

1996

## An Unsuccessful Attempt to Restore Justice George Sutherland's Tarnished Reputation: A Review Essay

Gary C. Leedes  
*University of Richmond*

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Judges Commons](#)

---

### Recommended Citation

Gary C. Leedes, *An Unsuccessful Attempt to Restore Justice George Sutherland's Tarnished Reputation: A Review Essay*, 30 U. Rich. L. Rev. 815 (1996).

Available at: <http://scholarship.richmond.edu/lawreview/vol30/iss3/5>

This Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# AN UNSUCCESSFUL ATTEMPT TO RESTORE JUSTICE GEORGE SUTHERLAND'S TARNISHED REPUTATION: A REVIEW ESSAY

Gary C. Leedes\*

## I. SUCCESS AND MODERATION

Justice George Sutherland (1862-1942) is the subject and hero of Professor Hadley Arkes's laudatory new biography.<sup>1</sup> Arkes portrays Sutherland as a judge "who had found the ground of [his] jurisprudence in 'natural rights.'"<sup>2</sup> Although history has not treated the Justice kindly, Arkes attempts to reverse history's verdict.

Sutherland was an intelligent jurist who agreed with the following classical liberal assertions:

(1) individuals own their bodies and minds and, by extension, they own the products of their work: property and income;

(2) a nation's prosperity in the long run will be enhanced if individuals are free to acquire as much wealth as they can honestly get;

(3) freedom of contract, a fundamental right, should not be restricted by lawmakers who cannot possibly know or take into account each economic actor's preferences, needs, and unique circumstances;

(4) the government's primary role is to protect the nation from foreign and domestic enemies, and to secure each individual's autonomy and property against nuisances, torts and common law crimes.

---

\* Professor of Law, The T.C. Williams School of Law, University of Richmond; B.S.E., 1960, University of Pennsylvania; LL.B., 1962, Temple Law School; LL.M., 1973, Harvard Law School; S.J.D., 1984, Harvard Law School. I thank Professor Greg Sergienko and Jeff Millican for helpful comments that improved an earlier draft.

1. HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994).

2. *Id.* at ix.

Sutherland believed that the common weal is served best if the Court provides individuals with maximum protection against the government's power.<sup>3</sup> His beliefs were embodied in several opinions he wrote as a Supreme Court Justice. For example, he wrote:

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.<sup>4</sup>

Sutherland's convictions should not be viewed as mere personal predilections according to Professor Arkes, who suggests that Sutherland understood the Constitution's provisions in light of extra-textual "natural rights" [that are] bound up with certain 'self-evident' moral 'truths.'"<sup>5</sup>

I am not convinced that Sutherland had access to immutable moral truth, but he did have definite ideas about good government and he communicated his ideas with precision and clarity. He brought to the Court's "deliberations learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness. . . ."<sup>6</sup> For most of his career, he was both principled and judicious. Before he retired, however, he became dogmatic and injudicious, and he was accordingly criticized.

When the Great Depression arrived in the 1930s, Sutherland was known to be a Justice who wanted to take the nation back to the horse and buggy days. In fact, he was born in England during the horse and buggy era. He arrived in the United States in 1864 when he was about eighteen months old, when his father, then a Mormon, migrated to Utah. Years later,

---

3. In an earlier biography, Sutherland has been accurately described as a "Man Against the State." See generally JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 239 (1951). In many ways, I found Paschal's biography more balanced, better written and more informative than Arkes's apologia for Sutherland.

4. *Adkins v. Children's Hospital*, 261 U.S. 525, 561 (1923).

5. ARKES, *supra* note 1, at 9.

6. 303 U.S. vi (1938) (Letter from Justice Sutherland's colleagues on the Court following their notification of his retirement).

