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JUSTICE GEORGE SUTHERLAND AND ECONOMIC LIBERTY: CONSTITUTIONAL CONSERVATISM AND THE PROBLEM OF FACTIONS

Samuel R. Olken*

Most scholars have viewed Justice George Sutherland as a conservative jurist who opposed government regulation because of his adherence to laissez-faire economics and Social Darwinism, or because of his devotion to natural rights. In this Article, Professor Olken analyzes these widely held misperceptions of Justice Sutherland's economic liberty jurisprudence, which was based not on socio-economic theory, but on historical experience and common law.

Justice Sutherland, consistent with the judicial conservatism of the Lochner *era, wanted to protect individual rights from the whims of political factions and changing democratic majorities. The* Lochner *era differentiation between government regulations enacted for the public welfare and those for the benefit of certain groups illuminates this underlying tenet of Justice Sutherland's jurisprudence. Professor Olken also examines Justice Sutherland's work prior to his years on the Court, his strict construction of constitutional limitations, his view of the judiciary's role in protecting individual rights, and his commitment to equal operation of the law. The ultimate irony in Justice Sutherland's jurisprudence is that his strong aversion to factions and his failure to understand*

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changing industrial and social conditions, in some instances, actually reinforced economic inequalities.

* * *

Constitutional revolutions often spawn myths in which there are heroes and villains of exaggerated proportions. During the 1930s, a bitterly divided United States Supreme Court fundamentally transformed economic substantive due process. Led by Chief Justice Charles Evans Hughes, a slim majority of the Court abandoned the categorical police powers jurisprudence of the *Lochner*[1] era in favor of a pragmatic approach that balanced public welfare and private rights in assessing the limits of economic regulation.[2] As a result, the Court sustained the types of laws it earlier had invalidated as arbitrary and unreasonable restrictions upon economic liberty.[3] A 1937 case, *West Coast Hotel Co. v.*

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[1] This term refers to the rise and fall of economic substantive due process between 1870 and 1937. *Lochner v. New York*, 198 U.S. 45 (1905), was the seminal case of this period. Stephen Siegel has suggested the *Lochner* era had an early phase, 1870-1900; a middle phase, 1900-1920; and a late phase, 1920-1937. For jurists like George Sutherland, precedent from the initial phase was especially relevant in determining the constitutional limits of state police powers. *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4-5 & n.9 (1991) [hereinafter Siegel, Lochner *Era Jurisprudence*]. *Lochner* era judges carefully scrutinized economic regulations and often narrowly construed the scope of state police powers. Unless the law substantially advanced public health, safety, morals, or welfare (recognized categories of police powers), it violated the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887) (sustaining a Kansas law that prohibited the manufacture or sale of liquor as a reasonable exercise of police powers).

[2] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a Washington state minimum wage regulation for women as a reasonable exercise of police powers); Nebbia v. New York, 291 U.S. 502 (1934) (sustaining a New York price regulation intended to ensure adequate production and distribution of milk); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (holding that the Minnesota Mortgage Moratorium Law was a reasonable exercise of police powers during an economic emergency). In all of these cases, Chief Justice Charles Evans Hughes and Associate Justices Louis D. Brandeis, Benjamin Cardozo, Owen J. Roberts, and Harlan F. Stone voted to sustain the economic regulations. In dissent were Associate Justices Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter, sometimes pejoratively referred to as the "Four Horsemen of Reaction." FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955, at 217 (1955).

[3] *See, e.g., West Coast Hotel*, 300 U.S. at 400 (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923), to sustain a minimum wage law for women).

Parrish,[4] signified the willingness of some members of the Court to recognize the increased importance of governmental intervention in private economic affairs. Associate Justice George Sutherland dissented in this pivotal case, as he had in others in which the Hughes Court flexibly interpreted the Constitution to permit expansion of public control over private economic interests.[5] Consequently, Sutherland was identified as the guardian of a reactionary jurisprudence characterized by its obsolete assumptions about economic liberty.[6]

Chronicled for years by historians sympathetic to the progressive views of the New Deal, the constitutional revolution of 1937[7] has assumed the status of a jurisprudential fable in which the enlightened pragmatism of five justices displaced the anachronistic and inflexible ideas of a quartet of dissenters intent on preserving the interests of an economic elite.[8] Accordingly, legions of scholars have portrayed Sutherland as an

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[4] 300 U.S. 379 (1937).

[5] For example, Sutherland also wrote the dissenting opinion in *Blaisdell*, 290 U.S. at 448-83 (Sutherland, J., dissenting), and joined Justice McReynolds's dissents in *Nebbia*, 291 U.S. at 539-59 (McReynolds, J., dissenting), and in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76-103 (1937) (McReynolds, J., dissenting) (contending that the National Labor Relations Board was unconstitutional because its enabling act ignored the distinction between the manufacture of goods and interstate commerce).

[6] *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 106-07, 109 (2d ed. rev. by Sanford Levinson 1994); ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO BURGER 52, 66-67, 73 (3rd rev. ed. 1979); RODELL, *supra* note 2, at 217; BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 228, 233, 235 (1993); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 198-99, 254-57 (1942).

[7] *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 204-05 (1994) (criticizing the notion of this constitutional revolution as an "historical artifact"). In 1937, the Court, in a departure from its earlier approach toward New Deal legislation, also upheld the National Labor Relations Act (NLRA) and the Social Security Act (SSA). *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining the NLRA); Helvering v. Davis, 301 U.S. 619 (1937) (sustaining the SSA). Consequently, *West Coast Hotel* alone did not comprise the constitutional revolution of 1937, although it signalled the formal repudiation of *Lochnerian* economic substantive due process. For the notion that President Roosevelt's Court packing plan did not influence the Court's decisions, see WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82-162 (1995) (discussing the origins and politics of the Court packing plan); David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 542 & n.170 (1987) (asserting that the Court actually decided the merits of *West Coast Hotel* before Roosevelt announced his plan to appoint additional justices to the Court).

[8] A considerable body of literature exists in support of the popular myth that many *Lochner* era jurists, influenced by principles of laissez-faire economics, Social Darwinism, or natural rights, went to great lengths to interpret the Constitution to protect property rights. *See generally, e.g.*, CLYDE E. JACOBS, LAW WRITERS AND THE COURTS:

ardent foe of government regulation who, like conservative jurists before him, imbued his analysis of the Constitution with principles of laissez-faire economics and Social Darwinism.[9] This was the conclusion of Sutherland's only true biographer, Joel Paschal, who contended that Sutherland's solicitude for private rights emanated from his fervent belief that government should not interfere with natural economic forces or the evolutionary progress of individuals.[10] In large part, this perception persists, although some view Sutherland as a jurist whose devotion to natural rights, rather than economic theory, influenced his behavior on the Court.[11] Both views, however, oversimplify Sutherland's economic lib-

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THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954) (arguing that *Lochner* era jurists used laissez-faire economics to advance the property interests of an economic elite); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (reprint ed. 1976) (discussing the increase in conservatism and laissez-faire constitutionalism); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1962) (noting the influence of laissez-faire economics and Social Darwinism on judicial review of local economic regulations); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) [hereinafter Hovenkamp, *Political Economy*] (noting the pervasive influence of classical economic theory during the *Lochner* era while disputing the notion that the judges were Social Darwinists); 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) (discussing the influence of laissez-faire economics and Social Darwinism); Alpheus Thomas Mason, *The Conservative World of Mr. Justice Sutherland, 1883-1910*, 32 AM. POL. SCI. REV. 443 (1938) [hereinafter Mason, *Conservative World*] (sketching the background of the initial and middle phases of the *Lochner* era); Frank R. Strong, *The Economic Philosophy of* Lochner*: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973) (attributing the era's jurisprudence to laissez-faire economics and Social Darwinism).

For specific discussion of the conservative nature of police powers jurisprudence during the 1920s and 1930s as reflective of laissez-faire economics, Social Darwinism, and/or natural law, see, for example, MASON, THE SUPREME COURT, *supra* note 6, at 66-67, 70, 73; SCHWARTZ, *supra* note 6, at 234-35; WRIGHT, *supra* note 6, at 200-60; Ronald F. Howell, *The Judicial Conservatives Three Decades Ago: Aristocratic Guardians of the Prerogatives of Property and the Judiciary*, 49 VA. L. REV. 1447 *passim* (1963); *see also* GARY J. JACOBSOHN, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 181-93 (1977) (discussing the pragmatism of Chief Justice Hughes's opinion in *Blaisdell*).

[9] *See, e.g.*, J. Francis Paschal, *Mr. Justice Sutherland, in* MR. JUSTICE 123, 126-28 (Allison Dunham & Philip B. Kurland eds., 1956) (ascribing to Sutherland an affinity for laissez-faire (classical) economics) [hereinafter Paschal, *Mr. Justice Sutherland*]; Howell, *supra* note 8, at 1453, 1456, 1467-75; Kens, *supra* note 8, at 96-98; Strong, *supra* note 8, at 452.

[10] *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951) [hereinafter PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE].

[11] *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A

erty jurisprudence and obscure its historical context. Undoubtedly, Sutherland was part of a conservative judicial tradition, yet misunderstanding about this tradition has created a skewed and inaccurate appraisal of Sutherland's work on the Supreme Court.

Recent historiography suggests that nineteenth and early twentieth century judges relied relatively little upon laissez-faire economics,[12]

JURISPRUDENCE OF NATURAL RIGHTS *passim* (1994). Arkes contends that Sutherland's jurisprudence was, in essence, a jurisprudence of natural rights in which unchanging moral, rather than economic, principles prescribed the limits of governmental authority. Unfortunately, Arkes overstates the influence of natural law/rights as a constitutional norm. He confuses the occasional natural rights rhetoric with the actual substance of *Lochner* era police powers jurisprudence. While many jurists may have held some personal beliefs in natural law, most declined to use it as the principal basis of decision making after the Civil War. *See* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66 (contending that *Lochner* era jurists invoked historical consciousness and the common law rather than natural rights); *see also* Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 *passim* [hereinafter Siegel, *Historism*] (examining the historist jurisprudence of John Pomeroy, Thomas Cooley, and Christopher Tiedeman). Siegel defines historism as a form of "historical consciousness." *Id.* at 1437 n.18. Because Sutherland sought to preserve the methodology of *Lochner* era police powers jurisprudence, it is unlikely that he relied very much upon natural law/rights. For further discussion of the decline of natural law/rights in late nineteenth century constitutional thought, 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) (suggesting that natural law's emphasis upon static moral principles and its relative rigidity rendered it largely unsuitable for addressing many legal issues in a rapidly changing industrial society).

[12] As used in this Article, laissez-faire economics refers to a theory of political economy in which the role of government in market relations assumes minimal importance in the private allocation of resources and the creation of economic opportunity. The value of goods and services derives from the natural law of supply and demand, which regulates the market free from the artificial constraint of public control and allows for maximum efficiency as individuals act pursuant to their own economic needs and desires. *See* TWISS, *supra* note 8, at 65. Drawing upon the classical economic theory set forth in Adam Smith's *The Wealth of Nations*, nineteenth century political philosophers Herbert Spencer and William Graham Sumner articulated the most extreme versions of laissez-faire economics. *See, e.g.*, HERBERT SPENCER, THE MAN VERSUS THE STATE *passim* (London, Williams & Norgale 1884); WILLIAM GRAHAM SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER I & II (Albert Keller & Maurice R. Davie eds., 1934) [hereinafter SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER I & II]; WILLIAM GRAHAM SUMNER, WHAT THE SOCIAL CLASSES OWE TO EACH OTHER *passim* (New York, Harper & Bros. 1883) [hereinafter SUMNER, WHAT THE SOCIAL CLASSES OWE TO EACH OTHER].

For criticism of the conventional assumption that *Lochner* era jurists relied extensively upon laissez-faire economics, see generally HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (noting that factional aversion and *not* economic theory best explains the

Social Darwinism,[13] or natural rights.[14] Instead, they invoked the limits of the Constitution to protect private rights from the ephemeral whims of turbulent democratic majorities controlled by political factions. Foremost among the civil rights that these jurists sought to protect was the right to

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pattern of judicial decisions); 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) (distinguishing between laissez-faire constitutionalism reflective of longstanding ideals of liberty and equal opportunity and that based upon classical economic theory). Like Gillman, Benedict contends *Lochner* era police powers jurisprudence emanated from an aversion toward political factions, and he refutes the idea that laissez-faire economics significantly influenced the pattern of judicial decision making. *Id.* at 311-14. Alan Jones's seminal study of Thomas Cooley, the pre-eminent constitutional theorist of the early *Lochner* era, also refutes the traditional notion that laissez-faire economic theory dominated late nineteenth century judicial thought. *See* Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752 (1967).

[13] As used in this Article, Social Darwinism refers to a sociological theory that complemented the evolutionary concepts of naturalist Charles Darwin. Its foremost proponents, Herbert Spencer and William Graham Sumner, believed that the finite amount of natural resources necessitated intense competition among individuals for long-term survival. Those most likely to survive developed superior adaptive attributes that rendered them most fit to handle changes within their environment. Like laissez-faire economics, Social Darwinism prescribed a marginal role for government; it presumed that the crucible of sometimes ruthless competition was necessary for the eventual perfection of society. *See generally, e.g.*, SPENCER, *supra* note 12; SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER I & II, *supra* note 12; SUMNER, WHAT THE SOCIAL CLASSES OWE TO EACH OTHER, *supra* note 12. Even those who associate laissez-faire economics with the *Lochner* era question the influence of Social Darwinism. *See, e.g.*, Hovenkamp, *Political Economy*, *supra* note 8, at 418-20; Siegel, *Historism*, *supra* note 11, at 1451, 1461 n.153, 1480.

[14] As used in this Article, natural rights and natural law are synonymous terms. Both terms refer to immutable moral principles that, in theory, people can ascertain through direct intuition. *See* Siegel, *Historism*, *supra* note 11, at 1434 n.5, 1434-35. Natural law embodies these principles and creates corresponding rights and duties for members of society. *See* JAMES HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 10 (1990). "Natural rights . . . are not something different from natural law but refer to the entitlement aspect of the relationship created by a natural law." *Id.* Herget further notes "that the idea of natural law makes sense as an abstract generality, but 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. For historical discussion of the marginal influence of natural law/rights on *Lochner* era jurists, see Nelson, *supra* note 11, at 513, 558-60 (attributing the decline of natural law in constitutional discourse to its inherent ambiguity and emphasis upon static moral principles inappropriate for resolving industrial legal issues); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66, 76-78, 80 & n.398, 82-90, 96 (stating that historical custom and the common law displaced natural law as a late nineteenth century constitutional norm); *see also* Siegel, *Historism*, *supra* note 11, at 1435-37.

property, which they perceived as representative of other individual liberties and as especially vulnerable in a democratic republic.[15] *Lochner* era judges distinguished impartial laws that inured to the benefit of the entire community from impermissible partial laws, or class legislation, that appeared to benefit some groups at the expense of others.[16] These judges actually upheld most economic regulation as long as it bore a substantial relationship to the public welfare.[17] Thomas Cooley and Stephen Field, both instrumental in the rise of economic substantive due process, emphasized equal operation of the law as the touchstone of economic liberty necessary for individuals to flourish in a thriving democracy. Their historical and common law analysis of state police powers reflected longstanding anti-factional bias and implicitly rejected the use of socio-economic theory as a constitutional norm.[18] They also exerted enormous influence over members of the judiciary and the bar for more than half a century. This influence was particularly strong with respect to George Sutherland, who studied law under Cooley and applied much of Field's constitutional analysis throughout his own tenure on the Supreme Court.

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[15] *See* Jones, *supra* note 12, at 766 (discussing Thomas Cooley). This was also true of the Framers of the Constitution. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 1, 6, 24-25, 153, 204, 206-08, 228 (1990) (discussing the constitutional philosophy of James Madison and its pervasive influence on judicial review throughout the next century and a half).

[16] *See generally* GILLMAN, *supra* note 12; *see also* Benedict, *supra* note 12, at 298, 328-30.

[17] *See* Ray A. Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 & n.11 (1927). Brown notes that between 1868 and 1920 the United States Supreme Court invalidated only 13 out of 145 (8.9%) state and federal laws on economic substantive due process grounds. Between 1921 and 1927 the Court struck down 15 out of 53 (28%) laws on this basis. *See id.*; *see also* Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 *passim* (1985); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC'Y 53 *passim*.

[18] For discussion of Thomas Cooley, see, for example, Jones, *supra* note 12, at 752, 755-57, 759-64, 766-67, 770-71; Siegel, *Historism*, *supra* note 11, at 1488-1515 (discussing both Cooley's private and public law jurisprudence). For discussion of Stephen Field, see generally Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, at 1003-05 (1975), *reprinted in* AMERICAN LAW & THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 246, 264-65 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 90-99.

A revised understanding of the *Lochner* era, therefore, compels reappraisal of Sutherland's economic liberty jurisprudence. Sutherland derived much of its content from the past and closely identified with the conservative judicial tradition that evolved from the early days of the nation. From this perspective, Sutherland emerges as an especially cautious jurist, whose opposition to some forms of government regulation emanated from his aversion to political factions. Inherently skeptical of legislative panaceas for social and economic problems, Sutherland, like conservative jurists before him, used historical experience and the common law, rather than socio-economic theory, to guide his constitutional interpretation.[19] Moreover, the description of Sutherland as a doctrinaire adherent of laissez-faire economics or Social Darwinism ignores the nuances of his jurisprudence and its consistency with his legislative support of workmen's compensation, women's suffrage, and other reform measures that he thought promoted the public welfare.

Sutherland's passionate, yet flawed, defense of the judicial prerogative to declare constitutional limitations during the final phase of the *Lochner* era drew upon a classical notion of the Supreme Court as "the least dangerous branch" in a democracy.[20] In some respects, Sutherland was a transitional figure on the Court. His concern about the tyranny posed by irresponsible majorities and his emphasis upon equal operation of the law anticipated the modern Court's willingness to invoke strict scrutiny in the equal protection context.[21] His adherence to an anachronistic view of state police powers during the Depression may have been myopic and seemingly insensitive, if not naive. Nevertheless, scholars have erred in construing Justice Sutherland's economic liberty jurisprudence from the sole vantage point of those who triumphed in the constitutional crisis of the 1930s. Theirs is an inaccurate portrait of a jurist

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[19] On conservative jurists before Sutherland who used historical custom and common law principles in constitutional interpretation, see Jones, *supra* note 12, at 752, 755-57, 759-64, 766-67, 770-71; *see also* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66, 76-78, 80 & n.398, 82-99; Siegel, *Historism*, *supra* note 11.

[20] *The Least Dangerous Branch* is the title of a 1962 book written by the late Alexander Bickel about federal judicial review. Alexander Hamilton initially explained that the Supreme Court was "the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." THE FEDERALIST NO. 78, at 520 (Alexander Hamilton) (The Heritage Press ed. 1945). Distinct from the legislative and the executive branches, it wields neither the purse nor the sword. It merely exercises the power of judgment in a constitutional democracy. *See id.*

[21] *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 493, 511 (1989) (O'Connor, J.) (discussing political factions and the importance of strict judicial scrutiny of race-conscious remedies); *see also* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 100-09 (referring to the *Lochner* era as a transitional era in American constitutional history).

infinitely more complex and progressive than one might otherwise expect.

This Article has three parts. Part I provides an overview of the conservative judicial tradition based upon recent historical analysis of the *Lochner* era and its antecedents. It demonstrates the pervasive bias against factions that influenced the development of judicial review and explains the minimal influence of laissez-faire economics, Social Darwinism, and natural rights as constitutional norms. Part II discusses Sutherland's notions of law and democracy and reveals his distaste for partial laws. Part III examines the extent to which factional aversion, historical custom, and the common law suffused Sutherland's economic liberty jurisprudence.[22] It analyzes some of the inherent flaws and ironies of this jurisprudence and suggests that Sutherland's adherence to a conservative judicial tradition may have rendered him unable to understand the socio-economic ramifications of some of his more unfortunate decisions.

I. THE CONSERVATIVE JUDICIAL TRADITION: FACTIONS, COMMON LAW, AND HISTORICAL CUSTOM, 1787-1921

As a member of the United States Supreme Court, Justice George Sutherland reflected a conservative judicial tradition in which judges invoked constitutional limitations to restrain political factions and preserve individual economic liberty. Through their reserved powers to promote public health, safety, morals, and welfare, states, from the inception of the republic, had enacted laws that sometimes restricted personal property and contract rights. Ostensibly distinguishing between law and politics, judges required a substantial relationship between economic regulations and the public welfare in order to protect private rights from the sometimes capricious tendencies of fleeting democratic majorities. By 1905, when the Supreme Court issued its controversial decision in *Lochner v. New York*,[23] several generations of jurists had adhered to a narrow conception of state police powers and a cogent belief in the primacy of constitutional limitations.

After 1937 and the fundamental transformation of economic substantive due process, scholars often explained the development of *Lochner* era police powers jurisprudence from a limited historical perspective. Rarely did they consider that for many late nineteenth and early twenti-

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[22] This Article focuses on only those aspects of Sutherland's economic liberty jurisprudence that involve substantive due process and the Contract Clause. Analysis of Sutherland's views about the Commerce Clause is beyond the scope of this Article.

[23] 198 U.S. 45 (1905).

eth century jurists the questions of public control over private economic affairs involved concepts of limited democracy and political legitimacy formed years before the Gilded Age. Accordingly, *Lochner* and other cases were thought to represent a reactionary activism in which judges invoked principles of laissez-faire economics and Social Darwinism to protect the property interests of an economic elite.[24]

Recently, however, some historians have challenged these relatively narrow assumptions about judicial behavior. Instead they have looked beyond the post-Civil War period to Jacksonian democracy and even earlier for principled explanations as to why courts occasionally invalidated state economic and labor reform laws between 1870 and 1937. Michael Les Benedict and Howard Gillman, among others, have attributed the marked judicial conservatism of the *Lochner* era to longstanding concerns about political factions and the vulnerability of individual rights in a democratic republic.[25]

From this perspective, a pattern of judicial review emerges in which judges differentiated between laws enacted for the public welfare and those for the benefit of particular groups. To the extent that members of the judiciary questioned the propriety of industrial regulations, they did so based on an unwavering commitment to equal operation of the law and a skepticism of political expediency. Judges ultimately assessed the constitutional limits of state police powers through common law and historical custom rather than through an appeal to their own particular economic and social views.[26] Examination of the contours of this judi-

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[24] In large part, this perspective emanates from Justice Holmes's dissent in *Lochner*, in which he accused the majority of deciding the case "upon an economic theory which a large part of the country does not entertain." *Id.* at 75 (Holmes, J., dissenting). Holmes then implied that the Court based its ruling upon laissez-faire economics and Social Darwinism when he wrote: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* (Holmes, J., dissenting). He also explained that "a Constitution is not intended to embody a particular economic theory . . . ." *Id.* (Holmes, J., dissenting). *See generally* JACOBS, *supra* note 8; TWISS, *supra* note 8; Kens, *supra* note 8; Mason, *Conservative World*, *supra* note 8; Strong, *supra* note 8.

[25] *See, e.g.*, GILLMAN, *supra* note 12, *passim*; NEDELSKY, *supra* note 15, at 1, 6, 23-25, 32, 38, 44, 64, 153, 161-62, 172, 177-79, 203-04, 206-08, 211 (discussing the views of constitutional Framers, particularly those of James Madison); Benedict, *supra* note 12, *passim*.

[26] *See* Jones, *supra* note 12, at 752, 755-57, 759-64, 766-67, 770-71; *see also* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66, 76-78, 80 & n.398, 82-99. *See generally* Charles W. 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 (discussing the common law methodology of *Lochner* era jurists); Siegel, *Historism*, *supra* note 11 (discussing historism).

cial tradition provides an essential context from which to understand the economic liberty jurisprudence of George Sutherland.

A. *The Anti-Factional Origins of the Constitution*

From the outset, the constitutional Framers recognized the problem of political factions in a democratic republic. After the conclusion of the Revolutionary War, they witnessed popular majorities, comprised largely of factions of debtors and those without much property, exert tremendous control over state legislatures.[27] Throughout the 1780s, enormous debt from the war restricted the amount of available capital, making it difficult for many citizens to fulfill their debt obligations. In response to the popular clamor for relief, states enacted various measures that altered private credit agreements and impaired the contract and property rights of creditors for the benefit of debtors. Rather than alleviate the harsh economic conditions, many of these debtor relief laws actually imperilled the public welfare and signified the vulnerability of property rights in a virtually unlimited democracy.[28]

By 1787, it became apparent that the loose federation of states created by the Articles of Confederation was unable to preserve individual liberty and to restrain the turbulent whims of democratic majorities. Artisans, merchants, and creditors for whom property represented an inalienable right and a means of stability sought to strengthen the national government and limit the influence of local factions.[29] Representatives from the states convened that summer in Philadelphia and replaced the Articles of Confederation with our present constitutional system.

Insofar as the Framers proclaimed the virtue of property and its paramount importance in a democratic republic, they implicitly understood its tendency to promote factions. James Madison, the principal architect of the Constitution, attributed the emergence of factions to both personal liberty, which enabled all to pursue property, and the differences in individuals' ability to acquire property.[30] Madison thought factions were

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[27] *See, e.g.*, GILLMAN, *supra* note 12, at 20, 28-31; THE FEDERALIST NO. 10, at 55 (James Madison) (The Heritage Press ed. 1945); NEDELSKY, *supra* note 15, at 2, 4, 30; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 402-03, 409-13 (Norton 1972).

[28] *See* GILLMAN, *supra* note 12, at 28; BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 4-6 (1938); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1139-43.

[29] *See* GILLMAN, *supra* note 12, at 22, 29; Benedict, *supra* note 12, at 317.

[30] *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 56. Madison observed: "From the protection of different and unequal faculties of acquiring property,

inevitable, as liberty made possible the unequal distribution of property,[31] creating societal divisions between groups of citizens "whether amounting to a majority or a minority of the whole . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[32]

The Framers' experience with a plethora of post-Revolutionary redistributive legislation confirmed their inherent skepticism about majority rule. They believed that those with little or no property were more likely to use the democratic process in ways harmful to members of the minority who had relatively large amounts of property.[33] Thus, Madison noted that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passions or interest both the public good and the rights of other citizens."[34]

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the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties." *Id.*

[31] *See id.* at 56-57.

[32] *Id.* at 55. Madison opposed class, or partial, legislation, which he believed threatened the public welfare. *See* THE FEDERALIST NO. 57, at 385 (James Madison) (The Heritage Press ed. 1945) (explaining that Congress was unlikely to pass partial laws); *see also* NEDELSKY, *supra* note 15, at 30-31, 42-45. Madison was concerned with "secur[ing] the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government." THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 58.

