach of legislative authority emerged early in our national experience. For example, in Calder v. Bull, Justice Chase stated:

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own case; or a law that takes property from A . . . and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.  

14. 3 U.S. (3 Dall.) 386 (1798).
15. Id. at 388.
Although there are other hints of substantive due process in pre-
Civil War cases,\textsuperscript{16} the flowering of the doctrine occurred during the
late nineteenth and early twentieth centuries. In the \textit{Slaughter-
House Cases},\textsuperscript{17} the four dissenting Justices found that "the right to
pursue a lawful employment in a lawful manner" was one of the
"privileges and immunities" protected against state infringement
by the fourteenth amendment.\textsuperscript{18} The early rejection of the doc-
trine\textsuperscript{19} was supplanted by the gradual acceptance of the doctrine\textsuperscript{20}
and its eventual triumph.\textsuperscript{21}

With \textit{Allgeyer v. Louisiana},\textsuperscript{22} the Supreme Court completed its
doctrinal transformation and invalidated a state insurance law on
the basis of substantive due process.\textsuperscript{23} The legal peg on which the
majority hung its hat was "liberty of contract," but it was just an-
other form of substantive due process. As Justice Peckham
explained:

> The liberty mentioned in [the fourteenth] amendment means
not only the right of the citizen to be free from the mere physi-
cal restraint of his person, as by incarceration, but the term is
deemed to embrace the right of the citizen to be free in the
enjoyment of all his faculties; to be free to use them in all law-
ful ways; to live and work where he will; to earn his livelihood
by any lawful calling; to pursue any livelihood or avocation,
and for that purpose to enter into all contracts which may be

\textsuperscript{16} E.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (Georgia statute invalid
"either by general principles which are common to our free institutions, or by the par-
ticular provisions of the constitution of the United States"); Dred Scott v. Sandford,
60 U.S. (19 How.) 393, 450 (1857) ("[A]n Act of Congress which deprives a citizen of
the United States of his liberty or property, merely because he came himself or
brought his property into a particular Territory of the United States, and who had
committed no offense against the laws, could hardly be dignified with the name of due
process of law."); Wynnehamer v. People, 13 N.Y. 378 (1856) (state liquor prohibition
law invalid).

\textsuperscript{17} 83 U.S. (16 Wall.) 36 (1873).

\textsuperscript{18} The Slaughter-House Cases, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

\textsuperscript{19} Munn v. Illinois, 94 U.S. 113 (1877) (private property may be regulated when it is
"affected with a public interest"); Mugler v. Kansas, 123 U.S. 623 (1877) (sustaining
a law prohibiting intoxicating beverages, while at the same time announcing that the
court would review legislation for its substantive reasonableness).

\textsuperscript{20} Allgeyer v. Louisiana, 155 U.S. 575, 579 (1897) (invalidating on substantive due
process grounds a Louisiana law prohibiting the obtaining of insurance on Louisiana
property "from any marine insurance company which has not complied in all respects"
with Louisiana law).

\textsuperscript{21} Lochner v. New York, 198 U.S. 45 (1905).

\textsuperscript{22} 165 U.S. 578 (1897).

\textsuperscript{23} The statute "deprives the defendants of their liberty without due process of
law." \textit{Allgeyer}, 165 U.S. at 589.
proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\textsuperscript{24}

The problem of defining an appropriate test to detect impermissible legislative intrusions into the domain of constitutionally protected rights is, of course, a persistent one which emerges continually in cases asserting preferred rights under the fourteenth amendment.\textsuperscript{25} The issue of whether the Supreme Court has successfully articulated a workable standard to govern decision-making in the substantive due process/equal protection area of non-economic rights of privacy, autonomy, and family relations is beyond the scope of this paper. It is appropriate, however, to examine federal cases which analyzed business regulations under substantive due process because the inability to fashion a coherent doctrine at the federal level bears on the appropriateness for reviving economic substantive due process at the state level.