Sutherland commented that he was tempted to think of himself as a "pioneer."<sup>7</sup>

Sutherland attended Brigham Young University, an institution that distributed Mormon texts advancing the idea that the Constitution was divinely inspired.<sup>8</sup> Although Sutherland was not a Mormon, his psyche was indelibly influenced by Utah's religious environment. It shaped his view that human beings *sui juris* are moral agents with free will and the capacity to govern themselves largely without help from or supervision by the government. As an adult, Sutherland consistently adhered to the so-called Protestant work ethic, and he used his high office to proclaim that Americans were "a Christian people."<sup>9</sup>

Sutherland attended the University of Michigan Law School for one term in 1882. On the faculty teaching constitutional law were Judges Thomas M. Cooley and James V. Campbell, both of whom believed that a censorial judiciary is necessary because the Constitution's limitations on lawmakers are not self-executing and because officials who enact and enforce laws often exceed their department's limited powers.<sup>10</sup>

Sutherland returned to Utah in 1883 to practice law. He became a successful attorney, a popular public speaker, and he served in the Utah Senate from 1896 to 1900.<sup>11</sup> During this period, he actively supported the enactment of a law limiting the maximum number of hours employees could work in underground mines. Sutherland's individualism was moderated by the maxim *sic utere tuo ut alienum non laedas* (roughly, use your own property without causing injury to others).

During his legislative career, Sutherland occasionally was willing to permit the government to interfere with free trade. For example, when he served in the United States House of Representatives from 1901 to 1903, Sutherland fought to obtain a tariff to protect Utah's sugar crop.<sup>12</sup> He defended his protectionism by arguing that tariffs "make production profitable

---

7. PASCHAL, *supra* note 3, at 4.

8. *Id.* at 5-6.

9. *United States v. MacIntosh*, 283 U.S. 605, 625 (1931).

10. PASCHAL, *supra* note 3, at 15-16.

11. *Id.* at 20-37.

12. *Id.* at 41.

thereby creating a demand for labor."<sup>13</sup> Sutherland dipped into the pork barrel to obtain direct federal financial aid for the construction of reservoirs in Utah.<sup>14</sup> He also obtained federal money in the form of a bounty for Utah's sugar producers. During this period, he was not yet fanatically opposed to paternalism.

As a United States Senator from 1905 to 1917, Sutherland yielded, with some misgiving, to several of the Progressive movement's demands. For example, he supported the Pure Food and Drugs Act,<sup>15</sup> the Seaman's Act of 1915,<sup>16</sup> the Federal Employers' Liability Act<sup>17</sup> (a strict liability workmens' compensation statute for some employees engaged in interstate commerce), and legislation establishing the Children's Bureau.<sup>18</sup> During this period of his career, he was aiming for an eventual appointment to the Supreme Court and, perhaps, as one of his biographers speculated, he was attempting to allay the fears of influential people who believed that he was incapable of interpreting the Constitution impartially.<sup>19</sup> In any event, Sutherland attempted to find "a middle way" that reconciled his preferences for a limited government with the "popular aspirations of the period."<sup>20</sup>

In 1915, he introduced the woman's suffrage amendment to the Constitution. His strong support for women's suffrage and gender equality was based on sincerely held moral convictions. During Sutherland's two terms in the Senate, he was a major contributor to reforms improving the administration of justice. He was an active member of the Foreign Relations Committee. His experience on the committee eventually led him to conclude that the President has inherent powers. His conception that the

---

13. *Id.* at 82.

14. *Id.* at 41-44.

15. Pure Food and Drugs Act, ch. 3915, 34 Stat. 768 (1906) (codified as amended in scattered sections of U.S.C.).

16. Seaman's Act, ch. 153, 38 Stat. 1164 (1915) (codified as amended in scattered sections of 22, 33, & 46 U.S.C.).

17. Employers' Liability Act, ch. 3073, 34 Stat. 232 (1906) (codified as amended in scattered sections of 45 U.S.C.).

18. Children's Bureau Act, ch. 73, 37 Stat. 79 (1912) (current version at 42 U.S.C. § 191 (1991)).

19. PASCHAL, *supra* note 3, at 64.

20. *Id.* at 56.