[33] *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 27 (1991); NEDELSKY, *supra* note 15, at 3-7, 17-25, 32, 153, 161, 208, 211. Madison reasoned that a majority comprised of those without much property might, in its zeal to protect other personal rights, threaten the property rights of a propertied minority. He thought that because persons of property had both property and personal rights at stake, they would be less tyrannical toward other members of the polity. *See id.* at 18. Madison, as well as other constitutional Framers, perceived the right to property as representative of other civil rights and as especially vulnerable in a democratic republic. *See id.* at 1, 6-7, 18, 23-25, 32, 153, 204, 206. Insofar as the Framers recognized an implicit tension between property and other personal rights, they believed that protection of the former from arbitrary government was integral to the security of other personal rights and, thus, essential to the stability of society. *See id.* at 17-25, 32, 38, 41, 44, 272. *See generally* THE FEDERALIST NO. 10 (James Madison).

[34] THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 58. Madison realized that "the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." *Id.* Neither pure democracy nor equal political rights would attain this objective. *See id.* at 59. In a large republic, however, a plethora of factions would keep each other in check and prevent the inordinant influence of any particular interest group. *See id.* at 61.

This conception of public welfare drew upon the commonwealth ideals of earlier generations of English reformers for whom class, or partial, legislation undermined the legitimacy of governmental authority.[35] Seventeenth century English courts had invalidated as unlawful restraints of trade grants of exclusive monopolies from the British monarch to favored groups or individuals.[36] Whig political reformers later proclaimed that government intervention on behalf of some citizens, but not others, threatened the overall public good.[37] By the 1780s, Madison and other American political thinkers concluded that the protection of individual liberty and the security of property rights were integral to "the permanent and aggregate interests of the community."[38] Impartial government, therefore, limited the opportunities for political factions to enact special interest laws inimical to the public welfare.[39]

Although seemingly committed to the concept of market liberty and the free exchange of property, the Framers of the Constitution primarily were interested in the security of property rights, which they deemed essential to the enjoyment of other civil rights and liberties.[40] Theirs was not so much an economic theory of government as an attempt to restrict factions while preserving personal freedom.[41] The Constitution they created, with its careful distribution and limitation of governmental powers, largely sought to protect individual rights from the tyranny of popular majorities that were controlled by factions eager to promote their own interests at the expense of the public good.[42]

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[35] *See* WOOD, *supra* note 27, at 54-55; Benedict, *supra* note 12, at 314-17.

[36] *See, e.g.*, Ipswich Tailors' Case, 77 Eng. Rep. 1218 (1614) (invalidating a tailors' monopoly as an unlawful restraint of trade detrimental to the commonwealth); The Case of Monopolies, 77 Eng. Rep. 1260 (1602) (invalidating a card monopoly).

[37] *See* WOOD, *supra* note 27, at 53-65 (discussing eighteenth century commonwealth ideals); Benedict, *supra* note 12, at 316-17.

[38] THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 55; *see also* NEDELSKY, *supra* note 15, at 1, 23-27, 32, 38, 41-45, 177-80, 203-08.

[39] *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 20, at 525 (discussing unjust partial laws); NEDELSKY, *supra* note 15, at 43-45; WOOD, *supra* note 27, at 54-55; Benedict, *supra* note 12, at 317.

[40] *See* NEDELSKY, *supra* note 15, at 1, 23-27, 32, 38, 41-45, 177-80, 203-08; BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 171 (1980).

[41] *See* THE FEDERALIST NO. 51 (James Madison) (explaining how separation of powers limits governmental authority, curbs factions, and preserves individual rights); NEDELSKY, *supra* note 15, at 44-45, 177-80, 207; SIEGAN, *supra* note 40, at 272-73. Siegan explains that majoritarianism poses several problems for the protection of individual rights. First, "[m]ajorities do not necessarily have enough knowledge, insight or expertise to assure wisest action." *Id.* at 273. Second, "the laws that fleeting alliances produce may long outlast the forces that created them." *Id.*

[42] *See* GILLMAN, *supra* note 12, at 13, 30-31.

B. *Vested Rights, Judicial Review, and the Distinction Between Law and Politics*

Alexander Hamilton most clearly perceived the connection between judicial review and factional bias. He believed that independent judges, free from the influence of political factions, would be the "bulwarks of a limited Constitution against legislative encroachment."[43] Through an impartial review of governmental action, judges would maintain the supremacy of constitutional principles intended to curb factions by invalidating "unjust and partial laws" that hurt the "private rights of particular classes of citizens."[44]

During the early years of the nation, judges distinguished between law and politics by asserting that principles of law protected property and contract rights from the expediency of political factions and the turbulence of democratic majorities.[45] Pursuant to this reasoning, many jurists applied the concept of vested rights as a limitation upon state legislative power. Under this concept, rights vested in those to whom the government granted land or gave a charter. With few exceptions, subsequent legislation that repealed the original grant or charter unlawfully divested the recipients of their property and contract rights.[46] Throughout the colonial and post-Revolutionary periods, governments encouraged economic development and commercial enterprise through grants and charters.[47] Laws enacted in response to the fleeting emotions of popular

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[43] THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 20, at 524.

[44] *Id.* at 525.

[45] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (holding that legislative repeal of a prior land grant violates the Contract Clause); Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805) (holding that a state's obscure interpretation of the language in the legislature's land grant should not be upheld); *see also* NEDELSKY, *supra* note 15, at 8, 187-99; Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 52-61.

[46] *See, e.g.*, Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829) (sustaining a Rhode Island law that transferred realty in satisfaction of a debt, but recognizing the doctrine of vested rights as a limit upon legislative power); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (invalidating New Hampshire laws that revoked a college's corporate charter); Van Horne v. Dorrance, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857) (holding that Pennsylvania could not divest its citizens of real property, even with compensation, in favor of Connecticut claimants to resolve an interstate land dispute). *See generally, e.g.*, G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 595-673 (abridged ed. 1991) (discussing the Marshall Court and vested rights); Benedict, *supra* note 12, at 323-25; Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 52-61.

[47] *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 88-100 (1989); Benedict, *supra* note 12, at 317.

majorities that threatened to divest rights acquired through grants or charters were often regarded as detrimental to the public welfare.[48]

Initially, the Marshall Court used vested rights theory to support its expansive interpretation of the Contract Clause. In *Fletcher v. Peck*,[49] the Court invalidated Georgia's 1796 repeal of the previous year's legislation through which innocent third party purchasers claimed title to millions of acres of land in the Yazoo territory.[50] In his majority opinion, Chief Justice John Marshall asserted that under common law a grant was a contract in which the grantor implicitly promised not to revoke or reassert its rights to the property.[51] Although he was aware that Georgia revoked its original grant to speculators who bribed a corrupt legislature, Marshall insisted that the state's actions divested innocent third parties, who purchased the land from the speculators, of their contract rights.[52] Concerned primarily with the security of property rights and the sanctity of contracts, he said that the Contract Clause served "to shield . . . property from the effects of those sudden and strong passions to which men are exposed."[53]

Using this reasoning, the Court also held unconstitutional New Hampshire laws that revoked Dartmouth College's charter, made the private, eleemosynary educational institution a state university, and divested the original college corporation of its property, which came under the control of a new public entity.[54] Upset with Dartmouth's educational objectives, political and religious factions within the state convinced the New Hampshire legislature to enact these laws.[55] In ruling that the state impaired the college's charter, the Court applied the Contract Clause to protect the private rights of a corporation from partial, or class, legislation that redistributed property.[56] Similarly, the Marshall Court invali-

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[48] *See, e.g., Dartmouth College*, 17 U.S. (4 Wheat.) at 557-58, 569, 573, 577-80 (argument of Daniel Webster, counsel for Plaintiffs in Error). Webster argued that New Hampshire laws that changed a private eleemosynary educational corporation into a public university divested the college's proprietors of private property acquired through an eighteenth century royal charter. *See id.*

[49] 10 U.S. (6 Cranch) 87 (1810).

[50] In 1795, speculators bribed the Georgia legislature into conveying over thirty million acres of land. A year later, a newly elected legislature enacted a law revoking this land grant. Unaware of the repeal, Fletcher bought fifteen thousand acres from Peck, who acquired his interest in the land from Gunn, an original grantee. *See id.* at 87-92.

[51] *See id.* at 136-37.

[52] *See id.* at 135, 139.

[53] *Id.* at 138.

[54] *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[55] *See* WHITE, *supra* note 46, at 613.

[56] *See Dartmouth College*, 17 U.S. (4 Wheat.) at 653-54.

dated a debtor relief law that excused payment of an antecedent debt, and struck down other retroactive measures that altered contract obligations in ways that demonstrated the particular vulnerability of private rights in a democratic republic.[57]

Although the early Court occasionally referred to natural law limits on state legislative power, it relied mostly on the common law principle of vested rights.[58] Some justices explicitly rejected natural law as the basis for restraining legislative power because of its vague and imprecise standards.[59] Others reasoned that the government alone created vested rights and thus could not revoke or impair property interests conferred in charters without reserving those powers in the initial grant of property rights to private parties.[60] As the Court increasingly derived meaning and content for the Contract Clause from the common law, it anticipated the historist methods of late nineteenth and early twentieth century jurists like Thomas Cooley and George Sutherland, who used common law

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[57] *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating a retroactive New York insolvency law that discharged a debtor from an antecedent contractual obligation); *see also* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (invalidating the Kentucky Occupying Claimants Law under the Contract Clause). *But see* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (sustaining a prospective New York insolvency law). In *Ogden*, Chief Justice John Marshall dissented, contending that *both* retroactive and prospective insolvency laws impair the obligation of contracts. *See id.* at 332-37 (Marshall, C. J., dissenting). In support of his argument, Marshall invoked the spectre of post-Revolutionary debtor relief laws and political factions. *See id.* at 354-57 (Marshall, C.J., dissenting).

[58] *See* NEDELSKY, *supra* note 15, at 8, 195 (contending that the Marshall Court used common law to define property rights and to prescribe the constitutional limits of legislative authority); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 30-51 (asserting that the Marshall Court used vested rights theory to reconcile natural law with textual constitutional interpretation—"constitutional conceptualism").

[59] *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (holding that a Connecticut law that set aside a probate decree was not an ex post facto law). In *Calder*, Justice Samuel Chase invoked natural law when he said: "An ACT of the Legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* at 388 (Chase, J.). In contrast, Justice James Iredell criticized natural law as the basis of constitutional adjudication:

> If . . . the Legislature . . . shall pass a law, within the general scope of [its] constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject . . . .

Id. at 399 (Iredell, J.).

[60] *See* WHITE, *supra* note 46, at 619-20 (suggesting that Justice Joseph Story implicitly rejected natural law as the source of vested property rights and as a limitation upon legislative power to divest private rights conferred by prior grants and charters); *see also Dartmouth College*, 17 U.S. (4 Wheat.) at 708-12 (Story, J., concurring).

principles, rather than abstract theories of natural rights, to protect private rights from the class legislation of political factions.

C. *Jacksonian Democracy: Equality, Class Legislation, and the Public Welfare*

By the end of the 1820s, deep divisions existed within American society. Improvements in technology, favorable governmental economic policies, and the growth of urban areas contributed significantly to industrial development. Large-scale production of goods increased the unequal distribution of property. Many more people toiled as laborers for modest wages than profited from the ownership of factories and other businesses. As economic independence became more difficult for many to attain, concerns arose that the protection of vested property rights often conferred a privileged status on an economic elite and that this status was detrimental to the long-term interests of the public welfare.[61]

Jacksonian democracy emerged from an alliance of laborers, farmers, small merchants, and other socio-economic groups eager to reprise Jeffersonian ideals of economic liberty and political equality.[62] Jefferson, an ardent foe of unrestricted government, decried against its partisan intervention in the market economy of the early nineteenth century. He believed that equal opportunity and personal liberty encouraged the self-reliance essential to a thriving democracy.[63] Jeffersonian Republicans opposed Federalist policies that created economic privileges for favored citizens and excluded others from similar opportunities.[64]

Jacksonian Democrats followed in this anti-factional tradition. They regarded laws that vested corporations, monopolies, tax exemptions, and other privileges in but a few persons as harmful to the community. This partial legislation was illegitimate because it created artificial distinctions often in conflict with the interests of the public. Instead, Jacksonian Democrats thought that government should promote widespread participation in the market.[65] Jacksonians did not, however, necessarily seek to

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[61] *See* GILLMAN, *supra* note 12, at 39-40, 43.

[62] *See id.* at 34-35; Benedict, *supra* note 12, at 318. *See generally* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 306-21, 334-46 (1945) (describing Jacksonian democracy).

[63] *See* GILLMAN, *supra* note 12, at 26; Benedict, *supra* note 12, at 317-18.

[64] *See* Benedict, *supra* note 12, at 317-18. Jefferson himself did not oppose charters for the benefit of the entire community. In general, he supported the principle prevalent in the early republic that government should encourage economic and industrial development in a neutral manner. *Id.* at 318.

[65] *See* GILLMAN, *supra* note 12, at 36-37; SCHLESINGER, *supra* note 62, at 306-49 (discussing Jacksonian political economy); Benedict, *supra* note 12, at 317-22; Stephen

redistribute wealth. Rather, they sought to preserve economic liberty through the impartial restraint of laws intended to encourage equal opportunity.[66]

Jacksonian judges interpreted "law of the land" provisions in state constitutions as limits on government's power to enact partial, or class, legislation.[67] They viewed the clause, "law of the land," as a mandate for government to remain neutral. Laws of general application that were "equally binding upon every member of the community" were consonant with the public good.[68] Eager to protect the rights of the minority from the tyranny of popular majorities, Jacksonian jurists distinguished between laws for the benefit of particular individuals or groups and those for the public welfare.[69]

A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 29-40, 55, 59, 64-66, 70-75 (1986) (describing the dichotomy between economic privilege and property rights). President Andrew Jackson was especially critical of partial, or class, legislation. In his veto of the bill renewing the charter of the second United States Bank, he described himself a foe of "exclusive privileges . . . [and] against any prostitution of our Government to the advancement of the few at the expense of the many . . . ." ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* IDEOLOGY AND POWER IN THE AGE OF JACKSON 199 (Edwin C. Rozwenc ed., 1964) (criticizing the bank's monopolistic status and discussing the virtues of neutral government); *see also* William M. Gouge, *The Artificial Inequality of Wealth* (1835), *in* IDEOLOGY AND POWER IN THE AGE OF JACKSON, *supra*, at 110-21 (Jacksonian essayist assailing economic privilege and exalting equal economic opportunity).

[66] *See* Benedict, *supra* note 12, at 318-19.

[67] Inserted in several state constitutions during the first quarter of the nineteenth century, the term "law of the land" referred to "a general and public law, equally binding upon every member of the community." Vanzant v. Waddel, 8 Tenn. (2 Yer.) 259, 270 (1829) (sustaining a law that gave bank creditors additional collection remedies).

[68] *Vanzant*, 8 Tenn. (2 Yer.) at 270. Conversely, a partial law was one "tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land . . . ." *Id.* at 269.

[69] *See, e.g.*, Wally's Heirs v. Kennedy, 8 Tenn. (2 Yer.) 554, 555-57 (1831) (invalidating as unconstitutional partial legislation a Tennessee law that dismissed suits filed on behalf of Cherokee Indians to recover land reserved to the tribe pursuant to federal treaties). The court distinguished between laws of equal operation and partial ones, *see id.* at 555-56, and said the state constitution required general public laws "to secure to weak and unpopular minorities and individuals equal rights with the majority, who . . . exercise the legislative power." *Id.* at 557. Otherwise, "the majority in the government . . . [would be] a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter." *Id.*; *see also* Bank v. Cooper, 8 Tenn. (2 Yer.) 599, 606-09 (1831) (invalidating legislative creation of a special tribunal to hear all suits brought by the state bank against its debtors and discussing the "selfish passions" of legislative majorities).

Rather than invoke vested rights to restrain political factions, as Federalist judges had done, judges of this era used the concept of public welfare to limit the self-interest of transient democratic majorities and to articulate the scope of permissible government regulation. In general, courts sustained measures intended to promote public health, safety, morals, and welfare,[70] and invalidated efforts by factions to manipulate the democratic process through laws that bestowed special benefits on their members or imposed distinct burdens on others.[71] Within this context, the United States Supreme Court held unconstitutional laws that impaired the contract rights of creditors or that diminished substantially the value of their remedies.[72] Enacted under intense pressure of debtors during the financial crisis of the late 1830s, the Court regarded these measures as illegitimate attempts to harm the long-term public interest in commercial security.

In their emphasis upon public welfare, Jacksonian judges recognized that some vested rights threatened equality and personal liberty. They differentiated between the right to acquire property and the accumulation, through partial legislation, of economic privilege that subverted widespread opportunity. For example, in *Charles River Bridge v. Warren Bridge*,[73] Chief Justice Taney rejected the claim that the charter of a toll bridge company conferred upon its proprietors a monopoly to operate a bridge across the Charles River.[74] Narrowly interpreting the language of

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[70] *See, e.g.*, Vadine's Case, 23 Mass. (6 Pick.) 187 (1828) (sustaining a Boston licensing law for waste removal); GILLMAN, *supra* note 12, at 50-55 (discussing Jacksonian cases).

[71] *See, e.g.*, *Wally's Heirs*, 8 Tenn. (2 Yer.) 554; *Cooper*, 8 Tenn. (2 Yer.) 599.

[72] *See, e.g.*, Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (invalidating, under the Contract Clause, an Illinois law that permitted defaulting mortgagors one year in which to redeem foreclosed real property). In *Bronson*, the state legislature had enacted this law in the aftermath of the Panic of 1837. No such provision existed when the parties executed the mortgage contract. The Court ruled that the creation of an equitable redemption period destroyed the mortgagee's contract rights and remedies and thus impaired the underlying contract obligation. *See id.* at 317-20; *see also* Gantly's Lessee v. Ewing, 44 U.S. (3 How.) 707 (1845) (invalidating an Indiana law requiring foreclosed property to sell for at least half of its market value); McCracken v. Hayward, 43 U.S. (2 How.) 608 (1844) (invalidating an Illinois requirement that foreclosed property sell for at least two-thirds of its appraisal value).

[73] 36 U.S. (11 Pet.) 420 (1837).

[74] *See id.* at 548-52. In 1785, Massachusetts granted investors in the Charles River Bridge Company a charter for a toll bridge between Charlestown and Boston. Forty-three years later the state chartered the adjacent toll-free Warren Bridge. By 1830, this new bridge diverted traffic from the Charles River Bridge, whose proprietors unsuccessfully sought injunctive relief in Massachusetts. Before the Court, the investors argued that the state's subsequent charter of the toll-free bridge substantially destroyed the

the charter, Taney ruled that Massachusetts did not intend to give the Charles River Bridge Company any exclusive rights.[75] Consequently, no impairment of vested contract rights occurred when the state subsequently chartered the toll-free Warren Bridge in the same location.[76] Taney essentially recognized that rigid application of the Contract Clause to protect the investment interests of the Charles River Bridge proprietors might hamper industrial progress and actually promote inefficient use of the waterway. In this context, economic competition was essential because it encouraged technological improvements and presumably enhanced the public welfare.[77]

Committed to neither laissez-faire economics nor to abstract principles of natural rights, jurists influenced by the tenets of Jacksonian democracy shared a fundamental belief that the primary objective of the law lay in the "release of individual energy."[78] They devised a jurisprudence that distinguished between permissible and impermissible uses of governmental authority. This jurisprudence reflected traditional biases against political factions and presaged the subsequent development of substantive due process as a limitation upon state police powers.[79]

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value of their exclusive franchise implicitly created by their 1785 charter. *Id.* at 447-61 (argument of Dutton, counsel for Plaintiffs in Error). Thus, the investors asserted that the state violated its contractual obligation to refrain from interfering with or diminishing the bridge's commercial enterprise. *Id.* at 444-45, 454, 457-58.

[75] Taney believed the 1785 charter was a contract but concluded that it did not prevent the state from chartering competing ventures. *See id.* at 548-52 (Taney, C.J.). "[I]n grants by the public, nothing passes by implication." *Id.* at 546. Thus, the charter's silence about exclusivity indicated it did not create a monopoly. *See id.* at 549.

[76] *See id.* at 548-52. *But see id.* at 608-45 (Story, J., dissenting) (arguing that the Warren Bridge charter divested the claimants' contract and property rights).

[77] *See id.* at 552-53 (Taney, C.J.) (holding that an implied monopoly would retard maximal waterway use and encourage waste). *See generally* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971) (asserting that Taney strictly construed the charter to promote local economic development and to prevent stagnation of private vested rights).

[78] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7 (1967), *quoted in* GILLMAN, *supra* note 12, at 5 (discounting the notion that laissez-faire economics marked Jacksonian legal development); *see, e.g.*, Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) (asserting that the Constitution, *not* natural rights, limited state laws); Merrill v. Sherburne, 1 N.H. 199, 206-17 (1818) (holding that the state constitution, *not* natural rights, limited the state legislature).

[79] *See* Benedict, *supra* note 12, at 325-26; Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 58-61.

D. *The Emergence of Substantive Due Process as a Limitation Upon Political Factions*

During the latter half of the nineteenth century, substantive due process emerged as an important limitation upon state police powers. Industry flourished in the aftermath of the Civil War, yet for those who worked in factories and for other laborers, economic opportunity diminished. Often unable to negotiate higher wages and improved working conditions, industrial workers and others for whom the promise of economic autonomy remained illusory exerted, through the democratic process, tremendous pressure upon local governments to intervene in market relations on their behalf.[80] As a result, pursuant to their authority to promote public health, safety, morals, and welfare, states increasingly regulated private economic activity.

Whereas before the Civil War local governments exercised their police powers to foster economic development and commercial enterprise, after the war they used these powers to alleviate the harsh consequences of rapid, large-scale industrialization.[81] In defense of their property rights, private businesses and others adversely affected by these laws invoked the Due Process Clause of the recently enacted Fourteenth Amendment[82] and similar state constitutional provisions.

Initially set forth in the Magna Carta, due process was part of the common law tradition the colonists brought to America.[83] Originally perceived as a procedural safeguard to ensure that government did not take one's life, liberty, or property without a judicial hearing,[84] it

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[80] *See, e.g.*, GILLMAN, *supra* note 12, at 63, 76-79; HALL, *supra* note 47, at 197-203; Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 260 (1984) [hereinafter Siegel, *Understanding the* Lochner *Era*].

[81] *See* Benedict, *supra* note 12, at 327; *see also* Kens, *supra* note 8, at 74 (noting that by the latter half of the nineteenth century the term "police powers" signified the limits upon state police powers, whereas before the Civil War it referred to the broad contours of state regulatory power). For discussion of antebellum police powers ideology, see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993); *see also* HALL, *supra* note 47, at 88-89, 93-102 (discussing the nexus between antebellum police powers and economic development); *id.* at 197-203 (discussing late nineteenth century local police powers and economic regulation).

[82] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, §1.

[83] *See* Kens, *supra* note 8, at 75. In relevant part, the Magna Carta provides: "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by lawful judgment of his peers or by the law of the land." MAGNA CARTA ch. 39 (1215).

[84] *See* Kens, *supra* note 8, at 75.

evolved in the late nineteenth century into a substantive limitation upon governmental authority. As antebellum judges distinguished between laws that benefited the entire community and those that advanced the narrow interests of a few, they implicitly used the power of judicial review to assess the substantive effects of laws.[85] Consequently, the content of legislation became critical in determining its relevance to the public welfare. State and federal judges fashioned the concept of substantive due process to protect the rights of those in the minority from the whims and prejudices of transient democratic majorities. Increased regulation of private economic affairs, therefore, gave the judiciary ample opportunity to interpret due process as a constitutional guarantee and to employ it as a limitation upon the scope of state police powers.

One jurist whose views became particularly influential was Thomas Cooley of the Michigan Supreme Court, who published a comprehensive analysis of constitutional government two months after the ratification of the Fourteenth Amendment. Entitled *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, Cooley's book focused primarily upon state constitutional law. Nevertheless, the principles it set forth were undoubtedly intended by Cooley and understood by others to apply to the problems of due process that arose in both state and federal litigation. Years later, George Sutherland, a former law student of Cooley's at Michigan, based much of his own Supreme Court analysis of economic liberty on the work of his mentor.[86]

Cooley perceived in a written constitution the principal means of protecting individual rights from political factions and the tyranny of democratic majorities.[87] Deeply committed to equal opportunity and a foe of

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[85] An early due process case was *Wynehamer v. The People*, 13 N.Y. 378 (1856) (ruling that the due process clause of the New York Constitution limits governmental power); *see also, e.g.*, Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 167-69 (1853) (invalidating class legislation that divested private property rights); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-88 (1851) (addressing limits of state police powers and class legislation); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843) (suggesting that some forms of class legislation may violate due process).

[86] *See* PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE, *supra* note 10, at 16-20, 36, 127, 170-72 (discussing Cooley's influence upon Sutherland). Sutherland attended Cooley's constitutional law lectures at the University of Michigan Law School in 1882.

[87] *See* 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 (Da Capo Press reprint ed. 1972) (1868) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS]. Cooley admonished against constitutional interpretation based on "[t]he violence of public passion." *Id.* at 54-55.

special privileges, Cooley, like other Jacksonian jurists, proclaimed the virtue of general laws enacted for the public good and distinguished them from partial laws of unequal operation.[88] While he acknowledged the authority of states to regulate private property for the health, safety, morals, and welfare of their citizens, he believed that courts had the duty to make sure that states employed their police powers for the benefit of all in a nondiscriminatory manner.[89] He suggested that in determining whether the government arbitrarily exercised its police powers to the detriment of individual rights, courts should look at the substance of a law and not merely at its form.[90]

Historical context and the common law, rather than natural rights or laissez-faire economics, were the linchpins of Cooley's constitutional jurisprudence.[91] Custom and legal precedent, he thought, constrained judges who otherwise might resolve questions of governmental authority on the illusory basis of their personal predilections.[92] A proponent of

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[88] *See, e.g.*, People v. Salem, 20 Mich. 452, 486-87 (1870) (ruling that Michigan could not pass preferential legislation for a railroad: "The state can have no favorites . . . and [should] . . . give all the benefit of equal laws."). Cooley associated the legitimacy of governmental action with laws of general application. *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 355, 389-94. While the legislature could "establish peculiar rules for the several occupations, and distinctions in the rights, obligations, and legal capacities of different classes of citizens," *id.* at 390, it could not impose particular obligations or burdens on one group "from which others in the same . . . class are exempt." *Id.* at 390-91. "Equality of rights, privileges, and capacities unquestionably should be the aim of the law . . . ." *Id.* at 393; *see also, e.g.*, GILLMAN, *supra* note 12, at 57; JACOBS, *supra* note 8, at 27, 29, 31; Jones, *supra* note 12, at 755, 760, 764. Jones characterizes Cooley as a Jacksonian Democrat because of his general opposition to partial laws and his penchant for equal economic opportunity. *See id.* at 752, 755-58, 760, 762-63.

