

# JOURNAL OF LEGAL EDUCATION

Volume I

Spring, 1949

Number 3

## THE EDUCATION OF A JUSTICE \*

JOEL FRANCIS PASCHAL †

### I

GEORGE SUTHERLAND was an associate justice of the United States Supreme Court from 1922 to 1938. Even before 1922, James Bryce had described him as "the living voice of the Constitution."<sup>1</sup> Sutherland was indeed the voice of *one* Constitution. While he was on the Court no other justice spoke for the majority in so many great cases.<sup>2</sup> His influence extended to every sphere of government. If the Constitution is what the judges say it is, Sutherland was its chief author during his incumbency. Accordingly, he can be regarded as a representative figure in a sense which is applicable to but few of the justices who have served on the Court. As such he retains a special significance for students

\* This paper is based on material gathered by the author for a forthcoming book on the life of George Sutherland.

† B.A.1935, LL.B.1938, Wake Forest; M.A.1942, Ph.D.1948, Princeton. Research Director, North Carolina Commission for the Improvement of the Administration of Justice.

<sup>1</sup> N. Y. Times, Sept. 10, 1922.

<sup>2</sup> The following cases, to which others could be added, seem sufficient to prove the point: *Massachusetts v. Mellon*, 262 U.S. 447, 43 Sup.Ct. 597, 67 L.Ed. 1078 (1923); *Adkins v. Children's Hospital*, 261 U.S. 525, 43 Sup.Ct. 394, 67 L.Ed. 785 (1923); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 Sup.Ct. 114, 71 L.Ed. 303 (1926); *Tyson and Bro. United Theater Ticket Office v. Banton*, 273 U.S. 418, 47 Sup.Ct. 426, 71 L.Ed. 718 (1927); *Ribnik v. McBride*, 277 U.S. 350, 48 Sup.Ct. 545, 72 L.Ed. 913 (1928); *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 Sup.Ct. 115, 73 L.Ed. 287 (1929); *Liggett Co. v. Baldrige*, 278 U.S. 105, 49 Sup.Ct. 57, 73 L.Ed. 204 (1928); *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 Sup.Ct. 235, 73 L.Ed. 483 (1929); *Macallen Co. v. Massachusetts*, 279 U.S. 620, 49 Sup.Ct. 432, 73 L.Ed. 874 (1929); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 47 Sup.Ct. 522, 71 L.Ed. 916 (1927); *Patton v. United States*, 281 U.S. 276, 50 Sup.Ct. 253, 74 L.Ed. 854 (1930); *Powell v. Alabama*, 287 U.S. 45, 53 Sup.Ct. 55, 77 L.Ed. 158 (1932); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 Sup.Ct. 371, 76 L.Ed. 747 (1932); *Stephenson v. Binford*, 287 U.S. 251, 53 Sup.Ct. 181, 77 L.Ed. 288 (1932); *Colgate v. Harvey*, 296 U.S. 404, 56 Sup.Ct. 252, 80 L.Ed. 299 (1935); *Rathbun v. United States*, 295 U.S. 602, 55 Sup.Ct. 869, 79 L.Ed. 1611 (1935); *Jones v. Securities & Exchange Commission*, 298 U.S. 1, 56 Sup.Ct. 654, 80 L.Ed. 1015 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 Sup.Ct. 855, 80 L.Ed. 1160 (1936); *United States v. Macintosh*, 283 U.S. 605, 51 Sup.Ct. 570, 75 L.Ed. 1302 (1931); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 Sup.Ct. 216, 81 L.Ed. 255 (1936); and *United States v. Belmont*, 301 U.S. 324, 57 Sup.Ct. 758, 81 L.Ed. 1134 (1937).

of constitutional law—and this despite the fact that so much of his constitutional philosophy has been discredited.

For teachers in American law schools, Sutherland is of further significance since he was in large measure the logical product of his formal education. His teachers not only supplied him with the ingredients of the political philosophy which governed his general outlook; they supplied him with specific answers to specific problems. In this, they were certainly exceptional. Despite the familiar platitudes, it is common experience that teachers of creative and lasting influence are all too rarely encountered. How did it happen, then, that Sutherland's teachers exercised such an influence on him?

Basically, I believe, the explanation is dependent on the fact that they had something significant to say on problems of perennial importance. They were men of conviction, with values they believed worth championing. Conviction alone, of course, does not make an effective teacher. Sutherland's teachers were aided also by their comprehension of the meaning of their age in the perspective of history. Their success was almost exactly proportional to this comprehension. They recognized in the emerging industrialism of their day a potent threat to their political philosophy. They did not understand that this philosophy could not, under modern conditions, attain its objective of securing freedom for the individual.