President has extra-constitutional functions in foreign affairs became the supreme law of the land many years later when he wrote a well-received and enduring landmark opinion in *United States v. Curtiss-Wright Export Corp.*<sup>21</sup> *Curtiss-Wright* clearly indicates that Sutherland was not wedded to the Constitution *as written*.

Sutherland vigorously opposed the federal income tax on constitutional and philosophical grounds, and his leadership in the Senate on that issue endeared him to President Taft. He became a nationally known public figure. Nevertheless, Sutherland was not re-elected to the Senate for a third term. Following his electoral defeat, he practiced law in Washington D.C. His influence and leadership as a public figure continued unabated. After only one year of membership in the American Bar Association, he was elected its president.

Sutherland devised a successful strategy that helped Warren G. Harding become President of the United States. In 1921, Harding appointed him chairman of the Advisory Committee to the American Delegation to the Washington Conference on the Limitation of Armaments. He performed other official duties at Harding's request. At this stage of his distinguished career, nearly everyone recognized that Sutherland was a brilliant jurist, politically savvy, scholarly, well-connected and well liked. Sutherland, at age sixty, became Harding's nominee for the Supreme Court on September 5, 1922. There were no calls for confirmation hearings or Senate debates. His nomination was immediately approved by acclamation. Newspaper editorialists regarded him as "eminently fit."<sup>22</sup> By the time he retired in 1938, he had written over 350 opinions.

One of Sutherland's best opinions for the Court is *Powell v. Alabama*.<sup>23</sup> The Court overturned the rape convictions of three young black men who were found guilty of raping white girls (then a capital offense in Alabama). Sutherland pointed out that the black men were not "afforded a fair opportunity to

---

21. 299 U.S. 304 (1936) (outlining the extra constitutional powers of the President in foreign relations); see also *United States v. Belmont*, 301 U.S. 324 (1937) (supporting the President's power to enter into executive agreements).

22. PASCHAL, *supra* note 3, at 114.

23. 287 U.S. 45 (1932).

secure counsel of [their] own choice."<sup>24</sup> He concluded that Alabama's criminal justice system denied them due process of law because "[t]o hold otherwise would be to ignore the fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government. . . .'"<sup>25</sup> To buttress his opinion, Sutherland cited his intellectual role model, Thomas Cooley, who had written, "[w]ith us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel."<sup>26</sup> *Powell v. Alabama* discloses that Sutherland's spectrum of individualistic values was not narrowly economic in nature.

Sutherland was a stickler for procedural due process, a trait that often irked the New Deal supporters of reform-minded administrative agencies. In *Jones v. SEC*,<sup>27</sup> the Court nullified a subpoena *duces tecum* on the ground that the Securities and Exchange Commission engaged in a fishing expedition. Sutherland's opinion refers *inter alia* to immunities honored by Parliament and the common law since 1640. He compared the Commission's "odious" investigation with the "intolerable abuses of the Star Chamber."<sup>28</sup> His eloquent opinion contains wonderful language that strikes the intellect and appeals to the heart. Quoting Justice Bradley, he wrote, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and [guard] against any stealthy encroachments thereon. Their motto should be *obsta principiis*"<sup>29</sup> (i.e., withstand beginnings). He added that "[e]ven the shortest step in the direction of curtailing one of these rights [of individuals] must be halted in limine, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others."<sup>30</sup> Sutherland's rhetoric was too excessive for Justice Cardozo, who dissented. The Court's opinion, in Cardozo's words, was flawed by "denunciatory fervor," and "hyperbole."<sup>31</sup> Sutherland, howev-

---

24. *Id.* at 53.

25. *Id.* at 71 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

26. *Id.* at 70 (citing 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 700 (8th ed. 1927)).