[89] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 357; Jones, *supra* note 12, at 762-63 (discussing Cooley's recognition that the impartial exercise of local police powers could protect property rights). *See generally* COOLEY, *supra* note 87, at ch. 16 (discussing the permissible scope of state police powers).

[90] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 355-56.

[91] *See id.* at 22, 55-61. Cooley thought "constitutions . . . [should] be construed in the light of the common law . . . ." *Id.* at 60; *see also* TWISS, *supra* note 8, at 22-25, 27, 30, 41 (discussing Cooley's common law emphasis); Jones, *supra* note 12, at 752, 757-64, 767-68, 770; Siegel, *Historism*, *supra* note 11, at 1489-91, 1497-1503, 1505, 1507-09, 1512-1515, 1540 (arguing Cooley's was an historist jurisprudence based primarily upon historical consciousness and common law). Siegel contends that Cooley "understood natural-law and historist jurisprudence as distinct enterprises." *Id.* at 1515.

[92] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 50-54, 165-68; *id.* at 167 (arguing that a court should not "substitute its own judgment for that of the legislature" in the absence of a constitutional violation by the legislature); *see also* Jones, *supra* note 12, at 761 ("By looking to history he meant to deprive judges of the right to define due process on the basis of . . . natural justice."); *id.* at 760-62. Due process of

gradual change, Cooley considered historical context essential in ascertaining the meaning of constitutional provisions and their application to contemporary problems.[93] His view, therefore, that due process of law protected private rights from the arbitrary exercise of governmental power reflected traditional concerns about political factions in a democratic republic.[94]

A few years after the publication of Cooley's seminal treatise, the United States Supreme Court began to address the meaning of the Due Process Clause of the Fourteenth Amendment. Within the context of prescribing the parameters of governmental authority to regulate private economic affairs, the Court devised a jurisprudence of substantive due process that revealed its commitment to economic liberty and its aversion to political factions. Associate Justice Stephen Field articulated this notion in an 1877 case that involved the use of local police powers to prescribe grain storage fees. In *Munn v. Illinois*,[95] the Court sustained Illinois's authority to regulate the prices charged by a private grain warehouse. In dissent, Associate Justice Stephen Field sharply questioned the premise that storing grain involved a significant public interest, when at common law this activity was not a nuisance, and the company neither dedicated its property to public use nor received special privileges from the government that would warrant state control.[96] Field believed that the statute was a restraint upon economic liberty that operated unequally when it impaired the use and value of private property for reasons that bore scant relevance to the public welfare. The law arbitrarily restricted the contractual freedom of one type of private business but left alone others that similarly affected the public tangentially.[97] Thus, Field in-

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law "mean[t] its settled usage . . . and we determine this by going to common law." *Id.* at 759 (quoting III COOLEY LAW LECTURES 112 (Law Notebook of John Nelles Young) (available in the University of Michigan Historical Collection)).

[93] COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 55-56; Jones, *supra* note 12, at 757 n.26, 759, 763; Siegel, *Historism*, *supra* note 11, at 1493-95, 1499, 1501, 1505, 1507-08, 1513, 1515, 1540.

[94] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 55-56; Jones, *supra* note 12, at 752, 758-60, 764, 770.

[95] 94 U.S. 113 (1877). Writing for the majority, Chief Justice Waite reasoned that a grain storage facility, although privately owned, "does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.* at 126.

[96] *See id.* at 139-40 (Field, J., dissenting). Thomas Cooley also thought Chief Justice Waite misinterpreted the common law and undermined private rights. *See* Jones, *supra* note 12, at 767.

[97] *See Munn*, 94 U.S. at 140-45 (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, so

voked the Due Process Clause as a substantive limitation upon state police powers to protect intangible property rights from the illegitimate class legislation of political factions.[98]

Although expressed in dissent, Field's conception of substantive due process ultimately prevailed until the 1930s. Indeed, judges consistently recognized that title and ownership of property were meaningless without some protection of its value and use.[99] Increasingly, members of the judiciary asserted their prerogative to preserve property rights from the roiling passions of transient majorities eager to use the police powers of the government to redress perceived inequities in industrial and market relations. Through the power of judicial review, courts carefully scrutinized the substance of laws to ensure that they actually promoted public health, safety, morals, or welfare.[100] Justice Field himself 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.[101]

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soon, at least, as his business became generally useful." *Id.* at 154 (Field, J., dissenting).

[98] *See id.* at 141-42, 145, 148, 154 (Field, J., dissenting). Field believed "[t]he decision of the [C]ourt . . . gives unrestrained license to legislative will." *Id.* at 148 (Field, J., dissenting).

[99] As Field noted in *Munn*: "All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession." *Id.* at 141 (Field, J., dissenting).

[100] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887) (explaining that "courts are not bound by mere forms . . . [t]hey 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."). The Court sustained Kansas's prohibition of the manufacture or sale of alcohol as a reasonable exercise of police powers. *See also* Lawton v. Steele, 152 U.S. 133 (1894) (upholding a law that made fishing with nets a criminal offense as a reasonable means of protection for fish and game).

[101] Powell v. Pennsylvania, 127 U.S. 678, 696-97 (1888) (Field, J., dissenting); *see also* STEPHEN FIELD, THE CENTENARY OF THE SUPREME COURT OF THE UNITED STATES (Feb. 4, 1890), *reprinted in* 24 AM. L. REV. 351, 361-68 (discussing the importance of judicial review as a means of preventing the tyranny of popular majorities controlled by political factions).

1. *Liberty of Contract*

Courts often reviewed police power regulations that interfered with the freedom of individuals to pursue an otherwise lawful occupation. From these cases emerged the idea that due process protected liberty of contract as a right of both property and liberty.[102] Derived in essence from the common law aversion to special privileges and the Jacksonian notion of equality, liberty of contract reflected the fundamental premise that everyone has a property right in his own labor. It also assumed that both employers and employees were free to bargain on equal terms about conditions of employment and other related matters.[103] To this extent, government intervention on behalf of one group or the other was considered impermissible class, or partial, legislation.

Justice Field and Justice Bradley both relied upon liberty of contract in their dissents in *The Slaughter-House Cases*[104] when they expressed their opposition to a Louisiana law that created a monopoly that excluded independent butchers from the slaughter business in New Orleans. Although a majority of the Court sustained the act as a reasonable measure to promote public health,[105] the dissenters concluded that the legislature really con-

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[102] *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36, 116 (1873) (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."); *see also* Frorer v. People, 31 N.E. 395, 397-98 (Ill. 1892); JACOBS, *supra* note 8, at 24-25.

[103] *See* JACOBS, *supra* note 8, at 65; McCurdy, *The Roots of "Liberty of Contract," supra* note 26, at 24-26; *see also Slaughter-House*, 83 U.S. at 110 (Field, J., dissenting) (citing in a footnote Adam Smith's observation in *The Wealth of Nations* that "The Property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.").

[104] 83 U.S. 36, 83-111 (1873) (Field, J., dissenting); *id.* at 111-24 (Bradley, J., dissenting). The 1869 act conferred upon the Crescent City Live-Stock & Slaughterhouse Company the exclusive right to operate a slaughterhouse designated for the destruction of animals. The slaughterhouse was located just below New Orleans, some distance from city residences, to prevent the spread of disease. This twenty-five year monopoly authorized the company to permit independent butchers, prohibited by law from slaughtering animals elsewhere in the city, to use its facilities upon the payment of considerable fees. Independent butchers characterized the law as impermissible class legislation that deprived them, in violation of the Constitution, of their liberty and property interests attendant with the right to pursue an otherwise lawful trade. *See id.* at 48-57 (argument of John A. Campbell, co-counsel for Plaintiffs in Error).

[105] *See id.* at 60-66 (Miller, J.). In so holding, the Court narrowly interpreted both the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment and limited the Thirteenth Amendment to eradicating the slavery of African-Americans. *See*

ferred an economic privilege upon one class of butchers to the detriment of their competitors who sought to pursue the same livelihood.[106] While the dissenters conceded that the state had the power to regulate the slaughter business for health and safety reasons, they noted that the provisions at issue did not involve the conduct of business, but rather excluded individuals for reasons that bore little connection to public health.[107] Thus, they concluded the law violated due process because it interfered with the independent butchers' rights to acquire property upon the same terms as anyone else. As such, the law represented impermissible class, or partial, legislation.[108]

In essence, liberty of contract meant "the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others . . . ."[109] As a doctrine, courts used it to expand the scope of substantive due process as a limitation upon state police powers. With its emphasis upon equal operation of the law, liberty of contract enabled the judiciary to consider the actual connection between legislative means and ends to ensure that government did not infringe upon the personal rights of some members of the community for the benefit of others. Consequently, state and federal judges sustained as a legitimate exercise of police power those laws that were substantially related to matters of public health, safety, morals, or welfare, which, by their very nature, equally benefited or restrained

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id. at 66-82.

[106] *See id.* at 87-89, 93, 101-02, 105-07, 109-11 (Field, J., dissenting); *id.* at 116-19, 122 (Bradley, J., dissenting). Both dissenters concluded, in part, that the Louisiana act abridged the independent butchers' Fourteenth Amendment due process "right to pursue a lawful and necessary calling" when it conferred a monopoly upon the Crescent City Company. *Id.* at 88-89 (Field, J., dissenting); *see also id.* at 116 (Bradley, J., dissenting). Justice Bradley, in particular, believed the monopoly provision of the law violated both the Privileges and Immunities and Due Process Clauses. *See id.* at 116-19, 122 (Bradley, J., dissenting).

[107] *See id.* at 87-89 (Field, J., dissenting); *id.* at 120 (Bradley, J., dissenting). Both Justices Field and Bradley conceded the state's regulation of the location where animals were slaughtered was a reasonable exercise of local police powers. They, however, distinguished this provision from the portion of the act that created a slaughterhouse monopoly. As Justice Field explained, "[I]t would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals." *Id.* at 87 (Field, J., dissenting). Similarly, Justice Bradley commented that the monopoly provision "is not a police regulation . . . [i]t is one of those arbitrary and unjust laws made in the interests of a few scheming individuals . . . ." *Id.* at 120 (Bradley, J., dissenting).

[108] *See id.* at 88-89, 93, 101-02, 105-07, 109-11 (Field, J., dissenting); *id.* at 116, 120, 122 (Bradley, J., dissenting).

[109] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring). Field agreed that a state could not contract away its police powers but reiterated his view that freedom of contract comprised both a liberty and a property interest protected by the Due Process Clause of the Fourteenth Amendment from the class legislation of political factions. *See id.* at 754-59 (Field, J. concurring).

the public.[110] Conversely, courts invalidated under the Due Process Clause partial laws whose remote connection to the public interest unduly interfered with liberty of contract.[111]

Late nineteenth century judges considered as tenuous the correlation between most legislative attempts to improve the wages and conditions of labor and the public interest in health, safety, morals, and welfare. For example, in *In re Jacobs*,[112] the New York Court of Appeals found a law that prohibited the manufacture of cigars in tenements to be unconstitutional. Jacobs, who manufactured cigars in the apartment he shared with his family, claimed the law interfered with his liberty of contract because it deprived him of the use of his leased property to pursue an otherwise legal livelihood.[113] Although the law proclaimed itself a health measure, the court concluded that it was an illegitimate exercise of state police powers because it did not promote public health and because it arbitrarily prevented Jacobs from making cigars. Accordingly, it was a partial law of unequal operation.[114]

In *Lochner v. New York*,[115] the United States Supreme Court also adopted a narrow conception of state police powers when it invalidated a portion of a New York labor law that prohibited bakers from working more than sixty hours a week, or an average of ten hours a day.[116] Unconvinced

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[110] *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898) (sustaining a Utah law regulating hours of labor in mines and smelters); Powell v. Pennsylvania, 127 U.S. 678 (1888) (sustaining a ban of butter substitutes); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding the prohibition of the manufacture or sale of alcohol); Barbier v. Connolly, 113 U.S. 27 (1885) (sustaining an ordinance closing laundries late at night).

[111] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a law prohibiting yellow-dog (anti-union) contracts); Lochner v. New York, 198 U.S. 45 (1905) (invalidating a maximum hours law for bakers); Ritchie v. People, 40 N.E. 454 (Ill. 1895) (holding that a law that limited women to a maximum of eight hours of daily factory labor was unrelated to public health); Frorer v. People, 31 N.E. 395 (Ill. 1892) (invalidating a law requiring cash payment of wages); Millett v. People, 7 N.E. 631 (Ill. 1886) (invalidating a law requiring coal mine operators to weigh coal on scales contemporaneous to its extraction as an arbitrary interference with the price of labor); Godcharles v. Wigeman, 6 A. 354 (Pa. 1886) (invalidating, on liberty of contract grounds, a law requiring cash payment of wages).

[112] 98 N.Y. 98 (1885).

[113] *See id.* at 101-02 (argument of Evarts et al., counsel for Respondents).

[114] *See id.* at 105-06, 110, 112-15.

[115] 198 U.S. 45 (1905).

[116] *See id.* at 52-64. In *Lochner*, a Utica, New York bakery owner convicted of a misdemeanor under 1897 N.Y. Laws ch. 415, art. 8, sec. 110, for having his employees work beyond the prescribed statutory limit, claimed the maximum hours regulation was impermissible class legislation. In *Lochner*, the Court held that the statute restricted the contractual freedom of bakery owners and deprived them of liberty and property in violation of the Due Process Clause of the Fourteenth Amendment.

that bakers' prolonged exposure to flour dust comprised a significant public health risk, the Court found no substantial connection between the public welfare and regulating the hours of labor in a bakery.[117] Justice Peckham, writing for the majority, expressed considerable skepticism about the legislature's motives and characterized the labor measure as an illegitimate exercise of state police powers that arbitrarily infringed upon the contractual liberty of those in the baking industry.[118] For this reason, he concluded the law operated unequally and invoked substantive due process to protect individual rights from what he perceived was the misuse of governmental authority by popular democratic majorities.[119]

2. *The Marginal Influence of Laissez-Faire Economics*

Lochner is a particularly egregious example of how judicial aversion to political factions helped produce an often sterile jurisprudence largely unaffected by unprecedented socio-economic changes. Rather than acknowledge the economic reality that bakers and other laborers rarely enjoyed freedom of contract because of gross inequities in the market economy,[120] courts

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[117] *See id.* at 57-59, 61-64. While the Court acknowledged the state could regulate bakeries pursuant to its police powers, it distinguished those sections of the law pertaining to the physical conditions of the bakery workplace (sanitation, plumbing, and ventilation), which substantially advanced public health and safety, from the restriction of labor hours. *See id.* at 61. The latter bore no connection to public health, safety, or welfare. *See id.* "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week." *Id.* at 57.

[118] *See id.* at 57, 61-64. Peckham explained that "[t]he 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. "[L]aws 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.

[119] *See id.* at 57, 59, 64. Peckham believed the maximum hours regulation was unnecessary given the presumed equality of bakers and their employers in the bargaining process. *See id.* at 57. The law was impermissible class legislation that subjected those in the baking industry to "the mercy of legislative majorities." *Id.* at 59.

[120] *See* GILLMAN, *supra* note 12, at 131-37, 153 (discussing Roscoe Pound and other contemporary critics of *Lochner*). Pound, a leading proponent of "sociological jurisprudence," thought the main flaw of much of economic substantive due process was judicial unwillingness to consider the sociological and economic context of the issues. *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* pt. I, 24 HARV. L. REV. 591 (1911); *id.* pt. II, 25 HARV. L. REV. 140 (1911); *id.* pt. III, 25 HARV. L. REV. 489 (1912); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Pound criticized *Lochner* era judges who "persist[ed] in the fallacy . . . of . . . forc[ing] upon legislation an academic theory of equality in the face of practical conditions of inequality." Roscoe Pound, *Liberty of Contract*, 18 YALE L.J.

adhered to legal assumptions that underscored their antimajoritarian tendencies, inviting speculation that substantive due process merely reflected the views of an economic elite. Justice Holmes suggested as much in his *Lochner* dissent in which he essentially accused the majority of substituting laissez-faire economics and Social Darwinism for dispassionate analysis of the law.[121]

Although many *Lochner* era decisions seemingly bore these characteristics, Holmes and the progressive historians who shared his assumptions actually neglected the judges' more paramount concerns with equality and the relationship between private rights and public authority.[122] Neither laissez-faire economics nor Social Darwinism was the principal basis of constitutional decision making during the height of economic substantive due process.[123]

Essentially an application of classical economic theory to the problems of government, laissez-faire political economy presupposed a self-adjusting economic system in which the natural laws of supply and demand, free from government interference, would promote efficiency and prosperity.[124] Value emanated from labor or from the bargaining process implicit in free exchange between individuals.[125] Competition and economic liberty were in-

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454, 454 (1909). Pound attributed this lack of judicial pragmatism to "mechanical jurisprudence" pursuant to which judges substituted the dry logic of the common law for social and economic reality. *Id.* at 457. He thought this artificial quality, not necessarily judges' idiosyncratic socio-economic views, produced decisions like *Lochner*. *Id.* at 454, 457-58, 461-64, 480-81.

[121] *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (criticizing Justice Peckham and the majority for deciding the case "upon an economic theory which a large part of the country does not entertain" and noting that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"). Holmes said that "a constitution is not intended to embody a particular economic theory . . . ", *id.* (Holmes, J., dissenting), and admonished his brethren not to use the Due Process Clause to "prevent the natural outcome of a dominant opinion." *Id.* at 76 (Holmes, J., dissenting).

[122] *See* GILLMAN, *supra* note 12, at 10, 29, 87, 104-05, 114, 131, 153, 193, 199 (discussing conservative jurists' emphasis upon equal operation of the law and their antifactional bias); Benedict, *supra* note 12, at 297-98, 304-05, 311, 314, 331 (discussing traditional emphasis upon liberty and impartial government); Jones, *supra* note 12, at 752, 755-58, 760, 763-66, 768, 770 (characterizing Thomas Cooley as a Jacksonian jurist); McCurdy, *supra* note 26, at 33. Edward Corwin was the preeminent progressive historian who adopted Holmes's interpretation of *Lochner*.

[123] *See generally* GILLMAN, *supra* note 12 (contending that factional aversion rather than laissez-faire economics best explains the pattern of *Lochner* era police powers jurisprudence); Benedict, *supra* note 12 (discounting the influence of laissez-faire economics); Hovenkamp, *Political Economy*, *supra* note 8, at 403-04 (dismissing Social Darwinism as an important influence); Jones, *supra* note 12 (placing Thomas Cooley in a Jacksonian context); McCurdy, *supra* note 26, at 33.

[124] *See* TWISS, *supra* note 8, at 8, 65; Benedict, *supra* note 12, at 299-301, 305.

[125] *See* Benedict, *supra* note 12, at 305; Hovenkamp, *Political Economy*, *supra* note

tegral components of this theory, which assigned to government the near singular role of removing monopolies and other artificial restraints from the market.[126] Laissez-faire adherents believed more widespread government intervention into market relations would impair economic efficiency, which they cherished more than contractual autonomy.[127]

Initially formulated by Adam Smith in the late eighteenth century, classical economic theory never really influenced American jurisprudence to the extent Holmes obliquely hinted in his *Lochner* dissent. Although many jurists were undoubtedly familiar with the socio-economic views of laissez-faire's most forceful proponents—the British philosopher Herbert Spencer and his American acolyte, William Graham Sumner—they relied primarily on common law notions of limited government and equality developed generations before the publication of Adam Smith's *The Wealth of Nations*.[128] Thomas Cooley, for example, doubted whether the law of supply and demand can adequately resolve legal issues pertaining to wages and labor conditions.[129]

While Spencer and Sumner decried vigorously against virtually any kind of governmental intervention in the economy, most Americans supported, to some extent, corporate subsidies, protective tariffs, and tax exemptions intended to benefit the public at large and to stimulate economic development.[130] Similarly, many people supported bimetallism and public education, both of which were anathema to the more dogmatic, though relatively few, adherents of the laissez-faire political economy.[131]

Between 1870 and 1920, courts sustained a variety of economic regulations.[132] Concerned primarily with protecting private rights from the partial laws of transient democratic majorities controlled by political factions, judges distinguished between illegitimate and legitimate exercises of state police powers. An abiding commitment to equal opportunity and individual liberty

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8, at 403-04 (discussing Adam Smith).

[126] *See* Benedict, *supra* note 12, at 298-301, 305.

[127] *Id.* at 304; Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2316 (1995) (book review) [hereinafter Hovenkamp, *Fuller Court*].

[128] *See* Benedict, *supra* note 12, at 298, 314-17.

[129] *See* Cooley, referring to the inadequacy of applying principles of laissez-faire economics to employment issues, noted: "[I]t is easy with a wave of the hand to refer them to the great law of demand and supply, but they return to plague us again and again." Thomas M. Cooley, VI LECTURES ON CITY GOVERNMENT 52 (1879), *quoted in* Jones, *supra* note 12, at 768.

[130] *See* Benedict, *supra* note 12, at 301-04.

[131] *See id.* at 301, 303. Benedict argues that while many people may have read Herbert Spencer, he probably exercised little influence upon Americans, in part, because of his extreme views about limited government. *See id.* at 301 n.21, 310.

[132] *See* Brown, *supra* note 17, at 944, 945 & n.11.

marked their use of substantive due process, as they rarely relied upon notions of economic efficiency.[133]

Moreover, *Lochner* era jurists did not use liberty of contract or other aspects of substantive due process to protect the interests of an economic elite.[134] Highly skeptical of partial laws of any kind, judges like Cooley and Field, while often solicitous of property rights, nevertheless distinguished the preservation of private property and economic opportunity from the excesses of factional politics and unrestrained concentrations of wealth detrimental to the public welfare.[135] During the late nineteenth and early twentieth centuries, courts also invalidated occupational licensing schemes intended to preserve the status quo and preclude newcomers from entry into established businesses.[136] From this perspective, it seems unlikely that judges intended to perpetuate economic elitism.[137]

Insofar as *Lochner* era jurists emphasized individual free will and equal opportunity in their economic liberty decisions, they implicitly rejected Social Darwinism as a constitutional norm.[138] Based on its assumption about the finite amount of natural resources, Social Darwinism posited a vision of evolutionary progress in which only the most fit individuals would survive the process of natural selection.[139] Although subtle distinctions existed between Social Darwinism and laissez-faire economics,[140] more dogmatic proponents of the latter invariably expressed views of Social Darwin-

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[133] *See* GILLMAN, *supra* note 12, at 10, 29, 87, 104-05, 114, 131, 153, 193, 199; Benedict, *supra* note 12, at 294, 297-98, 304-05, 311, 314, 325-26, 331; Jones, *supra* note 12, at 752, 755-58, 760, 763-66, 770.

[134] *See* Benedict, *supra* note 12, at 294-97, 311, 331; Hovenkamp, *Political Economy*, *supra* note 8, at 386-90.

[135] *See, e.g.*, Barbier v. Connolly, 113 U.S. 27 (1885) (Field, J.) (sustaining a law closing laundries late at night); People v. Salem, 20 Mich. 452 (1870) (Cooley, J.) (invalidating preferential railroad legislation); *see also* Jones, *supra* note 12, *passim* (discussing Cooley).

[136] *See, e.g.*, State *ex rel.* Richey v. Smith, 84 P. 851, 854 (Wash. 1906) (invalidating a licensing requirement for plumbers as partial legislation intended to discourage competition and tenuously related to public welfare); Bessette v. People, 62 N.E. 215 (Ill. 1901) (invalidating a licensing requirement for horse-shoers as impermissible class legislation unrelated to the public welfare).

[137] *See* Hovenkamp, *Political Economy, supra* note 8, at 388-90.

[138] *See id.* at 418-20; *see also* Hovenkamp, *Fuller Court*, *supra* note 127, at 2324-25 (asserting that the sole reference to Social Darwinism in United States Supreme Court cases is in Holmes's dissent in *Lochner*).

[139] *See* Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 664-71 (1985) [hereinafter Hovenkamp, *Evolutionary Models*]. For Social Darwinists, the state played a minimal role in social progress, but it was expected to protect individual economic rights. *See id.* at 668-71 (discussing Spencer and Sumner).

[140] *See* Hovenkamp, *Fuller Court*, *supra* note 127, at 2324 & n.79 (differentiating between classical political economy and Social Darwinism).

ism in their pointed criticism of governmental authority and their approval of ruthless competition. Given the marginal influence of Herbert Spencer and William Graham Sumner, both of whom at times expressed their notions of political economy in terms of natural selection,[141] there is relatively little evidence that judges relied upon Social Darwinism in their analyses of state regulation any more than they applied principles of laissez-faire economics. Indeed, for most judges, Social Darwinism merely represented an abstract theory that never really addressed the relationship between individual rights and governmental power.[142] Consequently, they refrained from using it in their jurisprudence.

3. *Historical Tradition and Common Law*

Enthralled with history and the common law, judges of this era looked to the past as an important guide for resolving constitutional issues. The common law, with its emphasis upon precedent, enabled them to interpret open-ended constitutional provisions such as due process with historical custom and tradition in mind.[143] Thomas Cooley, in particular, imbued his analysis of due process and the problems of class legislation with an acute awareness of the interplay between legal development and historical experience. His was a jurisprudence that reflected an historist perspective in that it drew upon traditional habits and customs rather than rational intuition to understand the content and meaning of constitutional law.[144] For Cooley and many other jurists, history, rather than abstract theories such as laissez-faire economics or Social Darwinism, was the basis of law. Knowledge of historical tradition revealed the moral and legal principles of society, which

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[141] *See* Hovenkamp, *Evolutionary Models*, *supra* note 139, at 661-71; Hovenkamp, *Political Economy*, *supra* note 8, at 418-20. *See generally* WILLIAM GRAHAM SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER I & II, *supra* note 12; WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE EACH OTHER, *supra* note 12.

[142] *See* Hovenkamp, *Political Economy*, *supra* note 8, at 418-20; Hovenkamp, *Evolutionary Models*, *supra* note 139, at 661, 671.

[143] *See generally* Siegel, *Historism*, *supra* note 11 (discussing the historist jurisprudence of Pomeroy, Tiedeman, and Cooley). Siegel defines historism as a form of "historical consciousness." *Id.* at 1437 n.18. Factional aversion and an abiding respect for equal operation of the law were the principal components of the historical custom upon which *Lochner* era jurists relied. *See* Jones, *supra* note 12, at 752, 755-57, 759-64, 766-67, 770-71 (placing Thomas Cooley in the historical context of Jacksonian democracy and Jeffersonian republicanism); *see also* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66, 76-78, 80 & n.398, 82-99 (discussing the pervasive influence of common law and historism upon late nineteenth century jurisprudence).

