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Justice Sutherland Reconsidered, 62 Vand. L. Rev. 639 (2009)

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Justice Sutherland Reconsidered

Samuel R. Olken*

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INTRODUCTION

In the annals of Supreme Court history, George Sutherland occupies a curious place. Associate Justice of the U.S. Supreme Court from 1921 to 1938, the Utah native has long been identified as one of the infamous “Four Horsemen,”¹ known largely for his role as a

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1. This pejorative term is short for “The Four Horsemen of the Apocalypse,” infamous mythical figures known for their doleful predictions of gloom. An early, if not the first, formal

judicial conservative instrumental in the Court's invalidation of significant aspects of the New Deal.² Yet Sutherland was also the author of several influential opinions involving matters as diverse as civil rights,³ freedom of expression,⁴ and others that recognized the broad authority of the federal government in the realm of foreign⁵ and military affairs.⁶ A proponent of limited government intervention into private economic activities, he also advocated the public interest in the exercise of reasonable controls of private land use.⁷ Moreover, Sutherland did not hesitate to support workers' compensation and other exercises of governmental authority intended to promote the public welfare.⁸ Accordingly, Justice Sutherland might appear to the modern observer as somewhat of a judicial enigma, who, except for an occasional progressive lapse, more often than not, imbued his analysis

reference in print to Sutherland and his fellow bloc of dissenters on the Hughes Court—Pierce Butler, James McReynolds, and Willis Van Devanter—as the “Four Horsemen” appears in FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE UNITED STATES FROM 1790 TO 1955*, at 217 (1955). While Rodell may have been the first to use the label “Four Horsemen,” many derogatory references to this quartet of Justices appeared in the press during the 1930s. One such variation was “The Four Horsemen of Reaction.” See, e.g., Drew Pearson & Robert S. Allen, *Nine Old Men at the Crossroads*, in *THE NINE OLD MEN* 54, 55 (Drew Pearson & Robert S. Allen eds., 1936) (using the phrase “Four Horsemen of Reaction”); see also G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL 19* (2000) (discussing usage of the phrase “Four Horsemen”).

2. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (ruling that the Guffey Coal Act violated the Commerce Clause and also infringed upon contractual liberty in contravention of the Due Process Clause of the Fifth Amendment).

3. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (finding the appointment of defense counsel to indigent defendants an essential attribute of due process in a capital case).

4. See *Associated Press v. NLRB*, 301 U.S. 103, 133–41 (1937) (Sutherland, J., dissenting) (asserting the application of the National Labor Relations Act to the editorial operations of a news agency restricted the editorial autonomy essential to freedom of the press); *Grosjean v. American Press Co.*, 297 U.S. 233, 250–51 (1936) (invalidating a Louisiana licensing tax law as a restriction of freedom of expression). For extensive analysis of Sutherland's First Amendment jurisprudence, see Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249 (2002) [hereinafter Olken, *The Business of Expression*].

5. See, e.g., *United States v. Belmont*, 301 U.S. 324, 332–33 (1937) (upholding a presidential executive agreement with the Soviet Union). Analysis of Sutherland's constitutional jurisprudence of foreign relations, matters of war, and separation of powers is beyond the scope of this Article.

6. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 332–33 (1936) (sustaining the President's implied statutory authority to prohibit the sale of weapons to foreign nations at war); *United States v. Macintosh*, 283 U.S. 605, 625–26 (1931) (upholding Congressional authority to abridge freedom of speech for national security reasons).

7. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (upholding a zoning ordinance as a reasonable exercise of local police powers).

8. See, e.g., *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 426 (1923) (sustaining a Utah worker's compensation law).

of constitutional law with principles of laissez-faire economics,⁹ Social Darwinism,¹⁰ and natural law.¹¹

Indeed, the principal mistake made by those who have sought to pigeonhole Sutherland is to assume that his was a constitutional jurisprudence devoted to preserving the socioeconomic status quo for a privileged elite¹² and that his judicial motivation reflected an overriding intent to apply an overarching theory of economic determinism to the facts of cases. In this regard, some scholars have erred in reducing the principles of legal classicism, which suffused constitutional discourse during much of Sutherland's life, to overly simplistic and exaggerated notions of political economy and the rule of law and thus have created inaccurate impressions of this now forgotten, but nevertheless, very important, early twentieth-century jurist. They have also confused Sutherland's judicial motivation with the adverse consequences likely to have resulted from some of his economic liberty opinions and thus have attributed to him an intent to preserve private property and contract rights at all costs. Indeed, Sutherland's myopic fealty to an increasingly irrelevant theory of judicial review may have helped contribute to subsequent misunderstanding of his counter-majoritarian tendencies and seemingly naive belief in neutral adjudication.

Analysis of Sutherland's judicial career and his constitutional values, however, reveals that his was a subtle and nimble mind, steadfast in its convictions about the virtue of constitutional limitations of governmental authority as the means for preserving individual liberties, less doctrinaire than his critics would attest, and perhaps more nuanced in its application of classical legal principles than other conservative Justices. Aversion to political factions was the linchpin of Sutherland's constitutional jurisprudence and the touchstone from which he limned the contours of public power in a

9. See, e.g., JOEL FRANCIS PASCHAL, *MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE* (1951).

10. See, e.g., J. Francis Paschal, *Mr. Justice Sutherland*, in MR. JUSTICE 123, 126–28 (Allison Dunham & Philip B. Kurland eds., 1956) (asserting that Social Darwinist Herbert Spencer influenced significantly Sutherland's constitutional thought).

11. See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994) (discussing Sutherland's doctrine of natural law).

12. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 106–07, 109 (2d ed. 1994); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 51–52, 66–67, 74 (3d rev. ed. 1979); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 228, 233–35 (1993); BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 198–99, 254–57 (1942); Ronald F. Howell, *The Judicial Conservatives Three Decades Ago: Aristocratic Guardians of the Prerogatives of Property and the Judiciary*, 49 VA. L. REV. 1447 (1963); R.A. Maidment, *A Study in Judicial Motivation: Mr. Justice Sutherland and Economic Regulation*, 1973 UTAH L. REV. 156, 157, 162.

democratic republic. Skeptical of public regulation that inured to the benefit of some groups at the expense of others, Sutherland insisted upon the equal operation of the law and distinguished between illegitimate class legislation and valid assertions of governmental authority that advanced the interests of the public at large.¹³ Viewed from the perspective of Sutherland's factional aversion and his respect for the principles of legal classicism, Sutherland's seemingly disparate judicial opinions on the Supreme Court become coherent parts of an integrated body of work and suggest a more complex set of judicial concerns than his critics would acknowledge.

This Article first explores the problems of Sutherland's judicial reputation and suggests that progressive and liberal historians as well as Supreme Court Justices and constitutional scholars have misconstrued both the intellectual milieu in which George Sutherland operated and the contours of his public law jurisprudence. It next provides a brief overview of the conservative judicial tradition Sutherland followed and summarizes Sutherland's understanding of judicial review in a constitutional democracy. The heart of the Article examines the extent to which Sutherland's jurisprudence of economic liberty reflected his aversion toward political factions and conviction that an unelected judiciary should function as the guardian of private rights threatened by the tyranny of democratic majorities. Thereafter, the Article links Sutherland's preoccupation with political factions to his inchoate recognition of the business of expression in the First Amendment context and his solicitude for criminal procedure. The Article concludes with a brief assessment of Sutherland's constitutional legacy in the domestic realm. Analysis of Sutherland's influence in the areas of foreign policy and separation of powers is beyond the scope of this Article, which instead focuses upon those areas of Sutherland's constitutional jurisprudence that scholars have largely neglected since his departure from the Court seven decades ago.

I. SUTHERLAND AND THE PROBLEM OF REPUTATION

Several reasons explain George Sutherland's relatively poor reputation as a Supreme Court Justice.¹⁴ Perhaps the most obvious is

13. See Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 7-8, 58-88 (1997) [hereinafter Olken, *Justice George Sutherland and Economic Liberty*] (discussing Justice Sutherland's attitude towards class legislation and factions).

14. Many constitutional scholars have relegated Sutherland to relative obscurity in the areas of constitutional law relating to the domestic realm, as opposed to issues involving

that because Sutherland was the intellectual leader in dissent from the Supreme Court's transformation of its jurisprudence of economic liberty during the 1930s, history has relegated him to the role of villain and has made him a conservative foil to the triumphant liberal bloc of the Court. Progressive historians of the first decades of the twentieth century, and the liberal scholars at mid-century who followed them, often cast Sutherland and the Justices who dissented from the Court's willingness to adapt the Constitution to changing economic circumstances—Pierce Butler, James McReynolds, and Willis Van Devanter—as inflexible jurists unable to shed their predilections for laissez-faire economics and obsessive devotion to property rights.¹⁵ Derisively dubbed the “Four Horsemen of the Apocalypse” by commentators, Sutherland and other conservative jurists have fared poorly over time in comparison to those Justices—Hughes; Stone; and, in particular, Cardozo and Brandeis—admired for their willingness to balance private rights and the public interest in constitutional adjudication.¹⁶

separation of powers and foreign policy, where some of his more influential decisions continue to warrant debate. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 332–33 (1937) (sustaining broad presidential authority to execute an arms embargo); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935) (limiting presidential authority to remove executive branch officials); *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923) (invoking the justiciability doctrine of standing as a prudential limit upon federal judicial power). In part, this is because the Court has overturned several of his opinions involving economic regulation. *See* Paschal, *supra* note 10, at 123 (commenting on the “obsolescence” of Sutherland's jurisprudence of economic liberty). The following cases overturned Sutherland opinions concerning economic regulation: *Olsen v. Nebraska*, 313 U.S. 236 (1941), *overruling* *Ribnik v. McBride*, 277 U.S. 350 (1928); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), *overruling* *Carter v. Carter Coal Co.* 298 U.S. 238 (1936); *Helvering v. Gerhardt*, 304 U.S. 405 (1938), *overruling* *Colgate v. Harvey*, 296 U.S. 404 (1935); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *overruling* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). However, thirty years ago, Sutherland received a ranking of “near great” in ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 46 (1978). A more balanced interpretation of Justice Sutherland appears in David Burner, *George Sutherland, in 6 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS* 2133, 2133–43 (Leon Friedman & Fred L. Israel eds., 1980).

15. *See* WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937*, at 254–62 (1998) (discussing Progressive historiography from 1910 to 1940 and Liberal historiography from 1940 to 1970); WHITE, *supra* note 1, at 269–301 (comparing the manner in which historians have portrayed various members of the Hughes Court in light of the 1930s transformation in constitutional interpretation); *see also* Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 3–5 & nn. 7–11 (discussing Sutherland's reputation in the aftermath of the constitutional revolution of the 1930s).

16. *See, e.g.*, ANDREW L. KAUFMAN, *CARDOZO* 536 (1998) (asserting that Cardozo upheld governmental decisions and enforced civil liberties on different occasions); ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 644 (1956) (discussing Brandeis's commitment to individual liberty); ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 683–98 (1951) (describing Stone as a “palladium of freedom”); 2 MERLO PUSEY, *CHARLES EVANS HUGHES* 717–30 (1951) (describing Hughes as a “guardian of freedom”); PHILIPPA STRUM, *LOUIS D.*

Not only does this conventional account portray Sutherland in an unflattering light, but it casts aside, perhaps for the sake of a consistent plot, the fact that with respect to most of the early New Deal programs, Sutherland was hardly alone in his opposition to them on either separation of powers or Commerce Clause grounds. Indeed, a near unanimous Court raised numerous constitutional objections to these poorly drafted legislative reforms.¹⁷ Although the Four Horsemen often voted together during the 1920s and 1930s, they were not necessarily the ideological monolith often described in pejorative terms. Of the four, Pierce Butler was by far the most conservative on socioeconomic matters and patriotic issues,¹⁸ and while James McReynolds had few peers as a social reactionary, neither Justice, nor the often ignored Willis Van Devanter, was as motivated by factional aversion as George Sutherland.

Progressive historians, in particular, including Charles Beard, the Columbia University economic historian who, at times, consulted with his former academic colleague Harlan Stone about the economic

BRANDEIS: JUSTICE FOR THE PEOPLE 309–39 (1984) (describing Brandeis's judicial approach to civil liberties); *see also* GARY J. JACOBSON, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 181–93 (1977) (describing Chief Justice Hughes's *Blaisdell* opinion as pragmatic).

17. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548–51 (1935) (holding that the minimum wage and maximum hour provisions of the National Industrial Recovery Act violated the delegation doctrine and the Commerce Clause); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (voiding the National Industrial Recovery Act's "hot oil" provision as an unconstitutional delegation of lawmaking authority); *see also* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 36–39 (1998) (discussing poor draftsmanship).

18. *See, e.g.*, *Steward Mach. Co. v. Davis*, 301 U.S. 548, 616 (1937) (Butler, J., dissenting) (asserting that the Social Security Act violated the Tenth Amendment); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 611 (1936) (asserting a state minimum wage law violated liberty of contract); *Helvering v. Taylor*, 293 U.S. 507, 515–16 (1935) (characterizing a federal tax on the sale of preferred stock as arbitrary and excessive); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (Butler, J., dissenting) (refusing to apply the Due Process Clause of the Fourteenth Amendment to afford indigent criminal defendants the meaningful right to counsel in a rape prosecution); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 735–36 (1931) (Butler, J., dissenting) (invoking the need for municipalities to restrict some forms of written expression that amount to a nuisance); *United States v. Schwimmer*, 279 U.S. 644, 653 (1929) (upholding denial of citizenship of an elderly Hungarian woman who refrained from swearing to bear arms in defense of the country in her citizenship application); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 420–21 (1926) (demonstrating Butler's penchant for applying the cost of reproduction theory to help utility companies in rate evaluation disputes); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (Butler, J., dissenting without opinion from the Court, *per* Justice Sutherland) (sustaining a zoning ordinance as a reasonable police powers regulation); *Terrace v. Thompson*, 263 U.S. 197, 224 (1923) (upholding Washington law restricting aliens from land ownership); *see also* DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964) (discussing Pierce Butler's appointment to the Supreme Court); Samuel R. Olken, *Butler, Pierce*, in *1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 209, 209–10 (Paul Finkelman ed., Routledge Press 2006) (biography describing Butler as "one of the most conservative justices ever to sit on the U.S. Supreme Court").

and historical context of New Deal constitutional issues,¹⁹ and Edward S. Corwin, the Princeton political scientist who helped Franklin Delano Roosevelt formulate the ill-fated Court packing plan,²⁰ had strong personal interests in advancing a particular history of the Court that unfortunately lacked nuance and objectivity. In addition, journalists who pilloried Sutherland and the other Horsemen of the Apocalypse primarily viewed constitutional issues in political terms²¹ and thus obscured the jurisprudential subtleties and canons of legal interpretation by which many *Lochner*-era jurists felt bound. Sutherland's reluctance to depart from *Lochner*'s classical assumptions revealed structural faults in his constitutional thought and unfortunately made possible a connection between *Lochner*'s pejorative meaning and Sutherland's own judicial reputation.

In part, progressive and liberal historians' attitudes toward Sutherland and his fellow constitutional classicists reflected criticism (both within and beyond the Hughes Court) anticipated years before by Oliver Wendell Holmes's *Lochner* dissent, in which the exasperated philosopher-Justice exclaimed: "This case is decided upon an economic theory which a large part of the country does not entertain The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."²² Nearly two decades later, William Howard Taft, in an uncharacteristic tirade against judicial conservatism, reiterated Holmes's trenchant observation and accused Sutherland of invalidating a minimum wage law on socioeconomic grounds.²³ Together, these dissents suggested that some early twentieth-century Justices invoked the abstract doctrine of liberty of contract to mask

19. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73–151 (Transaction Publishers 1998) (1913) (arguing that the Constitution reflects the economic interests of the Framers' generation); MASON, HARLAN FISKE STONE, *supra* note 16, at 410–11 (discussing the relationship between Beard and Stone); Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 584 n.329, 585–86, 589–91 (1993) [hereinafter Olken, *Charles Evans Hughes and the Blaisdell Decision*] (discussing Stone's draft concurring opinion in *Blaisdell*).

20. WHITE, *supra* note 1, at 318 n.3. Corwin's explanation of the Supreme Court's role in the constitutional revolution of the 1930s appears in EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 39–79 (1941).

21. Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 279 (2002) [hereinafter Olken, *Historical Revisionism and Constitutional Change*].

22. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

23. *Adkins v. Children's Hosp.*, 261 U.S. 525, 562–67 (1923) (Taft, C.J., dissenting). Taft commented that "it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound." *Id.* at 562.

their socioeconomic preferences and maintain the illusion of judicial neutrality, points frequently reiterated in subsequent historical assessments of the Supreme Court.²⁴

Both Taft and Holmes could, in other instances, have lodged these same criticisms against themselves. Taft, for example, normally a jurisprudential ally of Sutherland—and therefore subject more often than not to the same charges of socioeconomic determinism as his close personal friend—was probably, given his general constitutional views,²⁵ more disturbed by his colleague's apparent deviation from post-*Lochner* precedent than with Sutherland's factional analysis. Ever cognizant of the legitimacy of judicial review by an unelected judiciary in a constitutional democracy, Taft may have worried that Sutherland's opinion might seem reactionary to progressive critics of the Court still fuming over the *Lochner* decision.²⁶ Moreover, Taft's dissent expressed the very paternalistic attitude towards women that Sutherland decried both in his majority opinion and years before in the Senate.²⁷

24. See, e.g., WIECEK, *supra* note 15, at 98, 107–08, 132–33, 157 (discussing *Lochner* era juridical emphasis upon the neutral operation of the law in order to foster individual liberty); see also MCCLOSKEY, *supra* note 12, at 76–120 (portraying *Lochner* era jurists as ideologues who applied laissez-faire economics and Social Darwinism to preserve the economic status quo); SCHWARTZ, *supra* note 12, at 225, 228, 233–35 (same); WRIGHT, *supra* note 12, at 198–99, 254–57 (same).

25. See, e.g., *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 543–44 (1923) (Taft, C.J.) (construing narrowly the affectation doctrine to limit the scope of public economic regulatory authority). See generally ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 13–14, 16, 45–48 (1964) (portraying William Howard Taft as a conservative jurist).

26. See MASON, *supra* note 25, at 249–51 (discussing Taft's dissent in *Adkins*). In fact, Taft assumed that the Court had, in *Bunting v. Oregon*, 243 U.S. 426 (1918), “overruled [*Lochner*] *sub silentio*,” *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting), and thus questioned the logic of Sutherland's rigid adherence to the doctrine of liberty of contract, *id.* at 562–67.

27. See *Adkins*, 261 U.S. at 567 (Taft, C.J., dissenting) (suggesting that “[t]he Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests”). Conversely, Sutherland thought the recent passage of the Nineteenth Amendment, pursuant to which women received the right to vote, justified application of the doctrine of liberty of contract and rendered irrelevant paternalistic precedent such as *Muller v. Oregon*, 208 U.S. 412 (1908). Sutherland commented:

In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost . . . to the vanishing point . . . [We] cannot accept the doctrine that women of mature age, *sui juris*, require . . . restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.

Adkins, 261 U.S. at 553.

Eight years before *Adkins*, Sutherland, then a member of the United States Senate, introduced a joint resolution to amend the Constitution to provide women suffrage. 53 CONG. REC. 75 (1915) (statement of Sen. Sutherland). Sutherland believed that denying women the

Ironically, Holmes, perhaps the Court's most ardent Social Darwinist given his philosophical record and innate elitism,²⁸ implicitly accused conservative Justices of endorsing Social Darwinism in *Lochner* with his snide and unsubstantiated remark about the resonance of Herbert Spencer's *Social Statics*, a nineteenth-century tract of political economy that melded the emergent theory of natural selection with a rigid notion of laissez-faire economics.²⁹ Scant evidence, however, supports Holmes's assertion, as neither Spencer, nor his American disciple, William Graham Sumner, exerted much influence on American jurisprudence during the *Lochner* era.³⁰ Seminal jurists like Sutherland's Michigan law professor Thomas Cooley considered Social Darwinism too abstract for problems of constitutional law and expressed doubts about its harsh assumptions.³¹

In the 1930s, as the Court struggled to adopt a course between legal classicism and modernity in assessing the constitutional limits of public economic regulation, Sutherland's judicial colleagues Charles

right to vote was "purely artificial . . . unjust and [an] intolerant denial[] of equality." *Id.* at 11,318 (1916) (statement of Sen. Sutherland). He questioned such disparate treatment on the basis of gender, noting that "[i]f it be right to extend the voting privilege to all sorts . . . of men, I am not quite able to see the justice of denying the same right to all sorts . . . of women." 51 CONG. REC. 3601 (1914) (statement of Sen. Sutherland); see also Senator George Sutherland, Speech at Woman Suffrage Meeting, Belasco Theatre 3-4 (Dec. 12, 1915) (on file with the Vanderbilt Law Review) (advocating women's suffrage).

28. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 291, 324, 360 (1993) (discussing Holmes's Social Darwinism). A particularly egregious example of Holmes's Social Darwinism is his opinion in *Buck v. Bell*, 274 U.S. 200, 207 (1927), wherein he stated, in support of a Virginia law mandating the sterilization of "mentally defective" persons, that "[t]hree generations of imbeciles are enough."

29. HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED (1851); see also HERBERT SPENCER, FIRST PRINCIPLES (1862) (discussing natural selection, human progress, and the virtues of limited government); HERBERT SPENCER, THE MAN VERSUS THE STATE (1885) (same). Yale University political philosopher William Graham Sumner was the leading late nineteenth-century American proponent of Spencer's theories of Social Darwinism and laissez-faire economics. See 1-2 WILLIAM GRAHAM SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER (Albert Galloway Keller & Maurice R. Davie eds., 1934) (applying Spencer's theories); WILLIAM GRAHAM SUMNER, WHAT THE SOCIAL CLASSES OWE TO EACH OTHER (1883) (same).

30. See Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 403-04, 418-20 (1988) (suggesting the significant influence of classical economic theory upon *Lochner* era jurists while discounting their reliance upon Social Darwinism); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 30-35 (same).

31. See Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752, 755-57, 759-64, 766-67, 770-71 (1967) (attributing Cooley's opposition to class legislation, in part, to his respect for history and the common law tradition); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 33-34 (same); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1493-94, 1497-98, 1501-15, 1540 (same).

Evans Hughes and Louis Brandeis poignantly reminded their more conservative brethren about the need for judicial restraint in assessing questions of legislative authority, even going so far as to criticize Sutherland's refusal to recognize the public interest in private contract rights and his dogged application of traditional police powers doctrine.³² In the aftermath of the constitutional revolution of the 1930s, modern jurists eager to distance themselves from *Lochner*-era police powers jurisprudence and bolster the Court's institutional legitimacy³³ also fostered misconceptions about Sutherland and others who saw themselves as guardians of a constitutional system designed to curb the tyranny of ephemeral democratic majorities.³⁴

Invariably, the criticism of classical judges who resisted the trend to adapt the Constitution to changing economic circumstances during the initial decades of the twentieth century conflates (and even confuses) laissez-faire economics with laissez-faire constitutionalism.³⁵

32. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 398–400 (1937) (asserting the constitutionality of regulation by legislatures to protect liberties); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 435, 442–43 (1934) (same). Frustrated by Sutherland's insistence upon inflexibly applying the Contracts Clause during the Depression, Hughes remarked in *Blaisdell* that “[t]he policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, - a government which retains adequate authority to secure the peace and good order of society.” *Id.* at 435; see also *New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (criticizing the Court's application of substantive due process to thwart the reasonable exercise of state police powers). Brandeis warned Sutherland and the other Justices in the majority that in reviewing statutes the Justices “must ever be on our guard, lest we erect our prejudices into legal principles.” *Id.*

33. See *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) (upholding a Kansas law monopolizing debt collection). In *Ferguson*, Justice Black commented the Court should not invoke “the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.” *Id.*; see also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (Douglas, J.) (noting that the Court would no longer invalidate state economic regulations because they conflict “with a particular school of thought”); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (Douglas, J.) (rejecting the notion that the Supreme Court should function as a super-legislature deciding policy questions concerning public welfare).

34. See WHITE, *supra* note 1, at 4, 96, 168–69 (discussing guardian judicial review and the propensity for its practitioners to adhere to rigid classifications and apply seemingly immutable principles in the resolution of disputes). A prime example of guardian judicial review is Justice Bradley's statement in *Boyd v. United States*, 116 U.S. 617, 635 (1886): “[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon.”

35. Laissez-faire constitutionalism refers to broad construction of constitutional limits of governmental authority in order to facilitate personal liberty and does not necessarily require judicial application of socioeconomic principles to the meaning of constitutional text. Laissez-faire economics is a socioeconomic theory that posits the primacy of unimpeded market forces in economic affairs and discourages governmental intervention in a presumably self-correcting

According to Holmes's 1905 observation, later advanced as historical shibboleth and perpetuated by modern Supreme Court Justices, the Court's more conservative early twentieth-century jurists used principles of laissez-faire economics to constrain the scope of public regulation of private businesses.³⁶

However, laissez-faire economics was not the principal basis upon which *Lochner*-era judges assessed the constitutional limits of governmental authority.³⁷ As formulated by Adam Smith in the late eighteenth century, laissez-faire political economics signified a self-contained, autonomous economic system in which natural market forces of supply and demand, free from public regulation, would furnish prosperity.³⁸ Strict adherents to laissez-faire economics, of which there were relatively few in America, believed governmental intervention for reasons other than the removal of artificial restraints threatened economic efficiency because it altered the free exchange of goods and services between individuals in ways that distorted the value of labor and impaired commercial enterprise.³⁹

While *Lochner*-era jurists were certainly familiar with laissez-faire economics, and even with its expression in terms of Darwinian natural selection—as articulated by its most rigid proponents, Herbert Spencer and William Graham Sumner—most judges who applied substantive due process instead invoked common law precepts of limited government and equal operation of the law in striking down

market. For an explanation of the differences between laissez-faire constitutionalism and laissez-faire economics, see generally Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985), which refutes the notion that *Lochner* era jurists relied upon either laissez-faire economics or Social Darwinism. Like Benedict, I argue that conservative jurists of the late nineteenth and early twentieth centuries were more likely adherents of laissez-faire constitutionalism than proponents of laissez-faire economics. Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 5–7, 30, 32–33.

36. See, e.g., MCCLOSKEY, *supra* note 12, at 81–108 (discussing the Court's drift towards laissez-faire constitutionalism); Howell, *supra* note 12 (same); Frank R. Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973) (same). But see Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937*, 35 AM. J. LEGAL HIST. 70 (1991) (arguing that the Court did not follow laissez-faire capitalism).

37. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (arguing that factional aversion underscored conservative juridical behavior); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 9–35 (same); see also Benedict, *supra* note 35, (emphasizing judicial concern with preserving individual liberty).

38. Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 30–31.

39. *Id.*

economic regulations.⁴⁰ Thomas Cooley, for instance, questioned the utility of using supply and demand to resolve the legality of industrial regulations.⁴¹ Rather than disavow the government's role in economic development, various segments of American society accepted, to some extent, public intervention intended to stimulate economic growth in the form of corporate subsidies, protective tariffs, tax exemptions, antitrust regulation, bimetallism, and even public education.⁴² In fact, throughout his public career, Sutherland was a staunch advocate of workers' compensation and other industrial regulations he believed helped the public at large rather than discrete, favored groups.⁴³ Partial laws that bestowed benefits on some factions and imposed burdens on others underscored inherent tensions in the transformation from a primarily agricultural and small-scale entrepreneurial economy to one that featured more large-scale industrial production. Within this context, late nineteenth- and early twentieth-century judges confronted the task of construing due process and the limits upon state police powers.

Less interested in economic theory than in personal economic liberty, conservative judges like Sutherland invoked the ideal of government neutrality to protect private economic rights from the tyranny of shifting democratic majorities whose class legislation threatened to undermine the equal operation of the laws. Skeptical of political factions, they regarded constitutional limitations upon governmental power as essential to the preservation of individual liberty.⁴⁴ Accordingly, conservative jurists like Sutherland favored

40. GILLMAN, *supra* note 37; Benedict, *supra* note 35, at 297–98, 304–05, 311, 314, 331; Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 30–31, 33–35.

41. Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 31.

42. *Id.* As a United States senator, Sutherland advocated certain protective tariffs if they represented “a definite and defensible policy of general application” intended to limit “the artificial inequalities of special privilege.” 50 CONG. REC. 4297 (1913) (statement of Sen. Sutherland) (opposing the Underwood Tariff Bill of 1913 because it favored Southern agricultural interests at the expense of Western farmers). Unlike steadfast proponents of laissez-faire economics such as William Graham Sumner, Sutherland consistently supported protective tariffs of general and equal application.

43. *See* Cudahy Packing Co. v. Parramore, 263 U.S. 418, 426 (1923) (upholding worker's compensation statute). While in the U.S. Senate, Sutherland chaired a federal commission on industrial accidents and recommended a statutory compensation scheme that would provide prescribed awards to all injured workers in place of the inequitable and inconsistent damages available at common law. *See* 48 CONG. REC. 4853–54 (1912) (statement of Sen. Sutherland) (advocating workmen's compensation); 53 CONG. REC. 52 (1916) (statement of Sen. Sutherland) (introducing a federal workmen's compensation statute).

44. *See* WIECEK, *supra* note 15, at 107–08, 112 (discussing classicist judicial view favoring “equality of right”); Benedict, *supra* note 35 (discussing the basis for laissez-faire constitutionalism); Gillman, *supra* note 37 (discussing the factional aversion of conservative jurists).

limited governmental intervention in private economic affairs because they thought government neutrality was more likely to preserve individual rights through the equal operation of the law.⁴⁵

Moreover, between 1870 and 1937 the Supreme Court actually upheld most of the industrial regulations before it,⁴⁶ which belies the commonly held inaccurate perception that the Justices primarily interpreted the Constitution through the lens of laissez-faire economics. Even when Sutherland invalidated public restrictions upon private economic activities, he decried constitutional adjudication that substituted the personal views of jurists for seemingly neutral and detached assessment of the issues.⁴⁷ Factional aversion, historical custom, and respect for precedent formed the constellations of conservative jurisprudence rather than laissez-faire economics, Social Darwinism, and natural rights.⁴⁸ That some of Sutherland's conclusions may have appeared reactionary should not detract from his traditional methods nor distort his judicial motivation. As a classical jurist, Sutherland advocated laissez-faire constitutionalism without necessarily reading laissez-faire economics into the Constitution.

Interestingly, even Sutherland's biographers have contributed to the problem of his judicial reputation. J. Francis Paschal, a student of Corwin's at Princeton, published the first book-length Sutherland biography in 1951, at the height of liberal historical scholarship. Though for the most part a comprehensive study of Sutherland's public career, the Paschal biography, perhaps unwittingly, portrayed its subject as "a man against government"—indeed, this is the book's subtitle—and as a judicial activist whose passion for laissez-faire economics imbued his constitutional jurisprudence and fueled his

45. WIECEK, *supra* note 15, at 107–08, 112.

46. See Ray A. Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 HARV. L. REV. 943, 944–45 & n.11 (1927) (discussing cases between 1868 and 1927); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Progressive Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC'Y 53 (asserting that the Progressive era Court upheld most reform efforts, contrary to popular belief).

47. Though expressed in dissent, Sutherland cogently explained his opposition to constitutional adjudication reflective of the policy preferences of judges in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting), wherein he said: "The suggestion that the only check upon the exercise of the judicial power . . . to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of the will and not of judgment." Sutherland also cautioned that "[t]he judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation." *Id.* at 404.

48. Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 5–35.

opposition to the New Deal.⁴⁹ Aside from Paschal's failure to consider Sutherland's factional aversion as well as Sutherland's belief—albeit incorrect—that invalidating public regulation of private economic affairs was actually a form of judicial restraint, Paschal does little to differentiate Sutherland from the more conservative and doctrinaire members of the Taft and Hughes Courts. Nor does Paschal, or for that matter most other progressive and liberal historians, account for the fact that nearly all members of the Hughes Court ruled several aspects of the early New Deal unconstitutional.

In 1994, the natural rights philosopher Hadley Arkes, in an attempt to resurrect natural rights in public law discourse, asserted in his biography of Sutherland that Sutherland suffused his constitutional jurisprudence with natural rights.⁵⁰ Notwithstanding its creative attempt to portray Sutherland in an alternate light, Arkes's study is strangely ahistorical and, perhaps inadvertently, lends credence to the simplistic perception that Sutherland read his own views into issues before the Court. Sutherland, like other conservative jurists, on occasion, may have invoked the rhetoric of natural rights. But, as a faithful adherent of legal classicism, Sutherland understood the limited utility of natural rights in the resolution of constitutional disputes and the problems they created for judges intent upon curbing judicial discretion.⁵¹

49. PASCHAL, *supra* note 9; see also Paschal, *Mr. Justice Sutherland*, *supra* note 10, at 128–29 (discussing how Sutherland “adjust[ed] constitutional theory to the demands of his laissez faire ideology”).

50. ARKES, *supra* note 11. Insofar as Arkes emphasizes natural rights as the basis of Sutherland's constitutional jurisprudence, he probably overstates its influence as a constitutional construct. For notwithstanding its rhetorical appeal, most *Lochner* era jurists refrained from relying upon principles of natural law in post-Civil war constitutional adjudication, largely because natural rights theory proved too abstract for determining the contours of governmental authority. See William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 558–60 (1974) (positing that natural law's occupation with unchanging moral principles made it ill-suited for resolving many legal disputes spawned from industrial change); see also Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 65–66 (1991) (asserting that *Lochner* era jurists drew upon historicism—a cultivated sense of history—and common law custom instead of natural rights).