27. 298 U.S. 1 (1936).

28. *Id.* at 28.

29. *Id.* at 24 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

30. *Id.* at 28.

31. *Id.* at 33 (Cardozo, J., dissenting).

er, recognized prophetically what has occurred in recent years, namely the steady chipping away of the Fourth and Fifth Amendments' underlying principles and guarantees.

Sutherland's masterful opinion in *Euclid v. Ambler Realty*<sup>32</sup> is admired by liberals<sup>33</sup> and viewed as "unfortunate" by many conservatives.<sup>34</sup> Many scholars are puzzled by Sutherland's unexpected deference to the local legislature's judgment. Sutherland, however, noticed a conceptual link between the zoning ordinance under consideration and the common law of nuisance. Accordingly, he deferred to the legislative judgment that some land uses, depending on their location, could become nuisances that violate the maxim *sic utere tuo ut alienum non laedas*.<sup>35</sup> *Euclid* demonstrates that Sutherland's premises enabled him to act at times not as the foe of progress but as its proponent.

## II. OBSTINANCY AND FAILURE

In cases involving economic liberties, Sutherland often abandoned the canons of judicial restraint. Arkes claims that "liberals and conservatives recoil from the jurisprudence of Sutherland [because they] [b]oth fear the claims of moral truth."<sup>36</sup> Arkes's feisty presentation of this claim betrays his own entrenched metaphysical beliefs. Arkes apparently fails to appreciate that it is possible to believe in enduring moral truths and still recoil from Sutherland's jurisprudential preference for a censorious judiciary.

---

32. 272 U.S. 365 (1926).

33. Professor Michael Allan Wolf and many other experts on land use credit Sutherland for writing a superb opinion that requires judges to give state and local officials due deference when causes of action are brought by individuals who challenge the facial validity of land use and environmental restrictions. See Michael Allan Wolf, *George Sutherland*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 449 (1994) (Melvin I. Urofsky ed., 1994), see also Michael Allan Wolf, *The Pre-science and Centrality of Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM* 252 (Charles M. Haar & Jerold S. Kayden eds., 1989).

34. See, e.g., Steven J. Eagle, *Bookshelf: The Father of Natural Rights*, *WALL ST. J.*, Jan. 5, 1995, at A12.

35. Wolf, *George Sutherland*, *supra* note 33, at 450.

36. ARKES, *supra* note 1, at 284.

Sutherland believed that, at times, the Constitution may be cast aside "as a parchment without significance."<sup>37</sup> He saw applicable principles of law "behind the form and structure of the Constitution."<sup>38</sup> In addition to the Constitution itself and his oath to support it, he was constrained only by "his own conscientious and informed convictions."<sup>39</sup> To discover the sources of his informed convictions, one must turn again to his early experiences in life, his education, and his political career.

"Laissez-faire ideology was an important part of the religious individualism and self-determination that [had] developed in America"<sup>40</sup> when Sutherland was an impressionable youth. During that period of his life, many educators and opinion leaders believed that cooperative ventures between individuals are better left to private ordering than to public control. Ideals of economic liberty meshed well with the average Utah citizen's enduring distrust of political power.

After graduating from Brigham Young University, Sutherland was receptive to the paradigm of constitutional law taught by the constitutional law professors at the University of Michigan Law School. Professors James V. Campbell and Thomas M. Cooley "suffered no epistemological doubts when they made the rudimentary point that the purpose of the Constitution was to protect its citizens from the 'arbitrary' uses of political power."<sup>41</sup> Both jurists believed "that it was possible to make distinctions between the 'arbitrary' and the 'plausible' uses of legislation."<sup>42</sup> An essential element in Cooley's constellation of thought was the idea that property is "sacredly protected by the Constitution."<sup>43</sup> Sutherland never concealed his intellectual debt to this influential jurist.

---

37. *Id.* at 286.

38. *Id.* at 287.