B. Lochner Era

In many respects, the high watermark of substantive due process occurred in \textit{Lochner v. New York},\textsuperscript{26} at best a doctrinally thin piece of work notable primarily for its conclusory approach to the issues presented. \textit{Lochner} involved the constitutionality of a New York law prohibiting the employment of bakery employees for more than ten hours per day or sixty hours per week. Lochner was convicted under the law and fined for permitting an employee to work more than sixty hours in a week.\textsuperscript{27} In ruling that the New York law violated the fourteenth amendment by inhibiting the ability of a baker to contract for his labor for more hours than permitted by the statute, the court stated:

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting

\textsuperscript{24} \textit{Id.}


\textsuperscript{26} 198 U.S. 46 (1905).

\textsuperscript{27} \textit{Lochner}, 198 U.S. at 52.
arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. 28

In a sense, the decision in *Lochner* turns on the constitutional credibility of evidence about the deleterious effects *vel non* of the baking trade on the health of bakers. Essentially, the majority requires a threshold of unhealthfulness to legitimize legislative interference with contractual decisions of bakers. This requirement is expressed as a tight means/ends relationship between a legitimate legislative objective and the methodology chosen to implement this objective. 29 In contrast, the dissent is willing to defer to legislative judgments about health. 30 In addition, the dissenting opinion by the first Justice Harlan draws from contemporary treatises on worker health to document the deleterious character of the baking trade on bakers. 31

28. *Id.* at 57.
29. *Id.* at 57-58.
   The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

*Id.*
30. *Id.* at 69 (Harlan, J., dissenting).
   Whether or not this be wise legislation, it is not the province of the court to inquire .... [T]he courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery .... establishments.

*Id.*
31. *Id.* at 70-71 (Harlan, J., dissenting).
   Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflam-
The unprincipled operation of *Lochner* is reflected in Holmes' famous observation in dissent: "The fourteenth Amendment does not exact Mr. Herbert Spencer's Social Statics."32 *Lochner*’s analytical problems are most evident, however, in the handling of an apparent precedent, *Holden v. Hardy*,33 in which the Supreme Court sustained a Utah law limiting the employment of workers in underground mines to eight hours per day. The majority opinion in *Lochner* disposes of the putative authority of *Holden* with the cavalier observation that "[t]here is nothing in *Holden v. Hardy* which covers the case now before us."34

C. *Lochner*’s Undoing

On one level the *Lochner* issue is whether bakeries are sufficiently like mines to be treated similarly. Economic conservative Professor Bernard Siegan, whose recent book35 is, among other things, an attempt to justify the golden age of substantive due process (1897-1937)36 and rehabilitate cases such as *Lochner*37 by

> mation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year ...."

*Id.*

33. 169 U.S. 366 (1898).
34. *Lochner*, 198 U.S. at 55.
36. For example, Professor Siegan states:

> Modern understanding of the regulatory processes reveals that many of the most controversial opinions of the Supreme Court during the substantive due process period were well founded in economic theory. A substantial number of economists would now accept the majority opinions in *Lochner* [198 U.S. 45 (1905)], *Adkins* [261 U.S. 525 (1923)], and *New State Ice* [285 U.S. 262 (1932)], and the dissenting opinion in *Nebbia* [291 U.S. at 539], as beneficial to the more disadvantaged members of society. ....

> .... [T]here is little pragmatic basis for denying the Framers' intentions to secure property and economic liberties by restraining governmental authority.

*Id.* at 320-21.

rediscovering their economic underpinnings,\(^3^8\) attributes part of the motivation for the statute at issue in *Lochner* to the peculiar problems of small bakeries. His description of the baking industry at the time of *Lochner*, evokes an image hauntingly like that of a mine: “In New York, as elsewhere, the baking industry was split between sizable bakeries whose plants had been specifically built or fully converted for [bakery] purposes, and small bakeries, operating out of limited, often subterranean quarters not originally intended for such use.”\(^3^9\) Even allowing for the admitted limits of metaphor as a probative legal tool, there is obviously something in *Holden* worth considering.\(^4^0\) Unfortunately, no ordering principle emerges to explain *Lochner* (a law limiting employment to ten hours per day or sixty hours per week for bakers is *unconstitutional*) or to distinguish *Holden* (a law limiting employment to eight hours per day for miners in underground mines is *constitutional*).