Within the limits of their partial understanding of history, however, theirs was the maximum achievement. They responded with boldness and imagination to the threat posed by the new industrialism. They were not disarmed by the awkward fact that more government seemed a necessity, nor by the Supreme Court's initial disinclination to obstruct the political processes. Instead, they adhered to their faith in the power of ideas. For them, law was dynamic, subject to change and influence if properly approached. Their problem in seeking a change lay, therefore, in selecting from the arguments available to them those which represented significant intellectual currents, not mere surface ripples. Here precisely is the secret of their triumph as teachers. They made the vital distinction; of this the Court's capitulation to their views is proof enough. Even the skeptical must have been shaken by such a performance. For Sutherland—though he was not so thoroughly susceptible as one might suppose—the result was lasting conversion.

## II

George Sutherland was born of British parents at Stoney Stratford in Buckinghamshire, England, on March 25, 1862. The circumstance that he was a native of Great Britain was rendered noteworthy sixty

years later when he was appointed to the Supreme Court of the United States. Only three justices before him, and none for over a hundred years, had been of alien birth.<sup>3</sup> His father, Alexander George Sutherland, was of Scottish descent, belonging to a family which had earlier lived in Edinburgh, and earlier still in the extreme north of Scotland. His mother was Frances Slater, a native of England.<sup>4</sup> Some time in 1862 Alexander Sutherland espoused the faith of the Church of Jesus Christ of Latter Day Saints, and resolved to emigrate with his new family to the Promised Land that Brigham Young had found for the Saints in the Great American Desert. Accordingly, in the summer of 1863, the Sutherlands, aided perhaps by a grant from the Church, abandoned England and traveled some five thousand miles to settle in the little village of Springville, in what is now the state of Utah.<sup>5</sup>

After a short time Alexander renounced his faith in Joseph Smith's revelations, but he made no attempt otherwise to retrace his steps. Instead he pushed on to Montana as a mining prospector. By 1869, however, he was back in Utah, settling for a time in Silver City and later in Provo. His restlessness and the great variety of occupations he pursued suggest that this Sutherland never achieved more than a moderate economic success. Besides being a prospector for minerals, he was, at various times, mining recorder, justice of the peace, postmaster, and practicing attorney.<sup>6</sup> Both parents lived to see their son rise to high place, the father dying in 1911 and the mother in 1920.<sup>7</sup>

The Utah of Sutherland's youth, although it had been the home of the Mormons for two decades, was still a frontier community. Years later, Sutherland confessed that he was tempted to think of himself as

<sup>3</sup> N. Y. Times, Sept. 10, 1922, in a feature story on Sutherland's appointment to the Court. The other justices of foreign birth were James Wilson, who was born in Scotland; James Iredell, who was born in England, and William Paterson, who was born at sea while his English parents were on their way to America. To these, the name of David J. Brewer could be added. He was born in Asia Minor but was the child of American parents. Mr. Justice Frankfurter of the present Court was born in Austria.

<sup>4</sup> Sutherland to Alexander Sutherland (Scotland), Feb. 24, 1937; unpublished biographical memoir on Sutherland by Alan E. Gray, formerly Sutherland's law clerk and now of the San Francisco bar. A copy may be found in the office of the Marshal of the Supreme Court. Mr. Thomas E. Waggaman, the present marshal, informs me that this memoir was read by Sutherland and approved by him as an accurate statement. The letter referred to, as well as all others used in this article, is from a collection kindly made available to me by the Justice's daughter, Mrs. Walter Bloedorn of Washington, D. C., and his grandson, Mr. George Sutherland Elmore of the District of Columbia bar.

<sup>5</sup> Salt Lake Herald-Republican, Jan. 12, 1905, where Sutherland's career up to that time is briefly reviewed. The occasion was his election to the United States Senate.

<sup>6</sup> *Ibid.*

<sup>7</sup> Gray, *supra* note 4, at 4.

a pioneer and added that, if this was not exactly justified, he still could be called a "pio-nearly."<sup>8</sup> His boyhood was, in his words,

a period when life was very simple, but, as I can bear testimony, very hard as measured by present day standards . . . Nobody worried about child labor. The average boy of ten [undoubtedly referring to himself] worked—and often worked very hard . . . He milked, cut and carried in the night's wood, carried swill to the pigs, curried the horses, hoed the corn, guided the plow or, if not, followed it in the task of picking up potatoes which had been upturned, until his young vertebrae approached dislocation and he was ready to consider a bid to surrender his hopes of salvation in exchange for the comfort of a hinge in the small of his back.<sup>9</sup>