[144] *See* Cooley, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 59-60; Jones, *supra* note 12, at 757, 764; Siegel, *Historism*, *supra* note 11, at 1493-94, 1497-98, 1501-15, 1540.

they thought evolved over time in response to gradual changes in social customs and habits.[145] In contrast, Social Darwinism posited random change that was essentially ahistorical,[146] while laissez-faire economics substituted concepts of efficiency for the pattern of social experience.

In their concern for protecting the rights of liberty and property of the few from turbulent democratic majorities, *Lochner* era judges invariably drew upon the historical customs and habits of previous generations. Common law doctrines, developed to limit governmental authority, augmented this historical tradition and enabled judges to devise a police powers jurisprudence that restrained political factions in a manner wholly consistent with longstanding notions of judicial review and the public welfare. Although the common law, in part, reflected natural law's emphasis upon inalienable rights and equality, jurists throughout the nineteenth and early twentieth centuries perceived a fundamental distinction between the two. Whereas natural law involved questions of morality, the common law was far more useful in determining the status of constitutional rights because its rules and precedents were shaped by historical experience and social customs that evolved over time.[147] Largely discredited after the Civil War as a basis for enforcing legal rights, natural law's illusory and abstract characteristics rendered it particularly unsuitable as a constitutional norm.[148] Indeed, the leading constitutional treatise writers of the period, Thomas Cooley and

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[145] *See* Cooley, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 59-60 (recognizing the importance of historical context in constitutional interpretation); Jones, *supra* note 12, at 752, 755-57, 759-64, 766-67, 770-71 (discussing Cooley); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 66-67, 70-71, 73-77, 82-83, 90.

[146] *See* Siegel, *Historism*, *supra* note 11, at 1444 & n.53, 1450-51, 1461 (discussing John Pomeroy's non-Darwinian concept of legal evolution); *id.* at 1544.

[147] *See* Siegel, *Historism*, *supra* note 11, at 1435-37. Rather than base their conception of constitutional law solely on natural law, in which many jurists personally believed, these same jurists viewed constitutional issues from the perspective of historism, which "conceived law as an evolving product of the mutual interaction of race, culture, reason and events . . . objective legal principles were discernible through historical studies, not rationalistic introspection." *Id.* at 1435. Siegel concludes that historism comprised the principal basis of late nineteenth century constitutional jurisprudence. *See id.* at 1436. This Article contends that factional aversion and commitment to equal opportunity were at the core of this historical consciousness, which is termed "historical custom"; *see also* Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 66-67, 70-71, 73-74, 82.

[148] *See* Nelson, *supra* note 11, at 558-60 (explaining the inherent flaws of natural law reasoning as applied to legal issues arising in post-Civil War industrial society); Siegel, *Historism*, *supra* note 11, at 1435-37, 1450-51, 1489-1515 (discussing Cooley); *id.* at 1540-44 (explaining that common law and historical consciousness displaced natural law in late nineteenth century jurisprudence); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-66, 76-78, 80 & n.398, 82-90, 96 (discussing the primacy of common law and history in constitutional adjudication).

Christopher Tiedeman, rarely mentioned natural law in their analyses of state police powers, preferring instead to interpret problems of governmental power in a historical context that used common law principles.[149]

In essence, the judges who construed substantive due process in historical terms and employed common law methods to assess the legitimacy of state police powers created an inherently conservative jurisprudence. Skeptical of abrupt changes and convinced that many attempts to redress industrial conditions invited illegitimate class legislation, they insisted upon neutral government action, even as economic realities rendered their assumptions obsolete.[150] Even in the aftermath of *Lochner*, when faced with considerable criticism of its rigid methodology, the Supreme Court continued to view labor reform measures as legitimate only if they substantially promoted public health, safety, or welfare.[151] Although the Court appeared to retreat from *Lochner* in subsequent cases in which it sustained maximum hours laws,[152] it was not until the 1930s that a majority of the Court finally

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[149] *See* JACOBS, *supra* note 8, at 60 (discussing Tiedeman); Siegel, *Historism*, *supra* note 11, at 1514-15; TWISS, *supra* note 8, at 126-27 (discussing Tiedeman). Cooley "believe[d] American constitutional norms are consonant with natural law. Yet, he never draws directly from that source, and his landmark treatise mentions such concepts as natural justice only rarely." Siegel, *Historism*, *supra* note 11, at 1514 n.488; *see also id.* at 1517, 1535 (discussing Tiedeman); Jones, *supra* note 12, at 760-63 (discussing Cooley).

[150] *See* GILLMAN, *supra* note 12, at 10-11, 153, 193, 199-203; Pound, *Liberty of Contract*, *supra* note 120, at 454; Siegel, *Understanding the* Lochner *Era*, *supra* note 80, at 260-61.

[151] *See, e.g.*, Murphy v. California, 225 U.S. 623 (1912) (upholding a law that forbid billiard halls as a reasonable exercise of police powers); McLean v. Arkansas, 211 U.S. 539, 550, 552 (1909) (upholding as a reasonable exercise of police powers a law that required the weighing of pre-screened coal upon its extraction from mines to prevent fraudulent underpayment of miners). *But see* Adams v. Tanner, 244 U.S. 590 (1917) (invalidating a law that prohibited fees for employment agents as unrelated to police powers); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a law prohibiting yellow-dog contracts); Adair v. United States, 208 U.S. 161 (1908) (invalidating a federal anti-yellow-dog contract law). Many critics of *Lochner* did not advocate complete abandonment of the traditional police powers categories. Instead, they urged courts to examine more closely socio-economic data presented in cases about the effects of industrial conditions upon workers' health, safety, morals, and welfare. *See* GILLMAN, *supra* note 12, at 104, 131-37. Eventually, minimum wage advocates urged courts to accept the necessity of increased governmental intervention in the market to redress bargaining inequities. *See id.* at 148-59 (discussing Herbert Croly and other critics of the myth of government neutrality).

[152] *See, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (sustaining a ten hour daily limit for factory workers as a reasonable health measure); Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding a law that prohibited women from working in hospitals for more than eight hours a day/forty-eight hours a week); Miller v. Wilson, 236 U.S. 373 (1915) (upholding a law that prohibited women from working in hotels for more than

abandoned the jurisprudential tenets of *Lochner*.[153]

II. THE CONSTITUTIONAL CONSERVATISM OF GEORGE SUTHERLAND: THE PRE-COURT YEARS

To many, George Sutherland's constitutional philosophy reflected theories of natural rights, laissez-faire political economy, and Social Darwinism. Several progressive scholars writing after the New Deal regarded Sutherland's economic liberty decisions, with their emphasis on individual rights, as persistent remnants of an anachronistic, reactionary, and sterile jurisprudence employed to protect the property interests of an economic elite.[154] Others have regarded Sutherland more sympathetically, ascribing to him a certain courage in his persistent defense of the judicial prerogative to declare constitutional limitations upon governmental powers during an era of extreme political and social turmoil. They see in his jurisprudence a timeless appeal to natural rights, classical economics, or both, and argue that Sutherland's concerns about the relationship between public and private rights remain relevant today.[155]

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eight hours a day/forty-eight hours a week); Muller v. Oregon, 208 U.S. 412, 420-22 (1908) (sustaining a law restricting women to ten hours a day working in laundries or factories as a law of equal operation that promoted public health and welfare as it applied to the physical well-being of women).

[153] *See* Strong, *supra* note 8, at 452. Strong notes that *West Coast Hotel* "was of especial moment because it constituted the last stand of justices who had long carried the banner of Lochnerian economic philosophy." *Id. But see* GILLMAN, *supra* note 12, at 175-93 (agreeing that *West Coast Hotel* displaced *Lochner*, but de-emphasizing the earlier influence of laissez-faire economics).

[154] *See* Mason, THE SUPREME COURT, *supra* note 6, at 52, 66-67, 73; Paschal, *Mr. Justice Sutherland*, *supra* note 9, at 126-28; *see also* Kens, *supra* note 8, at 96-98; Strong, *supra* note 8, at 452. *See generally* Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545 (1924) [hereinafter Powell, *Minimum Wage Legislation*] (criticizing Sutherland's opinion in *Adkins v. Children's Hospital*). For a more recent discussion of Sutherland's purported laissez-faire economic views, see Hovenkamp, *Political Economy*, *supra* note 8, at 412, 416-17, 437, 444-47. Hovenkamp, however, rejects the association of classical political economic theory with judicial motivation to protect an economic elite. *See id.* at 388-90. Elsewhere, Hovenkamp suggests that Sutherland may have had an affinity for Social Darwinism. *See* Hovenkamp, *Fuller Court*, *supra* note 127, at 2324 n.82.

[155] *See, e.g.*, ARKES, *supra* note 11 (discussing Sutherland and natural rights); Richard A. Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 157-58 (1987) (equating maximum hours regulation and minimum wage regulation with special interest laws); Richard A. Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 732-38 (1984) (criticizing Hughes's majority opinion in *Home Building & Loan Ass'n v. Blaisdell* while extolling the virtues of the law and economics movement); Steven J. Eagle, *Bookshelf: The Father of Natural Rights*, WALL ST. J., Jan. 5, 1995, at A12 (book review praising Arkes's Sutherland biography and implicitly

These views largely misconstrue Sutherland and distort the lessons of his waning influence some sixty years ago in the area of economic substantive due process. They portray Sutherland in ways that either advance or denigrate a particular theory of modern jurisprudence. As a result, these scholars have obscured the historical context of his ideas and oversimplified his judicial motivations.

To best understand George Sutherland's constitutional philosophy, one must shed preconceived notions and instead focus upon the patterns of his legal and political thought. Close examination of his work in Congress and as a member of the bar reveals the extent to which Sutherland was part of a conservative judicial tradition that, instead of drawing primarily upon theories of natural rights, laissez-faire political economy, or Social Darwinism, reflected an aversion to political factions and a passionate insistence upon equal operation of the law. Sutherland's willingness to assign judges an integral role in the vigilant application of constitutional limitations to protect the rights of the few against the many emanated from his conception of democracy and concerns with political tyranny and judicial legitimacy.

Throughout his public career, Sutherland articulated a set of principles that reflected his inherent distrust of democratic majorities and his fundamental belief that the Constitution sets forth specific limitations of governmental authority to preserve individual liberties. Close scrutiny of his thought before he ascended to the Court shows a strong consistency, previously neglected by scholars, between some of his more "progressive" ideas and his economic liberty decisions of the 1920s and 1930s.

A. *Concept of Individual Rights*

At the core of Sutherland's philosophy of law and government was his deep concern for the individual. Presumably, at an early age, Sutherland developed an earnest appreciation for hard work, initiative, and self-reliance. Born in England and raised from infancy on the Utah frontier, Sutherland experienced first hand the difficulties of pioneer life. His family struggled financially during most of his youth, and at age twelve he left grammar school to help support his family. He worked over the next few years, first in a clothing store, then in the recording office of a mine, and later as an agent for the Wells-Fargo express company.[156]

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endorsing both laissez-faire economics and natural rights).

[156] Sutherland was born on March 25, 1862, in Stoney Stratford, Buckinghamshire, England. His parents joined the Mormon Church that year, and the following year the family emigrated to the Utah territory. Once in America, Sutherland's parents left the Mormon Church and embarked upon a peripatetic existence throughout Utah and its adjoining region. For biographical details of Sutherland's early life, see PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE, *supra* note 10, at 3-5.

In 1879, Sutherland resumed his formal education when he attended the Brigham Young Academy (now university), where for two years he studied with the school's founder, Professor Karl Maeser. Maeser, according to Sutherland's principal biographer, Joel Francis Paschal, was an ardent admirer of British philosopher Herbert Spencer.[157] Spencer, during the latter half of the nineteenth century, articulated a rather extreme notion of political economy that drew upon the economic theory of Charles Malthus and that paralleled the evolutionary concepts of biologist Charles Darwin.

Spencer posited that evolutionary forces shaped individuals. Over time, people either adapted to and mastered their surroundings or perished in the sometimes ruthless competition for limited resources. Survival of the fittest marked the inexorable progress of humanity, with successive generations more likely to thrive than preceding ones until society eventually attained a state of perfection. Idealistic in its assumptions about human development, Spencer's theory, called Social Darwinism, was considerably pessimistic about the role of government in the quest for human perfection. Spencer viewed individual liberty as a prerequisite for successful evolutionary adaptation and gave government the especially narrow tasks of resolving personal disputes and preserving social order. Government intervention on behalf of the less fortunate, or supposedly weaker, members of society merely impeded the natural course of selection, which, when left alone, assured survival of the most fit and the perpetuation of their adaptive attributes. Spencer insisted that government pursue a steady course of noninterference in virtually all commercial and social areas.[158]

Neither Karl Maeser nor his student George Sutherland endorsed Spencer's views in their entirety. Maeser was a devout Mormon who taught

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[157] *See id.* at 5-15 (discussing Maeser and his interest in Spencer).

[158] *See generally* HERBERT SPENCER, EDUCATION: INTELLECTUAL, MORAL, AND PHYSICAL (London, Williams & Norgate 1861) (discussing Spencer's views on education and social progress); SPENCER, THE MAN VERSUS THE STATE, *supra* note 12 (developing further Spencer's theories about natural selection, minimal government, individualism, and social progress); HERBERT SPENCER, FIRST PRINCIPLES (New York, Lovell, Coryell 1880) (discussing science, moral principles, and evolutionary notions of progress); HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED (London, J. Chapman 1851) (discussing political philosophy, sociology, and evolution). All of these works discuss, to one extent or another, Spencer's notion of Social Darwinism. *See also* WILLIAM GRAHAM SUMNER, ESSAYS OF WILLIAM GRAHAM SUMNER I & II, *supra* note 12 (applying Spencer's Social Darwinism to late nineteenth century America); WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER, *supra* note 12. Sumner, a Yale political philosophy professor, was a leading American disciple of Herbert Spencer. For an overview of Spencer and Sumner, see RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 31-66 (rev. ed. 1955); Hovenkamp, *Evolutionary Models*, *supra* note 139, at 664-71; Hovenkamp, *Fuller Court*, *supra* note 127, at 2324-27; Hovenkamp, *Political Economy*, *supra* note 8, at 417-20.

his students to appreciate the moral dimensions of their actions and encouraged them to value personal sobriety, stability, and responsibility.[159] While he generally approved of Spencer's emphasis on self-reliance and individual liberty, Maeser questioned the rigidity and harsh implications of Social Darwinism and particularly criticized the materialistic hue through which Spencer viewed individual progress.[160]

Maeser quite possibly conveyed his misgivings to his students, for Sutherland shared his mentor's ambivalence toward Social Darwinism. For example, Sutherland's support of workmen's compensation bills and other legislative measures that sought to improve working conditions drew upon his recognition that material progress for some did not necessarily proceed without tragic consequences for others. Speaking on behalf of a proposed law that would substitute a compensation system for the often uncertain damages sometimes available under common law negligence for workers injured on the job, Sutherland observed:

> 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.[161]

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[159] *See* PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE, *supra* note 10, at 6-8.

[160] *See* KARL G. MAESER, SCHOOL AND FIRESIDE 29-31 (1898) (transcript available in the Karl G. Maeser Papers at Brigham Young University). Maeser characterized Spencer's philosophy as "negative" and "materialistic" and referred to "the disintegrating tendencies of evolution." *Id.* at 30. Maeser urged that "true education . . . must resist the materialistic philosophy of evolution on the one hand, and the reactionary theology of Catholicism on the other." *Id.* at 31.

[161] 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) (Quebec, Canada) (transcript available in the Sutherland Papers at the Library of Congress), *reprinted as* S. DOC. NO. 131 (1913) [hereinafter Sutherland, *Economic Value and Social Justice*]. Earlier, in the context of supporting workmen's compensation for railroad employees, Sutherland observed: "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." 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland).

Sutherland regarded a worker's compensation law as a way of helping people injured in industrial accidents to become less dependent on societal charity and more self-dependent.[162]

Although he consistently supported governmental measures to improve working conditions, Sutherland worried that too much public interference might "encourage the indolent . . . ."[163] In the same speech, he said, "In framing our laws we must never lose sight of the vital distinction between helplessness, which is a misfortune, and laziness, which is a vice."[164] Sutherland thought democracy flourished when people retained the freedom to pursue their natural skills and talents. "[I]ndividual initiative [and] self-reliance . . . were necessary to develop a real democracy."[165] Largely a self-made man, he perceived in all but the most helpless the capacity for self-improvement through diligence and discipline. He assumed that when left alone, most people used sound judgment and understood the moral consequences of their actions, but he remained skeptical when confronted with legislative measures that he thought weakened individual autonomy and responsibility.[166]

Sutherland confided these thoughts to labor leader Samuel Gompers in 1916 when he wrote that "[w]e must be careful not to overdo our legislation and take from the individual the strengthening effect which comes from the struggle to help himself."[167] The following year, as President of the Ameri-

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[162] *See* Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 11-12; *see also* 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland) (explaining that without a fixed compensation scheme "the injured man or the family that is left . . . not compensated . . . [may] become a charge upon society").

[163] Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 11.

[164] *Id.* at 12.

[165] Letter from George Sutherland to Henry M. Bates, Dean, University of Michigan Law School (Apr. 21, 1937) (transcript available in the Sutherland Papers at the Library of Congress).

[166] In 1917, Sutherland addressed the relationship between individuals and government. He remarked:

> One objection to governmental interference with the personal habits, or even the vices of the individual, is that it tends to weaken the effect of the self-convincing moral standards and to put in their place fallible and changing conventions as the test of right conduct, with the consequent loss of the strengthening value to the individual of the free exercise of his rational choice of good rather than evil.

George Sutherland, *Private Rights and Government Control*, American Bar Association Annual Address (Sept. 4, 1917) (Saratoga Springs, N.Y.) (transcript available in the Sutherland Papers at the Library of Congress), *reprinted in* AMERICAN BAR ASS'N, REPORT OF THE 40TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 203 (1917) [hereinafter Sutherland, *Private Rights and Government Control*].

[167] Letter from George Sutherland to Samuel Gompers 3 (Jan. 15, 1916) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Letter to Samuel Gompers].

can Bar Association, Sutherland again took up this theme when speaking in reference to the proliferation of proposed progressive social and economic reforms. He said, "If widely indulged, such interference will not only fail to bring about the good results intended to be produced, but will gravely threaten the stability and further development of that sturdy individualism, to which is due more than any other thing our present advanced civilization."[168]

Yet Sutherland's philosophy was neither a ruthless individualism that dictated competition at all costs nor an apologia for the vast accumulation of material wealth. Sympathetic toward those who, through no fault of their own, were unable to become productive members of society, he supported the use of governmental power to "stimulat[e] . . . personal effort . . . ."[169] He also suggested that "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 . . . ."[170] In this respect, Sutherland's views differed considerably from ardent Social Darwinists like Herbert Spencer and William Graham Sumner, whose devotion to the concept of survival of the fittest sanctioned government involvement only under the most compelling circumstances.

Prosperity from honest effort and persistent hard work signified the depth of character and initiative Sutherland believed essential to the continued development of democratic ideals. To this extent, he decried against the thoughtless accumulation of material wealth and recognized that "[p]roperly applied [wealth] enables us to make more of ourselves, or what is infinitely better, to help others."[171] Moreover, throughout his life Sutherland remained certain that the characteristics of self-reliance, initiative, and moral responsibility made possible the progress of individuals and formed the basis of a vital society.

B. *The Relationship Between the Individual and Government*

For Sutherland, individual liberty meant autonomy from governmental interference "except where necessary to protect the liberties or rights of other individuals or to safeguard society."[172] Aware of the implicit tension between private rights and public order, he felt that by allowing individuals to control their own conduct whenever possible, government would encour-

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[168] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 202.

[169] Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 12.

[170] *Id.*

[171] George Sutherland, Commencement Address at Brigham Young University 7 (n.d.) (Provo, Utah) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Brigham Young Commencement Address].

[172] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 202.

age personal initiative and responsible behavior. To this end, he stated that "[i]ndividual liberty and the common good are not incompatible, but are entirely consistent with one another."[173]

Whereas Spencer and other acolytes of Social Darwinism may have embraced the concept that the best government is that which governs least, Sutherland rejected the more extreme implications of this notion. Just before he became a member of the United States Supreme Court, Sutherland remarked:

> The government which governs least is that of the savage tribe, while the government which governs most is a despotism. Too little government and too much government lie at the opposite extremities of social management, and both are bad; for if too little government tends toward anarchy, too much government carries us in the direction of tyranny and oppression, and, in the language of Wendell Phillips, "kills the self-help and energy of the governed."[174]

In sharp disagreement with those who saw government as "an unnecessary evil,"[175] Sutherland chided others for expecting too much from it and reminded all that government emanated from the people. As such, government reflected the people's strengths and weaknesses and therein lay its fallibility.[176] Sutherland recognized that government actually could protect and enhance individual rights but realized that it was unlikely to do so without limits upon the scope of its powers.

C. *Concepts of Law and Democracy*

Sutherland considered law an essential "prescription for future behavior"[177] and believed "that the rights and duties of the individual as a member of society must be defined by pre-established laws . . . ."[178] Lawmaking ideally represented a deliberate process of compromise and concern for long-term consequences. He deplored the initiative, referendum, and recall

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[173] *Id.* at 213.

[174] George Sutherland, *Principle or Expedient?*, Address Before the New York State Bar Association 3 (Jan. 21, 1921) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Sutherland, *Principle or Expedient?*].

[175] *Id.* at 6.

[176] *See id.*

[177] George Sutherland, *The Law and the People*, Address Before the Pennsylvania Society 6 (Dec. 13, 1913) (New York, N.Y.) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Sutherland, *The Law and the People*].

[178] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 204.

provisions favored by many progressive politicians and featured in the proposed constitutions of New Mexico and Arizona because he thought that they made possible in lawmaking the substitution of ephemeral popular impulses for the sober judgment of elected representatives who had the training and temperament to craft laws bearing a direct and practical relationship to the public welfare.[179] In contrast, Sutherland favored a federal workmen's compensation bill because it carefully and evenhandedly resolved a longstanding socio-economic problem.[180]

Sutherland insisted that although government derived its authority from the people, it functioned most effectively with a system of laws restraining the passions and prejudices of the populace. Shortly before his appointment to the Supreme Court Sutherland remarked:

> Self-government . . . means the exercise of sufficient self restraint on the part of the people to uphold their own fundamental law against every temptation to subvert it . . . for only thus can we preserve the character of our institutions as a government of laws and prevent their degeneration into a chaos of fleeting and fickle emotion.[181]

"A government of laws" was far superior as a means of protecting individual rights and liberties than was one where only human emotions and desires guided officials.[182]

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[179] The initiative and referendum enabled voters "to initiate and pass legislation without reference to a legislature and to veto a legislative measure by a majority vote of the people." GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA 1900-1912, at 81-82 (Harper Torchbooks 1962). Through "the recall . . . an elected officer could be recalled from his office at any time a sufficient number of the voters so expressed a desire." *Id.* at 82.

Pursuant to the Enabling Act of 1910, the Arizona and New Mexico territories created constitutions, which they submitted for congressional approval in 1911 as a prerequisite for becoming states. The Arizona constitution authorized the initiative, referendum, and recall of elected officials and judges. *See id.* at 264. Recall of judges reflected widespread dissatisfaction among laborers, reformers, and progressive politicians with judges who seemingly thwarted socio-economic reform legislation in order to preserve the interests of an economic elite. Recall of judges and of unpopular decisions therefore represented an attempt to restrict the power of judicial review. *See id.* at 265. Sutherland believed that the initiative, referendum, and recall would make some legislators more likely to enact laws hastily out of a desire to keep their jobs than out of genuine concern for the public welfare. *See* 47 CONG. REC. 2793, 2800 (1911) (statement of Sen. Sutherland).

[180] 48 CONG. REC. 4846, 4851-54, 4859 (1912) (statement of Sen. Sutherland); Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 4-11.

[181] Sutherland, *Principle or Expedient?*, *supra* note 174, at 8-9.

[182] *Id.*; Sutherland, *The Law and the People*, *supra* note 177, at 6 (equating recall of

Sutherland particularly emphasized the paramount importance of the government making laws that have as their objective similar treatment of all affected individuals and that result in such treatment.[183] Equality in creating the law and in its application were principles from which Sutherland rarely, if ever, deviated. Accordingly, he supported the federal workmen's compensation law[184] and women's suffrage.[185] Ultimately, Sutherland's insistence upon equality contributed to both the principal attributes and weaknesses of his jurisprudence. Sutherland's pursuit of this ideal at times may unwittingly have placed insurmountable barriers to his ability to properly assess various social and economic reforms,[186] thereby contributing to the popular misconception that his jurisprudence reflected the influences of laissez-faire economics and Social Darwinism.

In large part, Sutherland's dogged insistence upon "the impartial restraint of the law"[187] emanated from his understanding of democracy and its inherent flaws. He contended that "*pure* democracy was a . . . deceptive ideality [sic],"[188] ill-suited for a large and complex society and unable to

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judicial decisions with illegitimate partial laws that only reflect the ephemeral whims of popular democratic majorities); Sutherland, *Private Rights and Government Control*, *supra* note 166, at 204.

[183] *See* Sutherland, *Private Rights and Government Control*, *supra* note 166, at 204.

[184] *See* Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 8-11. Sutherland believed a fixed compensation scheme would "equalize the [economic] burden" between employers and injured industrial workers. *Id.* at 8. Prescribed compensation for industrial accidents would limit individual recovery awards, but it would also reduce the uncertainty of obtaining damages in negligence suits. This would enable a broader segment of the workers to recover some compensation, as employers no longer would be subject to disproportionate awards that depleted their financial resources to compensate other similarly injured workers. Sutherland endorsed this concept of "average justice," *id.* at 8, noting that "it is better that everybody injured should receive compensation than that only a portion of those injured should receive damages and the remainder nothing." *Id.* at 10; *see also* 48 CONG. REC. 4846, 4854 (1912) (statement of Sen. Sutherland). For similar reasons, in 1916, Sutherland also introduced in Congress another workmen's compensation bill for federal employees. *See* 53 *id.* at 452 (1916) (statement of Sen. Sutherland).

[185] *See* 51 CONG. REC. 3598-3601 (1914) (statement of Sen. Sutherland). In 1915, Sutherland introduced a joint resolution proposing a constitutional amendment to give women the right to vote. *See* 53 *id.* at 75 (1915) (statement of Sen. Sutherland). He thought denying women suffrage was "purely artificial . . . unjust and [an] intolerant denial[] of equality . . . ." *Id.* at 11,318 (1916) (statement of Sen. Sutherland).

[186] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400-14 (1937) (Sutherland, J., dissenting); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448-83 (1934) (Sutherland, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[187] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 204.