39. *West Coast Hotel v. Parrish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

40. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* at 74 (1991). Free trade principles, of course, were also influential in Scotland, the land of Sutherland's father's birth. The tradition of Scottish Realism, which includes Adam Smith and many other political economists during the Scottish Enlightenment, influenced generations of American intellectuals and jurists. *See id.* at 76.

41. ARKES, *supra* note 1, at 43.

42. *Id.*

43. HOVENKAMP, *supra* note 40, at 69 (quoting Thomas M. Cooley, *Limits to State Control of Private Business*, 1 PRINCETON REV. (SER.4) 233, 271 (1878)).

Cooley's treatise<sup>44</sup> "probably contributed more to substantive due process doctrine than any other volume."<sup>45</sup> But substantive due process is an indeterminate notion. How does a judge determine its scope? Cooley relied on state court cases to find the governing principles of fundamental fairness. His treatise and articles taught Sutherland to see the important relationships between constitutional law and the "grand old common law."<sup>46</sup> According to Cooley, common law principles can be used as trump cards to invalidate legislation.<sup>47</sup> Cooley's theory seems to disregard the usual assumption that statutes supersede case rulings. His inversion can be justified, however, if the reasoned case rulings of the common law enable judges to see principles of fundamental fairness beyond the words, form, and structure of the Constitution. Sutherland was persuaded by Cooley's reliance upon the common law's authority and its usefulness as a source of norms that protect the rights of individuals.

By the time Sutherland became involved in politics, scholarly jurists, like Christopher Tiedeman and Francis Wharton,<sup>48</sup> had long stressed the need for a Supreme Court that actively restrained the other departments of government. As the nineteenth century drew to a close, there was a growing familiarity with various versions of Marxism,<sup>49</sup> and state legislatures were responding to voters who wanted to regulate business enterprises that were not advancing the common good. In response,

---

44. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868). The treatise "is generally recognized as the single most influential work in constitutional law in the latter part of the nineteenth century." PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 73 (1992). Cooley tried to "produce a unified, systematic set of principles that are the true basis of constitutional order." *Id.*

45. Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 *YALE L.J.* 2304, 2320 (1995) (Book Review).

46. KAHN, *supra* note 44, at 74 (quoting Thomas M. Cooley, *Limits to State Control of Private Business*, 1 *PRINCETON REV. (SER.4)* 233, 247 (1878)).

47. Professor Barnett has helpfully described the relationships between judge-made common law, judge-made constitutional law, and legislation. See Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 *CONST. COMMENTARY* 93, 117 (1995).

48. See FRANCIS WHARTON, *COMMENTARIES ON LAW* (1884). Wharton's "work contained the most explicit argument in the 1880's legal literature that the Fourteenth Amendment should be used to protect a general, substantive liberty of contract." HOVENKAMP, *supra* note 40, at 95.

49. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 98 (1944).

Tiedeman wrote *Limitations of the Police Power* to "protect private rights against the radical experimentations of social reformers."<sup>50</sup> In his book urging courts to protect freedom, Tiedeman openly expressed his fears of socialism and communism. Others did the same. When Joseph H. Choate argued that an income tax was unconstitutional, he appealed to the Court's "reason" by arguing (hysterically): "The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon [communistic and socialist] principles. . . . [W]e submit that all patriotic Americans must pray that our views shall prevail."<sup>51</sup> His prayer for relief was granted. Subsequently, the Court's income tax decision (praised by Sutherland) was superseded by a duly ratified amendment to the Constitution.<sup>52</sup>

Social Darwinism was popularized by many defenders of capitalism and individualism. Social Darwinism was based loosely on a "survival of the fittest" thesis first espoused by Herbert Spencer as early as 1850—before Darwin published his theory of evolution in 1859.<sup>53</sup> Tiedeman was one of many distinguished popularizers of Spencer's pseudo-scientific doctrine. Perhaps even Cooley was a Spencerian.<sup>54</sup> In any event, by the time Sutherland became a judge, many of his friends and colleagues believed that government-sponsored regulatory and welfare schemes merely delay the inevitable and salutary demise of the weak members of the human species. It is unclear whether Sutherland ever embraced this amoral creed.<sup>55</sup>