51. Natural rights refer to those rights whose existence does not depend upon positive law. As with natural rights, the concept of natural law presupposes the existence of unchanging, eternal moral principles perceived through direct human intuition. In this regard, “[n]atural rights . . . are not something different from natural law but refer to the entitlement aspect of the relationship created by a natural law.” JAMES F. HERGET, *AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY* 10 (1990). Although “the idea of natural law makes sense as an abstract generality . . . any attempt to apply it to specific legal and ethical issues is impossible. Hence, the idea is useless as a practical matter.” *Id.* at 11. Indeed, nearly from the outset of American constitutional history, some jurists expressed doubts about relying upon natural rights/law concepts in constitutional adjudication. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398–99

Recent historical analysis of *Lochner*-era police powers jurisprudence and legal classicism's effect on constitutional adjudication during the late nineteenth and early twentieth centuries affords ample opportunity to reassess the judicial career of George Sutherland.⁵² With its emphasis upon how factional aversion informed the laissez-faire constitutionalism of conservative jurists between 1870 and 1937, this "revisionist" historical approach affords an essential perspective from which to examine Sutherland's judicial motivation and the problems stemming from his devotion to legal classicism.

II. THE CONSERVATIVE JUDICIAL TRADITION

The conservative judicial tradition to which George Sutherland adhered arose in the aftermath of the American Revolution. As the 1780s unfolded and social and economic instability ensued from state inflationary practices, lax credit policies, and ill-conceived debtor-relief legislation, James Madison, Alexander Hamilton, and John

(1798) (Iredell, J.) (criticizing the wide-ranging assertion of judicial review based upon natural law principles). *But see id.* at 387–88 (Chase, J.) (invoking natural law as an independent limitation of governmental authority). Increasingly, jurists confronted with disputes involving intangible property and legal problems arising from venture capital throughout the early nineteenth century realized natural law's limitations as a basis upon which to resolve concrete legal issues. *See* WIECEK, *supra* note 15, at 37 (asserting that insolvency cases forced the Court to confront tensions and contradictions posed by new forms of property). By the mid-nineteenth century, natural law theory suffused the inchoate notion of substantive due process as a restriction of governmental power. *See id.* at 49–51 (discussing antebellum doctrinal trends); *see also* Wynehamer v. People, 13 N.Y. 378, 415 (1856) (discussing natural rights). In the aftermath of the Civil War, natural law pretty much disappeared as an independent legal doctrine, its feasibility largely diminished by the complex legal issues that arose in the post-Civil War industrial nation. *See* WIECEK, *supra* note 15, at 124 (discussing post-war judicial approaches); *see also* Nelson, *supra* note 50, at 558–60 (same); Siegel, *Historism*, *supra* note 31, at 1540–44 (observing that *Lochner* era jurists relied primarily upon historical consciousness, custom, and common law rather than natural rights/law); Siegel, *Lochner Era Jurisprudence*, *supra* note 50, at 63–66, 76–78, 80 & n.398, 82–90, 96 (describing how late nineteenth-century constitutional jurisprudence reflected historical custom and common law methods). While some classical jurists may have retained on some level a "belie[f] that law . . . derived from universal principles of justice and moral order," WIECEK, *supra* note 15, at 12, most, like George Sutherland, did not necessarily regard natural rights/law as the principal basis of their constitutional adjudication, preferring instead to focus upon constitutional provisions to protect private property from incursion by class legislation. In essence, factional aversion and a longstanding commitment to the equal operation of the law comprised critical components of the historical consciousness, or historicism, of *Lochner* era jurists. *See* Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 33–35, 73–81 (discussing Sutherland's historicism).

52. *See, e.g.*, GILLMAN, *supra* note 37 (discussing the influence of factional aversion); WIECEK, *supra* note 15 (discussing legal classical thought); Benedict, *supra* note 35 (differentiating laissez-faire constitutionalism from laissez-faire economics in *Lochner* era constitutional interpretation).

Adams, among others, increasingly expressed grave concerns about the tyranny of democratic majorities and the problems of political factions in the new republic.⁵³ In so doing, they evoked the commonwealth ideal, expressed over a century earlier by British Whig political reformers, of a neutral state in which government sought to promote the general welfare rather than benefit some groups at the expense of others.⁵⁴

Insofar as Madison recognized the inevitable occurrence of factions in a democratic republic, he expressed hope that constitutional limitations of governmental authority would curb their influence in the passage of class, or partial, legislation inimical to the public good.⁵⁵ Hamilton posited that judicial review by an unelected, independent judiciary would keep political factions in check and preserve individual rights against the passions and whims of ephemeral democratic majorities.⁵⁶ For the constitutional Framers, the protection of property rights and contract obligations from incursion by democratic majorities was of paramount concern.⁵⁷ Within this context, the Marshall Court consistently applied the Contracts Clause as a constitutional limitation upon political factions that threatened the security of private vested interests.⁵⁸

Thereafter, Jacksonian jurists, intent upon reconciling the permissible scope of government regulation with the preservation of private property and contract rights, recognized that the legitimacy of public welfare depended upon the equal operation of the law. Accordingly, they sustained the exercise of police powers that promoted public health, safety, morals, or welfare and rejected as

53. See WIECEK, *supra* note 15, at 23–28 (discussing the political attitudes of the Framers); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 11–13 (same).

54. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 53–65 (Univ. of N.C. Press 1998) (1969) (describing eighteenth-century commonwealth ideology); Benedict, *supra* note 35, at 316–17 (same).

55. THE FEDERALIST NO. 10 (James Madison).

56. THE FEDERALIST NO. 78 (Alexander Hamilton).

57. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990) (discussing the constitutional Framers' perception that, because political factions rendered private property vulnerable to the whims of democratic majorities, judicial review was an essential means to protect property rights and other civil liberties from incursion by transient democratic majorities).

58. See, e.g., *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 653–54 (1819) (ruling that New Hampshire violated the Contracts Clause when it revoked a private college charter); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142–43 (1810) (invalidating, under the Contracts Clause, the Georgia legislature's repeal of a prior land grant). For discussion of the Marshall Court's Contracts Clause jurisprudence, see Olken, *Charles Evans Hughes and the Blaisdell Decision*, *supra* note 19, at 522–32.

impermissible class legislation attempts by political factions to manipulate the democratic process through laws that imposed special burdens on some groups for the benefit of others.⁵⁹ This approach not only supplanted the theories of natural and vested rights as the main bases for protecting private economic liberties from democratic majorities, it also augured the development, decades later, of substantive due process as a constitutional restriction upon state police powers.⁶⁰

In the late nineteenth century, judges confronted with legal challenges to the plethora of economic regulations began to construe broadly the notions of liberty and property within the ambit of constitutional protection afforded by the Due Process Clause of the Fourteenth Amendment. For example, Justice Stephen Field, in his *Munn* dissent, recognized the importance of protecting the intangible use and value of property from incursion by political factions.⁶¹ Eventually, the Court agreed with Field that the concept of due process included a substantive component that authorized close judicial scrutiny of both the form of legislation enacted pursuant to local police powers and its operative effects.⁶² Within this context, by the end of the nineteenth century, state and federal judges borrowed from the rhetoric of natural law to invoke substantive due process as a

59. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 553 (1837) (holding a bridge company charter did not create an implied monopoly). Many state courts had similar cases. See, e.g., *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 555–57 (1831) (distinguishing partial laws from those of equal operation while invalidating legislation enacted to prevent Cherokee Indians from recovering land promised them in federal treaties); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 269 (1829) (permitting bank creditors to pursue additional remedies for collection). *Vanzant* defined a partial law as one “tending directly or indirectly to deprive a corporation or an individual rights to property, or to the equal benefits of the general and public laws of the land.” *Id.*

60. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 17–20 (discussing the approach of Jacksonian jurists).

61. *Munn v. Illinois*, 94 U.S. 113, 140–45 (1877) (Field, J., dissenting).

62. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (formally adopting substantive due process as a constitutional limitation upon state economic regulatory authority); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (noting that “courts are not bound by mere forms . . . They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.”). Field expressly linked factional aversion to guardian judicial review when he explained that:

If the courts could not . . . examine . . . the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority of such bodies, instead of being protected by the guaranties of the Constitution.

Powell v. Pennsylvania, 127 U.S. 678, 696–97 (1888) (Field, J., dissenting).

fundamental constitutional limitation upon state police powers deemed illegitimate, arbitrary, or unreasonable.⁶³

Of particular importance in the emergence of substantive due process as an independent constitutional restraint upon public control of private economic activities was Thomas Cooley of the Michigan Supreme Court, a Jacksonian Democrat and legal scholar whose influential treatise about constitutional limitations linked judicial review and factional aversion.⁶⁴ Cooley, who taught George Sutherland constitutional law at the University of Michigan in 1882, disavowed laissez-faire economics and Social Darwinism as jurisprudential guidelines. He instead relied upon longstanding notions of factional aversion in differentiating permissible and impermissible police powers regulations. Partial, or class, legislation, enacted under the guise of local police powers, was unconstitutional, Cooley argued, because it benefited some groups at the expense of others in violation of the paramount constitutional principle of equal operation of the law.⁶⁵ Due process for Cooley, as for Field, implicitly proscribed class legislation and provided jurists with the constitutional implement to protect private economic rights from incursion by democratic majorities controlled by political factions.

Late nineteenth- and early twentieth-century jurists also drew upon principles of legal classicism in assessing the constitutional limitations of public power. Classical legal thought both complemented longstanding notions of factional aversion and provided a theoretical rationale for judicial conservatism in an era of acute social and economic turbulence. As a jurisprudential construct about the role of law in a democratic society, legal classicism formed the

63. See WIECEK, *supra* note 15, at 125 (discussing the application of substantive due process by the Court); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 21–35 (same).

64. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 3, 35–37, 54–55 (Lawbook Exchange 1999) (1868); see PASCHAL, *supra* note 9, at 16–20, 36, 127, 170–72 (attributing Sutherland's general skepticism of public regulation to lessons Sutherland absorbed from Cooley at Michigan Law School); Jones, *supra* note 31, at 751–52, 755–58, 760, 762–63 (asserting that Cooley's opposition to class legislation rendered him a Jacksonian Democrat). Though Paschal considered Cooley a proponent of Social Darwinism and laissez-faire economics, neither Jones nor I share this conclusion.

65. See *People v. Salem*, 20 Mich. 452, 486–87 (1870) (invalidating a Michigan statute that conferred unequal benefits upon a railroad to the detriment of the public welfare). In *Salem*, Cooley remarked, “The State can have no favorites . . . and [should] . . . give all the benefit of equal laws.” *Id.*; see also COOLEY, *supra* note 64, at 355, 389–94 (decrying the vices of class legislation and linking the legitimacy of governmental authority with the equal operation of the law).

intellectual backdrop of post-Civil War constitutional adjudication⁶⁶ and exerted a cogent influence upon early twentieth-century jurists like George Sutherland, who steadfastly adhered to the conservative judicial tradition.

Legal classicism sanctified the autonomy of the individual and posited a neutral state in which judges functioned as the guardians of private rights and liberties from the roiling passions of shifting democratic majorities.⁶⁷ Skeptical of class legislation, classical judges sought to protect individual free will through means calculated to curb judicial discretion and foster equal operation of the law.⁶⁸ Its methodology was highly formalistic, and its reasoning inductive as classical jurists applied abstract concepts based on general legal principles to discrete categories of disputes with the objective of deriving seemingly neutral conclusions.⁶⁹ Accordingly, classical judges viewed the Constitution in negative terms as a set of limitations upon government intended to preserve individual autonomy and considered problems of public law through the prism of factional aversion.

Through the doctrine of liberty of contract, jurists applied principles of legal classicism to legislation—both partial (or class) and impartial—that regulated virtually all aspects of private employment. Liberty of contract was a concept first articulated by the eighteenth-century political economist Adam Smith in his influential tract, *The Wealth of Nations*. In the United States it was an offshoot of antebellum free labor ideology⁷⁰ and reflected the primacy of individual will in a democratic society. Accordingly, liberty, or freedom, of contract presupposed an inherent equality in the

66. See WIECEK, *supra* note 15, at 3 (discussing legal classicism).

67. See *Munn v. Illinois*, 94 U.S. 113, 154 (1877) (Field, J., dissenting) (“No reason can be assigned to justify legislation interfering with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community . . . as his business became generally useful.”); WIECEK, *supra* note 15, at 11, 81–82 (discussing beliefs and approaches of classical judges and lawyers).

68. See *Lochner v. New York*, 198 U.S. 45, 57–59, 61–64 (1905) (limiting legislative power to protect liberty of contract); *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 758–59 (1884) (Field, J., concurring) (same); WIECEK, *supra* note 15, at 95–96 (discussing Thomas Cooley), 107–08, 112, 157 (discussing legal classicism).

69. See WIECEK, *supra* note 15, at 4–5, 89–92 (discussing legal science). Under the precepts of legal classicism, judges merely “found” the law and applied it to cases; they did not “make” it. Accordingly, legal classicists disavowed the notion of judge as policy maker. See *id.* at 5, 7, 13, 80–81, 91–92, 198.

70. See 1 MELVIN UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES*, at 376–78 (2d ed. 2002) (discussing free labor ideology); Charles McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 Y.B. SUP. CT. HIST. SOC’Y 20, 24–26 (discussing ideology of appellate courts between 1886 and 1937 regarding labor legislation).

bargaining positions of autonomous individuals who voluntarily chose to enter into contracts.⁷¹

Later, in dissent from Supreme Court decisions that they believed incorrectly upheld factional incursion of private economic rights, Justices Field⁷² and Bradley⁷³ invoked freedom of contract as both a liberty interest and a property right within the protection of due process. By the end of the nineteenth century, the Court adopted this perspective and recognized liberty of contract as “the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others.”⁷⁴ Classical jurists on all levels, immersed in a legal culture that exalted individualism and was skeptical of class legislation, adopted liberty of contract as a staple of substantive due process and invoked it as a constitutional limitation to preserve economic autonomy in an age of increased regulation.

*Lochner v. New York*⁷⁵ was a particularly notorious example of liberty of contract as a constitutional restriction upon state police powers. In *Lochner*, the Court invalidated a New York law prohibiting bakers from working more than ten hours a day, or sixty hours per week.⁷⁶ Justice Rufus Peckham’s majority opinion for a sharply divided Court exemplified the formal, categorical reasoning of legal classicism and its aversion toward political factions. Peckham refused to acknowledge the vast array of scientific and statistical data in support of this legislation, and instead he perceived only a remote connection between the regulation of bakers’ hours and public health.⁷⁷ In a curious and somewhat inconsistent admixture of judicial activism and caution, Peckham struck down the law as impermissible class legislation that arbitrarily infringed upon the contractual liberty

71. See WIECEK, *supra* note 15, at 83–87 (discussing classical social outlook); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 26 (discussing liberty of contract); see also *The Slaughter-House Cases*, 83 U.S. 36, 110 n.39 (1873) (Field, J., dissenting) (citing Adam Smith’s comment in *The Wealth of Nations*: “The Property which every man has in his own labor . . . is the most sacred and inviolable.”).

72. See *The Slaughter-House Cases*, 83 U.S. at 87–89, 93, 101–02, 105–07 (Field, J., dissenting) (asserting that a Louisiana law that created a butchers’ monopoly interfered with the right of independent butchers to “pursue a lawful and necessary calling,” *id.* at 88–89)).

73. See *id.* at 116–19, 122 (Bradley, J., dissenting) (asserting that a law creating a butchers’ monopoly violated the Fourteenth Amendment). Bradley distinguished the monopoly provision from a legitimate local regulation of public health, safety, morals or welfare, noting that “[i]t is one of those arbitrary and unjust laws made in the interests of a few scheming individuals.” *Id.* at 120.

74. *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring).

75. 198 U.S. 45 (1905).

76. *Id.* at 52–64.

77. *Id.* at 57–59, 61–64.

of both bakers and their employers in an unreasonable manner.⁷⁸ In dissent, Justices Harlan and Holmes expressed dismay and frustration, accusing their brethren of reading their socioeconomic views into the Constitution⁷⁹ and chastising the Court for its apparent abdication of judicial restraint.⁸⁰

However, notwithstanding its formalism and narrow conception of state police powers in *Lochner*, the Court did not invalidate most industrial regulations of the late nineteenth and early twentieth centuries,⁸¹ although it created a dichotomy between laws that involved industrial conditions in general (permissible)⁸² and laws that interfered with liberty of contract (generally impermissible, except for some paternalistic exceptions).⁸³ Nor did the Justices necessarily rely upon principles of laissez-faire economics, Social Darwinism, or even natural rights in devising their categorical police powers jurisprudence. Individual economic liberty was the ideal to which these jurists clung even as the assumptions that informed their

78. *Id.* Peckham said: “The act is not . . . a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best.” *Id.* at 61. He then explained that “laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.” *Id.* at 64. In essence, Peckham regarded the act as illegitimate class legislation that subjected the contractual freedom of bakery owners to “the mercy of legislative majorities.” *Id.* at 59.

79. *Id.* at 75 (Holmes, J., dissenting).