[188] George Sutherland, *The Courts and the Constitution*, Address Before the American Bar Association (August 28, 1912) (Milwaukee, Wis.), *reprinted in* AMERICAN BAR ASS'N, REPORT OF THE 35TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION

restrain "the passing whims and caprices and fleeting emotions of the constantly changing numerical majority."[189] The constitutional Framers, therefore, "established a *representative republic—a self-limited* democracy as distinguished from an *unlimited* democracy."[190]

Sutherland assailed the initiative and referendum as an attempt to undermine representative democracy and the deliberate nature of lawmaking. Allowing the people to frame, interpret, and execute the laws would supplant the sober reflection of carefully selected representatives entrusted with the responsibility of making laws for the public welfare.[191] Sutherland thought these reforms encouraged lawmaking marred by "careless ignorance of the facts"[192] in response to the ephemeral whims of transient majorities eager to further their own interests at the expense of the long-term public good. He considered the proposed recall of elected officials and unpopular judicial decisions especially troublesome because such recalls would make public officials more dependent upon the whims of the populace and less likely to act in furtherance of the public welfare.[193]

Sutherland inherently distrusted democratic majorities and throughout his public career remained skeptical of laws enacted to implement the tides of popular sentiment. Progressive measures like the initiative, referendum, and recall, which would make possible more direct participation of the public in the otherwise deliberate and gradual process of lawmaking, presented, he believed, significant threats to stable social change and to individual rights. In this regard, Sutherland remarked that "the will of the people as expressed from time to time through the decrees of the changing majority may be often unwise and sometimes unjust . . . ."[194] In other words, simply because a popular majority demanded a particular course of action did not mean it was the most prudent long-run solution.[195] For Sutherland, there

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372 (1912) [hereinafter Sutherland, *The Courts and the Constitution*].

[189] *Id.* at 373.

[190] *Id.*

[191] *See* 47 CONG. REC. 2793, 2797-98, 2800, 2802 (1911) (statement of Sen. Sutherland). Essentially, Sutherland perceived in the initiative and referendum an effective means for political factions to manipulate democratic majorities and further threaten the rights of unpopular minority groups. No longer would laws be the product of compromise and of "the deliberate interchange of conflicting opinion." *Id.* at 2798. They "would be framed, not by those who see the situation from different angles, but by those who all occupy the same point of view." *Id.*

[192] *Id.* at 2800. The initiative and referendum would undermine representative democracy because they would prevent elected representatives from acting as a truly deliberative body for the benefit of all rather than for particular factions. *See id.*

[193] *See id.*

[194] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 381.

[195] *See* 47 CONG. REC. 2793, 2796 (1911) (statement of Sen. Sutherland); Sutherland, *The Law and the People*, *supra* note 177, at 3. In 1917, Sutherland said, "A foolish law does not become a wise law because it is approved by a great many people."

was "no greater delusion than to suppose that by putting a ballot into the hands of a voter you thereby put wisdom into his head . . . ."[196]

Sutherland's principal concern lay with transient majorities whose disproportionate influence and ephemeral nature made them particularly inept at protecting the rights and liberties of individuals who, for one reason or another, were not members of the dominant group(s). For Sutherland, fleeting democratic majorities often promoted their own interests at the expense of others.[197] Indeed, he warned that they "subvert the liberties of the individuals, who in alternation may constitute the majority today and the minority tomorrow . . . ."[198] Instead, Sutherland trusted "the wisdom and the justice of the persistent majority," whose will emerged over time through the deliberate process of legislative compromise.[199]

Sutherland considered transient democratic majorities vulnerable to the control of political factions for whom self-interest and expediency were more important than the public welfare.[200] He thought factions were responsible for the creation of laws that benefited one group at the expense of another and often characterized these laws as class, or partial, legislation.[201] To Sutherland, class legislation was "the most odious form of legislative abuse"[202] because it ignored the premise that the "law . . . shall operate generally"[203] and impermissibly allowed government to distinguish between citizens upon the basis of factions. Consequently, he criticized the many "statutes . . . which select for privilege one class of great voting strength or set apart for special burdens another class of small numerical power at the polls."[204]

In addition, Sutherland found class legislation offensive because of its tendency to delegitimize individual initiative, self-reliance, and merit. In

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Sutherland, *Private Rights and Government Control*, *supra* note 166, at 203.

[196] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 383.

[197] *See* Sutherland, *The Law and the People*, *supra* note 177, at 6 (equating the recall of judicial decisions with illegitimate class legislation and noting the pernicious self-interest of factions).

[198] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 381.

[199] 47 CONG. REC. 2793, 2800 (1911) (statement of Sen. Sutherland).

[200] *See* Sutherland, *The Law and the People*, *supra* note 177, at 6.

[201] Sutherland, *Principle or Expedient?*, *supra* note 174, at 19. Sutherland implied that class legislation "may constitute the first link in a chain of precedents which, beginning in necessity, passes from one gradation to another until, at length, it rests in mere favor." *Id.*

[202] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 212.

[203] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 384.

[204] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 212. Moreover, "any law which arbitrarily separates men into classes to be punished or rewarded, not according to what they do but according to the class to which they are assigned, is odious and despotic, no matter how large a majority may have approved it." Sutherland, *Principle or Expedient?*, *supra* note 174, at 19.

1921, in reference to the popular clamor for increased government regulation, he observed:

> [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.[205]

This perspective provides an essential context from which to assess Sutherland's views of social and economic reform during his years in Congress; it also explains, in part, the pattern of his economic liberty decisions on the Supreme Court.

Accordingly, Sutherland found the initiative, referendum, and recall pernicious forms of class legislation. They would remove the protective barriers of representative democracy and unleash the untamed passions and whims of tyrannical, transient democratic majorities. Without much deliberation and compromise, single interest factions would enact laws of unequal operation that would favor a select few at the expense of others.[206] Similarly, he opposed the Underwood Tariff Bill of 1913, calling it "sectional in character and grossly unequal in its provisions" because it protected Southern rice and cotton producers with high tariffs but reduced the tariffs on sugar and wool from Western farmers.[207]

Moreover, Sutherland's commitment to legal equality explains his support for women's suffrage and a federal workmen's compensation law for interstate railroad employees. Appalled and bewildered by the exclusion of women from the election process, he decried against their disparate treatment on the basis of gender and invoked their rights as individuals to legal equality.[208]

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[205] Sutherland, *Principle or Expedient?*, *supra* note 174, at 18-19.

[206] *See* 47 CONG. REC. 2793, 2794-95, 2797-98, 2800 (1911) (statement of Sen. Sutherland).

[207] 50 *id.* at 4285, 4297 (1913) (statement of Sen. Sutherland). Sutherland stressed the need for a protective tariff based upon "a definite and defensible policy of general application" and decried against "the artificial inequalities of special privilege." *Id*; *see also* 44 *id.* at 2080 (1909) (statement of Sen. Sutherland) (supporting the protective tariff proposed in the 1908 Republican party platform). Sutherland's consistent support of protective tariffs further differentiated him from laissez-faire political economists like Herbert Spencer and William Graham Sumner.

[208] *See* 51 *id.* at 3598, 3600-01 (1914) (statement of Sen. Sutherland). "If it be right to extend the voting privilege to all sorts and conditions of men, I am not quite able to see the justice of denying the same right to all sorts and conditions of women." *Id.* at

As chair of a federal commission that studied industrial accident compensation, Sutherland recommended a compensation scheme that would award fixed sums to all injured laborers regardless of fault. Under the common law standard, which placed limits on damages and required laborers to prove the fault of employers, compensation was speculative and often inequitable; similarly injured workers could receive unequal damages if an employer had depleted its financial resources while defending previous suits. Sutherland proposed a compromise plan that would substitute certainty for unpredictability, permit the equal treatment of laborers and employers alike, and, in theory, create an incentive to prevent industrial accidents.[209]

Another problem Sutherland attributed to transient democratic majorities was the "tendency . . . to over-legislate,"[210] which he characterized as a "mania for regulating people."[211] In a speech before the New York Bar Association, he observed, though not for the first time, that: "Too many laws are being passed in haste. Too many that simply reflect a temporary prejudice, a passing fad, a fleeting whim, a superficial view or an exaggerated estimate of the extent, or a mistaken impression of the quality of an evil."[212]

Laws born of political expediency thwarted personal initiative, self-reliance, and responsibility, which, for Sutherland, were the true cornerstones of the public welfare rather than the narrow interests of transient democratic majorities and factions.[213] Instead, he counselled care and caution in the

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3601; *see also* 53 *id.* at 11,318 (1916) (statement of Sen. Sutherland); *id.* at 75 (1915) (statement of Sen. Sutherland) (introducing a joint resolution for a constitutional amendment for women's suffrage); George Sutherland, Speech at Women's Suffrage Meeting, Belasco Theatre 3-4 (Dec. 12, 1915) (Washington, D.C.) (transcript available in the Sutherland Papers at the Library of Congress).

[209] *See* Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 5-11. As Sutherland explained, "[T]he compensation law substitutes the communistic idea of benefit for the whole class in place of the individualistic theory which permits a minority of the class to recover much and the majority little or nothing." *Id.* at 9; *see also* 48 CONG. REC. 4846, 4854 (1912) (statement of Sen. Sutherland). Sutherland used many of these arguments in support of a federal workmen's compensation bill he introduced in the Senate. *See* 53 *id.* at 452 (1916) (statement of Sen. Sutherland).

[210] Letter from George Sutherland to Horace H. Smith (Mar. 2, 1921) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Letter to Horace Smith]; *see also* 48 CONG. REC. 4846, 4851 (1912) (statement of Sen. Sutherland).

[211] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 201.

[212] Sutherland, *Principle or Expedient?*, *supra* note 174, at 20. Four years earlier as the American Bar Association President, Sutherland remarked, "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 166, at 199.

[213] *See* Letter to Horace Smith, *supra* note 210 (discussing the plethora of laws that

enactment of laws, confident that over time "[m]ost . . . evils, if left alone, would disappear under the powerful pressure of public sentiment . . . ."[214] People would then be able to differentiate between true public necessity and the artifice of "doubtful experiment."[215]

D. *Progressive Conservatism*

Progress, for Sutherland, meant careful and deliberate change in response to significant new conditions and proven necessity, rather than in deference to political expediency and the whims of fleeting popular majorities. Not all change signified progress, which he measured by improvement, although imperceptible at times, in individuals and communities.[216] He also "distinguish[ed] between real progress and what amounts to a mere manifestation of the speed mania."[217] At the height of the Progressive movement, Sutherland emerged as a leading critic of reforms like the initiative, referendum, and recall, which he considered careless and unwise because they reflected the emotional turbulence of democratic society. He feared they would make possible an increase in ill-conceived and shortsighted legislation ultimately detrimental to the public welfare.[218]

Skeptical of hasty experiment and sharply critical of change for its own sake, Sutherland believed caution and common sense were essential to the attainment of progress.[219] Only then could society avoid "sudden and ill-considered determinations based upon transitory passion or emotion which, in the illuminating light of reflection and experience, must thereafter be abandoned as ill-advised or misconceived."[220] He further exhorted individuals "to rely upon their sober and deliberate convictions rather than upon their impulses, which, however honest, are more likely to reflect their desires than their judgment."[221]

Individual progress and the advancement of society occurred gradually as part of an evolutionary process, marked not as Herbert Spencer and the Social Darwinists thought by survival of the fittest, but instead by occasion-

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"penalize a lot of things that ought to be left to the individual to determine for himself"); Sutherland, Brigham Young University Commencement Address, *supra* note 171, at 9 (praising the virtues of self-reliance, perseverance, and personal responsibility); Sutherland, *Private Rights and Government Control*, *supra* note 166, at 199 (suggesting that many statutes are unnecessary because they do not promote the public welfare).

[214] Sutherland, *Private Rights and Government Control*, *supra* note 166, at 200.

[215] *Id.* at 201.

[216] *See* Sutherland, *Principle or Expedient?*, *supra* note 174, at 7, 21.

[217] 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland).

[218] *See id.* at 2794-95, 2797-98, 2800, 2803.

[219] *See id.* at 2795.

[220] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 383.

[221] *Id.* at 382-83.

al fits and starts tempered by careful action and cautious optimism. Moreover, Sutherland did not reflexively regard government as an impediment to progress; rather, he preferred to focus on ways it could increase its effectiveness in promoting the long range public good. Government made progress possible by "thoroughgoing investigation, dispassionate consideration . . . and . . . courageous patience which moves deliberately in the face of clamorous demands to make haste."[222]

Essentially, Sutherland believed that the true path of progress lay in "the methodical habits of the past . . . ."[223] He considered himself "to be fairly progressive . . . [with a] tendency to put a good deal of faith in experience and very little in mere experiment . . . ."[224] Experience provided the critical perspective from which to assess both the necessity for and type of change most practical under the circumstances. As Sutherland explained:

> 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.[225]

Afraid that change too abrupt or cataclysmic might "generate[] consequences more seriously unfortunate than the original evil itself,"[226] Sutherland regarded experience as a critical tool for the maintenance of an effective and responsible government.[227]

Insofar as radical or ill-conceived change worried Sutherland, he considered blind adherence to the past just as foolish and pernicious to the public welfare.[228] His support of women's suffrage and of a federal workmen's

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[222] 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland).

[223] *Id.* (statement of Sen. Sutherland).

[224] Sutherland, *Principle or Expedient?*, *supra* note 174, at 6-7. Elsewhere, Sutherland said: "I am no standpatter. I am not in favor of standing still." 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland).

[225] George Sutherland, *What Shall We Do With the Constitution?*, UTAH INDEPENDENT 2 (1912) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Sutherland, *What Shall We Do With the Constitution?*]. "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).

[226] Sutherland, *Principle or Expedient?*, *supra* note 174, at 8.

[227] *See* 47 CONG. REC. 2793, 2803 (1911) (statement of Sen. Sutherland). "[I]n the main and in the long run changes which come by the gradual and orderly processes of evolution are better and far more enduring than those brought about by the spasmodic methods of revolution. Experience is a safer guide than prediction." *Id.*

[228] *See* 51 *id.* at 3598, 3600 (1914) (statement of Sen. Sutherland) (noting that "tradi-

compensation law exemplifies his willingness to depart from traditions that he considered obsolete.[229] Although not especially reactionary, Sutherland's notion of progress reflected his innate conservatism and his abiding faith in the lessons of experience.

E. *The Constitutional Philosophy of George Sutherland*

As one deeply interested in the theory and practice of American government, George Sutherland held the Constitution in the highest esteem. He often referred to it as the soul of the country[230] and regarded it as the foundation for a government of laws.[231] Emanating from the popular will and "a solemn covenant of all the people,"[232] the Constitution represented the fundamental law of the land, supreme over all persons and branches of government.[233] It comprised the basis of governmental authority and made possible the progress of a democratic republic "along sane and symmetrical lines."[234] Specific provisions conferred certain powers, either directly or by implication, upon the federal government and reserved others to the states, but as a whole the Constitution set forth a concept of limited government intended to preserve and protect individual rights and liberties.

For Sutherland, the Constitution served an integral role in the restraint of transient democratic majorities. Years before he became a Supreme Court Justice he remarked:

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tion . . . has been responsible for the perpetuation of a good deal of foolishness . . ."). Earlier, Sutherland said that "[t]o oppose a new thing simply because it is new is quite as bad as to insist upon change merely because it is change." 47 *id.* 2793, 2795 (1911) (statement of Sen. Sutherland); *see also* Sutherland, *Principle or Expedient?*, *supra* note 174, at 7.

[229] *See* 51 CONG. REC. 3598, 3600-01 (1914) (statement of Sen. Sutherland); 48 *id.* at 4846, 4851 (1912) (statement of Sen. Sutherland) ("We have outgrown the system of employers' liability under the common law. It has no longer application to our industrial conditions."); *see also* Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 4.

[230] *See* Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 1; Sutherland, *The Courts and the Constitution*, *supra* note 188, at 392.

[231] *See* 47 CONG. REC. 2793, 2794 (1911) (statement of Sen. Sutherland).

[232] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 375; 47 CONG. REC. 2793, 2794 (1911) (statement of Sen. Sutherland).

[233] *See* Sutherland, *Principle or Expedient?*, *supra* note 174, at 8; George Sutherland, Address Before the Utah State Bar Association (1924), *reprinted in* STATE BAR ASS'N OF UTAH, 1924 PROCEEDINGS OF THE TWENTIETH ANNUAL SESSION OF THE STATE BAR ASSOCIATION OF UTAH 65 [hereinafter Utah State Bar Association Address]; Sutherland, *The Law and the People*, *supra* note 177, at 6.

[234] 47 CONG. REC. 2793, 2803 (1911) (statement of Sen. Sutherland).

> Constitutions are made not only for the purpose of confining the representative agents of the people within definite boundaries, but also for the purpose of presenting hasty, ill-considered, and unjust action on the part of the majority of the people themselves. The written constitution is the shelter and the bulwark of what might otherwise be a helpless minority.[235]

Sutherland realized that in an unlimited democracy individuals are vulnerable to "the transitory opinions of a constantly changing majority."[236] Without restrictions, factions could exercise the powers of government tyrannically by promoting their own interests in ways harmful to others. From this perspective, Sutherland viewed the Constitution as:

> the shield of the weak against the powerful and of the few against the many. The majority can always take care of itself but without the checks of the Constitution the minority would live under the constant menace of the dangers which flow from sudden popular emotion or prejudice.[237]

Sutherland also emphasized the differences between the Constitution and legislation. First, the limitations the Constitution placed on governmental power necessarily made it the supreme legal authority. Laws or other actions of government that transgressed constitutional limits were invalid.[238] In addition, the principles of the Constitution were largely immutable and "eternal," subject to alteration only by the protracted process of amendment.[239] The Constitution, from Sutherland's perspective, was a "declaration[] of the permanent, settled, broadly fundamental policies of the State, not to be lightly altered upon the mere caprice of the moment, but only after the most

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[235] *Id.* at 2800.

[236] Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 4; *see also* George Sutherland, *The Constitutional Aspect of Government Ownership*, Address Before the Missouri Bar Association 13 (Sept. 29, 1915) (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Sutherland, *Constitutional Aspect of Government Ownership*]; Sutherland, *The Law and the People*, *supra* note 177, at 7 ("The guaranties of the Constitution are primarily for the protection of the minority.").

[237] George Sutherland, Undated/Untitled Speech 2 (transcript available in the Sutherland Papers at the Library of Congress).

[238] *See* Sutherland, *Principle or Expedient?*, *supra* note 174, at 8.

[239] Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 1; Sutherland, *Principle or Expedient?*, *supra* note 174, at 8.

serious and deliberate consideration."[240] Conversely, laws changed relatively rapidly in response to the ebb and flow of public opinions and needs.[241]

Moreover, Sutherland attached considerable significance to the Constitution as a written document. He believed this quality helped it "prevent ill-considered and impulsive action . . . ."[242] Amendment of the Constitution required "sober reflection"[243] as part of a slow and deliberate process intended to arrest "the drastic and dangerous expedient of constitutional violation"[244] that would otherwise occur if the people could alter it impulsively. Rather than impede progress, the written principles of the Constitution helped create the stability and sense of permanency essential for a government based upon equality and the impartial restraint of the law.

Invariably, Sutherland's strict construction of constitutional limitations reflected his conviction that the meaning of the Constitution must remain the same over time in order to preserve individual rights and liberties from transient democratic majorities.[245] Acutely aware that perceived exigency and the desires of the moment might dull the constitutional sensibilities of political factions, Sutherland insisted that reform was illusory and damaged the public welfare if it transgressed the limits of the Constitution.[246]

Sutherland recognized the tension between the fundamental concept of limited government and the demands of a progressive society. Constitutional restrictions on the powers of government were necessary to protect individual rights against incursion from the most well-meaning of democratic majorities. Conversely, he worried that "[a] constitution incapable of adaptation to the constant growth and constant change of a progressive and constantly

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[240] 47 CONG. REC. 2793, 2794 (1911) (statement of Sen. Sutherland). Although Sutherland made this statement in reference to state constitutions, he clearly held similar views about the United States Constitution.

[241] *See id.* (statement of Sen. Sutherland).

[242] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 376; Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3.

[243] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 376.

[244] Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3.

[245] *See id.* at 3-4. "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 leaving him at the mercy of the transitory opinions of a constantly changing majority." *Id.* at 4. Elsewhere, Sutherland commented that "[t]he written constitution is the shelter and the bulwark of what might otherwise be a helpless minority." 47 CONG. REC. 2793, 2800 (1911) (statement of Sen. Sutherland); *see also* Sutherland, *Constitutional Aspect of Government Ownership*, *supra* note 236, at 12.

[246] *See* 49 CONG. REC. 2903, 2911 (1913) (statement of Sen. Sutherland) (expressing concern about violating the Constitution "in order to bring about a good result" in the interest of expediency and arguing that a bill prohibiting interstate commerce in liquor was unconstitutional because it gave states a power that belonged only to the federal government under the Commerce Clause).

changing people would be a useless and an impossible contrivance, serving only to hamper, and not to promote, the development of a free people."[247]

Sutherland did not perceive the Constitution as a barrier to reform, nor did he seek to invoke its limitations to preserve the status quo or to protect an economic elite. Rather, he considered the principal task of a constitutional democracy to be the encouragement of progress within the limits of prescribed governmental authority. To accomplish reform through unconstitutional means ultimately subverted the primacy of the Constitution and rendered its principles meaningless.[248] Thus, Sutherland approved of broadening the scope of constitutional provisions to meet "changing social, industrial and economic conditions" so long as this did "not alter the meaning of the [C]onstitution."[249]

F. *The Judicial Prerogative in a Constitutional Democracy*

Even before he became a Supreme Court Justice, George Sutherland recognized the critical importance of the judiciary in a constitutional system that limited governmental power to protect individual rights. Indeed, many of his pre-Court ideas anticipated his judicial opinions and thus provide an essential context from which to understand his jurisprudence.

Sutherland perceived in an independent judiciary the principal means of restraining transient democratic majorities. Although the Constitution set forth the concept of a limited government, only the judiciary, free from the political demands of making and executing the laws, could ensure that those in power observed the constitutional limits of their authority.[250] In 1912 Sutherland suggested:

> [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 sentiment, or how strong the necessity may seem, for if the door be

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[247] 45 *id.* at 2613, 2619 (1910) (statement of Sen. Sutherland) (supporting a postal savings depositories bill as within the federal government's Commerce Clause powers).

[248] *See* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 384. "Constitutional principles would be of little value unless they were permanent and predetermined. You cannot make impartial rules while the controversy is pending any more than you can prescribe rules for a game while it is in progress." *Id.*; *see also* 49 CONG. REC. 2903, 2911 (1913) (statement of Sen. Sutherland).

[249] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 391.

[250] *See* 47 CONG. REC. 2793, 2802 (1911) (statement of Sen. Sutherland); Sutherland, *The Law and the People*, *supra* note 177, at 4-6.

> opened to such violation or evasion on the ground of necessity we shall be unable to close it against expediency or mere convenience.[251]

As impartial arbiters of disputes, courts could uphold the primacy of the Constitution and its emphasis upon the equal operation of the laws.[252] Judges had an important obligation to assess issues of power using constitutional principles; the relative popularity or perceived wisdom of a particular statute or course of action were not appropriate guides for adjudication.[253] Instead, Sutherland thought judges should "simply . . . declare and apply the law" of the Constitution in order to preserve individual rights from the whims of fleeting popular majorities.[254] That courts on occasion invalidated laws on constitutional grounds made them neither blameworthy nor especially reactionary.[255] Sutherland believed judicial review was an essential prerogative in a limited democracy in which governmental power emanated from the people, who in the form of a written constitution manifested their belief in the supremacy of constitutional principles and delegated to the judiciary the ultimate responsibility for their interpretation and application.[256]

Moreover, Sutherland recognized a fundamental distinction between making law and interpreting it. In response to the transient interests of their constituents, legislators enacted laws for political expediency. Judges, however, had no constituents.[257] Through reason and logic, judges interpreted laws and resolved disputes upon the basis of public policy intended to ensure the equal operation of the laws.[258] As Sutherland explained:

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[251] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 391.

[252] *See id.* at 384; *see also* Sutherland, *The Law and the People*, *supra* note 177, at 5.

[253] *See* Sutherland, *The Law and the People*, *supra* note 177, at 5.

[254] George Sutherland, Undated Speech on Utah Judiciary 4, 18 (transcript available in the Sutherland Papers at the Library of Congress) [hereinafter Utah Judiciary Speech]. In this regard, Sutherland remarked that the recall of judges and judicial decisions "advocate[s] a method by which the *rights* of the minority shall be subordinate to the *will* of those who for the time being predominate in numbers." Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3; *see also* Sutherland, *The Law and the People*, *supra* note 177, at 7.

[255] *See* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 388.

[256] *See id.* at 377-78; Utah State Bar Association Address, *supra* note 233, at 64-66; Sutherland, *The Courts and the Constitution*, *supra* note 188, at 381; Sutherland, *The Law and the People*, *supra* note 177, at 4-5.

[257] *See* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 379; Utah Judiciary Speech, *supra* note 254, at 10; Sutherland, *The Law and the People*, *supra* note 177, at 5; Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3; 47 CONG. REC. 2793, 2801 (1911) (statement of Sen. Sutherland).

[258] *See* Sutherland, *Private Rights and Government Control*, *supra* note 166, at 204-05 ("The law must apply to all alike. The making of law is an exercise of the *will* of

> The judiciary stand upon wholly different ground. They voice no policy; speak for no political party or faction and discharge the behests of no majority. Their duty is simply to declare and apply the law. In doing so it often becomes their sworn and solemn duty to disregard the wishes and sentiments of a majority of the people and declare in favor of the position of a single individual as against every other citizen of the commonwealth.[259]

Free from the constraints of partisan politics, courts were more likely to preserve individual rights and maintain constitutional principles.[260]

From this perspective, Sutherland criticized Progressive Era proposals that authorized legislative invalidation of unpopular judicial decisions and the recall of judges. He feared these reforms would impair the integrity of courts and compromise their role in the constitutional system. He decried against attempts to ignore the distinctions between the judicial and legislative processes[261] and regarded all types of judicial recall as unfortunate efforts "to make judges more responsible to popular opinion . . . ."[262]

In addition, recall threatened an independent judiciary necessary to preserve individual rights through impartial construction of constitutional principles designed to limit governmental authority.[263] Without their independence, Sutherland felt courts might decide cases on the basis of popular whims and emotions and thus leave the rights of persons at "the mercy of the transitory opinions of the changing majority."[264] Subject to the control of political factions through the means of popular recall, the judiciary would no longer restrain democratic majorities. Ultimately, in Sutherland's view, this signified the unfortunate transformation of a government of laws to one based upon the fickle desires of men.[265]

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the state; the interpretation and application of the law is an exercise of the *reason* of the judge."); *see also* Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3; 47 CONG. REC. 2793, 2801 (1911) (statement of Sen. Sutherland).