It is clear that in the last two decades of his life, Sutherland's conscientious convictions about the government's limited role in the economy remained intact. Indeed, during the Great Depression, he stubbornly dug in his heels and allowed the legislatures little or no leeway when they enacted laws to

---

50. Thomas C. Grey, *Introduction* to CHRISTOPHER TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* at iii (Roy M. Mersky & Myron Jacobson eds., 1974) (1890).

51. *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 532-553, *modified on reh'g*, 158 U.S. 601 (1895). The decision, invalidating the federal income tax, according to Sutherland, corrected "a century of error."

52. U.S. CONST. amend. XVI.

53. CHARLES DARWIN, *THE ORIGIN OF SPECIES* (1928).

54. PASCHAL, *supra* note 3, at 9.

55. HOVENKAMP, *supra* note 40, at 2324, 2324 n.82.

ameliorate the consequences of a malfunctioning economy. As a result, he impeded the implementation of the New Deal and, partly because of President Roosevelt's sardonic critique, Sutherland became an object of ridicule in some quarters.

In retrospect, it is apparent that Sutherland's jurisprudence contains at least four related flaws:

First, Sutherland relied too heavily on backward-looking common law concepts. For example, he believed that the government was only permitted to regulate businesses devoted to the public interest.<sup>56</sup> This notion was championed by Cooley who manipulatively used venerable common law maxims to limit the legislature's power. The doctrine that only a few businesses were devoted to the public interest was perhaps useful during the early days of the industrial revolution, but it was clearly anachronistic by the 1930s. Indeed, the common law often moves too incrementally to cope with the complexities of a rapidly changing economy. Unlike Sutherland, the modern Court realizes correctly that no commercial enterprise open to the public is per se immune from duly enacted laws that restrict economic liberty in order to improve the common weal.

Second, Sutherland relied excessively on the law's artificial reasoning often ignoring the legislature's findings that indicate a real and substantial nexus between means (laws) and ends (permissible legislative objectives). He thereby disregarded Aristotle's common sense caveat: Do not allow formal logic to tempt you to deny experience.<sup>57</sup>

Third, Sutherland mistakenly believed that his effort to preserve the economic status quo was neutral in character. However, the very act of choosing the status quo as an appropriate baseline often unfairly disfavors groups already disadvantaged by existing laws. For example, in cases involving the regulation

---

56. For cases holding that certain types of businesses are immune from state regulation, since they are not devoted to the public interest, see, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Williams v. Standard Oil*, 278 U.S. 235 (1929); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927). The English common law origin of this concept is discussed in *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876).

57. See *THE OXFORD HISTORY OF WESTERN PHILOSOPHY* 33 (Anthony Kenny ed., 1994).

of prices and wages, Sutherland deemed invalid any redistribution of power incompatible with judge-made precepts that created unfair distributions of power and wealth. Sutherland's opposition to economic reforms maintained many existing unfair inequalities. He opposed many reforms on the basis of the four classical liberal assertions referred to earlier in this essay.<sup>58</sup> These assertions are politically controversial. Therefore, Sutherland's approach was hardly neutral unless the word "neutral" is used naively or fecklessly.

As a result of these three related flaws, Sutherland's jurisprudence contains a fourth defect. He thought that he was interpreting the Constitution as a judge should when, in many cases, he was actually making policy judgments legislative in character. Moreover, he became increasingly dogmatic, disingenuous, and result-oriented. A line of cases commencing with *Adkins v. Children's Hospital*,<sup>59</sup> decided in 1923, illustrates his hubris and obstinacy.