80. *Id.* at 68, 72–74 (Harlan, J., dissenting). Harlan explained: “If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.” *Id.* at 68.

81. *See supra* note 46 and accompanying text (citing examples of the Court upholding industrial regulations).

82. *See, e.g.*, *Bunting v. Oregon*, 243 U.S. 426, 437–38 (1917) (upholding maximum hours legislation for factory workers as a reasonable exercise of state police powers); *Lochner*, 198 U.S. at 61 (suggesting New York could regulate the sanitation, plumbing and ventilation of bakeries pursuant to the legitimate exercise of local police powers); *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (upholding Utah’s maximum hours limitations for miners and smelters); *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885) (upholding law mandating that laundries close late at night).

83. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating a statute barring yellow-dog (anti-union) contracts); *Adair v. United States*, 208 U.S. 161, 180 (1908) (invalidating a federal prohibition of yellow-dog contracts). *But see* *Bosley v. McLaughlin*, 236 U.S. 385, 396 (1915) (sustaining a maximum hours limitation for women who worked in hospitals); *Miller v. Wilson*, 236 U.S. 373, 384 (1915) (sustaining a federal law prescribing maximum hours for female hotel workers); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a law prohibiting women from working more than ten hours a day in factories or laundries). Each of these cases sustaining laws prescribing maximum hours limitations for women may have reflected, to some extent, the Court’s paternalistic attitudes towards women. *See* 2 MELVIN L. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 553–55 (2002) (discussing feminist critiques of *Muller*).

constitutional interpretation were becoming obsolete. Though most classical jurists believed constitutional restrictions existed to preserve individual autonomy in economic and other forms of activity, theirs was essentially an abstract laissez-faire constitutionalism devoid of socioeconomic determinism that used historical custom and precedent in its interpretation of constitutional limitations of public power.⁸⁴ Outwardly cognizant of the need to limit judicial discretion, ironically they failed to understand that their application of liberty of contract and other abstract, formal legal doctrines actually helped preserve the economic status quo in cases like *Lochner* and belied assertions of judicial restraint. Ultimately, legal classicism as a viable constitutional construct would collapse under the weight of its internal inconsistencies and doctrinal limitations,⁸⁵ as evidenced by the trajectory of George Sutherland's judicial career.

III. THE CONSTITUTIONAL PHILOSOPHY OF GEORGE SUTHERLAND

Prior to joining the Supreme Court in 1922, George Sutherland enjoyed a distinguished public career in law and politics during which his understanding of individual liberty, constitutional democracy, the problems of political factions, and the judicial process coalesced. A brief summary of Sutherland's views provides an essential perspective from which to assess his constitutional jurisprudence.

A. Individual Liberty as the Cornerstone of American Democracy

George Sutherland's admiration for individualism emanated from his hardscrabble upbringing on the Utah frontier to which he and his parents had immigrated shortly after his 1862 birth in England. Employed as a youth in a variety of jobs, he undertook to help support his struggling family. Sutherland understood the value of hard work and personal initiative, attributes he considered essential components of a thriving democratic society. "[B]e independent. Do your own thinking. Act upon your own judgment and responsibility. Cultivate self[-]reliance,"⁸⁶ Sutherland encouraged graduates in a commencement speech at Brigham Young University a year before his death. Once himself a student at Brigham Young Academy, young Sutherland learned from the school's director, Karl Maeser, about the

84. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 29–35 (detailing the jurists' views).

85. See WIECEK, *supra* note 15, at 150, 157, 206, 248–50 (documenting classicism's decline).

86. George Sutherland, *Commencement Address at Brigham Young University 9 (1941)* (on file with the Vanderbilt Law Review) [hereinafter *BYU Commencement Address*].

importance of personal stability and moral responsibility.⁸⁷ Drawing upon these lessons decades later, the aged jurist also advised his commencement audience that “nothing so soon and so effectually destroys the moral fibre as the habit of constantly referring doubts and difficulties to others. Solve them for yourselves. Look the world in the face as an individual and not merely as a part of the general mass.”⁸⁸

Often critical of public regulation that he thought weakened individual initiative and self-reliance, Sutherland believed that excessive governmental intervention in private economic activity would “encourage . . . indolen[ce]”⁸⁹ and foster lethargy in ways inimical to the public welfare. “We must be careful not to overdo our legislation and take from the individual the strengthening effect which comes from the struggle to help himself,”⁹⁰ Sutherland confided to labor advocate Samuel Gompers in 1916 amidst the Progressive-era clamor for pervasive economic and industrial reform measures.

In the U.S. Senate, Sutherland urged both public officials and voters to “never lose sight of the vital distinction between helplessness, which is a misfortune, and laziness, which is a vice,”⁹¹ and warned that ill-conceived, partial legislation would imperil democratic society by thwarting personal ambition and autonomy. Government, Sutherland thought, should “not impede the initiative of independent persons engaged in productive and moral activities.”⁹² Instead, it should foster “the release of individual creative energy”⁹³ and preserve “personal rights through the equal operation of its laws.”⁹⁴ Accordingly, Sutherland believed “[i]ndividual liberty and the

87. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 38–39 (describing Maeser’s influence on Sutherland).

88. BYU Commencement Address, *supra* note 86, at 9.

89. George Sutherland, *The Economic Value and Social Justice of a Compulsory and Exclusive Workmen’s Compensation Law*, Address Before the Third Annual Convention of the International Association of Casualty and Surety Underwriters 11 (July 14, 1913) (on file with the Vanderbilt Law Review), *reprinted in* S. DOC. NO. 131 (1913) [hereinafter Sutherland, *Economic Value and Social Justice*].

90. Letter from George Sutherland to Samuel Gompers 3 (Jan. 15, 1916) (on file with the Vanderbilt Law Review).

91. Sutherland, *Economic Value and Social Justice*, *supra* note 89, at 12.

92. Olken, *The Business of Expression*, *supra* note 4, at 260.

93. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 7 (1956) (describing how Jacksonian democracy transformed American law).

94. Olken, *The Business of Expression*, *supra* note 4, at 260.

common good are not incompatible, but are entirely consistent with one another.”⁹⁵

Though a staunch proponent of “sturdy individualism,”⁹⁶ Sutherland rejected the harsh implications of Social Darwinism, as did his influential teachers Karl Maeser and Thomas Cooley. Maeser, who generally admired the British Social Darwinist philosopher Herbert Spencer and his emphasis upon self-reliance and individual freedom, nevertheless disagreed with Spencer’s rigid application of natural selection principles to democratic society, and Maeser criticized what he perceived was Social Darwinism’s materialistic assumptions about personal progress.⁹⁷

Sutherland echoed these sentiments in his support for government programs such as workers’ compensation:

There is a growing feeling that the individualistic theory has been pushed with too much stress upon the dry logic of its doctrines and too little regard for their practical operation from the humanitarian point of view . . . we can not always regulate our economic and social relations by scientific formulae, because a good many people perversely insist upon being fed and clothed and comforted by the practical rule of thumb rather than by the exact rules of logic.⁹⁸

Sutherland realized that without a uniform compensation scheme, injured workers would likely become more dependent upon society if unable to recover damages from employers at common law.⁹⁹ Sutherland regarded workers’ compensation as an impartial regulation beneficial to the public. For similar reasons he helped secure passage of Utah’s law limiting the hours of those engaged in ultrahazardous occupations¹⁰⁰ and recognized, from a pragmatic

95. George Sutherland, Private Rights and Government Control, American Bar Association Annual Address (Sept. 4, 1917) (on file with the Vanderbilt Law Review), reprinted in 40 A.B.A. ANN. REP. 197, 213 (1917) [hereinafter Sutherland, *Private Rights and Government Control*].

96. *Id.* at 202. At times, Sutherland recognized the necessity for government to help those persons unable to fend for themselves. For example, speaking in support of worker’s compensation, Sutherland remarked, “the prime duty of society, and therefore the prime study of the lawmaker, should be to prevent or minimize the evils which give rise to the necessity for assisting the helpless.” Sutherland, *Economic Value and Social Justice*, *supra* note 89, at 12.

97. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 38–39 (explaining Maeser’s disagreements with certain aspects of Spencer’s philosophy).

98. Sutherland, *Economic Value and Social Justice*, *supra* note 89, at 11.

99. See *id.* at 11–12 (justifying the need for a uniform workmen’s compensation scheme); see also 48 CONG. REC. 4853 (1912) (statement of Sen. Sutherland) (noting that without a prescribed compensation system for the nation’s railway workers, “the injured man or the family that is left . . . not compensated . . . [may] become a charge upon society”). Sutherland also commented: “We must take care that these people do not become wrecks, human driftwood in society. That is one object of this legislation. The law of negligence is hard; it is unjust, it is cruel in its operation. The law of compensation proceeds upon broad humanitarian principles.” *Id.*

100. See PASCHAL, *supra* note 9, at 36 (describing Sutherland’s support for this legislation). The U.S. Supreme Court upheld this law in *Holden v. Hardy*, 169 U.S. 366, 398 (1898).

perspective, the ability of organized labor to improve industrial conditions.¹⁰¹

B. Factional Aversion and the Equal Operation of the Law

At Michigan, Sutherland studied constitutional law under the eminent scholar-jurist Thomas Cooley, a Jacksonian Democrat, who not only was critical of Social Darwinism but expressed doubts as well about the application of laissez-faire economics to constitutional issues.¹⁰² Instead, Cooley stressed the equal operation of the law as the touchstone of constitutional democracy and questioned the legitimacy of partial laws enacted by political factions to benefit some groups and burden others.¹⁰³

Like Cooley, Sutherland attributed the unequal operation of the law to the pernicious influence of political factions and differentiated illegitimate class legislation from the reasonable exercise of local police powers for the benefit of the public as a whole. Inherently skeptical of democratic majorities and concerned that their volatile nature impeded their judgment,¹⁰⁴ Sutherland decried the manner in which political factions captured the legislative process. Cautious in nature, Sutherland was wary of legislative panaceas enacted in response to the imperatives of political expediency¹⁰⁵ and

101. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 39 (describing Sutherland's support for workmen's compensation bills).

102. See Jones, *supra* note 31, at 752, 755–57, 759–64, 766–67, 770–71 (discussing Cooley's historicism and factional aversion); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 33 (discussing Cooley's historicism); Siegel, *Historism*, *supra* note 31, at 1493–94, 1497–98, 1501–15, 1540 (discussing Cooley's reliance upon historical custom rather than Social Darwinism and laissez-faire economics).

103. See *People v. Salem*, 20 Mich. 452 (1870) (invalidating a Michigan statute that conferred unequal benefits upon a railroad to the detriment of the public welfare); COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 64, at 355, 389–94 (emphasizing this equality of rights and criticizing special privileges granted to certain groups by statutes); Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 22–24, 33 (outlining Cooley's jurisprudence and his reliance on historical tradition).

104. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 43–49 (discussing Sutherland's concepts of law and democracy and concerns about political factions and class legislation); see also George Sutherland, *The Courts and the Constitution*, Address Before the American Bar Association (Aug. 28, 1912), reprinted in 35 A.B.A. ANN. REP. 373, 381, 383 (1912) [hereinafter Sutherland, *The Courts and the Constitution*] (expressing concern about democratic majorities and the wisdom of legislation enacted in response to popular clamor).

105. See George Sutherland, *Principle or Expedient?*, Address Before the New York State Bar Association 20 (Jan. 21, 1921) (on file with the Vanderbilt Law Review) [hereinafter Sutherland, *Principle or Expedient?*]. In 1917, as president of the American Bar Association, Sutherland observed: "The trouble with much of our legislation is that the legislator has mistaken emotion for wisdom, impulse for knowledge, and good intention for sound judgment." Sutherland, *Private Rights and Government Control*, *supra* note 95, at 199.

worried that the tyranny of ephemeral democratic majorities threatened the security of individual rights and liberties. Accordingly, he believed the legitimacy of government derived from the impartial restraint of the law. Class legislation enacted at the behest of political factions who manipulated the roiling emotions of transient democratic majorities was “the most odious form of legislative abuse”¹⁰⁶ and subverted the equal operation of the law.

Factional aversion permeated Sutherland’s public career. In the Senate, for example, Sutherland objected to a protective tariff that reduced rates for southern cotton and sugar farmers and imposed a competitive obstacle for western agricultural interests.¹⁰⁷ He also invoked the destructive influence of political factions in his passionate defense of fellow Reed Smoot, a devout Mormon accused of unsubstantiated political misconduct by Utah Protestants bent on removing him from the Senate.¹⁰⁸ Moreover, in 1911, Sutherland opposed the initiative, referendum, and recall provisions of the proposed Arizona Constitution because he thought they enabled the spasmodic impulses of turbulent democratic majorities to impair the long-term interests of the public welfare.¹⁰⁹

The plethora of Progressive-era reform legislation worried Sutherland, who in a speech delivered a year before his ascent to the Supreme Court revealed the depth of his concern about political factions:

[F]or if the hand of power shall ever be permitted to take from “A” and give to “B” merely because “A” has much and “B” has little, we shall have taken the first step upon that unhappy path which leads from a republic where every man may rise in proportion to his energy and ability, to a commune where energy and sloth, ability and ignorance, occupy in common the same dead level of individual despair.¹¹⁰

From Sutherland’s perspective, class legislation actually weakened democracy by thwarting individual initiative, self-reliance, and merit.

Conversely, Sutherland supported workers’ compensation and women’s suffrage because their inclusive nature removed the

106. George Sutherland, *Private Rights and Government Control*, *supra* note 95, at 212.

107. 50 CONG. REC. 4295 (1913) (statement of Sen. Sutherland) (opposing the Underwood Tariff).

108. 41 CONG. REC. 1486–87 (1907) (statement of Sen. Sutherland) (defending Sen. Smoot in a speech); Olken, *The Business of Expression*, *supra* note 4, at 263 (describing Sutherland’s defense of Sen. Smoot).

109. 47 CONG. REC. 2793, 2797–98, 2800, 2802 (1911) (statement of Sen. Sutherland). In particular, Sutherland warned that the initiative and referendum would facilitate manipulation of the legislative process by political factions to the detriment of unpopular minority groups and undermine “the deliberate interchange of conflicting opinion[s]” essential to a democratic republic. *Id.* at 2798.

110. Sutherland, *Principle or Expedient?*, *supra* note 105, at 18–19.

“artificial inequalities of special privilege”¹¹¹ and fostered individual liberty. The denial of the franchise to women particularly bothered Sutherland, who considered gender discrimination illogical and undemocratic.¹¹² “The course of safety for society, as well as liberty for the individual, is to make and enforce laws which will keep free the gates of equal opportunity,”¹¹³ Sutherland noted shortly before he joined the Court. For the future jurist, equal operation of the law was the hallmark of a constitutional system.

C. *Constitutional Conservatism and Judicial Review*

In a written constitution, Sutherland found the principal means to curb democratic majorities and diminish the influence of political factions. “Constitutions are made . . . also for the purpose of preventing hasty, ill-considered, and unjust action on the part of the majority of the people themselves,”¹¹⁴ the future Justice explained in a speech critical of Arizona’s proposed constitution. Through limitations—both express and implied—upon governmental authority, the Constitution, Sutherland believed, preserved individual rights and liberties from the whims and caprice of popular sentiment. Accordingly, the Constitution functioned as “the shield of the weak against the powerful and of the few against the many.”¹¹⁵

Frequently, Sutherland compared the Constitution to an edifice, its terms largely immutable and their fundamental meaning intended to endure through the ages and stabilize a turbulent democratic society.¹¹⁶ Once on the Court, Sutherland resisted efforts to

111. 50 CONG. REC. 4297 (1913) (statement of Sen. Sutherland) (criticizing the Underwood Tariff Bill as class legislation); see also Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 44, 47 (describing Sutherland’s opposition to the bill).

112. See 51 CONG. REC. 3600–01 (1914) (statement of Sen. Sutherland) (supporting women’s suffrage). Sutherland also remarked:

[T]o deprive . . . [women] of the right to participate in government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should, therefore, be ruled.

George Sutherland, *Speech at Women’s Suffrage Meeting, Belasco Theatre 3–4* (Dec. 12, 1915) (on file with the Vanderbilt Law Review). Moreover, Sutherland introduced a joint resolution for a constitutional amendment for women’s suffrage. 53 CONG. REC. 75 (1915) (statement of Sen. Sutherland).

113. Sutherland, *Principle or Expedient?*, *supra* note 105, at 19.

114. 47 CONG. REC. 2800 (1911) (statement of Sen. Sutherland).

115. George Sutherland, *Undated/Untitled Speech 2* (on file with author).

116. See George Sutherland, *What Shall We Do with the Constitution?*, UTAH INDEP. 1, 3–4 (1912) (on file with the Vanderbilt Law Review) (warning against the dangers of the ballot box and popular majorities). Sutherland said: “The great purpose of the Constitution is to . . . preserve the rights of the citizen by the definite and unchanging law of the land, instead of

adapt the Constitution to changing economic circumstances and openly criticized flexible interpretation of its provisions.¹¹⁷ From his traditional perspective, constitutional adjudication required judges to “simply . . . declare and apply the law [of the Constitution].”¹¹⁸ Essentially a late nineteenth-century legal classical jurist on a premodern Court, Sutherland ostensibly sought to limit judicial discretion in constitutional interpretation by refraining from policymaking and interposing his personal views,¹¹⁹ relying instead upon his understanding of historical custom and precedent.