When *Bunting v. Oregon*\(^4^1\) came to the high court, the issue was the constitutionality of a maximum ten hour day for factory workers with up to three hours per day overtime at time-and-a-half. *Bunting* upheld the Oregon statute without distinguishing or even referencing *Lochner*. However, *Bunting* was not without precedent: nine years earlier, in *Muller v. Oregon*, the Court upheld an Oregon statute limiting the working hours of female employees in factories and laundries to ten hours per day, although admittedly, that case involved special eugenics considerations.\(^4^2\)

Later, when the issue of minimum wage for women, as opposed to maximum hours regulation, was before the Court in *Adkins v. Children’s Hospital*,\(^4^3\) the result marked a return to *Lochner*; wage regulation violated due process. In a dissent, Justice Holmes confessed, “I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who

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39. Id. at 116.
40. “United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court... The decision sustaining an eight hour law for miners is still recent.” *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
41. 243 U.S. 426 (1917).
42. 208 U.S. 412 (1908). “[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest...” *Id.* at 421.
43. 261 U.S. 525 (1923).
admit the power to fix a maximum for their hours of work . . . . The bargain is equally affected whichever half you regulate." 44  *Adkins* was adhered to thirteen years later in *Morehead v. New York ex rel. Tipaldo*, 45 but shortly thereafter overruled in *West Coast Hotel v. Parrish*, 46 which sustained a state minimum wage law for women with these observations:

[T]he violation [of due process] alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrolled liberty. . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. . . . 47

. . . .

We think that *Adkins* was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. . . . 48

. . . .

. . . What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? 49

The Supreme Court has continued to adhere to the *West Coast Hotel* analysis in more modern cases, such as *Day-Brite Lighting*,

44. Id. at 569 (Holmes, J., dissenting).
45. 298 U.S. 587 (1936).
46. 300 U.S. 379 (1937). *See* Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955) (challenging the hypothesis that Justice Roberts' vote in *West Coast Hotel* was in response to Roosevelt's judicial reorganization ["court-packing"] plan; a memorandum left by Justice Roberts shows that the Court voted on *West Coast Hotel* weeks before the announcement of the plan). For a contemporary account of the birth and death of Roosevelt's court reorganization scheme (and coincidentally the death of Arkansas' great Senator Joseph Taylor Robinson, the bill's champion) see J. ALSON & T. CATLEDGE, *The 168 Days* (1938).
47. *West Coast Hotel*, 300 U.S. at 391.
48. Id. at 397.
49. Id. at 398.
REGULATING BUSINESS ACTIVITY

Inc. v. Missouri,50 Williamson v. Lee Optical Co.,51 and Ferguson v. Skrupa.52 In addition, the doctrine applicable to laws regulating business activity challenged under the equal protection clause of the fourteenth amendment (as opposed to the due process clause) has been brought into conformity with the standard of West Coast Hotel and its progeny.53 Justice Marshall's observation in City of Cleburne v. Cleburne Living Center,64 that "[t]he suggestion that the traditional rational basis test allows [a] searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational basis review — a small and regrettable step back toward the days of Lochner v. New York,55 demonstrates the current Supreme Court's continuing distrust of the Lochner doctrine.

D. Nebbia, Munn, and the Reasonableness Standard

Nebbia v. New York,56 along with West Coast Hotel, an oft-cited case reflecting the judicial abandonment of the Lochner doctrine, provides an important statement of the reasonableness standard used to review business regulations challenged under the due process clause of the fourteenth amendment. Nebbia sustained a 1933 New York law establishing a Milk Control Board with the power to fix minimum and maximum retail prices for the sale of milk. At issue was whether the business of retail milk sales was one "af-