The Court held in *Adkins* that a legislatively mandated minimum wage for women unconstitutionally abridges liberty of contract. Sutherland's opinion seemed plausible to many jurists in 1923. He pointed out accurately that "the [minimum wage act's] declared basis . . . is not the *value of the services rendered* but the extraneous circumstances that the employee needs to get a prescribed sum of money to insure her subsistence."<sup>60</sup> Such legislation, in Sutherland's opinion, is akin to taking money from A and giving it to B, even when A's conduct is not a cause of B's indigence. Therefore, Sutherland concluded that the minimum wage law challenged in *Adkins* violates a moral requirement that obligates legislatures not to force employers to pay wages greater than the value of the services rendered by their employees.<sup>61</sup> Whence came this moral requirement? Arkes would have us believe that Sutherland derived it from an eternal moral truth.

To comply with this posited extra-constitutional moral requirement, the New York legislature enacted a minimum wage

---

58. See *supra* part I.

59. 261 U.S. 525 (1923).

60. *Id.* at 558 (emphasis added).

61. *Id.* at 559.

law that required administratively prescribed minimum wages, in various categories of business, to be "fairly and reasonably commensurate with the value of the service or class of service rendered."<sup>62</sup> Despite New York's compliance with the moral requirement insisted upon by Sutherland, the Court in *Morehead v. New York ex rel. Tipaldo*<sup>63</sup> deemed unconstitutional the State's minimum wage law. Chief Justice Hughes's caustic dissent observed that there was "nothing in the Federal Constitution which denies to the state the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute. . . ."<sup>64</sup> Justice Stone's dissent noted "the grim irony is [that the Court is] speaking of the freedom of contract of [employees], who, because of their economic necessities, give their services for less than is needful to keep body and soul together."<sup>65</sup>

In *Morehead*, Justice Sutherland joined the Court's unconvincing opinion which did not discuss forthrightly New York's apparent compliance with the moral requirement Sutherland engrafted in the Constitution. Professor Arkes unfortunately does not discuss this case, perhaps because Sutherland's concurrence indicates that he disingenuously avoided the implications of his prior position in *Adkins*.

Sutherland imprudently underestimated the furor that immediately ensued after *Morehead* was announced. The Republican National Convention disavowed the decision, and the party's platform pledged that the Republican candidate for the presidency would support state minimum wage laws that protect women.<sup>66</sup> Sutherland, however, refused to adapt to the changed political climate; he continued to be "deluded by the notion that the welfare state could be judicially throttled and the brave old world of [his] youth restored."<sup>67</sup>

---

62. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 605 (1936) (citing Section 551(8) of New York's minimum wage law).

63. 298 U.S. 587 (1936).

64. *Id.* at 619 (Hughes, C.J., dissenting).

65. *Id.* at 632 (Stone, J., dissenting).

66. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY 173-74* (1941).

67. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT 167* (1960).

*Adkins* and *Morehead* were overruled in *West Coast Hotel Co. v. Parrish*,<sup>68</sup> when the Court finally rejected a challenge to a minimum wage law. Sutherland's impassioned dissent quotes words penned by the professors who taught at the law school he attended. Relying on Professor Campbell, Sutherland wrote that the Constitution cannot be changed when "unforeseen emergencies" occur.<sup>69</sup> Quoting Cooley, Sutherland added that "much of the benefit expected from written Constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion."<sup>70</sup>

Professor Arkes, who is extremely critical of the Court's opinion in *West Coast Hotel Co.*, claims that the majority opinion never adequately answered Sutherland's dissent.<sup>71</sup> Perhaps Arkes has a point; on the other hand, the Court and Sutherland did not share the same first principles concerning individualism, the common good or equal justice under law. Indeed, the Court's opinion presupposes that a legislature may protect women employees exploited by owners of sweat shops. Moreover, the Court selected as applicable a moral requirement quite different from the one announced in *Adkins* by Sutherland. According to the Court, "[t]he [charitable and tax-paying community] is not bound to provide what is in effect a subsidy for unconscionable employers."<sup>72</sup>