Nowhere was this more evident than in his dissents in *Home Building and Loan Ass'n v. Blaisdell*¹²⁰ and *West Coast Hotel Co. v. Parrish*,¹²¹ in which the aging jurist both plaintively and bitterly assailed a majority of the Court for balancing public power and private rights in assessing the constitutional limits of economic regulation.¹²² In *Blaisdell*, Sutherland invoked the historical origins of the Contracts Clause to refute the notion that the Constitution permitted states to enact debtor relief laws that impaired the obligation of contracts during times of financial distress¹²³ and admonished his colleagues

leaving him at the mercy of the transitory opinions of a constantly changing majority.” Earlier, Sutherland compared the Constitution to a building foundation when he commented that “[a] written constitution means nothing unless it means stability and permanency.” 47 CONG. REC. 2794 (1911) (statement of Sen. Sutherland) (advocating strict adherence to the Constitution’s provisions).

117. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 403–04 (1937) (Sutherland, J., dissenting) (“The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.”); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 449, 451–53, 473 (1934) (Sutherland, J., dissenting) (arguing that the Constitution’s provisions have a fixed meaning). In *Blaisdell*, Sutherland admonished his brethren that “[a] provision of the Constitution . . . does not mean one thing at one time and an entirely different thing at another time.” *Id.* at 449. Interestingly, prior to joining the Court, Sutherland expressed qualified approval of flexible constitutional interpretation in light of “changing social, industrial and economic conditions” provided doing so did “not alter the meaning of the [C]onstitution.” 45 CONG. REC. 2613, 2619 (1910) (statement of Sen. Sutherland) (asserting the Commerce Clause allowed the federal government to enact legislation for a postal savings depository). In *Blaisdell*, he reiterated this point about constitutional provisions, explaining “their *meaning* is changeless; it is only their *application* which is extensible.” 290 U.S. at 451.

118. George Sutherland, Undated Speech on Utah Judiciary 3, 19 (on file with the Vanderbilt Law Review).

119. See *W. Coast Hotel Co.*, 300 U.S. at 402, 404 (Sutherland, J., dissenting) (explaining that “[t]he judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation”)

120. 290 U.S. at 448–83 (1934) (Sutherland, J., dissenting).

121. 300 U.S. at 400–14 (1937) (Sutherland, J., dissenting).

122. See *id.* at 401–04 (arguing that amendment, and not novel judicial interpretations, is the only proper way to alter the Constitution’s provisions); *Blaisdell*, 290 U.S. at 448–53, 473, 483 (same).

123. See *Blaisdell*, 290 U.S. at 453–65, 472 (examining the Contracts Clause’s history).

that “[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”¹²⁴ Similarly, distressed by the Court’s departure from the *Adkins* precedent, Sutherland opined in the Washington minimum wage case that “much of the benefit expected from written Constitutions [sic] would be lost if their provisions were to be bent to circumstances or modified by public opinion.”¹²⁵

Sutherland’s refusal to acknowledge the importance of judges balancing the rights of interest groups emanated both from his steadfast adherence to legal classicism—its formalism, its mechanistic perception of the judicial function, and its core values of individual autonomy and free will—as well as his traditional factional aversion. Focused as he was upon political factions and the need to protect individual economic rights from the tyranny of democratic majorities, Sutherland ultimately was unable to recognize that the underlying assumptions of legal classicism were no longer relevant. By the 1930s, fundamental economic changes required the Justices to assess constitutional limits of public power as questions of evolving policy shaped by the conflict of competing interest groups in a dynamic society.¹²⁶ Sutherland, the constitutional conservative, refused to do this, to the detriment of his judicial reputation, notwithstanding the integrity of his motives. Sutherland was so intent upon adhering to the principles of legal classicism that it rendered his constitutional analysis myopic and susceptible to criticism that it was he who was reading his own socioeconomic views into the Constitution.

IV. ECONOMIC LIBERTY AND FACTIONAL AVERSION

Much criticism of Sutherland stems from his constitutional jurisprudence of economic liberty, in which he adhered closely to the tenets of legal classicism and rarely deviated from its formalistic assumptions about the primacy of individual autonomy in assessing the limits of public regulation of private economic affairs. In the aftermath of the constitutional revolution of the 1930s, Sutherland emerged as a reactionary jurist who melded constitutional analysis with socioeconomic determinism to preserve elite property interests from increased public control. Though, in hindsight, several of

124. *Id.* at 483.

125. *W. Coast Hotel Co.*, 300 U.S. at 404 (Sutherland, J., dissenting).

126. See WIECEK, *supra* note 15, at 160, 248–50 (offering reasons for classicism’s waning influence); Olken, *Historical Revisionism and Constitutional Change*, *supra* note 21, at 317–20 (discussing constitutional adaptivity as a characteristic of jurisprudential change during the 1930s).

Sutherland's conclusions were incorrect, so have been conventional assumptions about his judicial behavior. For it was Sutherland's factional aversion born from an inherent distrust of democratic majorities, *not* principles of laissez-faire economics or Social Darwinism, that permeated his jurisprudence of economic liberty.¹²⁷ At times formalistic in his analysis, Sutherland relied extensively upon historical custom and precedent in calibrating the permissible scope of governmental authority.¹²⁸ These factors provide an essential context from which to understand Sutherland's constitutional interpretation and its problems.

A. Liberty of Contract

Sutherland often invoked liberty of contract in prescribing the constitutional limits of public economic regulation. Like conservative jurists before him, he tended to apply this abstract doctrine as a substantive component of due process in order to preserve private economic rights from the turbulence of democratic majorities. Less interested in maintaining the economic status quo than in protecting economic liberty, Sutherland's principal concern was with illegitimate class legislation enacted under the guise of local police powers. In this regard, Sutherland once remarked:

There is no such thing as rights of property apart from the rights of man . . . [t]he thing protected by the constitution [sic] is not the right of property, but the right of a person to property, and this right to property is of the same character as the right to life and liberty.¹²⁹

Two of Sutherland's more notorious opinions demonstrate the depth of his factional aversion. They also underscore the tenacity of his views and the consistency of his judicial approach toward public regulation of private economic affairs.

In *Adkins v. Children's Hospital*,¹³⁰ Sutherland, on behalf of a divided Court, asserted that a Washington, D.C. minimum wage law for women infringed upon contractual liberty in violation of due process because it interfered with the bargaining positions of parties

127. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13 (chronicling Sutherland's distrust of democratic majorities).

128. See *id.* at 73–79 (explaining Sutherland's reliance on the common law and precedent).

129. Sutherland, *The Courts and the Constitution*, *supra* note 104, at 390 (emphasis added). “[F]or it is not the right of property which is protected, but the right to property. Property, *per se*, has no rights; but the individual . . . has . . . rights, equally sacred from arbitrary interference: the right . . . to his liberty, the right to his property.” Sutherland, *Principle or Expedient?*, *supra* note 105, at 18.

130. 261 U.S. 525 (1923).

to a private contract.¹³¹ In particular, Sutherland observed how the law impeded the freedom of women to negotiate their own compensation, yet left men free to bargain for their own terms.¹³² Moreover, the minimum wage act forced employers to pay women a fixed sum regardless of the value of their labor and of actual business conditions:

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden¹³³

Given Sutherland's previous support of women's suffrage and his general aversion toward factions, he likely regarded a minimum wage law for women as both unnecessarily paternalistic and illegitimate class legislation that bore only a remote connection to public welfare.¹³⁴ Sutherland believed the minimum wage statute was "the product of a naked, arbitrary exercise of power."¹³⁵

Yet despite its arid formalism and unwavering application of legal classicism, Sutherland's majority opinion manifested his overarching concern with the equal operation of the law and the pursuit of economic liberty. The irony of this paternalistic statute was not lost on the jurist, who realized that the law's operative effect was to perpetuate gender discrimination.¹³⁶ Indeed, Sutherland noted that Willie Lyons herself, the employee at the center of this case, did not lose her job as an elevator operator because of the quality of her job performance. Instead, she lost her job because her hotel employer chose to dismiss her rather than risk criminal sanctions for paying her a wage she found satisfactory but which fell below that prescribed by the local administrative board.¹³⁷

Sixteen years later, to Sutherland's dismay, the Court in *West Coast Hotel* overruled *Adkins* and upheld a Washington state

131. *Id.* at 545, 553–54, 556–59, 561–62. Sutherland regarded the law as impermissible class legislation because it prescribed a minimum wage that "exceeds the fair value of the services rendered . . . [and] amounts to a compulsory exaction from the employer for the support of a partially indigent person." *Id.* at 557.

132. *Id.* at 553–54.

133. *Id.* at 557.

134. *See id.* at 553–54, 556 (discussing the relevance of the Nineteenth Amendment and public welfare); *see also* George Sutherland, Speech at Women's Suffrage Meeting, Belasco Theatre 3–4 (Dec. 12, 1915) (on file with the Vanderbilt Law Review). Moreover, Sutherland introduced a joint resolution for a constitutional amendment for women's suffrage. 53 CONG. REC. 75 (1915) (statement of Sen. Sutherland).

135. *Adkins v. Children's Hosp.*, 261 U.S. 525, 559 (1923).

136. *Id.* at 553.

137. *See id.* at 542–43 (discussing the case's facts).

minimum wage law for women as a reasonable exercise of local police powers.¹³⁸ In dissent, Sutherland rebuked the Court for its deference to public regulation and once again invoked liberty of contract as an implied constitutional restriction of what he considered class legislation that imposed an arbitrary and unreasonable burden on personal economic liberty.¹³⁹ As in *Adkins*, Sutherland considered the minimum wage statute impermissible because it only applied to women and thus conferred a competitive advantage upon men.¹⁴⁰

Unlike laws that regulated hours and conditions of labor and left workers free to negotiate their compensation,¹⁴¹ the Washington statute impaired directly freedom of contract.¹⁴² Conversely, in *Radice v. New York*,¹⁴³ Sutherland found constitutional a statute that limited the hours women could work in restaurants because it promoted public health and safety.¹⁴⁴ However, in *West Coast Hotel*, Sutherland perceived only a remote connection between a minimum wage and public welfare. Most significant was the veteran jurist's refusal to accept the premise that a public interest inhered in private contracts and the corollary that changed economic circumstances—in this case the Depression—warranted a more flexible standard of judicial review that balanced public power and private rights in determining the constitutional scope of governmental authority.¹⁴⁵

Sutherland's rigid conception of local police powers arose from his innate skepticism of democratic majorities. In keeping with the legal classicism of the conservative judicial tradition, Sutherland

138. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 398–400 (1937).

139. *See id.* at 403–04, 407–09 (Sutherland, J., dissenting) (emphasizing freedom of contract).

140. *See id.* at 407–08, 411–13 (pointing out the statute's unequal treatment of women). Sutherland commented "Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free The ability to make a fair bargain . . . does not depend upon sex." *Id.* at 413.

141. *See id.* at 407 (explaining that statutes fixing hours of labor had been upheld); *Adkins*, 261 U.S. at 553–54 (characterizing the statute at issue as a "price-fixing law").

142. *See W. Coast Hotel Co.*, 300 U.S. at 406–10 (noting the statute's arbitrariness and terming the statute a "compulsory exaction from the employer").

143. 264 U.S. 292 (1924).

144. *Id.* at 294–96.

145. *See W. Coast Hotel Co.*, 300 U.S. at 402–03 (Sutherland, J., dissenting) (refusing to interpret the Constitution differently even in light of changed economic circumstances). In contrast, Chief Justice Charles Evans Hughes explained that freedom of contract was not an absolute right but rather protected by due process from unreasonable incursion. "The liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *Id.* at 391. Moreover, "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.*

narrowly applied the common law affectation doctrine¹⁴⁶ to limit the scope of public regulation of seemingly private businesses. For example, in *New State Ice Co. v. Liebmann*,¹⁴⁷ wherein the Court invalidated Oklahoma's effort to regulate the manufacture, distribution, and sale of ice, Sutherland explained that the law attempted to impede ordinary commercial enterprise through the guise of local police powers.¹⁴⁸ In effect, the state had conferred a monopoly status upon established ice businesses to the detriment of newer, competing entities, a result Sutherland attributed to the influence of political factions that manipulated the legislative process for self-interest.¹⁴⁹ Unlike Justice Brandeis, who in dissent extolled the virtues of states as laboratories of democracy as a rationale for judicial restraint,¹⁵⁰ Sutherland thought it imperative for an unelected judiciary to guard economic liberty from political expedience and the tyranny of transient democratic majorities.¹⁵¹

146. See, e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1929) (voiding a Tennessee statute that prescribed gasoline prices); *Ribnik v. McBride*, 277 U.S. 350, 357 (1928) (voiding a New Jersey law regulating the fees of employment agencies), *overruled by Olsen v. Nebraska ex. rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 244 (1941); *Tyson & Brother v. Banton*, 273 U.S. 418, 445 (1927) (invalidating New York's statutory restriction upon the prices for resold tickets); see also *Adkins*, 261 U.S. at 554 (explaining that minimum wage regulation for women neither prevented fraud nor protected people of diminished contractual capacity, either of which at common law might justify public interference with a private contract). Under English common law private property could be subject to public regulation if: (1) the owner of the property specifically dedicated it to public use; or (2) private use of the property arose from a constructive monopoly, grant or privilege. See Matthew Hale, *De Portibus Maris*, in 1 HARGRAVE LAW TRACTS 78 (Francis Hargrave ed., 1787) (listing the common law rules). In *Munn v. Illinois*, 94 U.S. 113, 126 (1877), the Court broadly construed the affectation doctrine when it sustained public regulation of grain elevator rates, declaring "Property does become clothed with a public interest when used in a manner to make it of public consequence." However, in *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 535, 544 (1923), the Taft Court on which Sutherland sat constrained this concept when it struck down a Kansas statute that mandated binding arbitration of wage disputes in the food processing industry because this business was affected with a public interest.

147. 285 U.S. 262 (1932).

148. *Id.* at 277–78. Sutherland characterized the manufacture, sale and distribution of ice as "a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor." *Id.* at 277.

149. See *id.* at 277–79 (analyzing the practical effect of the statute). "The control here . . . does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it." *Id.* at 279.

150. See *id.* at 311 (Brandeis, J., dissenting) (calling such experimentation a "grave responsibility").

151. See *id.* at 280 (warning against experimentation). In 1912, Sutherland observed: [I]f constitutional and orderly government is to endure there is but one course for the courts to follow, and that is to set their faces steadily and unswervingly against any palpable violation of that great instrument, no matter how overwhelming in the particular instance may be the popular

Sutherland's reluctance to expand the category of businesses affected with a public interest¹⁵² reflected his longstanding concern about the vulnerability of private economic rights to political factions. For these reasons, Sutherland also regarded with suspicion state laws that prescribed price fixing of goods¹⁵³ and services¹⁵⁴ or otherwise restricted the autonomy of businesses engaged in ordinary economic activity.¹⁵⁵ In so doing, Sutherland broadly construed liberty of contract as a constitutional constraint upon legislation he thought both partial and arbitrary.¹⁵⁶ However, laws that did not impose economic burdens on some for the benefit of others withstood Sutherland's careful scrutiny; for example, Oklahoma's attempt to create a cotton monopoly met his stringent test of constitutionality because it equally affected all parties subject to its requirements.¹⁵⁷

B. Licensing Taxes

In some respects, Sutherland's application of substantive due process, with its emphasis upon the equal operation of the law, drew upon not only traditional theories of limited government but also foreshadowed a burgeoning jurisprudence of equal protection the Court would use with increasing frequency after the 1940s. Indeed, Sutherland actually relied upon the Equal Protection Clause in finding unconstitutional a series of state license taxes on chain stores and other commercial franchises at progressive (graduated) rates ostensibly intended to enhance retail competition and promote economic opportunity.¹⁵⁸ As in substantive due process cases, Sutherland, ever skeptical of governmental intervention into private economic affairs, insisted that there be a close and substantial

sentiment, or how strong the necessity may seem, for if the door be opened to such violation or evasion on the ground of necessity we shall be unable to close it against expediency or mere convenience.

Sutherland, *The Courts and the Constitution*, *supra* note 104, at 391.

152. See *New State Ice Co.*, 285 U.S. at 277-79 (opining that the manufacture of ice is not a business affected with a public interest).

153. See, e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1929) (voiding a Tennessee law setting retail gas prices).

154. See, e.g., *Ribnik v. McBride*, 277 U.S. 350, 357 (1928) (invalidating New Jersey's regulation of employment agencies), *overruled by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941).

155. See, e.g., *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114 (1928) (invalidating a law banning corporate ownership of pharmacies).