50. 342 U.S. 421 (1952) (sustaining a state law requiring employers to give workers four hours off with full pay to vote). "[The Court does] not sit as a super-legislature. [State legislatures] may within extremely broad limits control practices in the business-labor field . . . ." Id. at 423.
51. 348 U.S. 483 (1955) (sustaining an Oklahoma law making it unlawful for anyone who is not a licensed optometrist or ophthalmologist [e.g., a dispensing optician] to fit lenses or duplicate lenses other than upon a written prescription by an Oklahoma-licensed ophthalmologist or optometrist).
52. 372 U.S. 726 (1963) (sustaining a Kansas law excluding all but lawyers from the "business of debt adjusting"). "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours." Id. at 732.
53. Compare Morey v. Doud, 354 U.S. 457 (1957) (invalidating a by-name exemption of the American Express Company from the financial responsibility requirements imposed by an Illinois law on businesses issuing money orders) with New Orleans v. Dukes, 427 U.S. 297, 298 (1976) (overruling Morey and sustaining a "grandfather clause" in a New Orleans law which permitted the operation in the French Quarter only of pushcart food vendors who had "continually operated the same business for eight years prior to January 1, 1972").
ected with a public interest," the standard suggested by the much earlier case of *Munn v. Illinois*. The *Nebbia* majority, however, discarded this standard as insufficient to differentiate between regulable and unregulable categories of businesses:

'[A]ffected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression.

...  

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.  

Justice McReynolds dissented, objecting to such price fixing as "the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines." *Nebbia* and *Munn*, as will be seen, are useful windows through which to view the application of substantive due process doctrine in Georgia.

II. GEORGIA'S CONSTITUTIONAL PROVISIONS

It is worth noting at the outset that those provisions of Georgia's constitution which are cognates of the federal due process and equal protection clauses of the fifth and fourteenth amendments are not significantly different in text from their federal counterparts. Therefore, there is no reason to ascribe to them a legal distinction based on their phrasing in order to legitimize the practice of substantive due process. So elastic is the process by which judicial values are imported into constitutions that a variety of vehicles — "rights," "fundamental rights," "liberties," and the like — have nicely sufficed. And, indeed, Georgia has a sufficiency of cognates — a due process clause ("No person shall be deprived of life,

57. 94 U.S. 113 (1877) (grain elevator rate regulation permissible because "affected with a public interest").
59. *Id.* at 554-55 (McReynolds, J., dissenting).
60. Cf. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 181-83 (1984) (Whether or not the state constitution differs textually from the federal constitution, the state court must reach its own conclusion in construing the state constitution.).
liberty or property except by due process of law”), and two equal protection clauses now combined: an older, discrete one, part of Georgia’s constitution since 1868 (“Protection to person and property is the paramount duty of government and shall be impartial and complete”), and another provision borrowed from the 1868 constitution which drew its language in turn from the fourteenth amendment of the United States Constitution (“No person shall be denied the equal protection of the laws”). The text in Georgia’s constitution, in short, provides an opportunity but no justification for substantive due process.

III. GEORGIA’S INCONSISTENT EXPERIENCE

“The life of the law has not been logic: it has been experience.”

Like the Supreme Court in earlier times, Georgia courts have used the constitution to invalidate a variety of business regulations. For example, concepts such as the restriction in the 1877 case of Munn v. Illinois, that to be regulable a business must be “affected with a public interest” — rejected at the federal level in Nebbia — live on in our state jurisprudence, a living testament to Justice McReynolds’ dissent in Nebbia.

Thus, in the 1986 case of Batton-Jackson Oil Co. v. Reeves, the Georgia Supreme Court held unconstitutional a provision in the Gasoline Marketing Practices Act, which made it an unlawful business practice to sell gasoline to one distributor at a retail price and to another distributor at a distributor price for resale at retail. The court considered the case under the due process clause of the Georgia Constitution. The applicable rule, set out in Harris v. Duncan, is that “[t]he right to contract, and for the seller and