Sutherland was not long in acquiring the rudimentary learning available to him. McGuffey's readers and Webster's blueback spelling book marked the uppermost bounds of this discipline, and an ability to recite "The Raven" with "appropriate emphasis and inflection" was the crowning glory.<sup>10</sup> By the time he was twelve, Sutherland began to earn his own living. At that age, he took a job as a clerk in a clothing store in Salt Lake City. Three years later he became an agent of the Wells-Fargo Company, and at the same time held a position in the mining recorder's office. In 1879 he entered the recently established Brigham Young Academy at Provo.<sup>11</sup>

### III

This institution, which later became Brigham Young University, was, of course, an enterprise of the Mormon Church. It was presided over by a man of compelling force, Karl G. Maeser. To him Sutherland was always quick to attribute a decisive influence on his life.<sup>12</sup> Maeser was of German birth and had been converted by Mormon missionaries to Saxony. Except for Brigham Young, he seems to have been the most powerful of the Mormon leaders. After sixty years had intervened, Sutherland described him thus:

Dr. Maeser's knowledge seemed to reach into every field. Of course there were limits; but they were not revealed to me during my course

<sup>8</sup> "The Spirit of Brigham Young University," an address prepared by Sutherland to be read at the commencement exercises of the University on June 4, 1941. It was reprinted in the University publication, *The Messenger*, Vol. 18, No. 10. The reference is to p. 3.

<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> *Id.* at 6. For an account of the influence of the McGuffey readers on American life, see RICHARD D. MOSIER, *MAKING THE AMERICAN MIND: SOCIAL AND MORAL IDEAS IN THE MCGUFFEY READERS* (1947). Mosier pictures the readers as exercising a conservative and nationalist influence.

<sup>11</sup> Gray, *supra* note 4, at 1.

<sup>12</sup> Sutherland to James E. Talmage, Jan. 13, 1927; Sutherland to Reinhard Maeser, Feb. 26, 1923.

at the Academy. That he was an accomplished scholar I knew from the first. But the extent of his learning so grew before my vision as time went on that my constant emotion was one of amazement. I think there were days when I would have taken my oath that if the Rosetta Stone had never been found, nevertheless he could have easily revealed the meaning of the Egyptian hieroglyphics. He spoke with a decided accent; but his mastery of the English language, of English literature, and of the English way of thought, was superb.<sup>13</sup>

Maeser's influence was not merely that of an instructor. "He was," says Sutherland, "a man of such transparent and natural goodness that his students gained not only knowledge, but character which is better than knowledge."<sup>14</sup> The Academy's atmosphere and the tone of its instruction were definitely religious. Indeed, Brigham Young's single command to Maeser at the time of its establishment had been: "I do not want you to attempt even the alphabet or the multiplication table without the spirit of the Lord. That is all."<sup>15</sup> To such an ideal Maeser undoubtedly gave unswerving allegiance, but always in a free and generous spirit. The non-conforming Sutherland was never made to feel that his dissent made the slightest difference in the attention he received or the esteem in which he was held.<sup>16</sup> He carried with him for the remainder of his days a vivid and grateful memory of Maeser, acknowledging always that the immigrant Saint had exerted an influence on his "whole life which can not be exaggerated."<sup>17</sup> Maeser, for his part, admired and respected his pupil. He was often heard to remark that Sutherland's essays were invariably models of excellence, and in later years his friends speculated that no one would have been less surprised or more pleased at his pupil's subsequent success.<sup>18</sup>

A full outline of Sutherland's course of study at Brigham Young is not available. It is certain, however, that among other things Maeser discussed with his students the Constitution of the United States. Years later, Sutherland approvingly recalled his teaching that a divine hand had guided the framers.<sup>19</sup> This was in strict conformity with the official doctrine of the Church. Indeed, Maeser, had available—and doubtless used—the Mormon scriptures to prove his point. Section 101 of the *Doctrine and Covenants* quotes the Deity thus:

<sup>13</sup> *The Spirit of Brigham Young University*, *supra* note 8, at 8.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> J. MARINUS JENSEN, *HISTORY OF PROVO, UTAH* 348 (1924).

<sup>16</sup> *The Spirit of Brigham Young University*, *supra* note 8, at 4.

<sup>17</sup> Sutherland to Reinhard Maeser, Feb. 26, 1923.

<sup>18</sup> *Deseret News*, Sept. 6, 1922.

<sup>19</sup> Sutherland to Mrs. Jeanette A. Hyde, May 28, 1936.

79. Therefore, it is not right that any man should be in bondage one to another.

80. And for this purpose have I established the Constitution of this land, by the hands of wise men whom I raised up unto this very purpose and redeemed the land by the shedding of blood.

There were many other texts which Maeser might have quoted to stimulate in his scholars a reverential feeling for the Constitution. Section 98 of the *Doctrine and Covenants*, for example, contains the following passage:

5. And that law of the land which is constitutional, supporting that principle of freedom in maintaining rights and privileges, belongs to all mankind and is justifiable before me.