156. See, e.g., *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 430 (1927) (invalidating New York's statutory restriction upon the prices for resold tickets).

157. See *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 528 (1929) (upholding the monopoly).

158. See *Olken, The Business of Expression*, *supra* note 4, at 293-98 (discussing divisions within the Supreme Court during the 1920s and 1930s regarding licensing taxes).

relationship between the exercise of governmental authority and the public welfare.¹⁵⁹ Imprecise taxation schemes that treated similarly situated entities—both personal and corporate—differently were unconstitutional because their disparate effects were detrimental to the community.¹⁶⁰ Consequently, he decried the differential tax treatment that some states in the 1920s and 1930s accorded businesses based upon their size or organizational structure.¹⁶¹ For example, in his dissent from a case in which the Court sustained a graduated tax on chain stores, Sutherland asserted that negligible distinctions between types of commercial enterprises or their volume of sales did not justify an Indiana law that taxed retail chain stores more than independent merchants.¹⁶² Often Sutherland characterized progressive taxes that disproportionately burdened large retail stores as illegitimate class legislation: “[A] mere subterfuge by which members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced.”¹⁶³ Conversely, he sanctioned as beneficial to the public progressive taxes designed to redress tangible differences between competitive businesses.¹⁶⁴

159. See, e.g., *Colgate v. Harvey*, 296 U.S. 404, 422 (1935) (emphasizing that the Fourteenth Amendment prohibits gross inequality in taxes). “The classification . . . must be founded upon pertinent and real differences, as distinguished from . . . artificial ones.” *Id.* at 423; see also Olken, *The Business of Expression*, *supra* note 4, at 296–98 (discussing Sutherland’s opposition to progressive state license taxes).

160. See, e.g., *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 430–34 (1937) (Sutherland, J., dissenting) (emphasizing the disparate effects of the tax); *State Bd. of Tax Comm’rs of Ind. v. Jackson*, 283 U.S. 527, 543–48 (1931) (Sutherland, J., dissenting) (examining the tax and finding no basis for the classification therein).

161. See, e.g., *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 527, 531 (1937) (Sutherland, J., dissenting) (regarding such distinctions as arbitrary and unconstitutional); *Grosjean*, 301 U.S. at 430–34 (Sutherland, J., dissenting) (same); *Jackson*, 283 U.S. at 543–48 (Sutherland, J., dissenting) (same).

162. See *Jackson*, 283 U.S. at 546–48 (finding no justification for the differential tax treatment of chain stores). Sutherland thought it “wholly irrelevant . . . that the business of one is carried on under many roofs, and that of the other under one only.” *Id.* at 548.

163. *Id.* at 548. In *Colgate v. Harvey*, 296 U.S. 404, 423 (1935), Sutherland explained: “The test to be applied . . . is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?”

164. See, e.g., *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 43 (1934) (upholding as a reasonable exercise of state police powers Washington’s fifteen-cent tax on butter substitutes); *Great N. Ry. Co. v. Minnesota*, 278 U.S. 503, 509 (1929) (upholding Minnesota’s taxation of the gross intrastate business revenue of an interstate railway); *Raley & Bros. v. Richardson*, 264 U.S. 157, 160 (1924) (sustaining Georgia’s taxation of the intrastate business revenue of interstate brokers).

C. Formalism and Judicial Review

At times, Sutherland's opinions were quite formalistic, reflecting his devotion to principles of legal classicism and demonstrating the limitations of his jurisprudence. Aside from his frequent invocation of liberty of contract, Sutherland's formalism also manifested itself in his refusal to recognize the public interest in private contracts and disdain for adapting the Constitution to changing economic circumstances. In particular, Sutherland's *Blaisdell* dissent demonstrates how formal logic, historicism, and factional aversion informed his constitutional jurisprudence of economic liberty.

In *Blaisdell*, a sharply divided Court upheld the Minnesota Mortgage Moratorium Law as a legitimate means of altering contractual remedies during the Depression.¹⁶⁵ Chief Justice Charles Evans Hughes's majority opinion sought to reconcile the constitutional prohibition against state impairment of contract obligations with the reserved powers of the state to promote the public welfare during an economic emergency occasioned by rampant foreclosures.¹⁶⁶ Five members of the Court recognized, in Hughes's words, "that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."¹⁶⁷ These Justices interpreted the scope of the Contracts Clause in a flexible manner that weighed the public interest in extending the equitable period of redemption against the private rights of the mortgagee.¹⁶⁸

165. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–48 (1934) (giving the holding of the five-Justice majority).

166. *Id.* at 435, 437, 439–40, 442–44. Hughes explained that "[t]he policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society." *Id.* at 435. Hughes also emphasized the "principle of harmonizing the constitutional prohibition [the Contracts Clause] with the necessary residuum of state power." *Id.* Elsewhere, he invoked the "growing recognition of public needs and the relation of individual right to public security." *Id.* at 443–44.

167. *Id.* at 442. Joining Hughes's majority opinion were Justices Brandeis, Cardozo, Stone and Roberts. See Olken, *Charles Evans Hughes and the Blaisdell Decision*, *supra* note 19, at 584–85, 590–91 (discussing how Stone and Cardozo influenced Hughes's analysis of the Contracts Clause).

168. *Blaisdell*, 290 U.S. at 435, 442–44 (1934). Hughes noted the "growing appreciation of public needs and of the necessity . . . for a rational compromise between individual rights and the public welfare." *Id.* at 442. He also suggested that "the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity." *Id.*

In contrast, Sutherland, on behalf of the quartet of Justices in dissent, insisted the Minnesota act retroactively altered contract rights and duties in violation of the Contracts Clause.¹⁶⁹ Convinced that the mortgage moratorium was an “attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor,”¹⁷⁰ Sutherland invoked constitutional history in support of his factional aversion when he characterized the law as tantamount to the plethora of unfortunate and ill-considered debtor relief class legislation that prompted the Framers of the Constitution to create the Contracts Clause.¹⁷¹ Reluctant to depart from precedent that restricted public regulation of contract rights and duties,¹⁷² Sutherland asserted the Contracts Clause protected the primacy of private contract interests under all circumstances.¹⁷³ Instead of balancing private rights and public authority in construing the limits of the Contracts Clause, Sutherland literally construed the clause to prohibit all incursions upon private contractual obligations.¹⁷⁴ So intent was Sutherland upon applying the Contracts Clause as a shield against political factions¹⁷⁵ and upholding the judicial prerogative to void partial laws, he did not realize that the Minnesota Mortgage Moratorium—a temporary measure that required the mortgagors to pay the mortgagee rent at market value in order to continue possession¹⁷⁶—also may have actually benefited the mortgagee by preventing it from

169. *Id.* at 480–83 (Sutherland, J., dissenting). Joining Sutherland in dissent were Justices Butler, McReynolds and Van Devanter. *Id.* at 483.

170. *Id.* at 472.

171. *See id.* at 453–65, 472 (arguing that the Minnesota act was precisely the type of legislation that the Framers intended to prohibit with the Contracts Clause).

172. *See id.* at 480–81 (citing several cases that held private contract rights paramount to the interest in public regulation).

173. *See id.* at 473 (declaring that an emergency does not change the meaning of constitutional restrictions).

174. *See id.* at 449, 453, 472–73, 482–83 (arguing that the Contracts Clause was adopted to prevent states from delaying enforcement of private contracts). Invoking a historical perspective of the Contracts Clause, Sutherland commented that “it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.” *Id.* at 472. He concluded that “the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts.” *Id.* at 473.

175. Sutherland characterized the mortgage moratorium statute as an “attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor.” *Id.* at 472.

176. *See* The Minnesota Mortgage Moratorium Act of 1933, ch. 339, pt. 1, § 4, 1933 Minn. Laws 514, 518–19, 521 (giving the full details of the Minnesota statute in question in *Blaisdell*); *see also* *Blaisdell*, 290 U.S. at 444–45 (summarizing the Minnesota mortgage moratorium statute).

reselling the property at a loss during an economic recession.¹⁷⁷ Ironically, Sutherland's guardian notion of judicial review, in which unelected judges applied constitutional provisions of fixed meaning as a shield against the turbulent tides of democracy,¹⁷⁸ blinded him to the pitfalls of his analysis¹⁷⁹ and left him vulnerable to criticism that he misunderstood the nature of the mortgage moratorium¹⁸⁰ and the devastating socioeconomic effects of the Depression. In part, the plaintive tone of his *Blaisdell* dissent¹⁸¹ revealed the depth of this traditional jurist's personal anguish at witnessing the Court's pointed departure from legal classicism. Yet it also underscored the naiveté of some of his jurisprudential assumptions about the impartial restraint of the law and the virtue of limited government regulation of private economic affairs.

Sutherland was more obsolescent than reactionary in most economic liberty cases, as he stubbornly clung to a view of society comprised of individual actors rather than interest groups.¹⁸² In large

177. See Olken, *Charles Evans Hughes and the Blaisdell Decision*, *supra* note 19, at 597–98 (arguing that Sutherland “incorrectly interpreted the terms of the mortgage in a rigid, technical fashion”).

178. See *Blaisdell*, 290 U.S. at 452 (Sutherland, J. dissenting) (giving an example of Sutherland's attitude towards judicial review).

179. See Olken, *Justice George Sutherland and Economic Liberty*, *supra* note 13, at 86 (observing that Sutherland, at times, did not perceive that adherence to tradition and factional aversion actually reinforced socioeconomic equality, as in *Blaisdell*).

180. From a historical perspective, Sutherland's comparison of 1780s debtor relief laws with Depression era mortgage moratoria may have been incorrect in that the former were intended to redistribute wealth whereas the latter were not. See *id.* at 86–87 (comparing the colonial and Depression era laws).

181. Sutherland began his dissent with the doleful observation that the effects of the Minnesota mortgage moratorium, “though serious . . . [are] of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument.” *Blaisdell*, 290 U.S. at 448 (Sutherland, J., dissenting).

182. See *id.* at 451–53, 465, 472–83 (analyzing Minnesota's mortgage moratorium as an impairment of private contract rights irrespective of the statute's context). Conversely, and with some sarcasm, Chief Justice Charles Evans Hughes remarked: “The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contracts are worth while, —a government which retains adequate authority to secure the peace and good order of society.” *Id.* at 435. Hughes then explained that “the question is no longer merely that of one party to a contract against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.” *Id.* at 442. Eleven years earlier, Sutherland proclaimed the virtue of judicial review in protecting liberty of contract from incursion by democratic majorities: “To sustain the individual freedom of action contemplated by the constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.” *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923). Fourteen years later, a majority of the Hughes Court rejected this individualistic premise of guardian review when it overruled *Adkins*. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (concluding that “the case of *Adkins v. Children's Hospital*, . . . should be, and it is,

part, this was because of his deep set aversion toward political factions, which from his perspective not only were responsible for illegitimate class legislation but also subverted the intrinsic values and virtues of individual liberty. Accordingly, he invoked liberty of contract in cases like *Adkins*, *New State Ice Co.*, and *West Coast Hotel*, and he rejected the public interest in private contracts in others, in order to preserve the autonomy of private enterprise from what he perceived as the tyranny of shifting democratic majorities.¹⁸³ He also steadfastly refused to abdicate the traditional guardian approach of judicial review in favor of the less rigid model of constitutional adaptivity first embraced by Holmes¹⁸⁴ and Brandeis,¹⁸⁵ and later by Stone, Cardozo, and Hughes.¹⁸⁶ Unwilling to balance public power and private rights, or unable to do so because of his historicism, Sutherland ultimately found himself on the wrong side of history, and his jurisprudence of economic liberty largely discredited at his death in 1942, four years after he retired from the Court.

Interestingly, even at its most formalistic, Sutherland's constitutional thought manifested an internal logic and clarity not

overruled"). Chief Justice Hughes chided Sutherland and the other three Horsemen who dissented from the Court's decision to uphold a Washington minimum wage statute, admonishing them that the Constitution protected "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people . . . regulation which is reasonable in relation to its subject and is adopted in the interests of the community." *Id.* at 391.

183. See *Blaisdell*, 290 U.S. at 450–52, 472 (Sutherland, J., dissenting) (demonstrating Sutherland's belief in the supremacy of private contractual interests).

184. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 569–71 (1923) (Holmes, J., dissenting) (arguing that the "criterion of constitutionality is not whether we believe the law to be for the public good"); *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (arguing that "a Constitution is not intended to embody a particular economic theory").

185. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 302–04, 311 (1932) (Brandeis, J., dissenting) (invoking the laboratories of democracy as a means of judicial restraint in assessing the reasonableness of state police powers).

186. See *W. Coast Hotel Co.*, 300 U.S. at 389–91 (1937) (explaining the necessity for reconsideration of judicial precedent in light of changing economic conditions); *Blaisdell*, 290 U.S. at 426, 428, 435, 438–39, 442–44 (holding that cases "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago"). Hughes remarked: "But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details." *Id.* at 426. Hughes also noted "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Id.* at 442. Moreover, Hughes rejected Sutherland's constitutional formalism with the observation that "to say that the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlooks of their time, would have placed upon them, the statement carries its own refutation." *Id.* at 443; see also Olken, *Charles Evans Hughes and the Blaisdell Decision*, *supra* note 19, at 590–91 (discussing the influence of Stone and Cardozo on Hughes); Olken, *Historical Revisionism and Constitutional Change*, *supra* note 21, at 311–20 (discussing constitutional adaptivity and judicial deference during the 1930s).

often acknowledged by his critics. For example, in *Carter v. Carter Coal Co.*,¹⁸⁷ Sutherland set forth a seemingly rigid distinction between manufacturing and commerce in a majority opinion that rejected the authority of the federal government to regulate the hours and wages of miners.¹⁸⁸ Yet despite his reluctance to jettison traditional assumptions about contractual autonomy during changed economic circumstances, Sutherland nevertheless managed to explain in most lucid terms the late nineteenth-century conception of commerce in a manner devoid of abstraction: "The word 'direct' implies that the activity . . . produce the effect. . . . The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."¹⁸⁹ Though undoubtedly formal in its application, Sutherland's test for interstate commerce was pragmatic and reflected his abiding concern with curbing governmental power in order to preserve individual liberty. He erred, however, in failing to recognize the limitations of classical jurisprudence in addressing constitutional problems arising from the Depression and the imperative of reassessing traditional notions of federalism.

D. Progressive Aspects of Sutherland's Economic Liberty Jurisprudence

Despite Sutherland's formalism, his constitutional thought, at times, revealed a strong progressive strain, as seen from his opinions that approved local governmental authority to regulate some forms of land use. In *Village of Euclid v. Ambler Realty Corp.*,¹⁹⁰ the Court

187. 298 U.S. 238, 278–324 (1936).

188. *See id.* at 307–09 (invalidating the Guffey Act under the Commerce Clause). Sutherland refrained from determining directly whether the Guffey Act's price fixing provisions violated liberty of contract, noting they were "so related to and dependent upon the labor provisions . . . as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former." *Id.* at 316. Curiously, Sutherland employed the passive voice to clarify the scope of an otherwise clear decision, as if he used considerable restraint to not reiterate his concept of liberty of contract. However, Sutherland did suggest the Guffey Act represented illegitimate class legislation that compelled a "dissentient minority, either of producers or miners or both, to the will of the stated majority" to comply with its hours and wage requirements. *Id.* at 311. Moreover, Congress did not devise these regulations; instead, it impermissibly delegated this lawmaking function "to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.*

189. *Id.* at 308 (explaining the concept that manufacturing is distinct from commerce; it precedes commerce, a notion initially set forth in *United States v. E.C. Knight Co.*, 156 U.S. 1, 11–13 (1895) and applied faithfully by legions of legal classicists); *see Hammer v. Dagenhart*, 247 U.S. 251, 277–81 (1918) (distinguishing manufacturing from commerce).

190. 272 U.S. 365, 379–97 (1926).

upheld a zoning ordinance that restricted industrial expansion in a village contiguous to Cleveland.¹⁹¹ Rather than endorse the unbridled concept of economic liberty asserted by businesses that invoked substantive due process to shield them from compliance with the local zoning scheme, Sutherland recognized the exercise of local powers to address a pervasive problem within the community.¹⁹² To this extent, he eschewed abstract theory and relied upon the common law doctrine of nuisance to justify land restrictions enacted to facilitate the public interest in quiet use and enjoyment of residential property.¹⁹³ Insofar as Sutherland realized that the Euclid zoning ordinance would enhance some property values, he also expressed considerable deference to local police powers because the village regulated the land in a manner beneficial to the public as a whole.¹⁹⁴ For similar reasons, he also sustained the authority of other municipalities to regulate land use.¹⁹⁵

Sutherland's progressivism also surfaced in his support of workers' compensation programs. Years before he joined the Court, the Utah native lent his support to both state and federal workers' compensation plans primarily because they appealed to his sense of equity in that they helped mitigate the harsh reality of industrial

191. *Id.* at 391–95.