61. Ga. Const. art. I, § 1, ¶ 1. This has been part of the Georgia Constitution since the constitution of 1861.
62. These clauses are combined in the 1983 Georgia Constitution, art. I, § 1, ¶ 2. See Linde, supra note 60, at 182-83.
64. Id.
65. O. W. Holmes, Jr., The Common Law 1 (1881).
66. 94 U.S. 113 (1877).
purchaser to agree upon a price, is a property right protected by the due-process clause of our Constitution, and unless it is a business ‘affected with a public interest,’ the General Assembly is without authority to abridge that right.” According to the Batton-Jackson Oil case, once it is determined that a statute fixes prices, the court must decide if the business is “affected with a public interest”; if it is not, the regulation violates due process. In addition to the gas pricing issue in Batton-Jackson Oil, the Harris rule, taken from the Nebbia dissent, has been adhered to in a number of different regulatory contexts. Interestingly, however, the rule has not always been followed.

For example, in 1979, the Supreme Court of Georgia decided State v. Major, a case involving a state statute prohibiting the scalping of tickets to sporting events. The trial judge held the statute unconstitutional; the law violated the due process clause of the Georgia Constitution because it “unduly interfered with the private property right of disposing of one’s property at a non-exorbitant, non-fraudulent, non-extortionate price set by him.” Clearly, precedent was with the trial court judge. On appeal, however, the Georgia Supreme Court upheld the constitutionality of the statute, concluding that the majority opinion in Nebbia, rather than the dissent, controlled the outcome of the case. With the Major decision, the Georgia Supreme Court thus opened up a second line of authority deriving from the majority opinion in Nebbia.

Appellees in Major had relied on a pre-Nebbia ticket resale case admittedly on all fours with Major — Tyson & Bros. v. Banton. The Georgia court, however, ruled that the precedential value of Tyson had been eroded under federal case law by the decision in Nebbia:

Decided just seven years after Tyson, the court [in Nebbia] ad-

72. Harris, 208 Ga. at 564-65, 67 S.E.2d at 694.
76. Judge Beasley was then on the bench of the Fulton County State Court, but now
is a judge on the Georgia Court of Appeals.
78. See id. at 257-58, 253 S.E.2d at 726.
mitted that the concept of "affected with a public interest" was not susceptible of definition and formed an unsatisfactory test of the constitutionality of legislation directed at business practices and prices.

Although subsequent state court decisions have split on this question, it now appears that contrary to its earlier decision in Tyson the United States Supreme Court has recognized a legitimate state interest in the regulation of the resale price of tickets to places of entertainment and amusement.\textsuperscript{80}

In sum, Major considered a situation governed by the due process clause of the Georgia Constitution, held the applicable standard to be the majority position in Nebbia, and abandoned the limitation of regulating only businesses "affected with a public interest."

In many respects, 1979 was an unusual year for Georgia substantive due process, with seemingly inconsistent application of this doctrine. The Major case (argued January 16, 1979; decided March 6, 1979) in an opinion by Justice Jordan, without apparent reference to the Harris line of cases, introduced a new line of authority in Georgia based on the majority opinion in Nebbia. Despite the holding in Major, in Strickland v. Rio Stores, Inc.\textsuperscript{81} (argued April 9, 1979; decided May 2, 1979), the court struck down a law prohibiting the sale of cigars or cigarettes below cost. Under the facts of that case, the Georgia Supreme Court had no trouble discerning price fixing or concluding that tobacco sales were not a business "affected with a public interest" and therefore not subject to price constraints.\textsuperscript{82} Although an effort was made in Strickland to argue that, under the Major case, the law was a "reasonable means to [the] legitimate legislative end [of collecting tobacco taxes]"\textsuperscript{83} by assuring the financial health of retailers so that they "will be able to assist the State in collecting the cigarette stamp revenues,"\textsuperscript{84} the court rejected this argument with the observation that "price fixing applicable to cigars and cigarettes is not a reasonable means to the legitimate end of collecting tobacco taxes."\textsuperscript{85} Such a conclusion is a far more rigorous testing of rationality than the Nebbia majority would require.\textsuperscript{86} Interestingly, Justice Jordan, who had written