Whether minimum wage laws are unwise is a controversial political question that depends, in large part, on a legislature's finding of relevant facts. For example, will a mandatory minimum wage harm small businesses? Will it increase unemployment? Will it cause disproportionate harm to laid off persons of color? Will it have inflationary effects on prices? Will it redistribute income in ways that do not benefit the low income group for whose benefit it is intended? Or will a minimum wage law increase purchasing power and help the neediest among the employed? Will it be an incentive for persons to end

---

68. 300 U.S. 379 (1937).

69. *Id.* at 403 (Sutherland, J., dissenting) (quoting *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 139 (1865)).

70. *Id.* at 404 (Sutherland, J., dissenting) (quoting 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927)).

71. ARKES, *supra* note 1, at 141-42.

72. *West Coast Hotel Co.*, 300 U.S. at 399.

their dependency on welfare? The answers to these questions of legislative fact and many other relevant factual questions are not dictated by transcendent natural law or immutable moral truth. A minimum wage law, therefore, should not be deemed unconstitutional if the legislature has made a reasoned judgment based on the evidence simply because judges who oppose the policy option have made a different and perhaps more enlightened judgment.

The abandonment of Sutherland's expansive notion of judicial review in economic liberty cases has resulted in some excessively high costs to businesses, some self-defeating laws, and the proliferation of several administrative agencies running amok. Sutherland's shade will say, "I told you so" when he observes our ailing regulatory/welfare state, which needs a major overhaul. The appropriate forum to argue the need for deregulation, however, is no longer the Court, *pace* Cooley, Sutherland, and Arkes. Therefore, despite the resurgent interest in natural law, Professor Arkes's *apologia* is unlikely to restore the good name of Sutherland whose dogmatic adherence to libertarian nostrums placed the Supreme Court in serious jeopardy in 1937 when Roosevelt threatened to "pack" the Court. In 1938, the nation, by and large, breathed a huge sigh of relief when George Sutherland retired.

### III. CRITIQUE OF ARKES'S APPROACH

Professor Arkes believes that the United States Constitution is morally perfectible and he encourages the Justices of the Supreme Court to act as our nation's moral guardians. Arkes's beliefs in immutable moral truths that are discernible by judges are dangerous—as is unwittingly demonstrated by his study of George Sutherland's record of obstructionism. And Arkes's advocacy of judicial activism is incompatible with the allocation of powers specified in the Constitution. For example, the Constitution permits the enactment of immoral laws, so long as the legislation is within the ambit of the legislature's powers and is not prohibited explicitly or implicitly by the text of the Constitution. To argue, as Arkes does, that every immoral law, which abridges someone's economic liberty, is unconstitutional is to argue for an imperial judiciary.

Throughout his biography of Sutherland, Arkes fails to acknowledge that judges lack the perfect moral compass demanded by his call for unbridled judicial activism. For example, a law that increases the minimum wage can be either defended or attacked on moral grounds. But surely, the average judge is not better qualified than the average citizen to make the right moral judgment.

Recognizing their intellectual limitations, the Justices of the Supreme Court have properly limited the Court's power in many respects. For example, doctrines like standing to sue, abstention doctrines, the political question doctrine, the presumption of constitutionality (except in exceptional situations) and the doctrine of separation of powers limit the judiciary's capacity to interfere with the give and take of politics. Arkes, however, wants judges to be oracles of truth even though Sutherland, his role model, was more often reactionary than right.

My critique of Arkes's jurisprudence is this: it is one thing to believe in immutable truths, it is quite another to trust the moral compass of unelected judges. Arkes is much too trusting, and this is the embarrassing non sequitur of his absurd thesis. On the one hand, he criticizes the Court, and on the other he wants it to grasp more power.