192. *See id.* at 391–92 (recognizing that “the segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear rational relation to the health, morals, safety, and general welfare of the community”). Sutherland also demonstrated his willingness to apply the constitution to changing circumstances, explaining that “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles.” *Id.* at 387.

193. *See id.* at 387–88 (finding “no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, . . . and excluding from residential sections offensive trades, industries and structures likely to create nuisances”). Using the common law of nuisance as a guide in this case, Sutherland pithily explained that “[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of in the barnyard.” *Id.* at 388.

194. *See id.* at 388–90 (finding the ordinance a “proper exercise of the police power”). Initially, Sutherland considered the Euclid ordinance unconstitutional, but at the behest of Justice Stone, among others on the Court, Sutherland acquiesced in the re-argument of the case, after which he concluded that the law reasonably advanced local police powers. *See* Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946) (noting that Sutherland's discussions with Stone “shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld”).

195. *See* *Gorieb v. Fox*, 274 U.S. 603, 608–10 (1927) (Sutherland, J.) (upholding a Roanoke, Virginia set-back ordinance as a legitimate exercise of local police powers in response to changing economic conditions); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927) (Sutherland, J.) (upholding the authority of Los Angeles to bar commercial buildings from a residential area). *But see* *Nectow v. Cambridge*, 277 U.S. 183 (1928) (Sutherland, J.) (voiding a Cambridge, Massachusetts zoning ordinance because its restriction of a landowner from using his property for industrial purposes did not bear a significant relationship to the public welfare).

accidents and provided more widespread compensation to victims than remedies based upon ordinary principles of tort law.¹⁹⁶ In *Cudahy Packing Co. v. Parramore*,¹⁹⁷ Sutherland adopted a case-by-case approach to determine the scope of workers' compensation legislation in rejection of a staid formulaic approach.¹⁹⁸ In contrast with cases involving liberty of contract, Sutherland appeared willing to consider changing industrial conditions to determine the limits of local police powers. That he perceived workers' compensation laws as "ha[ving] a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury"¹⁹⁹ belies the conventional notion that Sutherland was a socioeconomic reactionary. It also shows his occasional pragmatism.

For Sutherland, the notion of progress was consonant with his view of public welfare. His was a conservative progressivism born of caution and deliberation rather than an impulse to yield to the transitory emotions of democratic majorities.²⁰⁰ Wary of experimentation for its own sake, Sutherland reposed his trust in experience and common sense and urged government to proceed slowly in addressing problems arising from changing social and economic conditions.²⁰¹ Though he viewed societal progress as an evolutionary process,²⁰² unlike Social Darwinists Herbert Spencer and

196. See Sutherland, *Economic Value and Social Justice*, *supra* note 89, at 8–11 (demonstrating Sutherland's public support for worker's compensation plans throughout his address to the International Association of Casualty and Surety Underwriters Convention). Elsewhere, speaking in favor of worker's compensation for federal railroad employees, Sutherland said: "We must take care that these people do not become wrecks, human driftwood to society. That is one object of this legislation. The law of negligence is hard; it is unjust, it is cruel in its operation. The law of compensation proceeds upon broad humanitarian principles." 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland).

197. 263 U.S. 418, 421–26 (1923).

198. See *id.* at 424 (arguing that "[n]o exact formula can be laid down which will automatically solve every case").

199. *Id.*

200. See Sutherland, *The Courts and the Constitution*, *supra* note 104, at 383 (arguing for cautious treatment of popular legislation).

201. See 47 CONG. REC. 2794–95, 2797–98, 2800, 2803 (1911) (statement of Sen. Sutherland) (demonstrating further Sutherland's skeptical view of impulsive, popular legislation). Later Sutherland explained: "On the whole I entertain a profound regard for notions which have long persisted, because, having passed the scrutiny and survived the buffetings of time, they are more likely to be right than wrong. . . ." 51 CONG. REC. 3598, 3600 (1914) (statement of Sen. Sutherland).

202. See Sutherland, *Principle or Expedient?*, *supra* note 105, at 7, 21 (detailing Sutherland's views of society and social order). For Sutherland, experience, not emotion—and certainly not partial, or class, legislation enacted at the behest of political factions who manipulated the legislative process—provided an essential perspective from which to assess the need for change. In this regard, he remarked:

William Graham Sumner, the Utahan rejected the concept of survival of the fittest, and he categorically rejected governmental intervention into private economic affairs. Instead, Sutherland believed that government could facilitate progress by “thoroughgoing investigation, dispassionate consideration . . . and . . . courageous patience which moves deliberately in the face of clamorous demands to make haste.”²⁰³

This strain of progressive conservatism in Sutherland’s thought therefore complemented the factional aversion that infused his constitutional jurisprudence of economic liberty. He invalidated class legislation, in part, because its inherent inequality undermined its capacity to foster progress on behalf of the public as a whole. Conversely, Sutherland readily upheld zoning ordinances and workers’ compensation laws based on equitable principles precisely because they inured to the benefit of the public in ways that exemplified equal operation of the law and represented careful, deliberate attempts by government to foster progress in response to changing social and economic conditions.

In essence, Sutherland understood his juridical role in terms of guardian judicial review. A faithful adherent of legal classicism, who like conservative jurists before him perceived the Constitution in negative terms, Sutherland’s aversion toward political factions was the touchstone of his constitutional jurisprudence. Though seemingly devoted to property rights and often critical of public economic regulation, he nevertheless recognized the propriety of and necessity for governmental power exercised pursuant to the equal operation of the law.

V. ECONOMIC RIGHTS AS A CONSTITUTIONAL PARADIGM

Sutherland, like conservative jurists before him, regarded economic rights as a paradigm for other constitutional liberties and understood that the liberty protected by due process included both tangible and intangible aspects. Accordingly, he perceived that

We learn to distinguish what is wise and right from what is wrong and foolish by experience which compels our assent rather than by precept which only advises our understanding; molding by evolutionary rather than by revolutionary methods the fundamental principles of law and government into appropriate form.

Sutherland, *supra* note 116, at 2.

203. 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland). Accordingly, Sutherland criticized the initiative, referendum and recall provisions of the proposed Arizona constitution because they represented ill-conceived, intemperate and short-sighted legislation inimical to the public welfare. *Id.*

political factions, class legislation, and the unequal operation of the law threatened personal rights of all kinds and thus did not necessarily distinguish between economic and noneconomic interests in his application of guardian judicial review. In fact, Sutherland concluded his *New State Ice Co.* opinion, which invalidated a state ice monopoly, with a brief reference suggesting parallels between liberty of contract and the freedom of expression.²⁰⁴ Often overlooked in conventional portraits of the jurist as an inflexible social and economic conservative is the manner in which his factional aversion influenced his understanding of press autonomy and criminal procedure. Ever worried about the influence of political factions, Sutherland, in a few notable instances, used guardian judicial review to protect the media and criminal defendants from the tyranny of democratic majorities.

A. The First Amendment and the Business of Expression

Often neglected by constitutional scholars is Sutherland's occasional solicitude for freedom of the press. In part, Sutherland's forgotten First Amendment legacy derives from the relative paucity of his decisions in this area. Aside from his opinions in *Grosjean v. American Press Co.*²⁰⁵ and *Associated Press v. NLRB*,²⁰⁶ Sutherland rarely expressed strong sentiment in favor of a free press.²⁰⁷ However, Sutherland's powerful invocation of First Amendment limitations upon governmental authority in these two cases reveals the extent to which factional aversion linked his jurisprudence of economic liberty and his paramount concern for preserving individual rights from what he perceived as the tyranny of democratic majorities. Implicitly, Sutherland realized that partial economic laws threatened freedom of the press, and accordingly he recognized the importance of protecting the business of expression from political factions.

Sutherland advanced the business of expression as a hybrid constitutional concept when, during the 1930s, a bare majority of the Court adopted a deferential approach in matters of economic regulation and more closely scrutinized laws that restricted First Amendment rights. Sutherland, who clung to the tenets of legal

204. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932).

205. 297 U.S. 233, 240–51 (1936).

206. 301 U.S. 103, 133–41 (1937) (Sutherland, J., dissenting).

207. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (Sutherland, J., joining Butler, J., dissenting) (arguing that a Minnesota law that authorized interdiction of publications of reputed scurrilous tendency was a reasonable means of limiting a public nuisance); *see also* Olken, *The Business of Expression*, *supra* note 4, at 306–08 (discussing Sutherland's pre-*Grosjean* First Amendment record).

classicism, resisted differentiating between economic and noneconomic rights and opposed the attendant jurisprudential transformation from which emerged bifurcated judicial review.²⁰⁸ Modern scholars accustomed to the dichotomous operation of multi-tiered judicial review rarely consider Sutherland's First Amendment contributions because they reflected jurisprudential assumptions now considered obsolete and supplanted by the mythical constitutional revolution of the 1930s.²⁰⁹

Interestingly, as Sutherland's jurisprudence of economic liberty was losing ground within the Court, his emphasis upon equal operation of the law enabled him to forge a nexus between political factions, economic rights, and freedom of expression. Throughout his judicial tenure Sutherland opposed progressive (in terms of rates) taxation of chain stores and other businesses as illegitimate class legislation of dubious advantage to the public welfare.²¹⁰ He also construed broadly the concept of liberty within the ambit of the Due Process Clause to include intangible rights such as the pursuit of property and other facets of commercial activity.²¹¹ From this perspective, he worried that differential taxation of the press would impair the economic and expressive rights of unpopular segments of the print media.

208. In *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938), Justice Harlan F. Stone suggested that the Court more carefully scrutinize laws that threatened either fundamental constitutional rights or involved suspect legislative classifications such that inadequate protection existed throughout the normal political process. See also Olken, *The Business of Expression*, *supra* note 4, at 282–83 (discussing the emergent dichotomy during the 1930s in judicial review of statutes that affected economic liberty and freedom of expression).

209. See, e.g., CUSHMAN, *supra* note 17, at 133–35 (discussing the labor context of *Associated Press* but omitting discussion of Sutherland's dissent and its First Amendment analysis); KAUFMAN, *supra* note 16, at 539–41 (explaining Justice Cardozo's significant contribution to Sutherland's *Grosjean* opinion and his pivotal role in convincing Sutherland to base the decision upon the First Amendment rather than upon equal protection). In so doing, Kaufman, at least implicitly diminishes Sutherland's First Amendment contribution and, more significantly, ignores the manner in which Sutherland melded freedom of expression and economic liberty. Other scholars also make this mistake. See, e.g., DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, at 260 (1990) (analyzing *Grosjean* as only a pure First Amendment case); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 773, 817, 998, 1004, 1040 (2d ed. 1988) (discussing *Grosjean* and the First Amendment).

210. See, e.g., *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 430–34 (1937) (Sutherland, J., dissenting) (opposing a tax on Louisiana business operators); *State Bd. of Tax Comm'rs of Ind. v. Jackson*, 283 U.S. 527, 544–48 (1931) (Sutherland, J., dissenting) (opposing Indiana's graduated license fees on store owners); see also Olken, *The Business of Expression*, *supra* note 4, at 296–98 (discussing conservative opposition towards state licensing taxes within the Supreme Court during the 1920s and 1930s).

211. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278–80 (1932) (recognizing the right to engage in a lawful private business); *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923) (recognizing the right to acquire property).

In *Grosjean v. American Press Co.*,²¹² a unanimous Court invalidated a Louisiana licensing law that levied a two percent tax on the gross advertising receipts of periodicals published within the state whose weekly circulation exceeded 20,000 copies. Enacted by a Democratic political faction controlled by U.S. Senator Huey P. Long and Governor Oscar K. Allen, this act, dubbed by its proponents as “[a] tax on lying, 2 cents a lie,”²¹³ applied only to the Bayou state’s thirteen largest newspapers, which, unlike Louisiana’s smaller, rural periodicals, were longstanding critics of the Long political machine and the efforts of its charismatic leader to implement a far ranging public works program financed by comprehensive commercial taxes.²¹⁴

Justice Sutherland, highly suspicious of the law’s factional origins and cognizant of its differential effect upon a small segment of the media, wrote the Court’s opinion, careful to mix consideration of the statute’s financial burden upon targeted publishers with discussion of the law’s detrimental effects upon freedom of the press. In particular, the form of the license tax suggested its punitive intent and revealed its partial nature.²¹⁵ As with other types of economic regulation, Sutherland scrutinized closely the Louisiana law to ascertain whether it truly operated as a revenue measure. Finding that the state actually differentiated between periodicals based upon circulation volume rather than advertising revenue,²¹⁶ Sutherland concluded the law’s partial effects undermined its legitimacy in much the same way he reasoned in other cases that chain store taxes bore the pernicious influence of political factions.²¹⁷ Though Sutherland’s

212. 297 U.S. 233, 240–51 (1936).

213. See Appellees’ Brief at 9, *Grosjean*, 297 U.S. 233 (1936) (No. 303) (quoting a 1934 circular distributed by Sen. Huey P. Long and Louisiana Governor Oscar K. Allen); Transcript of Record at 43, *Am. Press Co. v. Grosjean*, 10 F. Supp. 161 (E.D. La. 1935) (No. 315) (quoting Affidavit of Marshall Ballard & J. Walker Ross (Nov. 23, 1934)).

214. See RICHARD C. CORTNER, *THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA 19–20* (1996) (discussing the opposition of urban Louisiana newspapers to Huey Long); Olken, *The Business of Expression*, *supra* note 4, at 284–92 (discussing the political and economic context of the Louisiana licensing tax on newspapers).

215. See *Grosjean*, 297 U.S. at 250–51 (pointing out the suspicious nature of the tax). Sutherland commented:

The form in which the tax is imposed is itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the selection of a selected group of newspapers.

Id. at 251.

216. *Id.* at 251.

217. See, e.g., *State Bd. of Tax Comm’rs of Ind. v. Jackson*, 283 U.S. 527, 544–48 (1935) (Sutherland, J., dissenting) (describing the effects of the Indiana store license fees as “obvious

initial impulse was to decide *Grosjean* solely as an economic liberty case, eventually he incorporated Justice Cardozo's draft concurrence that emphasized freedom of the press into the final opinion.²¹⁸ Not only did Sutherland recognize the interplay between expressive and business rights at issue in the case, but his willingness to accommodate a Justice with whom he often disagreed suggests he may have been less rigid than his critics would believe.

Sutherland noted that insofar as the Louisiana licensing law created a differential tax borne by a distinct minority of newspapers, it also restricted freedom of expression. Huey Long's political faction devised this tax to penalize those segments of the media critical of the Kingfish's regime and to impose a tariff based upon their circulation volumes under the guise of a seemingly neutral economic regulation.²¹⁹ In effect, the tax burdened a select group of periodicals highly dependent upon advertising revenue to defray publication and distribution costs not otherwise covered by subscription fees and individual purchases.²²⁰ As such, the law threatened to curtail newspaper circulation, which was both integral to the business of the press and critical to its informative function in democratic society.²²¹

and flagrant discriminations which put upon the act the clear stamp of unconstitutionality"); see also *Colgate v. Harvey*, 296 U.S. 404, 422 (1935) (ruling that gross inequality in taxes violates the Fourteenth Amendment). Sutherland explained in *Colgate*: "The classification . . . must be founded upon pertinent and real differences, as distinguished from artificial ones." *Colgate*, 296 U.S. at 423. Similarly, in *Grosjean*, Sutherland considered the Louisiana licensing tax a partial law enacted at the behest of a political faction controlled by Huey Long and Oscar Allen intent upon thwarting criticism of its social and economic policies by certain segments of the press: See 297 U.S. at 244-45, 250-51 (arguing that the "plain purpose" of the tax was to "penaliz[e] the publishers and curtail[] the circulation of a selected group of newspapers"). The American Newspaper Publishers Association, for whom Elisha Hanson (who argued for the appellees-newspapers in *Grosjean*) was general counsel, anticipated Sutherland's conclusion. This newspaper organization asserted "that the freedom of the press includes the freedom from unjust and discriminatory taxation by which hostile political factions may seek to stifle criticism through attempting the economic destruction of their critics." CORTNER, *supra* note 214, at 171 (quoting 69 EDITOR & PUBLISHER 41, 41 (Feb. 15, 1936)).

218. See KAUFMAN, *supra* note 16, at 540-41 (discussing Cardozo's draft concurring opinion in *Grosjean* and his significant contribution to Sutherland's final opinion for the Court); Olken, *The Business of Expression*, *supra* note 4, at 298-99, 305 n.262 (discussing Cardozo's influence upon Sutherland and Harlan Stone's advice to Sutherland that he not dwell upon the legislative motive behind the license tax and simply focus on its facial discrimination).

219. *Grosjean*, 297 U.S. at 241, 244-45, 250-51.

220. See Olken, *The Business of Expression*, *supra* note 4, at 287-88 (discussing the economic realities of the Louisiana licensing tax).

221. *Grosjean*, 297 U.S. at 250:

The tax here involved is . . . bad because, in light of its history and of its present setting, it is . . . a deliberate and calculated devise in the guise of a tax to limit the circulation of information to which the public is entitled A free press stands as one of the great interpreters between the government and the people.