[259] Utah Judiciary Speech, *supra* note 254, at 4.

[260] *See id.* at 18; *see also* Sutherland, *The Law and the People*, *supra* note 177, at 8.

[261] *See* Sutherland, *The Law and the People*, *supra* note 177, at 5.

[262] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 379.

[263] *See* 47 CONG. REC. 2793, 2800-02 (1911) (statement of Sen. Sutherland); Sutherland, *The Law and the People*, *supra* note 177, at 5; Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3-4.

[264] Sutherland, *The Courts and the Constitution*, *supra* note 188, at 384; Sutherland, *The Law and the People*, *supra* note 177, at 7.

[265] *See* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 375, 382. Sutherland worried that a mixture of judicial and legislative authority would foster class legislation. *See* Sutherland, *The Law and the People*, *supra* note 177, at 7-8.

Sutherland considered the judiciary most able to resolve constitutional and legal issues with deliberate care and long-range perspective. Trained in the common law, with its respect for precedent, its emphasis upon gradual change, and its appreciation of historical custom, most judges were unlikely to make radical or impulsive decisions.[266] Sutherland favored application of the common law to new conditions but also understood the importance of departing from it where dogmatic adherence to precedent would be foolish.[267]

Nevertheless, it was Sutherland's fealty to common law principles and abiding respect for historical tradition that ultimately led Sutherland to defend the increasingly untenable police powers jurisprudence of the *Lochner* era. Indeed, Sutherland's enduring legacy may be that, as a Supreme Court Justice, his commitment to seemingly neutral concepts of judicial review blinded him to the realities of industrial society.

III. JUSTICE GEORGE SUTHERLAND AND ECONOMIC LIBERTY

Between 1922 and 1937, George Sutherland articulated a jurisprudence of economic liberty that revealed his inherent distrust of democratic majorities and his aversion to political factions. To the extent that he set forth limitations upon governmental authority to regulate private economic affairs, his views reflected those of a conservative tradition in which the common law and historical custom, rather than laissez-faire political economy or Social Darwinism, guided judicial decision making.[268] Moreover, an abiding respect for the equal operation of the law and an acute awareness of the foibles of political expediency molded Sutherland's conception of the public welfare. Although on occasion his opinions invoked the rhetoric of natural rights or lauded the merits of individualism, as a jurist he preferred to rely upon the steady progress of the common law and historical experience in his analysis of governmental powers. For nearly a decade, Sutherland's views were those of a majority of the Justices; thereafter, the composition of the Court changed and Sutherland became the principal guardian of a crumbling judicial tradition.[269] Insofar as Sutherland's dissents recapitulated his fun-

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[266] *See* Sutherland, *The Law and the People*, *supra* note 177, at 4-5; 44 CONG. REC. 2080, 2096 (1909) (statement of Sen. Sutherland) (discussing the importance of stare decisis); *see also* 47 *id.* at 2793, 2803 (1911) (statement of Sen. Sutherland) (expressing enthusiasm for the common law as an instrument of gradual change); Sutherland, *The Courts and the Constitution*, *supra* note 188, at 385 (discussing the importance of history and precedent in the judicial process).

[267] *See* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 386.

[268] *See supra* notes 122-50 and accompanying text.

[269] On September 5, 1922, George Sutherland joined the United States Supreme Court, replacing the retired John H. Clarke. William Howard Taft, appointed in 1921, was the Chief Justice. The other members of the Court were Louis D. Brandeis, Wil-

damental ideas, they also underscored his emphasis upon the significance of judicial review and the vulnerability of private rights in a democratic republic.

A. *The Problem of Factions*

In large part, Sutherland's aversion to political factions comprised the principal component of his jurisprudence of economic liberty. For Sutherland, like many jurists before him, class legislation threatened the public welfare. From this perspective, he assessed labor regulations, debtor relief measures, and state laws that fixed prices or restricted competition in the marketplace.

These cases also involved freedom of contract, a doctrinal staple of substantive due process for years before Sutherland joined the Supreme Court and the catalyst for some of the Court's most troublesome disputes during his tenure. While Sutherland did not believe in absolute contractual freedom,[270] he recognized liberty of contract as an important personal right protected from factions by constitutional limitations upon state police powers. Disagreement about the nature of these restrictions and the role of the judiciary in their interpretation marked the transformation of economic substantive due process during the 1930s. Sutherland and his more conservative colleagues on the Court insisted that state regulation of private economic affairs bear a substantial relationship to public health, safety, morals, or welfare. In contrast, other justices, more deferential toward legislative ma-

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liam R. Day, Oliver Wendell Holmes, Joseph McKenna, James McReynolds, Mahlon Pitney, and Willis Van Devanter. In 1923, Pierce Butler replaced Justice Day, and Edward T. Sanford succeeded Justice Pitney on the Court. In 1925, Harlan F. Stone replaced Justice McKenna. Taft, Butler, McReynolds, Sutherland, and Van Devanter often voted as a conservative bloc in economic regulation cases, although, on occasion, Taft broke from the pack. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting). Justices Brandeis, Holmes, and Stone were far more tolerant of local economic regulation. *See, e.g.*, Tyson and Brother v. Banton, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting) (Brandeis, J., joining); *id.* at 447 (Stone, J., dissenting) (Brandeis, J., joining).

In 1930, Charles Evans Hughes succeeded William Howard Taft as Chief Justice, and Owen J. Roberts assumed Justice Sanford's seat on the Court. Holmes retired in 1932, and Benjamin N. Cardozo took his place on the Court. Toward the end of his Court tenure, Sutherland, together with Justices Butler, McReynolds, and Van Devanter, often comprised a minority in economic regulation cases.

[270] *See Adkins*, 261 U.S. at 546.

> There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.

Id.

jorities, endorsed expansive notions of public welfare and ultimately rejected the rigid categorical assessment of local police powers in favor of a pragmatic balance between private rights and public power.

1. *Private Contracts and Local Police Powers*

Local regulation of private contracts afforded Sutherland, as a Supreme Court Justice, ample opportunity to rely upon the concepts of democracy, law, and judicial review that he had held throughout his public career. Indeed, his approach toward employment contracts underscored his factional aversion and skepticism about the democratic process. Sutherland regarded laws that directly restricted the freedom of parties to negotiate wages as illegitimate class legislation that benefited one group at the expense of another and that created arbitrary distinctions unsubstantially related to public health, safety, morals, or welfare. Conversely, he found permissible laws that regulated methods of payment or the conditions of labor.[271]

Sutherland initially set forth his views in *Adkins v. Children's Hospital*,[272] the first Supreme Court case to address the constitutionality of a minimum wage for women. In *Adkins*, one of the plaintiffs was Willie Lyons, a young woman discharged from her employment as a hotel elevator operator when the hotel sought to avoid criminal liability for paying her a wage less than that prescribed by a local administrative board.[273] Enacted

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[271] *See id.* at 547-48. Sutherland explained that laws regulating methods of payment were constitutional because they prevented fraudulent and inequitable employer practices and left both the employers and employees free to negotiate the amount of wages. *See id.* at 547, 554; *e.g.*, McLean v. Arkansas, 211 U.S. 539 (1909) (upholding a law that mandated pre-screening weighing of coal to determine the coal miners' wages). Sutherland also thought the government could limit hours of labor in dangerous occupations, such as mining, but questioned the constitutionality of a blanket restriction on the number of hours workers toiled in all occupations. *See Adkins*, 261 U.S. at 548. As a Utah legislator, Sutherland had supported the maximum hours law upheld in *Holden v. Hardy*, 169 U.S. 366 (1898).

[272] 261 U.S. 525 (1923).

[273] The District of Columbia Minimum Wage Law Act of Sept. 19, 1918, ch. 174, 40 Stat. 960 (amended 1966), authorized a local administrative board to investigate wage levels for women and children employed in any occupation in Washington, D.C. *See id.* § 8(1). It empowered the board to set minimum wages for women and children necessary to "maintain them in good health and to protect their morals . . . ." *Id.* § 9, *quoted in Adkins*, 261 U.S. at 540. An employer who paid a female or child employee below the minimum wage committed a misdemeanor under the Act and was subject to a fine and prison. *See* ch. 174, § 18, 40 Stat. at 960.

Adkins actually involved two consolidated cases, one brought by a children's hospital that employed some, but not all, women below the assigned minimum wage, and one brought by Willie Lyons, age twenty-one, an elevator operator "employed by the Congress Hall Hotel Company . . . at a salary of $35 per month and two meals a day."

expressly to promote the health and moral welfare of women employed within the District of Columbia,[274] the law relied, in part, upon a series of post-*Lochner* decisions that sustained maximum hour regulations for industrial workers.[275] Felix Frankfurter, counsel for the District of Columbia Minimum Wage Board, who previously had convinced the Court that regulation of an employee's hours was well within a state's legitimate police powers, argued that the minimum wage law similarly advanced the public interest in preserving the health and welfare of women.[276]

A divided Court rejected this premise and invalidated the District of Columbia minimum wage law as an unconstitutional deprivation of liberty and property under the Due Process Clause. Writing for the majority, Sutherland ruled that the law was an arbitrary and unreasonable infringement upon freedom of contract.[277] He presumed that parties to an employment contract bargained from relatively equal positions, which the minimum wage law undermined when it restricted the freedom of women to negotiate for their own wages and compelled employers to pay them a fixed sum.[278]

Adkins, 261 U.S. at 542. The hotel discharged her rather than pay her the higher wage prescribed by the board. *See id.*

[274] *See* ch. 174, § 23, 40 Stat. at 960.

[275] *See, e.g.*, Wilson v. New, 243 U.S. 332 (1917) (upholding the Adamson Act's temporary post-World War I regulation of interstate rail employees' hours and wages in a business affected with a public interest); Bunting v. Oregon, 243 U.S. 426 (1917) (sustaining a law regulating the hours of workers in mills, mines, and factories, regardless of gender, and not even mentioning *Lochner v. New York*); Bosley v. McLaughlin, 236 U.S. 385 (1915) (sustaining a law regulating the hours of female hospital workers); Miller v. Wilson, 236 U.S. 373 (1915) (sustaining a law restricting the number of hours women could work in hotels); Riley v. Massachusetts, 232 U.S. 671 (1914) (sustaining a law that regulated factory workers' hours); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a law prohibiting women from working more than ten hours daily in a factory or laundry). Before *Lochner*, the Court sustained as a reasonable exercise of police powers a Utah law that set maximum hours for laborers in mines, smelters, and factories, which the Court recognized as inherently dangerous occupations. *See* Holden v. Hardy, 169 U.S. 366, 391-93, 395 (1898). Moreover, the Court noted that the inherent bargaining disparity between employers and employees in these dangerous jobs often prevented employees from negotiating for improved working conditions. *See id.* at 397. *Lochner* and other cases ignored this bargaining disparity.

[276] In *Bunting*, Frankfurter successfully argued that an Oregon maximum hours law for mill and factory laborers promoted public health, safety, and welfare. *See Bunting*, 243 U.S. at 431-33 (argument of Felix Frankfurter, co-counsel for Defendant in Error). In *Adkins*, Frankfurter argued that the District of Columbia wage regulation substantially advanced the health and morals of women, who, because of disparities in the bargaining process, were thought less able than men to afford adequate food, shelter, and medical care without a standard living wage. *See Adkins*, 261 U.S. at 527-35 (argument of Felix Frankfurter, co-counsel for Appellants).

[277] *See Adkins*, 261 U.S. at 545, 555-62.

[278] *See id.* at 545 ("[T]he parties have an equal right to obtain from each other the

As a staunch advocate of equal opportunity and a longstanding supporter of women's suffrage, Sutherland believed that regulation of women's wages was unnecessary given the recent passage of a constitutional amendment that gave women the franchise.[279] Sutherland assumed, perhaps naively, that women no longer required special legislative treatment. He thought that women, capable of voting and of exerting their own political and civic influence, should be as able as men to enter into employment contracts of their own free will.[280] Accordingly, he suggested that the minimum wage law operated unequally in that it restricted the contractual liberty of one set of potential employees, women, but left men alone.[281] In this regard, Sutherland wryly observed that "[n]o distinction can be made between women . . . and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty."[282]

Essentially, Sutherland construed the minimum wage provision as illegitimate class legislation for several reasons. First, differential treatment of workers upon the basis of gender hampered the economic freedom of women like Willie Lyons, who, but for the imposition of a standard wage, would have continued in jobs they enjoyed at compensation they considered fair.[283] Moreover, the minimum wage law, with its broad assumptions about income and public welfare, disregarded the individual circumstances of employers and employees alike.[284] It created involuntary burdens for employers and disproportionate benefits for their employees. As Sutherland explained:

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best terms they can as the result of private bargaining."); *see also id.* at 554-55, 557.

[279] *See id.* at 553. Sutherland referred to the Nineteenth Amendment, ratified in 1920, which provides, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, cl. 1. For Sutherland's earlier support of women's suffrage, see 51 CONG. REC. 3598-3601 (1914) (statement of Sen. Sutherland); 53 *id.* 11,318 (1916) (statement of Sen. Sutherland); *id.* at 75 (1915) (statement of Sen. Sutherland).

[280] *See Adkins*, 261 U.S. at 553.

[281] *See id.* at 553-54. Sutherland explained the law was "simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men." *Id.* at 554.

[282] *Id.* at 556.

[283] At trial, Willie Lyons apparently testified that her wages "were the best she was able to obtain for any work she was capable of performing . . . ." *Id.* at 542. She also claimed, in Sutherland's words, "that she could not secure any other position at which she could make a living, with as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment but for the order of the board." *Id.* at 542-43.

[284] *See id.* at 557.

> 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 burden . . . .[285]

In particular, Sutherland found objectionable the employer's obligation to pay a set wage regardless of the actual value of the labor provided or the changing conditions of the business.[286] Not only did this curtail the employer's economic liberty, it also made the employer assume a collateral duty "to insure [the] subsistence, health and morals" of workers.[287] Sutherland regarded the imposition of a minimum wage with considerable skepticism, uncertain that it promoted the health of women and unconvinced that a substandard wage adversely affected public welfare.[288] He doubted that an employer who paid fair value for an employee's service either caused the indigence of that employee or contributed to it, and so regarded the Washington, D.C. law as "the product of a naked, arbitrary exercise of power . . . ."[289]

Sutherland further explained his intense opposition to minimum wage legislation in *West Coast Hotel Co. v. Parrish*,[290] in which he dissented

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[285] *Id.* Sutherland also noted that the law prevented employers "from adjusting compensation to the differing merits of . . . employees." *Id.* Moreover, he considered the law overinclusive because it applied to both employers with a distinct advantage when bargaining with employees and to "those whose bargaining power may be as weak as that of the employee." *Id.*

[286] *See id.* at 555-58. "The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored." *Id.* at 558.

[287] *Id.*

[288] As Sutherland noted:

> [T]he sum fixed 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, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

Id. at 557-58.

[289] *Id.* at 558-59. Sutherland also feared that if a minimum wage was permissible, the government could, at some other time, impose a maximum wage. *See id.* at 560. This demonstrated the law's arbitrary nature. In 1916, Sutherland expressed similar concern to labor leader Samuel Gompers: "[I]f we once undertook by legislation to fix wages, they may be at first fixed at a high sum, but under this concession they may sometimes be fixed at a very inadequate sum." Letter to Samuel Gompers, *supra* note 167, at 2.

[290] 300 U.S. 379, 400-14 (1937) (Sutherland, J., dissenting). Between *Adkins* and

from the Court's decision to overrule *Adkins* and sustain a Washington state minimum wage law for women. In support of his contention, Sutherland explained that a fundamental difference existed between maximum hours and minimum wage laws. Unlike regulations of labor that left contractual parties free to negotiate the value of services provided, minimum wage laws impaired the liberty and property rights of both employers and employees.[291] Moreover, a law that prohibited the employment of women below a standard wage conferred a competitive advantage upon men, whom employers could hire for the same jobs at lower wages.[292]

Nevertheless, Sutherland understood that under some circumstances the government could intervene in the relationship between employees and employers without infringing upon contractual liberty.[293] In large part, his

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West Coast Hotel, Sutherland joined three Court opinions that invalidated minimum wage laws for women. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927); Murphy v. Sardell, 269 U.S. 530 (1925).

[291] *See West Coast Hotel*, 300 U.S. at 411 (Sutherland, J., dissenting); *see also Adkins*, 261 U.S. at 554. Sutherland believed, however, that an emergency might warrant a temporary wage regulation. *See id.* Moreover, he suggested that a business affected with a public interest also might have the wages of its employees regulated. *See id.* at 546. He thought neither situation existed in *Adkins* nor *West Coast Hotel.*

[292] *See West Coast Hotel*, 300 U.S. at 411 (Sutherland, J., dissenting). Sutherland also said: "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, as everyone knows, does not depend upon sex." *Id.* at 413 (Sutherland, J., dissenting).

A majority of the Court remained unpersuaded by Sutherland's semantical distinctions and, in overruling *Adkins*, adopted a more tolerant approach toward local police powers that expressed the public interest in providing women with adequate wages. Writing for the majority, Chief Justice Hughes refused to distinguish between a state's power, previously upheld, to regulate the hours of labor, and minimum wage regulations. *See id.* at 391-97. Accordingly, the Court re-examined *Adkins* in light of "the economic conditions which have supervened . . . ." *Id.* at 390. Unlike Sutherland, Hughes recognized the public interest in providing women with a decent wage to preserve their health. *See id.* at 398-99. He noted that "women . . . are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances." *Id.* at 398. For this reason, the state could enact a minimum wage law. *See id.* at 398-99. In response to Sutherland's factional concerns, Hughes even noted that the absence of a minimum wage law for women exacerbated their exploitation and unequal bargaining position, hindered their health and welfare, and burdened the public that must support them. *See id.* at 399. "The community [as a whole] is not bound to provide what is in effect a subsidy for unconscionable employers." *Id.* The employers' unwillingness to pay a minimum wage manifested "their selfish disregard of the public interest." *Id.* at 400.

[293] Writing to labor leader Samuel Gompers, Sutherland revealed his relatively progressive views about working conditions:

willingness to sustain regulations of the number of hours employees worked reflected his notion that this type of legislation was impartial and inured to the benefit of the community. For example, in *Radice v. New York*,[294] Sutherland found constitutional a law that prohibited women from working in restaurants between 10:00 p.m. and 6:00 a.m. In contrast to his approach in minimum wage cases, Sutherland perceived that physiological differences between the sexes warranted protective laws of this kind designed to promote the health and welfare of women.[295] Although the law was aimed only at women, Sutherland noted with approval that it applied equally to all female employees.[296]

Sutherland's conception of police powers reflected his fundamental aversion to factions. Like conservative jurists before him, he believed that the reasonable exercise of police powers required a substantial relationship between economic regulation and public health, safety, morals, or welfare.[297]

> I have always favored laws which had for their object the substantive betterment of the workers, such as those which enforce proper sanitary conditions, safety appliances and machinery, adequate . . . compensation for injuries, and so on. I [also favor], by legislation the eight-hour day in industries such as mining, smelting and other industries where long employment is injurious to health . . . . I am in favor of an eight-hour day in all the mechanical industries and in all work where the same set of muscles are continuously employed, or where the same strain and attention is continuously required about the work.

Letter from George Sutherland to Samuel Gompers, *supra* note 167, at 1-2.

[294] 264 U.S. 292 (1924). The law exempted female entertainers, cloakroom and parlor attendants, hotel dining room employees, and some cafeteria workers. *See* 1917 N.Y. Laws, ch. 535, at 1564. The state enacted this law to prevent women from endangering their health through late night work. *See Radice*, 264 U.S. at 294.

[295] *See Radice*, 264 U.S. at 295 (distinguishing *Adkins*). However, in the context of minimum wage legislation, Sutherland rejected the relevance of physiological differences between men and women. *See Adkins*, 261 U.S. at 553; *West Coast Hotel*, 300 U.S. at 413 (Sutherland, J., dissenting).

[296] *See Radice*, 264 U.S. at 296. Sutherland explained: "The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free, but a case where all in the same class of work, are included in the restraint." *Id.* (citation omitted).

[297] *See, e.g.*, Liggett Co. v. Baldridge, 278 U.S. 105, 111-12 (1928) (holding that the state exercises its police powers reasonably "only when such legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare.") In *Liggett*, the Court, in an opinion written by Sutherland, invalidated a 1927 Pennsylvania law that prohibited prospective ownership of pharmacies within the state by pharmaceutical corporations in which not all of the shareholders were licensed pharmacists. Ostensibly, this law meant to promote public health and safety. The Court ruled it an unconstitutional "restriction upon private business." *Id.* at 113. It reasoned that "mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health . . . ." *Id.* Unlike other state laws regulating prescriptions and the conduct of pharmacies that advanced public health,

Invariably, he assessed the scope of police powers in the context of whether governmental action was impartial.[298] While Sutherland realized that legislative classifications often produce unequal effects, he only objected to arbitrary public intervention in private economic affairs.[299] Laws for the benefit of one group at the expense of another were illegitimate precisely because their unequal operation threatened, rather than advanced, the public welfare. From this perspective, he considered workmen's compensation permissible and supported maximum hours laws, yet found minimum wage regulations unreasonable.[300]

Undeterred by the shift in the Supreme Court's police powers jurisprudence toward the end of the 1930s, Sutherland persisted in his categorical approach. Whereas Chief Justice Hughes and a slim majority of the Justices began to assess the scope of police powers by balancing the public interest against private rights,[301] Sutherland refused to abandon the traditional requirement that local economic regulation bear a substantial relationship to public health, safety, morals, or welfare. It was on this basis that he dissented in *West Coast Hotel*, wherein he suggested that a minimum wage law for women was arbitrary and unrelated to the legitimate exercise of police powers.[302]

Protection of private contract rights from the turbulent whims of democratic majorities was, for Sutherland, most consistent with the public welfare. As he explained in *Adkins*:

> 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.[303]

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this measure was an arbitrary restraint upon private business. *See id.* at 112-13.

[298] *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 279 (1932) (noting that reasonable police powers are those "applied with appropriate impartiality").

[299] *See, e.g.*, *Radice*, 264 U.S. at 296.

[300] For cases in which Sutherland wrote majority opinions sustaining state workmen's compensation laws, see *Bountiful Brick Co. v. Giles*, 276 U.S. 154 (1928), and *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923). For Sutherland's distinction between maximum hours laws and minimum wage regulations, see *Adkins*, 261 U.S. at 553-54, and *West Coast Hotel*, 300 U.S. at 407 (Sutherland, J., dissenting).

[301] *See, e.g.*, *West Coast Hotel*, 300 U.S. at 391-92, 398-400; Nebbia v. New York, 291 U.S. 502 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434-35, 437, 442-44 (1934).

[302] *See West Coast Hotel*, 300 U.S. at 407-14 (Sutherland, J., dissenting).

[303] *Adkins*, 261 U.S. at 561.

Sutherland thus was reluctant to balance private economic rights with the public interest in determining the reasonableness of local police powers. Political expediency and the self-interest of factions who manipulated the democratic process made him regard even the most well-meaning legislation with suspicion. He doubted claims of public imperative as the basis for governmental authority because he feared that they emanated from factional objectives inconsistent with the long-term interests of the community.[304]

Sutherland's dissent in *Home Building & Loan Ass'n v. Blaisdell*[305] demonstrated his willingness to invoke the primacy of constitutional limitations as the safeguard against partial laws that restricted contractual liberty and redistributed property. In *Blaisdell*, he argued that the Contract Clause prohibited a state from using its police powers to impair a mortgagor's contractual obligation.[306] At the height of the Depression, Minnesota, in response to intense pressure from mortgagors, enacted a law that extended the period of redemption "from mortgage foreclosure and execution sales."[307] As applied to a pre-existing contract between two mortgagors and the financial institution that held their mortgage, the law permitted the mortgagors to retain possession of foreclosed property for up to two years during the Depression upon the payment of a reasonable rent.[308] This controverted the

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[304] *See, e.g., Blaisdell*, 290 U.S. at 471-73 (Sutherland, J., dissenting) (contending that a mortgage moratorium enacted for the temporary benefit of Depression mortgagors impaired the contract rights of mortgagees in contravention of the Contract Clause and jeopardized the stability of contracts); New State Ice Co. v. Liebmann, 285 U.S. 262, 278-80 (1932) (rejecting as illegitimate partial legislation an Oklahoma law that restricted competition in the manufacture, sale, and distribution of ice).

[305] 290 U.S. 398, 448-83 (Sutherland, J., dissenting).

[306] *See id.* at 473, 479-83 (Sutherland, J., dissenting) (explaining that the Contract Clause was an absolute prohibition against state laws that impaired the obligation of contracts).

[307] Minnesota Mortgage Moratorium Act, ch. 339, preamble, 1933 Minn. Laws 514-15. For a discussion of the law's Depression context, see Samuel R. Olken, *Charles Evans Hughes and the* Blaisdell *Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 569-70 (1993).

[308] The law declared an economic emergency and authorized mortgagors of foreclosed property sold at public auction to request from a district court an extension of the redemption period for up to two years. To retain possession of foreclosed property, a mortgagor would have to pay its reasonable rental value throughout the redemption period.

In 1928, the Blaisdells executed a mortgage on their Minnesota boarding house in exchange for a $3,800 loan from Home Building & Loan Association. As mortgagee, the lender had a right to foreclose upon the property if the Blaisdells, as mortgagors, defaulted. A 1927 law only gave mortgagors a year to redeem foreclosed property sold at public auction. *See* MINN. STAT. § 9608 (1927). In May 1932, the Blaisdells defaulted, and under the law in effect when the parties formed the mortgage contract, Home Building & Loan Association would have obtained complete title to the realty in May 1933. Before this time, however, under the new law the Blaisdells applied to a local

foreclosure provisions of the mortgage contract and, in Sutherland's view, impaired the contract rights of the mortgagee.[309] A majority of the Court sustained the constitutionality of the mortgage moratorium and recognized that the public interest in private contracts permitted Minnesota to adjust temporarily contractual rights and duties during an economic emergency.[310] In contrast, Sutherland interpreted the Contract Clause literally, found no exception for emergencies, and concluded that the state had exceeded the permissible scope of its police powers.[311] He characterized "the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor" as impermissible class legislation.[312]

2. *Access to Business and the Rights to Property*

While a Supreme Court Justice, Sutherland confronted a number of regulations that restricted the liberty of businesses to compete in the market as well as others that attempted to fix the prices for services and commodities.[313] As in his approach toward economic regulation of private contracts, Sutherland analyzed these issues from an anti-factional perspective.

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court for equitable relief. The court initially dismissed their petition but eventually extended the period of redemption to May 1935 after the Blaisdells appealed successfully to the state's highest court. *See* Olken, *supra* note 307, at 573-75.