\textsuperscript{80} Major, 243 Ga. at 257-58, 253 S.E.2d at 726.
\textsuperscript{81} 243 Ga. 600, 255 S.E.2d 714 (1979).
\textsuperscript{82} Accord Williams v. Hirsch, 211 Ga. 534, 57 S.E.2d 70 (1955) (wholesale price of cigarettes) (following Harris v. Duncan, 208 Ga. 561, 67 S.E.2d 692 (1951)).
\textsuperscript{83} Strickland, 243 Ga. at 602, 255 S.E.2d at 716.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 603, 255 S.E.2d at 716.
\textsuperscript{86} The literature regarding rationality review is prodigious and beyond the scope of
the opinion in Major, concurred in the judgment in Strickland. Finally, in Georgia Franchise Practices Commission v. Massey-Ferguson, Inc., 87 (argued June 13, 1979; decided December 5, 1979) the supreme court returned to the pre-Nebbia notion that regulation was not constitutional if the "industry [was] not affected with a public interest." 88 Justice Jordan again concurred.

Although more recent cases, like Batton-Jackson Oil, discussed above, have adhered to the earlier Harris view, 89 one other case has followed Major, Paramount Pictures Corp. v. Busbee. 90 Paramount Pictures upheld the Georgia Motion Picture Fair Competition Act against the charge, inter alia, that it violated the due process clause of the state constitution. Relying on Major, the court upheld the law, which prohibits "blind bidding" for films, 91 as rationally related to the legislative goal of "promoting competition among motion picture distributors, eliminating unfair and deceptive trade practices, and insuring informed bidding by exhibitors." 92 Because the regulation does not involve price fixing, the business regulated need not be one "affected with a public interest."

According to Justice Weltner who dissented in Paramount Pictures, if judged in terms of its economic effect, the motion picture law, by affecting contracting procedures, affects the price of films:


87. 244 Ga. 800, 262 S.E.2d 106 (1979) (retail sale of motor vehicles).
88. Id. at 802, 262 S.E.2d at 108.
89. See supra notes 68-74 and accompanying text.
90. 250 Ga. 252, 297 S.E.2d 250 (1982).
91. O.C.G.A. § 10-1-292(2) (1982). This statute defines the term "blind bidding" as: the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of a motion picture at any time before the motion picture has either been trade screened within the state or before the motion picture, at the option of the distributor, otherwise has been made available for viewing within the state by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

Id.

The heart of this controversy is one not of law, but of economic advantage, translated through the political process into a statute of this State.

... The majority seeks to disregard the constitutional protections declared in Harris v. Duncan by suggesting that it is limited in its scope only to legislation which fixes consumer prices. While it is true that the legislation struck down in that case was price-fixing in nature, our Constitution cannot be so constricted.

Can we fail to recognize the final result of all competitive advantage is price? Can we deny that this intrusion into an industry will affect bargaining power, and, of necessity, price?

**Conclusion**

"What experience and history teach is this — that people and governments never have learned anything from history, or acted on principles deduced from it." 94

Justice Weltner's questions cut to the heart of the insubstantial distinction between Harris and Major. However, as the discussion of the federal experience reveals, it is Harris, not Major which is wrongly decided. Faced with the anomaly presented by these cases, the Georgia courts have a choice: they can continue selectively to disable business regulations on substantive due process grounds or admit the essentially ad hoc and unprincipled character of the competing lines of precedent and follow Nebbia, as Justice Jordan proposed in his brave and visionary opinion in Major.

In the next appropriate case, Georgia should consider afresh whether it will continue on a path of judicially second-guessing legislative regulations of business using the incoherent standard of whether the regulations touch only businesses "affected with a public interest" — a concept whose bankruptcy has been acknowledged at the federal level for decades and also briefly and accurately assessed in Georgia in the Major case — or whether it will take the opportunity to follow Major (and Nebbia). I, for one, hope that the court will take the prudent tack and choose the latter alternative.

93. *Id.* at 257-58, 297 S.E.2d at 254-55 (Weltner, J., dissenting).