Significantly, Sutherland, albeit at the urging of Justices Cardozo and Stone, analyzed the licensing tax from the dual perspectives of economic liberty and freedom of expression and concluded that it impeded the newspaper's business of expression.²²²

In so doing, Sutherland explicitly recognized economic rights and expressive ones as complementary aspects of personal liberty; the business of expression, Sutherland implicitly set forth, therefore marked the coalescence of commercial and expressive activities.²²³ Moreover, Sutherland regarded freedom of the press as an essential means for exposing the influence of political factions.²²⁴ Accordingly, a Louisiana licensing tax enacted by a pro-Huey Long faction to restrict the commercial enterprise of newspapers critical of Long's policies posed a significant threat to the public because of its potential to thwart the newspaper's dissemination of important information.²²⁵

The following year, Sutherland's dissent in *Associated Press* revealed even more clearly his commitment to freedom of the press in

See also id. at 247, 249–50 (discussing the similarity of the repressive colonial stamp tax and the Framers' desire to prevent this situation from ever occurring again).

222. This Article uses the phrase "the business of expression" in reference to the confluence of economic liberty and freedom of expression. In both *Grosjean* and *Associated Press*, Sutherland perceived that economic regulation of the commercial or business facets of the press adversely affected core expressive activities, and thus impaired the business of expression for some segments of the press. Sensitive to the problems of class legislation, Sutherland believed that in each case political factions sought to enact regulatory laws intended to curb freedom of expression through restricting the economic liberty of the press. *See* Olken, *The Business of Expression*, *supra* note 4, at 256–57, 282–83, 300–06 (discussing Sutherland's view of economic liberty and freedom of expression as similar aspects of personal liberty despite the emergence of bifurcated judicial review of these concepts during this time).

223. *See id.* at 300–06 (discussing Sutherland's belief that freedom of expression and economic freedom were part of the same whole—personal freedom). At oral argument, Sutherland asked Elisha Hanson, counsel for the newspapers, whether the Louisiana licensing tax "would tend to curtail circulation." Hanson answered: "Yes It would also turn the business of one newspaper group over to another." CORTNER, *supra* note 214, at 163 (quoting NEW ORLEANS TIMES-PICAYUNE, Jan. 14, 1936, at 28). Sutherland incorporated Hanson's response into his *Grosjean* opinion when he described the operative effects of the Louisiana licensing tax: "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation [I]t might well result in destroying both advertising and circulation." 297 U.S. at 244–45.

224. Years before, Sutherland explained:

The guaranties for safe-guarding life, liberty and property, freedom of speech, of the press and of religious worship, and all the other guaranties of the Constitution, would be of little value if their interpretations and enforcement depended upon arbitrary, shifting, temporary official edicts instead of the calm, judgment of the judiciary under the general law of the land.

Sutherland, *Principle or Expedient?*, *supra* note 105, at 11.

225. *See Grosjean*, 297 U.S. at 249–50 (finding that this tax had "a long history of hostile misuse against the freedom of the press").

the context of commercial activity. In *Associated Press*, five of the Justices upheld the application of the National Labor Relations Act to the editorial operations of a private agency that collected news items, rewrote them, and distributed the articles to a national network of newspapers, as both within the Commerce Clause powers of the federal government²²⁶ and as a legitimate economic regulation under a fairly deferential standard of review.²²⁷ In a 5-4 decision, the Court upheld the constitutional authority of the National Labor Relations Board (“NLRB”) to issue a cease and desist order that the Associated Press refrain from interfering with the collective bargaining activities of its editorial employees and reinstate a union leader, Morris Watson, whom the news entity dismissed.²²⁸ Justice Owen Roberts’s majority opinion rested upon the premise that the underlying dispute involved an economic issue—in fact, Roberts was skeptical about the First Amendment claim of the Associated Press, raised for the first time on appeal—and thus applied a deferential standard of review predicated upon his observation that the law was a general economic regulation of incidental effect upon the news agency’s First Amendment interests.²²⁹

In dissent, Sutherland, who disagreed with both Roberts’s characterization of the labor Act and the Court’s relative deference, focused instead upon how the NLRB interfered with the autonomy of news editors to control the content of their stories and make personnel decisions. In essence, Sutherland analyzed the dispute through the prism of factional aversion and found that “through the guise of a

226. See *Associated Press v. NLRB*, 301 U.S. 103, 128–30 (1937) (finding the Associated Press “so engaged in interstate commerce the Congress may adopt appropriate regulations of its activities for the protection and advancement and for the insurance of the safety of such commerce”). *Associated Press* was one of a quintet of cases decided on April 12, 1937, in which the Supreme Court upheld the application of the National Labor Relations Act (“NLRA”) to private commercial enterprise. See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–49 (1937) (sustaining application of the NLRA to the steel industry); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 51–57 (1937) (sustaining application of the NLRA to the manufacture of trailers); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 70–75 (1937) (sustaining the application of the NLRA to clothing manufacturers); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 144–47 (1937) (sustaining the application of the NLRA to a private company engaged in interstate transportation). The Four Horsemen, Justices Butler, McReynolds, Sutherland and Van Devanter, dissented from all but one of these cases, *Washington, Virginia & Maryland Coach Co.*, in which they assented to the Court’s opinion.

227. See *Associated Press*, 301 U.S. at 131–33 (noting that “the Associated Press is not immune from regulations because it is an agency of the press”).

228. *Id.*

229. See *id.* at 133 (arguing that “[t]he order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires”). Roberts declared: “The publisher of a newspaper has no special immunity from the application of general laws The regulation here in question has no relation whatever to the impartial distribution of news.” *Id.*

seemingly neutral economic regulation”²³⁰ the NLRB had actually interfered with both the economic liberty of the Associated Press and its editorial discretion. For Sutherland, the National Labor Relations Act signified a partial law that promoted the freedom of employees engaged in the process of collective bargaining but also impaired the managerial discretion of the Associated Press to dismiss members of its editorial staff whose pro-union bias threatened to compromise the news agency’s objective reportage of labor and business affairs.²³¹ As an economic restriction upon the autonomy of the Associated Press, it also affected the news organization’s freedom of expression.²³² Significantly, Sutherland refused to distinguish, as had the Roberts majority, between economic and expressive rights; he instead perceived the case as one involving the business of expression that warranted much more careful scrutiny of the operative effects of the law under which the NLRB issued its orders.²³³

Sutherland explained that “[w]hen applied to the press, the term freedom . . . means more than publication and circulation.”²³⁴ Linking the First Amendment interests of the Associated Press with its economic ones, Sutherland further remarked that the news entity had “the liberty to exercise an uncensored judgment in respect of the employment and discharge of [its] agents.”²³⁵ Accordingly, Sutherland construed the NLRB order that the Associated Press reinstate Watson as a form of compelled speech because it forced the news organization to employ an editor whose judgment the Associated Press questioned.²³⁶ Melding factional aversion with the First Amendment, Sutherland observed that the NLRB action skewed the marketplace of ideas:

230. Olken, *The Business of Expression*, *supra* note 4, at 323.

231. *See Associated Press*, 301 U.S. at 137–40 (Sutherland, J., dissenting) (suggesting that the Associated Press might have concluded “that its policy to preserve its news service free from color, bias, or distortion was likely to be subverted by Watson’s retention”); *see also id.* at 104–17 (quoting the oral argument of John W. Davis, counsel for the Associated Press). Davis argued that “those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. You cannot divorce . . . the author from his product . . .” Transcript of Oral Argument of Petitioner at 733, *Associated Press*, 301 U.S. 103 (1937) (No. 365).

232. *See Associated Press*, 301 U.S. at 137–40 (Sutherland, J., dissenting) (arguing that “[w]hen applied to the press, the term freedom is not to be narrowly confined”).

233. *See Olken, The Business of Expression*, *supra* note 4, at 321–27 (discussing Sutherland’s opposition to treating economic and expressive rights differently).

234. *Associated Press*, 301 U.S. at 137 (Sutherland, J., dissenting).

235. *Id.*

236. *See id.* at 137–41 (arguing that the reinstatement of an editorial writer discharged under these circumstances would abridge the freedom of the press guaranteed by the First Amendment).

[A]n unbiased version of [news about matters of labor and business] is of the utmost public concern. To give a group of employers on the one hand, or a labor organization, on the other, power of control over such a service is obviously to endanger the fairness and accuracy of the service.²³⁷

In tandem, Sutherland's opinions in *Grosjean* and *Associated Press* demonstrate his use of constitutional limitations to protect individual liberty, albeit that of corporations engaged in the dual endeavors of expression and commerce, from class legislation. While, to most members of the Hughes Court and subsequent scholars, *Grosjean* and *Associated Press* presented disparate issues of economic regulation and the First Amendment, Sutherland understood that both cases arose from attempts by political factions to impede freedom of expression through economic means. Cognizant of the vulnerability in a democratic republic of personal rights of all kinds to political factions, Sutherland applied guardian judicial review to protect economic liberty as a constitutional paradigm of other rights and forged a nexus between freedom of the press and economic liberty. Significantly, his inchoate recognition of the business of expression anticipated the modern Court's approach to differential taxation of the press,²³⁸ a point often obscured by those who mistakenly assess Sutherland's jurisprudence from the binary historical perspective spawned by the victors in the constitutional revolution of the 1930s.

B. Criminal Procedure

Sutherland's aversion toward factions also influenced his criminal procedure jurisprudence. As in his jurisprudence of economic liberty, Sutherland insisted upon neutrality of governmental action in criminal cases. Long interested in matters of criminal law, Sutherland had helped draft a revised federal criminal code while in Congress. Theoretically concerned with the arbitrary and unreasonable exercise of criminal procedure, Sutherland also viewed issues of criminal procedure from a practical perspective and, at times, revealed a progressive impulse often overlooked by his critics.

237. *Id.* at 138.

238. See, e.g., *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 227–34 (1987) (invalidating an Arkansas sales tax applicable only to general interest magazines as an unconstitutional restriction of freedom of the press); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586–93 (1983) (voiding a Minnesota use tax on ink and paper that exempted small publishers as an unconstitutional infringement of freedom of the press); see also Olken, *The Business of Expression*, *supra* note 4, at 327–39 (discussing Sutherland's forgotten First Amendment legacy and the imperative of heightened review in cases involving the interplay of economic and expressive interests).

Sutherland's opinion in *Powell v. Alabama*²³⁹ exemplifies his heightened sensitivity to the problems factions pose in the democratic process. In *Powell*, a lynch mob threatened to take justice into its own hands outside the rural jail in which the Scottsboro defendants—nine young African American men—awaited trial for the alleged gang rape of two white women in the boxcar of a train. Cognizant of the circumstances under which the State of Alabama prosecuted these illiterate and impoverished defendants, Sutherland's opinion demonstrated his passion for legitimate procedure and the sanctity of the rule of law. Implicitly, Sutherland understood that unequal operation of the law, as occurred in *Powell*, threatens the individual liberty of all citizens. Accordingly, he ruled that the defendants were, in effect, deprived of counsel as a matter of due process when the trial judge assigned a single lawyer, with little time to prepare a defense, to represent them as a group.²⁴⁰ Though relatively narrow in scope, *Powell* is a critical link in the chain of Supreme Court precedent that culminated in the more inclusive incorporation of the Sixth Amendment right to counsel in felony cases recognized in *Gideon v. Wainwright*.²⁴¹

Similarly, Sutherland emphasized the importance of impartial governmental authority in *Berger v. United States*,²⁴² in which the Court ordered a retrial in a conspiracy case marred by the misconduct of a prosecutor who engaged in improper cross-examination and made a prejudicial closing statement. In his opinion for the Court, Sutherland explained that the prosecutor's behavior undermined the neutrality and fairness of the proceedings.²⁴³ From Sutherland's perspective, impartial proceedings were essential in the maintenance of the criminal justice system because of the equal operation of the law in a democratic society.

Another case, *Funk v. United States*,²⁴⁴ reveals Sutherland's notion of progress and helps belie the perception that the Utah Justice was a social reactionary who rigidly interpreted the law. In *Funk*, Sutherland refused to apply the common law evidentiary rule that prevented the spouse of a criminal defendant from testifying at trial. Rather than follow a legal principle of little relevance to twentieth-

239. 287 U.S. 45, 49–73 (1932).

240. *Id.* at 57–60, 67–72.

241. 372 U.S. 335, 341–45 (1963).

242. 295 U.S. 78, 79–89 (1935).

243. *See id.* at 84–85, 88 (finding that the “prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense”).

244. 290 U.S. 371, 373–87 (1933).

century litigation, Sutherland permitted a woman to testify on behalf of her husband in a criminal action.²⁴⁵ Interestingly, Sutherland justified this departure from the common law as the logical result of changing societal notions about the competency of witnesses and the evolutionary process in determining truth. Conservative in temperament, Sutherland associated progress with gradual change and understood the imperative for judicial recognition of a new evidentiary rule. Sutherland reasoned “that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.”²⁴⁶

In this regard, Sutherland’s willingness to adapt the common law in a flexible manner to redress problems arising from flawed criminal procedures was consistent with his concerns about class legislation and the vulnerability of personal economic rights in a constitutional democracy. As in cases involving economic interests in which he insisted that government regulation bear a close and substantial relationship to the public welfare, Sutherland emphasized that the legitimacy of the criminal justice system depended upon the impartial administration of the law.²⁴⁷ Unequal application of rules of criminal procedure, therefore, jeopardized individual liberty much the same way that partial laws threatened the security of property and contract rights, and, in some instances, freedom of expression.

CONCLUSION

Long considered one of the Supreme Court’s more conservative Justices in matters of economic liberty, George Sutherland has suffered in reputation primarily because of his vigorous opposition to the fabled revolution of the 1930s, in which a bare majority of the Justices began to adapt the Constitution to changing economic circumstances and departed from the jurisprudential premises of legal classicism and guardian judicial review. Close examination of Sutherland’s jurisprudence of economic liberty reveals, however, that although he insisted upon adhering to classical and traditional notions of law and the judicial function, neither laissez-faire economics, Social

245. See *id.* at 381 (finding “a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity”).

246. *Id.* Sutherland also suggested that “[t]he public policy of one generation may not, under changed conditions, be the public policy of another.” *Id.*

247. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 72–73 (1932) (finding the availability of counsel necessary for a fair trial).

Darwinism, nor natural rights wielded much influence upon his perspective. Rather, his skepticism about public regulation of private economic affairs emanated from his aversion toward political factions and his abiding commitment to the equal operation of the law. These were also integral components of classical legal thought, the intellectual construct from which Sutherland and other conservative jurists of the late nineteenth and early twentieth centuries derived their constitutional jurisprudence.

In particular, as a legal classicist Sutherland understood the judicial function as one of guardian review in which judges used seemingly neutral principles of law, historical custom, and precedent in assessing the constitutional limits of governmental authority to protect individual rights and liberties from the tyranny of democratic majorities manipulated by political factions. In this regard, Sutherland's factional aversion reflected his paramount concern with governmental neutrality and his belief that government could best promote the public welfare through the equal operation of its laws. Accordingly, he broadly construed due process and equal protection as constitutional means to restrict political factions from infringing upon economic rights, which he also viewed as a paradigm for other rights and liberties such as those involving certain aspects of freedom of expression and criminal procedure.

Ironically, perhaps the main catalyst in the eclipse of Sutherland's reputation concerning economic liberty was Sutherland himself. Often preoccupied with political factions and class legislation, Sutherland, at times, failed to perceive the practical effects of his decisions and the limitations of his constitutional vision. His was essentially a negative view of the Constitution in terms of economic affairs; it existed primarily to restrict governmental authority in order to protect individual liberty. Yet because he perceived the Constitution primarily in terms of its limitations, he was unable, for the most part, to appreciate the importance of adapting its provisions to changing economic circumstances.

Though, at times, Sutherland demonstrated a progressive streak, his predominant tendency was to cleave to the past when assessing issues before him. In the vanguard of the conservative Taft Court, Sutherland, by the end of his judicial tenure, increasingly found himself in dissent from the Hughes Court's willingness to adapt the Constitution to modern conditions and its burgeoning recognition of the public interest in private economic affairs. Rather than balance public power and private rights, Sutherland preferred to ascertain the contours of governmental authority from a traditional anti-factional perspective that featured mechanical, categorical reasoning in which

jurists regarded themselves less as policymakers and more as objective agents who used classical doctrines as a means of preserving individual autonomy.

So intent was Sutherland on clinging to this tradition that he failed to recognize the growing obsolescence of his jurisprudence of economic liberty and its inability to resolve issues arising from conflicts between interest groups. Sutherland's jurisprudence became inevitably more myopic and vulnerable to misconceptions about his judicial motivation. Consequently, Sutherland's more progressive views about criminal procedure and the business of expression have received much less attention than they deserve, overshadowed by his seemingly reactionary opinions concerning economic liberty. Indeed, the ultimate lesson of Sutherland's economic liberty jurisprudence is how strict adherence to the past can relegate even the most conscientious jurist to the dustbin of obsolescence.