[309] *See Blaisdell*, 290 U.S. at 480-83 (Sutherland, J., dissenting).

[310] *See Blaisdell*, 290 U.S. at 434-48. The Court eschewed a rigid construction of the Contract Clause in favor of one that reconciled private contract rights with the collective interest in economic order. *See id.* at 442-44. Five of the Justices ruled that the law was a reasonable exercise of state police powers that prevented "the impending ruin" of both mortgagors and mortgagees during a period of unprecedented economic turmoil. *Id.* at 446. The law's temporary duration and preservation of the underlying indebtedness meant it did not impair the obligation of contracts within the meaning of the Contract Clause. *See id.* at 440, 444-47. In response to Sutherland's factional concerns, Chief Justice Hughes noted "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." *Id.* at 442.

[311] *See id.* at 473 (Sutherland, J., dissenting). Sutherland believed the mortgage moratorium impaired the obligation of contracts because it delayed the mortgagee's complete possession of the foreclosed property. *See id.* at 480-83 (Sutherland, J., dissenting).

[312] *Id.* at 472 (Sutherland, J., dissenting).

[313] *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929) (Sutherland, J.) (invalidating a Tennessee law fixing gas prices); Ribnik v. McBride, 277 U.S. 350 (1928) (Sutherland, J.) (invalidating a New Jersey law that fixed fees charged by employment agencies), *overruled by* Olsen v. Nebraska, 313 U.S. 236, 244 (1941); Tyson and Brother v. Banton, 273 U.S. 418 (1927) (Sutherland, J.) (invalidating a New York law that fixed resale prices of entertainment tickets).

In *New State Ice Co. v. Liebmann*,[314] Sutherland wrote an opinion that upheld the right of an ice company to operate in a city without first demonstrating its public necessity and securing a license required by law.[315] For Sutherland, this prerequisite signified a restriction imposed by the legislature to stifle competition in favor of an established business.[316] The manufacture, sale and distribution of ice, while important to the community, still comprised an "ordinary business," and therefore did not warrant special regulation.[317] Accordingly, the law arbitrarily infringed upon Liebmann's freedom to pursue economic opportunity in the ice business, and its provisions were unreasonable in their tenuous connection to the public good.[318] In this respect, Sutherland's rationale reflected that of Chief Justice Taney nearly a century earlier in the *Charles River Bridge* case when he suggested that special laws protecting monopolies were detrimental to the public welfare.[319]

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[314] 285 U.S. 262 (1932).

[315] A 1925 act proclaimed that the manufacture, sale, and distribution of ice was a public business, and prohibited the undertaking of these activities without a license. The issuance of a license depended upon showing proof of necessity for a new ice business in the affected community. Under the act, where existing ice facilities adequately met the public needs, the ice commission could deny a license to any applicant. *See id.* at 271-72 (describing 1925 Ice Law, 1925 Okla. Sess. Laws 147). New State Ice Company, which had a license to manufacture, sell, and distribute ice within Oklahoma City, invoked the act to restrain Liebmann, who did not have a license, from operating his ice business in the same area. Writing for the Court, Justice Sutherland rejected the premise that the ice business was one sufficiently affected with a public interest to warrant the regulation of competition. *See id.* at 277-79. Accordingly, the Court ruled that the ice law unconstitutionally restricted Liebmann's freedom of contract. *See id.* at 280.

[316] *See id.* at 278-79. Sutherland noted that "[t]he control here asserted 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.

[317] *Id.* at 277-80. In essence, Sutherland believed that the law infringed upon the right to pursue an otherwise lawful occupation. The law reflected factional bias because it did not similarly restrict other ordinary businesses (e.g., groceries, shoemakers, etc.). *See id.* Sutherland's opinion recalls Justice Field's dissent in the *Slaughter-House Cases*. *See* The Slaughter-House Cases, 83 U.S. 36, 109-110 (1873) (Field, J., dissenting).

[318] *See New State Ice Co.*, 285 U.S. at 277-80. In his dissent, Justice Brandeis explained that the license requirement advanced the public interest in preventing waste created by the unnecessary duplication of services and producers in the ice business. *See id.* at 282, 292 (Brandeis, J., dissenting). Brandeis believed that supplying ice was tantamount to a public utility and thus was a business affected with a public interest that necessitated regulation of this kind to ensure that Oklahoma residents received an adequate and dependable supply of ice for their hygienic and food needs. *See id.* at 290-91, 300-05 (Brandeis, J., dissenting).

[319] *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 452-53 (1837).

Insofar as Sutherland conceded the authority of the states to regulate businesses concerning matters of public health or safety, or concerning utilities upon which the community relied, he insisted that the exercise of police powers be in a direct and impartial manner.[320] Moreover, Sutherland refused to permit the guise of local experimentation to sanctify what was otherwise impermissible class legislation.[321] Thus, he could recognize the public interest in cotton gins, yet still strike down as unconstitutional a law that made it harder for some types of entities to obtain a cotton gin license.[322] Similarly, he ruled that California could not restrict access to its public highways through a licensing scheme that conferred a competitive benefit upon common carriers at the expense of private businesses.[323] In a third case, Sutherland believed New York was well within its power to mandate that all motor vehicles for hire obtain liability insurance or post bonds because the regulation equally affected all such carriers and benefited the entire public.[324]

Sutherland on occasion realized that seemingly partial laws actually advanced the public interest in health, safety, or morals. His zoning decisions exemplify his willingness to restrict the uses of private property of some groups for the benefit of the community. For example, in *Euclid v. Ambler Realty Co.*,[325] Sutherland rejected the argument by a real estate developer's counsel that a comprehensive zoning plan diverted the profitable use of property from one set of property owners to others.[326] Instead,

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[320] *See New State Ice Co.*, 285 U.S. at 279-80; *see also* Liggett v. Baldridge, 278 U.S. 105, 111-14 (1928).

[321] *See New State Ice Co.*, 285 U.S. at 279-80. In contrast, Justice Brandeis perceived the importance for the state "to remould, through experimentation, . . . economic practices and institutions to meet changing social and economic needs." *Id.* at 311 (Brandeis, J., dissenting). Much more deferential toward the local legislature than Sutherland, Brandeis implicitly accepted the legislature's conclusion that regulated competition in the ice business was necessary to promote the more efficient manufacture, sale, and distribution of ice. *See id.* at 284-86, 291-94, 300-05 (Brandeis, J., dissenting).

[322] *See* Frost v. Corporation Comm'n, 278 U.S. 515, 520-25 (1929) (invalidating an Oklahoma law exempting agricultural and horticultural cooperatives from demonstrating public necessity as a prerequisite for obtaining a cotton gin license, but requiring other businesses to obtain such a license). Sutherland explained that the law "produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary" because it does not promote the public welfare. *Id.* at 524-25.

[323] *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) (invalidating the application of a highway certificate of convenience regulation to private automobiles for hire).

[324] *See* Packard v. Banton, 264 U.S. 140, 143-45 (1924) (sustaining a New York liability insurance/bond requirement for hired motor vehicles as a reasonable exercise of local police powers that promoted public safety).

[325] 272 U.S. 365 (1926).

[326] *See id.* at 371 (argument of Newton D. Baker, co-counsel for Appellee). Ambler

Sutherland found that limiting a section of the village to residential use substantially advanced public health and safety by reducing the likelihood of neighborhood accidents and improving the quality of life.[327] Sutherland accepted the premise that changes in demographic growth necessitated some restriction upon private land use[328] and noted that the zoning ordinance did not distinguish arbitrarily between different types of industrial activity.[329] For this reason, the zoning ordinance functioned as a law of equal operation, protecting the town's interest in preserving the quiet use and enjoyment of residential property.[330]

Realty Company alleged the zoning ordinance impaired its liberty and property interests in violation of the Fourteenth Amendment when it reduced substantially the industrial value of land the developer hoped to sell in the future by restricting the land to a less profitable residential use. The company claimed the ordinance was impermissible class legislation born of the financial self-interest of homeowners and only involved ephemeral matters of aesthetic taste that did not implicate legitimate police power concerns. *See id.* at 373-76. Sutherland sustained the Euclid ordinance "in its general scope," *id.* at 397 (Sutherland, J.), refusing to speculate about its specific provisions in the absence of any actual or imminent injury to the complainant. *See id.* at 395-97.

[327] *See id.* at 391-94.

[328] *See id.* at 392; *see also* Gorieb v. Fox, 274 U.S. 603, 608-10 (1927) (Sutherland, J.) (sustaining, in reference to changing demographic conditions, a Roanoke, Virginia set-back ordinance as a reasonable exercise of local police powers); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927) (Sutherland, J.) (sustaining a Los Angeles law prohibiting commercial buildings in a residential area). *But see* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (Sutherland, J.) (invalidating a Cambridge, Massachusetts zoning ordinance that did not advance a legitimate police powers interest when it prevented an owner from using his entire property for industrial use).

[329] *See Euclid*, 272 U.S. at 387-89. At first, Sutherland thought the law was unconstitutional, but after some persuasion by Justice Stone and others, Sutherland requested reargument of the case and eventually decided to sustain the ordinance as a reasonable exercise of local police powers. *See* Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946).

[330] *See Euclid*, 272 U.S. at 388-90. For the implication that laissez-faire economics did not influence Sutherland's decision, see SIEGAN, *supra* note 40, at 153 (arguing that Sutherland "did not believe economic freedom was desirable in the landuse market"). Siegan contends this reason, not a calculated effort to protect the economic interests of wealthy homeowners, best explains the ruling. *See id.* Herbert Hovenkamp argues the opinion really applied the economic doctrine of externalities, an early twentieth century exception to classical economic theory (laissez-faire economics) that allowed limited governmental intervention into market relations on behalf of affected third parties not part of the normal bargaining process. *See* Hovenkamp, *Political Economy*, *supra* note 8, at 441-46. Both arguments, however, seemingly overlook Sutherland's aversion toward factions and his reliance upon historical custom and the common law. Indeed, Sutherland perceived *Euclid*, in large part, as a nuisance case. *See Euclid*, 272 U.S. at 387-88.

3. *Economic Liberty as a Constitutional Paradigm*

In essence, Sutherland interpreted issues arising from the regulation of private economic affairs as questions of power best resolved through historical and legal analysis. Rather than attempt to read a particular economic order into the Constitution or imbue his interpretation of its limitations with notions of Social Darwinism, Sutherland applied longstanding concepts of anti-factional jurisprudence that had less to do with socio-economic theory than with the common law and traditional ideals about equality. The economic ramifications of his anti-factional approach should not be confused with the judicial intent of Sutherland or other conservative jurists before him.

Sutherland's support of workmen's compensation, regulation of the hours and conditions of labor, and comprehensive zoning controverts the often-held notion that his jurisprudence was motivated and influenced primarily by laissez-faire political economy.[331] Undoubtedly aware of the extremist views of Herbert Spencer and William Graham Sumner, Sutherland, like his early mentor Thomas Cooley and other *Lochner* era jurists, emphasized equal opportunity and individual liberty as integral to the public welfare, while recognizing and appreciating the need for impartial governmental action.[332] Moreover, early in his public career, Sutherland had explicitly rejected the premise that the law of supply and demand prevented the government from intervening in a market economy to improve the conditions of labor.[333]

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[331] *See, e.g.*, Hovenkamp, *Political Economy*, *supra* note 8, at 437, 445; Kens, *supra* note 8, at 96-98; PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE, *supra* note 10; Strong, *supra* note 8, at 438-39, 444-49, 452.

[332] *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31-32 (1885) (Field, J.) (sustaining as a reasonable exercise of state police powers a prohibition against washing and ironing in public laundries late at night). Justice Field remarked, "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment." *Id.* at 32 (referring to Fourteenth Amendment Due Process); *see also* Cooley, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 389-93 (discussing equal operation of the law); *id.* at 572-97 (discussing the importance of the impartial exercise of governmental authority to preserve public health, safety, morals, and welfare).

[333] *See* Sutherland, *Economic Value and Social Justice*, *supra* note 161, at 11. Thomas Cooley also rejected the use of laissez-faire economics as the principal means of resolving legal issues arising out of employment relationships, noting that "it is easy with a wave of the hand to refer them to the great law of demand and supply, but they return to plague us again and again." Thomas Cooley, VI LECTURES ON CITY GOVERNMENT 52 (1879), *quoted in* Jones, *supra* note 12, at 768.

Rarely did Sutherland mention economic theory in his judicial opinions.[334] Although in a few of his private writings and public speeches Sutherland suggested that in price fixing and related areas government intervention made little economic sense, he was careful to explain that his primary concern was with the shortcomings of the legislative process. He thus once referred to the "folly of attempting to control the movement of prices of ordinary commodities by legislation. Not only is any such attempt futile from a practical view point, but it constitutes a distinct departure from the great political principle . . . ."[335] In the same speech, Sutherland then noted that "[t]he 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 to all . . . ."[336]

For Sutherland and other members of the conservative judicial tradition, constitutional limitations upon the scope of local police powers existed not to protect an economic elite but rather to preserve the rights of individuals, whenever possible, from the tyranny of the majority.[337]

Throughout his public career, Sutherland did not view the mere possession of property or its accumulation in sacred terms.[338] Instead, he perceived it as an individual right representative of others especially vulnerable in a democratic republic. From this perspective, he explained the importance of constitutional limitations upon the arbitrary exercise of governmental authority: "[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 three great rights, equally sacred from arbitrary interference: the right to his life, the right to his liberty, the right to his property."[339] Accordingly, he believed freedom of contract was entitled to no less constitutional protection than the First Amendment and other individual rights.[340]

It was precisely because Sutherland understood economic liberty as a constitutional paradigm that the principal source of his jurisprudence was an

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[334] One example is Sutherland's observation that a minimum wage law ignored the actual value of services provided. *See* Adkins v. Children's Hosp., 261 U.S. 525, 558-59 (1923).

[335] Sutherland, *Principle or Expedient?*, *supra* note 174, at 17.

[336] *Id.* at 19.

[337] *See* Hovenkamp, *Political Economy*, *supra* note 8, at 386-90; Jones, *supra* note 12, at 755.

[338] *See* Sutherland, *Principle or Expedient?*, *supra* note 174, at 18. "I personally entertain a very well settled opinion that society, including the very rich themselves, would be greatly benefited if the few who have great wealth had less, and the vast number who have very little had more." *Id.*

[339] *Id*; *see also* Sutherland, *The Courts and the Constitution*, *supra* note 188, at 390 (arguing that the "right to property is of the same character as the right to life and liberty").

[340] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932).

aversion to factions. Speculation about his economic motives ignores the context of his constitutional analysis and obscures his reliance upon common law and historical custom.

B. *Common Law Principles and Historical Custom*

Common law principles and historical custom, rather than abstract socio-economic theories, helped shape Sutherland's jurisprudence of economic liberty. For many late nineteenth and early twentieth century jurists, both the common law and history were important sources of constitutional adjudication. The common law, with its emphasis upon gradual change and legal precedent, enabled judges to interpret constitutional principles from a historical perspective.[341] Aversion to political factions and skepticism of political expediency were significant aspects of the historical tradition that influenced *Lochner* era jurists. The common law afforded jurists a legal methodology from which to apply anti-factional sentiment to the problems of economic regulation. Historical custom perpetuated longstanding concerns about factions and provided the more conservative members of the judiciary with the context from which to construe the constitutional limits of local police powers. Sutherland strongly identified with this tradition and drew upon the common law and historical experience during his years on the Court.

Inherently wary of abrupt change, which he associated with the fleeting whims of popular majorities, Sutherland reposed his trust in "the methodical habits of the past."[342] As a member of Congress he warned against "careering after novel and untried things" and urged caution.[343] Speaking before the Senate in 1911, he expressed a fondness for the common law and history that later would mark his judicial career: "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 . . . ."[344]

Much of the economic legislation before the Supreme Court during Sutherland's judicial career emanated from social and economic turmoil. Government intervention in private economic affairs became more pervasive at the behest of popular majorities eager to use the legislative process to redress perceived inequities in what had become a somewhat harsh, highly

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[341] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 22, 59-60; Jones, *supra* note 12, at 757-59; Siegel, *Historism*, *supra* note 11, at 1492-1515 (discussing Cooley's constitutional jurisprudence); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 65-99 (discussing historism and common law).

[342] 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland); Sutherland, *Principle or Expedient?*, *supra* note 174, at 7.

[343] 47 CONG. REC. 2793, 2795 (1911) (statement of Sen. Sutherland).

[344] 51 *id.* at 3598, 3600 (1914) (statement of Sen. Sutherland).

interdependent economy in which relatively few enjoyed significant economic freedom. Although during the 1920s and 1930s the Supreme Court sustained many local economic regulations before it, Sutherland and his more conservative colleagues on the Court voted to invalidate measures that they considered inconsistent with prior common law principles and factional concerns.

1. *Common Law Methodology*

Sutherland often applied the common law in a literal manner that underscored his aversion to political factions and disregard for expediency. For example, he thought that minimum wage laws abridged freedom of contract because they allowed government intervention on the behalf of one of the parties to a private contract under circumstances not recognized under common law.[345] As Sutherland noted in *Adkins*, the District of Columbia minimum wage regulation neither prevented fraud nor protected people who lacked the capacity to contract[346]—the common law exceptions to the general principle of non-interference in private contracts.[347]

Indeed, the common law had restricted the freedom of women to enter into contracts on the presumption that they lacked legal capacity.[348] Sutherland believed, however, that by the 1920s women had attained relative political and legal equality with men. Consequently, there was "no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right

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[345] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 411-12 (1937) (Sutherland, J., dissenting) (differentiating between women's presumed lack of contractual capacity at common law and the irrelevance, by the 1920s, of that rule given the passage of the Nineteenth Amendment); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 475-78 (1934) (Sutherland, J., dissenting) (discussing implied contract conditions at common law); Adkins v. Children's Hosp., 261 U.S. 525, 554 (1923).

[346] *See Adkins*, 261 U.S. at 554. Sutherland also noted that the businesses involved were not affected with a public interest, nor was there an emergency—both of which were other common law rationales for public regulation of private rights. *See id.*

[347] *See id.* In this sense, Sutherland's ideas were in the mainstream of *Lochner* era police powers jurisprudence. Conservative jurists before him primarily defined liberty of contract from a common law perspective. At common law, neither economic pressure nor inequality in the bargaining process comprised legal excuses for nonperformance of employment contracts. Duress was a very narrow exception to this rule, but it was primarily limited to commercial contracts, which the judges differentiated from contracts of employment. *See* McCurdy, *supra* note 26, at 20-21, 24-26 (discussing the work of Elizabeth Mensch and the reasons why courts often invalidated laws that directly interfered with employment relationships); *see also* Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a law prohibiting yellow-dog (anti-union) contracts on liberty of contract grounds).

[348] *See West Coast Hotel*, 300 U.S. at 411 (Sutherland, J., dissenting).

to compete with men for work paying lower wages which men may be willing to accept."[349] Women's suffrage represented a gradual change within society that made unnecessary the common law's protection of women in the marketplace. Rather than distinguish the common law, Sutherland used it to demonstrate that the imposition of a minimum wage was impermissible class legislation.

Sutherland also narrowly interpreted the common law in his constitutional analysis of public control over private businesses. Since 1877, the Supreme Court had sustained public regulation of prices charged by private businesses who devoted their property to public use. In *Munn v. Illinois*,[350] the Court upheld a law that fixed the price of grain charged by a private grain elevator. In so holding, the Court adopted a principle of common law intended to distinguish between private business activities in which the public had some peripheral concern and those whose characteristics necessitated public control.[351] Though broadly applied in *Munn*, by the 1920s the Court narrowly confined the affectation doctrine to three categories. Accordingly, a business became affected with a public interest and thus subject to price regulation if it: (1) provided a service to the public pursuant to a public grant or privilege; (2) was historically regulated because of the services it

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[349] *Id.* at 411-12 (Sutherland, J., dissenting). Sutherland's belief emanated, in large part, from the passage of the Nineteenth Amendment, which gave women the right to vote.

[350] 94 U.S. 113 (1877).

[351] *See id.* at 126 ("Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."). Chief Justice Waite, who wrote the majority opinion in *Munn*, derived this principle from the English common law rule set forth in the eighteenth century by Lord Chief Justice Matthew Hale. As Waite himself explained, "[W]hen private property is 'affected with a public interest, it ceases to be *juris privati* only.'" *Id.* (quoting Matthew Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78). Both Thomas Cooley and Stephen Field criticized the Court's broad application of this principle to the private business of grain elevators, each believing that Hale only meant the affectation doctrine applied to situations in which the private property had been dedicated specifically to the public use by its owner, or to situations in which a constructive monopoly or a public grant or privilege was associated with the property. Otherwise, they considered the business wholly private and its rates immune from state regulation. *See Munn*, 94 U.S. at 138-41 (Field, J., dissenting); Jones, *supra* note 12, at 767 (discussing Cooley's criticism).

Thereafter, the Court somewhat limited its holding in *Munn*. *See* Chicago, Milwaukee, & St. Paul R.R. Co. v. Minnesota, 134 U.S. 418 (1890) (ruling that courts can review the reasonableness of rate regulations). This decision conflicted with *Munn*'s implicit premise based upon an expansive notion of state police powers, one that manifested judicial deference toward legislative rate determinations. *See* Maurice Finkelstein, *From* Munn v. Illinois *to* Tyson v. Banton *A Study in the Judicial Process*, 27 COLUM. L. REV. 769, 774-77 (1927). *But see* German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914) (sustaining the regulation of insurance industry rates).

provided to the public (i.e., a mill, inn, common carrier, etc.); or (3) was a constructive monopoly.[352]

Sutherland's common law approach underscored his commitment to economic liberty and inherent distrust of legislative majorities. Insofar as his factional concerns made him reluctant to defer to legislative declarations of public interest, they compelled his reliance upon the common law as a constitutional norm. Neither the size of a business nor the widespread use of its commodities or services transformed it into a public entity that warranted price regulation.[353] While he recognized the authority of government to prescribe the conduct of private business pursuant to its police powers, he considered price regulation an unconstitutional deprivation of liberty and due process.

Sutherland's opinion in *Tyson and Brother v. Banton*[354] illustrates his reliance upon common law doctrine. In *Tyson*, the Court invalidated a New York City law that prohibited the resale of tickets to theatrical and other entertainment events for more than fifty cents over their face value.[355] The law declared resale ticket prices a matter of public interest and said their regulation was necessary to prevent fraud and exorbitant prices.[356] Sutherland rejected this broad assertion of governmental authority. In an opinion devoid of economic analysis, Sutherland concluded that the law was an unconstitutional attempt to fix the prices of a private business.[357] Ticket

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[352] *See* Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535 (1923) (invalidating a Kansas law requiring binding arbitration of wage disputes in the food processing industry because it was not affected with a public interest).

[353] *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 240 (1929) (invalidating a Tennessee law fixing gas prices); Ribnik v. McBride, 277 U.S. 350 (1928) (invalidating a New Jersey law regulating employment agency fees), *overruled by* Olsen v. Nebraska, 313 U.S. 236, 244 (1941); Tyson and Brother v. Banton, 273 U.S. 418, 430 (1927) (invalidating a New York law restricting resale ticket prices).

[354] 273 U.S. 418 (1927).

[355] *See id.* at 427. Tyson's company sold resale tickets. Threatened with the revocation of its business license and criminal sanctions for attempting to resell tickets at prices in excess of the statutory limit, the company sued, asserting that the law arbitrarily and unreasonably deprived it of liberty and property in violation of the Due Process Clause of the Fourteenth Amendment. *See id.* at 426-28. The Court earlier had sustained the licensing provision of the act (New York General Business Law, ch. 590, 1922 N.Y. Laws § 168). *See* Weller v. New York, 268 U.S. 319, 325 (1925).

[356] *See Tyson*, 273 U.S. at 427. Sutherland explained that a price fixing law does not necessarily protect consumers from fraud. *See id.* at 445. The Court also found the New York law to be overinclusive because it applied to all ticket resellers regardless of their intent. *See id.* at 443.

[357] *See id.* at 438-42. Sutherland concluded the state could fix only the prices of a business affected with a public interest. *See id.* at 430. He also said that legislative declaration of this matter was subject to judicial review because price fixing was more intrusive on private rights and liberties than regulations merely pertaining to the conduct

resellers did not operate pursuant to a public grant or privilege, nor did they provide the public with an essential service.[358] Moreover, Sutherland did not believe that the business involved a monopoly.[359] Accordingly, he ruled that the resale of tickets was not a business affected with a public interest that warranted price regulation.[360]

In dissent, Justice Stone criticized Sutherland's literal application of the common law because it ignored the inability of the general public "to protect themselves" from the imposition of grave wrongs.[361] Stone believed that ticket brokers who purchased advance tickets for prime seats intended to resell them at much higher prices. Given the control they exerted over the number of available seats, ticket brokers enjoyed a considerable bargaining advantage over consumers unable to purchase tickets directly from theatres and other entertainment venues. From Stone's perspective, the brokers operated a monopoly which, left unregulated, substantially damaged the public welfare.[362]

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of private business. *See id.* at 431.

[358] *See id.* at 439-42.

[359] *See id.* at 431-41 (distinguishing *Munn v. Illinois*).

[360] *See id.* at 430-31, 438-41. In essence, Sutherland distinguished between price fixing and regulating the conduct of a business, asserting the state through its police powers could do the former only with businesses affected with a public interest. Thus, while New York could regulate the conduct of a ticket reseller's business even though it was not, at common law, affected with a public interest, it could not regulate the prices it charged. *See id.* at 441-42. Sutherland feared that a contrary ruling would permit all sorts of governmental price fixing in the entertainment business in the absence of emergency reasons for such regulation and regardless of whether a particular business was private. *See id.* at 442. For criticism of Sutherland's distinction between price fixing and business regulation, see Finkelstein, *supra* note 351, at 782-83 (questioning the soundness of Sutherland's decision and characterizing it as a judicial usurpation of legislative discretion). For the concept that public regulation of prices charged by an otherwise private business is permissible during an emergency, see, for example, *Block v. Hirsh*, 256 U.S. 135 (1921) (sustaining a Washington, D.C. holdover tenancy law as a reasonable exercise of local police powers during the housing shortage emergency caused by post-World War I conditions).

[361] *Tyson*, 273 U.S. at 454 (Stone, J., dissenting).

[362] *See id.* at 450-52 (Stone, J., dissenting). Stone believed that Sutherland assessed the wisdom of the law from the perspective of laissez-faire economics and thus unnecessarily constrained the legislature's authority to regulate a business whose "gross abuse" of an otherwise private right to resell tickets adversely affected the public interest in procuring entertainment tickets at fair prices. *Id.* at 450 (Stone, J., dissenting). Stone rejected Sutherland's view of *Munn* and, instead, focused upon the business's effects on the public. *See id.* at 450-51 (Stone, J., dissenting). Stone thought that government intervention in the form of price regulation was appropriate given the gross inequities in the bargaining positions of ticket resellers and most patrons. Unlike Sutherland, Stone sought to balance the public interest in obtaining tickets at fair prices with the private rights of contractual liberty and property. *See id.* at 452 (Stone, J.,

Justice Brandeis similarly believed that Sutherland's use of the common law was inaccurate and inappropriate. In *New State Ice Co. v. Liebmann*, Brandeis's dissent de-emphasized the common law distinction between private businesses and those affected with a public interest.[363] Sutherland invoked this distinction in his majority opinion when he found unconstitutional an Oklahoma law that required entrants into the ice business to show the necessity of their services to the community.[364] Sutherland regarded the ice business as an ordinary one and thus immune from such regulation.[365] In contrast, Brandeis perceived that the manufacture, sale, and distribution of ice was necessary to preserve food and was a valid public health concern.[366] His expansive notion of local police powers recognized the authority of government to regulate a wide spectrum of hitherto private economic activities in the paramount interests of the community.[367] Less concerned with factions than Sutherland, Brandeis was reluctant to adhere to common law principles he regarded as irrelevant. In particular, he noted that Lord Hale, the English jurist who initially set forth the affectation doctrine, never intended to apply it beyond the context of government regulation of wharves and ports.[368] Rather than operating as a principle of general application, the affectation doctrine was initially understood as having no effect upon the authority of government to otherwise regulate prices.[369]

That Sutherland and conservative jurists before him may have misconstrued the common law in no way diminishes their commitment to using it in the service of their anti-factional objectives. Furthermore, it does not alter the perception that Sutherland imbued his constitutional analysis with com-

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dissenting).

[363] *See* 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting).

[364] *See id.* at 277, 279 (Sutherland, J.).

[365] *See id.* at 277-79.

[366] *See id.* at 287-89, 291, 300 (Brandeis, J., dissenting).

[367] *See id.* at 284-87, 300-11 (Brandeis, J., dissenting). Brandeis was much more deferential toward the state legislature than was Sutherland, who primarily viewed the law as impermissible class legislation. Indeed, Brandeis devoted a considerable portion of his dissent to discussion of both the vital importance of ice to the public and the longstanding problems in Oklahoma with its reliable distribution to those least likely to manufacture it themselves. *See id.* at 287-94 (Brandeis, J., dissenting).

[368] *See id.* at 302 & n.43 (Brandeis, J., dissenting).

[369] *See id.* (Brandeis, J., dissenting) (stating that the affectation doctrine as applied by Sutherland "rests upon historical error"). Brandeis, like Stone, rejected a rigid distinction between private and public businesses for purposes of regulation. He explained:

> But so far as concerns the power to regulate, there is no difference in essence, between a business called private and one called a public utility or said to be "affected with a public interest." Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same . . . the police power.

Id. at 302 (Brandeis, J., dissenting).

mon law principles rather than those of laissez-faire economics, Social Darwinism, or natural rights. In fact, on occasion, Sutherland's application of the common law yielded results one would normally associate with the utilitarian jurisprudence of the Court's more "progressive" jurists.[370]

For example, in *Euclid v. Ambler Realty Co.*,[371] Sutherland relied upon the nuisance doctrine to explain the constitutional basis of comprehensive zoning. He reasoned that if the common law permitted the government to abate a nuisance in order to prevent one from using his private property to the detriment of another, then a municipality also should be able to regulate private land use that harmed the public at large.[372] The restriction of industrial development from residential areas pursuant to a law, which by its general terms operated equally on all citizens, did not represent an illegitimate exercise of police powers. As Sutherland understood the zoning provision, it promoted public health and safety in response to long-term changes in demographic and social conditions.[373] These, rather than political expediency, were permissible reasons to enact the ordinance.

2. *History and Constitutional Limitations*

Conservative by nature, Sutherland infused his jurisprudence of economic liberty with historical perspective. His dissent in *Home Building & Loan Ass'n v. Blaisdell*[374] exemplifies his reliance upon the past to interpret the constitutional limits of governmental authority. In *Blaisdell*, the Court sustained the Minnesota Mortgage Moratorium Law as a reasonable exercise of police powers during an economic emergency.[375] Writing for the majority, Chief Justice Hughes eschewed a literal interpretation of the Contract Clause of the United States Constitution for one that balanced the state interest in general economic welfare with private rights.[376] Sutherland, however, used history to explain that the Contract Clause prohibited all state laws that

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[370] For the notion that Brandeis and Stone relied upon principles of utilitarian economics, see RODELL, *supra* note 2, at 227; ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 240-41 (1956).

[371] 272 U.S. 365 (1926).

[372] *See id.* at 387-90, 394-95. "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Id.* at 388.

[373] *See id.* at 386-88, 391-95; *see also* Hadachek v. Sebastian, 239 U.S 394 (1915) (sustaining the regulation of a brickyard on the basis of common law nuisance).

[374] 290 U.S. 398, 448-83 (1934) (Sutherland, J., dissenting).

[375] *See id.* at 445 (Hughes, C.J.).

[376] *See id.* at 439-47. In particular, Hughes 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. For Hughes, "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." *Id.*

impaired the obligation of contracts, and especially those "designed to relieve debtors . . . in time of financial distress."[377]

For Sutherland, the foreclosure crisis in Minnesota was no different than the financial one that precipitated the formation of the Constitution. Noting the severe economic chaos that ensued from the plethora of debtor relief laws after the Revolution, he argued that the constitutional Framers intended to protect contract rights from turbulent democratic majorities and the political factions that controlled them.[378] A mortgage moratorium that impaired the contract rights of mortgagees, therefore, was precisely the type of class legislation that the Contract Clause was meant to prohibit.[379]

From Sutherland's viewpoint, the majority had ignored the historical context of the Contract Clause and thus had altered the original purpose of an important constitutional limitation. Sutherland feared that under Hughes's interpretation, the Contract Clause would become a meaningless provision subject to legislative whims and judicial pragmatism.[380] This particularly troubled Sutherland, and he reminded the Court that unless amended, the meaning of a constitutional provision remains constant.[381] Otherwise, the Constitution would revert into "a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour."[382]

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[377] *Id.* at 453 (quotation), 465 (Sutherland, J., dissenting).

[378] *See id.* at 453-65 (Sutherland, J., dissenting).

[379] *See id.* at 449, 453, 465, 471-72 (Sutherland, J., dissenting). Sutherland perceived no difference between the Depression and previous economic crises that had precipitated debtor relief laws invalidated by the Court. *See id.* at 471 (Sutherland, J., dissenting). Indeed, he believed three cases in particular were controlling, each of which involved legislation enacted in response to a financial crisis. *See* Barnitz v. Beverly, 163 U.S. 118 (1896) (invalidating as an unconstitutional impairment of contract obligations a Kansas law that retroactively extended a mortgage redemption period to eighteen months); Howard v. Bugbee, 65 U.S. (24 How.) 461 (1860) (invalidating as an unconstitutional impairment of contract obligations an Alabama law that permitted a two year mortgage redemption period); Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (invalidating as an unconstitutional impairment of contract obligations an Illinois law that extended a mortgage redemption period for a year). Chief Justice Hughes distinguished *Bronson*, noting that in that case the time period was unconditional, whereas in *Blaisdell*, the mortgagors had to pay rent during the redemption period. *See Blaisdell*, 290 U.S. at 432 (Hughes, C. J.).

[380] *See Blaisdell*, 290 U.S. at 449-53, 465, 472-73 (Sutherland, J., dissenting). Sutherland commented: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Id.* at 483 (Sutherland, J., dissenting).

[381] *See id.* at 449-50 (Sutherland, J., dissenting) (citing Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 426 (1856)).

[382] *Id.* at 450 (Sutherland, J., dissenting).

Primarily concerned with the stability of constitutional principles, Sutherland believed that a written constitution permits flexible application of its provisions consistent with their intended meaning.[383] By its terms, however, the Contract Clause is an absolute limitation upon *all* state laws that impair the obligation of contracts, and for this reason Sutherland argued that the Minnesota law was unconstitutional.[384] To permit the excuse of an economic emergency to expand the scope of state police powers, as Hughes did, would subvert the primacy of the Constitution and threaten the long-term public interest in the sanctity of private contracts.

A sense of history, rather than economic determinism, pervaded Sutherland's dissent. Like conservative jurists before him, he did not invoke constitutional limits to preserve a certain economic order. Sutherland's main objective in *Blaisdell*, as in other economic liberty cases, was to assess the legitimacy of police powers and not the wisdom or merits of legislation.[385] Historical custom and the common law reinforced his commitment to impartial government and enhanced his perception that constitutional limitations existed to restrain the unbridled self-interest of political factions.

C. *Economic Liberty and the Ironies of Sutherland's Jurisprudence*

Sutherland's jurisprudence of economic liberty also reflected his concept of judicial review. Throughout his public career, Sutherland emphasized the critical role of an independent judiciary in preserving the rights of the minority from the tyranny of democratic majorities. Constitutional provisions existed in large part, he thought, to limit government in order to protect individual rights and liberties from incursion by political factions. Through impartial interpretation of its text, Sutherland believed judges were more likely than other public officials to uphold the Constitution and prevent it from becoming an instrument of oppression and civil instability.[386]

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[383] *See id.* at 451 (Sutherland, J., dissenting).

[384] *See id.* at 473, 480-83 (Sutherland, J., dissenting) (arguing that the statute not only modified the contractual remedies of the mortgagee, but also destroyed its underlying contract rights when it denied the mortgagee absolute possession of the property for two years). As a general rule, a state may alter a private contract remedy as long as it does not impair the corresponding contract rights and duties, which comprise the contractual obligations. Initially, this theoretical distinction between contract rights and remedies played an integral role in nineteenth century Contract Clause jurisprudence, but it became less important after the Civil War. *See* Olken, *supra* note 307, at 522-36; *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (sustaining a prospective insolvency law); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating a law that retroactively discharged a debtor from a debt).

[385] *See Blaisdell*, 290 U.S. at 483 (Sutherland, J., dissenting).

[386] *See supra* notes 250-66 and accompanying text.

As a member of the Supreme Court, Sutherland adhered to a conservative judicial tradition hostile toward political factions. Careful scrutiny of governmental action was therefore considered an essential prerogative in a limited democracy. In this regard, he insisted that economic regulation bear a substantial relationship to public safety, health, morals, or welfare. During his later years as a Supreme Court Justice, however, the Court adopted a more deferential approach in economic substantive due process as it explicitly recognized the public interest in private contracts. Sutherland believed that in balancing public authority and private rights to determine the scope of state police powers, the Court had allowed political expediency to diminish its essential function. Dismayed that the Court had begun to sustain the types of laws it earlier would have invalidated as illegitimate class legislation, Sutherland implored his colleagues not to abdicate their constitutional authority. Ultimately, it was for these reasons—not the protection of property rights for their own sake—that he dissented in *Blaisdell* and *West Coast Hotel.*

In particular, Sutherland was troubled by the Court's willingness to reexamine precedent because of changed economic circumstances.[387] In *West Coast Hotel,* Sutherland reminded his colleagues that "the meaning of the Constitution does not change with the ebb and flow of economic events."[388] Three years earlier, Sutherland had made a similar observation in *Blaisdell* when he argued that, notwithstanding the Depression, the Contract Clause prohibited any state law that impaired the obligation of a contract.[389]

Like his mentor Thomas Cooley, Sutherland believed that a written constitution provided the stability necessary to preserve individual rights in a democratic republic.[390] While he understood that the provisions of a constitution were subject to amendment, he considered it inappropriate for judges to alter the meaning of constitutional principles through "the guise of interpretation."[391] Equal operation of the law, therefore, required judges to pursue impartial analysis and thus refrain from becoming the instruments of social or economic policy.[392] Relatively early in his judicial tenure

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[387] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting). Chief Justice Hughes invoked the notion of changed economic conditions as a rationale for the Court to re-examine the viability of *Adkins v. Children's Hospital* and its narrow restriction upon state police powers in the liberty of contract context. *See id.* at 388-90 (Hughes, C.J.). Hughes emphasized "that freedom of contract is a qualified and not an absolute right." *Id.* at 392 (quoting Chicago, B. & Q. R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911)).

[388] *Id.* at 402 (Sutherland, J., dissenting); *see also Blaisdell,* 290 U.S. at 450-51 (Sutherland, J., dissenting).

[389] *See Blaisdell,* 290 U.S. at 473 (Sutherland, J., dissenting).

[390] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 54.

[391] *West Coast Hotel,* 300 U.S. at 404 (Sutherland, J., dissenting).

[392] *See* Sutherland, *The Law and the People, supra* note 177, at 8 (contending that

Sutherland noted that "[c]onstitutional principles, applied as they are written . . . operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice."[393] Sutherland feared that once judges subordinated the intended meaning of constitutional provisions to the exigent demands of public imperative they would compromise their critical role in the constitutional system. Years before he joined the Court, Sutherland expressed this concern when he commented that:

> To suggest that the court must construe the Constitution in accordance with the popular will, or that judicial decisions should be subject to be overruled by popular opinion . . . is simply to advocate a method by which the *rights* of the minority shall be subordinate to the *will* of those who for the time being predominate in numbers.[394]

From this perspective, Sutherland objected to the methodology Chief Justice Hughes employed in a series of cases that transformed the standard of judicial review in economic substantive due process from one of strict scrutiny to rational basis.[395]

Sutherland differed from several members of the Hughes court in his conception of the judicial function. Whereas Hughes, Brandeis, Cardozo, and Stone openly acknowledged that judicial decision making incorporated elements of social and economic policy,[396] Sutherland and his fellow dissenters rejected this premise. As Sutherland explained in 1913, before he joined the Court, "in construing law, the judge has nothing to do with consequences, he must enforce the law as he finds it."[397] Judges declared the law, they did not make it, and their principal task in a constitutional democracy was to decide questions of power to prevent intemperate action by democratic majorities.[398]

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recall of judicial decisions and judges would introduce political and social expediency into the judicial process and threaten the stability of legal and constitutional principles).

[393] Tyson and Brother v. Banton, 273 U.S. 418, 445 (1927).

[394] Sutherland, *What Shall We Do With the Constitution?*, *supra* note 225, at 3.

[395] *See, e.g.*, *West Coast Hotel*, 300 U.S. at 411 (Sutherland, J., dissenting); Nebbia v. New York, 291 U.S. 502 (1934) (McReynolds, J., dissenting) (Sutherland, J., joining).

[396] *See generally* New State Ice Co. v. Liebmann, 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting) (applying utilitarian economics); *Tyson*, 273 U.S. at 447-54 (Stone, J., dissenting) (applying utilitarian economics); *see also* MASON, HARLAN FISKE STONE, *supra* note 370, at 240-41; RODELL, *supra* note 2, at 227 (discussing Brandeis's attempt to read his own economic views into the Constitution).

[397] Sutherland, *The Law and the People*, *supra* note 177, at 8.

[398] 49 CONG. REC. 2903, 2911 (1913) (statement of Sen. Sutherland).

Sutherland's deep regard for the Constitution made him increasingly anxious about the nature of judicial review in his last years on the Court. He thought that departure from precedent and pragmatic constitutional interpretation delegitimized the judiciary. His dissenting opinions emanated from a strong sense of duty and resonated with long held convictions about the primacy of constitutional limitations.[399] As early as 1913, Sutherland expressed concern about manipulating the Constitution to attain short term objectives. In a speech before the Senate, he warned "that if we violate the Constitution in order to bring about a good result, or what we fancy to be a good result, we have opened the door of opportunity for future violations where the result may be neither good nor wise."[400]

Not surprisingly, Sutherland expressed his disagreement with the Court's decisions to sustain the Minnesota mortgage moratorium and the Washington state minimum wage regulation. In a passage often misunderstood by those who attribute to Sutherland a reactionary judicial activism, he explained, in part, his reluctance to join the Court's opinion in *West Coast Hotel*:

> Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.[401]

Sutherland's convictions were not those of an adherent of laissez-faire economics or of Social Darwinism—motives often attributed to his jurisprudence. His progressive views about workmen's compensation and tolerance of laws regulating the conditions of labor belied any sort of commitment to unrestricted individualism.[402] Moreover, the conservative judicial tradition he followed cared little about theories of economic efficiency, and Sutherland consciously avoided them as a basis of ascertaining the scope of police powers.[403] To the extent that Sutherland opposed economic regula-

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[399] *See, e.g., West Coast Hotel*, 300 U.S. at 401-03 (1937) (Sutherland, J., dissenting); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting).

[400] 49 CONG. REC. 2903, 2911 (1913) (statement of Sen. Sutherland).

[401] *West Coast Hotel*, 300 U.S. at 402 (Sutherland, J., dissenting).

[402] *See* Letter to Samuel Gompers, *supra* note 167, at 1-3; Letter from Samuel Gompers to O. E. Asbridge 1-2 (June 30, 1916) (noting Sutherland's extensive support for many kinds of labor reform laws) (transcript available in the Sutherland Papers at the Library of Congress).

[403] *See supra* notes 128-30, 132-34 and accompanying text.

tion, he did so because, notwithstanding its ameliorative purpose, it created arbitrary distinctions that advantaged some but not others in ways tenuously connected to the long-term interests of the entire community.

Sutherland's jurisprudence of economic liberty also was not influenced significantly by natural rights. Few jurists relied extensively upon natural rights after the Civil War because their illusory nature and highly abstract qualities diminished their utility as a basis for ascertaining the precise limits of government.[404] Instead, common law and historical custom primarily shaped the contours of constitutional jurisprudence.[405] Thomas Cooley, Sutherland's law teacher at Michigan and probably the jurist who most influenced him, explicitly rejected the use of natural rights as a constitutional norm even though he acknowledged their initial importance in the American historical experience.[406] Sutherland at times may have invoked the rhetoric of natural rights, but this does not mean that his was a jurisprudence of natural rights. He dissented from the Court's opinions in *Blaisdell* and *West Coast Hotel* because he believed the Court had abandoned its commitment to the determination of the limits of local economic regulation on the neutral grounds of factional aversion.

Nevertheless, Sutherland's unfledging commitment to equal operation of the law exposed serious flaws in his jurisprudence of economic liberty. The conservative judicial tradition, to which Sutherland faithfully adhered, reflected notions of democracy and economic liberty rendered somewhat obsolete by the tremendous changes in industrial society after the Civil War. It assumed that partial laws enacted for the benefit of some groups but not others signified impermissible class legislation inimical to the long-term public welfare.[407] Jurists like Thomas Cooley extolled the virtues of equal opportunity and perceived the basis of a thriving democracy to be in contractual freedom and the right to property. Economic liberty, however, did not exist in a meaningful sense for many people by the end of the nineteenth century. By the time Sutherland joined the Court in 1922, there was a considerable discrepancy between those few who enjoyed significant economic power and the vast majority for whom government intervention in the

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[404] *See* Nelson, *supra* note 11, at 548-50; Siegel, *Historism*, *supra* note 11; Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-65.

[405] *See* COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 87, at 22, 59-61; Jones, *supra* note 12, at 757-59 (discussing Cooley); Siegel, *Historism*, *supra* note 11, at 1492-1515 (discussing Cooley's constitutional jurisprudence); Siegel, Lochner *Era Jurisprudence*, *supra* note 1, at 63-65, 78-80 & n. 398, 82-90 (discussing preeminence of historism and common law).

[406] *See* Jones, *supra* note 12, at 760-63; Siegel, *Historism*, *supra* note 11, at 1492-1515.

[407] *See generally* GILLMAN, *supra* note 12; Benedict, *supra* note 12, at 298, 316-20, 323, 328-31.

industrial economy had become a necessary means of restoring widespread economic opportunity.

In large part, Sutherland distinguished between law and politics when he invoked constitutional limits to protect property rights from democratic majorities. Yet in using judicial review as a means of restraining political factions that he thought manipulated the democratic process for their own selfish ends, he neglected to consider that the invalidation of some types of local economic regulation actually preserved the status quo in ways detrimental to the public welfare, given inequities in the bargaining process and the sad realities of industrial life.[408] In particular, Sutherland failed to realize that in some instances judicial aversion to factions perpetuated unequal economic power and limited the efficacy of the political process to broaden economic opportunity through legislative reform.[409]

Sutherland's dissent in *Blaisdell* exemplifies the limits of his jurisprudence. Sutherland construed the Minnesota mortgage moratorium as a partial law enacted for the benefit of one class of debtors that impaired the private contract rights of mortgagees.[410] As Chief Justice Hughes explained, however: "The 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."[411] Sutherland, preoccupied with the ideal of neutral government, simply did not consider that the literal enforcement of a mortgage contract actually might exacerbate social and economic unrest during a recession and thus jeopardize the long-term interests of the community.[412]

Moreover, Sutherland's reliance upon historical experience and the common law as constitutional norms occasionally obscured his understanding of the context of issues before him on the Court. For example, Sutherland

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[408] *See* GILLMAN, *supra* note 12, at 136-37, 148, 152-53, 176-77, 203; Charles Grove Haines, *Minimum Wage Act for District of Columbia Unconstitutional*, 58 AM. U. L. REV. 581, 592 (1924); Pound, *Liberty of Contract*, *supra* note 120, *passim*; Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-1930* pt. 7, 18 VA. L. REV. 379, 400 (1932); Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545 (1924).

[409] Jennifer Nedelsky discusses this concept in the context of her analysis of private property and the Constitution's Framers. *See* NEDELSKY, *supra* note 15, at 1-3, 7, 159, 199, 205-06. Nedelsky says *Lochner* era court opinions invalidating state laws were consistent with the "Federalists' vision of constitutionalism." *Id.* at 228; *see also* GILLMAN, *supra* note 12, at 136-37, 148, 152-53, 176-77, 203 (discussing the inequities in the bargaining process of the late nineteenth and early twentieth centuries).

[410] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 472, 480-83 (1934) (Sutherland, J., dissenting).

[411] *Id.* at 435 (Hughes, C.J.).

[412] *See* Olken, *supra* note 307, at 597-98.

incorrectly concluded that mortgage moratoria and minimum wage regulations of the twentieth century were identical in both form and effect to the debtor relief and currency measures that precipitated this country's economic crisis after the Revolution. In fact, many Depression era economic regulations were enacted to alleviate harsh conditions that occurred in the absence of government action and to enhance economic opportunity for most of the public. Redistribution of resources was not the final objective. In contrast, much of the post-Revolutionary economic regulation reflected conscious attempts by political factions of debtors to disadvantage creditors. Financial chaos ensued precisely because of partial legislation.[413] Sutherland unfortunately overlooked this subtle difference and thus misunderstood both the intent and the effect of some laws.

The irony of Sutherland's economic liberty jurisprudence was its myopia. Its focus on political factions and emphasis upon equal operation of the law sometimes blinded Sutherland to the economic realities of twentieth century industrial society. This, in turn, contributed to the notion that Sutherland's was essentially a jurisprudence of laissez-faire economics or Social Darwinism.[414] Sutherland, however, invoked freedom of contract not to protect the interests of an economic elite, but, rather, as a constitutional paradigm for liberty of all kinds in a democratic republic.[415] He consciously avoided reading a particular socio-economic order into the Constitution and remained critical of judges who assessed the wisdom of the law on this basis. Unable to detect the inherent limits of his economic liberty jurisprudence, Sutherland clung to its fundamental tenets in the face of intense criticism and thus unwittingly fostered misconceptions about his judicial motivations that persist today. Ironically, it was the consistency of his factional aversion that underscored both his greatest strengths and most significant weaknesses as a jurist.

CONCLUSION

Few Supreme Court Justices have been so misunderstood as George Sutherland, whose reputation in the area of economic liberty has suffered because of the persistent, but incorrect, notion that his was a jurisprudence that used principles of laissez-faire economics and Social Darwinism to pro-

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[413] *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 45-46 (1969); NEDELSKY, *supra* note 15, at 228 (differentiating early twentieth century industrial and economic reform laws from late eighteenth century redistributive laws).

[414] *See, e.g.*, Haines, *supra* note 408, at 592; PASCHAL, SUTHERLAND: A MAN AGAINST THE STATE, *supra* note 10, *passim*; Powell, *The Judiciality of Minimum Wage Legislation*, *supra* note 154, at 555-56, 560, 572-73.

[415] Jennifer Nedelsky discusses this concept in her analysis of property and the Constitution's Framers. *See* NEDELSKY, *supra* note 15, at 1, 6, 23-25, 32, 38, 153, 204, 206-08; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932).

mote the interests of an economic elite. In large part, misconceptions about Sutherland derive from the perceptions that popular mythology has assigned to the conservative judicial tradition to which he belonged and whose fundamental tenets he invoked unsuccessfully as the Court transformed economic substantive due process in the 1930s. Indeed, recent historiography about late nineteenth and early twentieth century police powers jurisprudence suggests that, for *Lochner* era judges, the appropriate limits of local economic regulation emanated from longstanding concerns about the vulnerability of individual rights in a democratic republic. Aversion to political factions and a passionate commitment to equal operation of the law informed judicial decision making. Jurists interpreted constitutional restrictions upon governmental authority through historical custom and the common law, rather than socio-economic theory or abstract notions of natural law, and sought to prevent the tyranny of democratic majorities controlled by the self-interest of political factions.

From this altered perspective, Sutherland's jurisprudence of economic liberty assumes an altogether different meaning. In addition, a strong consistency emerges between Sutherland's relatively progressive views about workplace conditions and women's suffrage before he came onto the Court and the distinctions he drew between various kinds of economic regulation as a Supreme Court Justice. For these reasons, the common pejorative views of Sutherland oversimplify his motives and ignore the precise historical context of his thought. Throughout his public career, Sutherland believed that the self-interest of political factions threatened the long-term public welfare. To this extent, he regarded economic regulation that benefited one group at the expense of another as illegitimate class legislation. He did not, however, oppose neutral government action that advanced the interests of the entire community. Both before and after he got onto the Court, Sutherland supported regulations of conditions of labor, workmen's compensation measures, and women's suffrage. Conversely, Sutherland thought that laws that prescribed prices and wages or restricted entry into business were arbitrary and unreasonable.

Sutherland adhered to the rigid categories of *Lochner* era police powers jurisprudence because he mistakenly construed industrial conditions of the early twentieth century as no different from those of the past. His inherent conservatism made him skeptical of abrupt change pursuant to the claim of public imperative. Sutherland's error was his inability to perceive how the anti-factional tradition upon which he relied embodied insular assumptions about law and democracy rendered largely untenable by the Depression. Convinced that an independent judiciary must use impartial means to interpret constitutional limits of government, Sutherland never understood that the antidemocratic nature of judicial review at times reinforced unequal economic power. Therein lies the ultimate irony of Justice George Sutherland's jurisprudence.