6. Therefore, I, the Lord, justify you and your brethren of my church, in befriending that law which is the constitutional law of the land;

7. And as pertaining to law of man, whatsoever is more or less than this cometh of evil.

8. I, the Lord God, make you free, therefore ye are free indeed; and the law also maketh you free.

These verses, as Maeser believed, were transmitted to the Mormon people by means of revelations received by Joseph Smith in the year 1833. Maeser probably also recalled to his students the belief of the Mormons, voiced by Brigham Young, that some day, when the Constitution should be hanging "upon a single thread," the Faithful would rush forth to save it.<sup>20</sup>

It is not mere supposition that the idea of a divinely inspired law which had for its purpose the freedom of man seared itself into the consciousness of George Sutherland, although he himself was not of the Faith. So, too, with the notion of a last-ditch, heroic defense of this law. More than a half-century later, when it seemed to him that the Constitution was under attack as never before, he wrote a Mormon friend that one of his greatest joys had been derived from the Church's adherence to that document. He went on to add:

I can recall, as far back as 1879 and 1880, the words of Professor Maeser, who declared that [the Constitution] was a divinely inspired instrument—as I truly think it is.<sup>21</sup>

Maeser, however much he relied on sacred writings, led his pupils to an acquaintance with other literature as well. A book published by him in 1898, entitled *School and Fireside*, indicates a preoccupation with

<sup>20</sup> THE DISCOURSES OF BRIGHAM YOUNG 553 (1925).

<sup>21</sup> Sutherland to Mrs. Jeanette A. Hyde, May 28, 1936.

philosophic ideas. It reveals him as a thorough-going believer in the individualistic doctrines of the nineteenth century. His acceptance of those doctrines in the realm of educational theory was whole-hearted and specific. "The fundamental principle of occidental education," he wrote, "is the development of individuality." To this principle he attributed all progress in "politics, commerce, industry, art, and learning."<sup>22</sup> While placing high value on the works of John Stuart Mill, he accorded the first place among philosophers to Herbert Spencer. In a lavish tribute, he termed "this great thinker . . . the peer of Plato, Aristotle, Bacon, Newton, Leibnitz, and Kant."<sup>23</sup>

Spencerian notions were so much a part of the intellectual atmosphere of Sutherland's early years that he could not have escaped their influence altogether,<sup>24</sup> and their sponsorship by a revered and seemingly omniscient teacher rendered them irresistible. Moreover, something like a cosmic conspiracy seemed to militate against any later apostasy, for when Sutherland began the study of law at the University of Michigan a few years later, his great teacher, Thomas M. Cooley, was a Spencerian disciple of the highest standing. So too were the oracles of the bench and Sutherland's companions at the bar. In addition, there were pouring from the presses during this period countless other justifications of the master's tenets, the most important of which Sutherland undoubtedly read and absorbed.<sup>25</sup>

Spencer, then, was not only the initial intellectual influence in Sutherland's life but a persisting one. He provided a basic philosophy which served as a celestial guide for Sutherland in his odyssey as lawyer, legislator, and judge. This philosophy embodied two major conceptions, each universal in scope and application: evolution and liberty.<sup>26</sup> Spen-

<sup>22</sup> KARL G. MAESER, *SCHOOL AND FIRESIDE* 32 (1898).

<sup>23</sup> *Id.* at 29.

<sup>24</sup> Spencer's enormous influence in late nineteenth-century America is attested by both Parrington and the Beards. See *MAIN CURRENTS OF AMERICAN THOUGHT* iii, 197-211 (1939), and *THE RISE OF AMERICAN CIVILIZATION* ii, 406ff. (1943). It was also noted by Justice Holmes. "H. Spencer you English never quite do justice to," he wrote Lady Pollock in 1895, "or at least those whom I have talked with do not. He is dull. He writes an ugly uncharming style, his ideals are those of a lower middle class British Philistine. And yet after all abatements I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe." *HOLMES-POLLOCK LETTERS* 57-58 (1941).

<sup>25</sup> Three, which are fairly representative, are: CHRISTOPHER G. TIEDMAN, *TREATISE ON THE LIMITATIONS OF THE POLICE POWERS* (1886); JOHN FORREST DILLON, *LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1894); JOHN RANDOLPH TUCKER, *TREATISE ON THE CONSTITUTION* (1899). In his Senate days, Sutherland often used "Mr. Tucker" to prove a point.

<sup>26</sup> The discussion of Spencer which follows is drawn from his *SOCIAL STATICS AND THE MAN VERSUS THE STATE*. I have also used HUGH ELLIOT, *HERBERT SPENCER* (1917), T. J. C. HEARNshaw, *SOCIAL AND POLITICAL THINKERS OF THE VICTORIAN ERA* (1933), and ERNEST BARKER, *POLITICAL THOUGHT IN ENGLAND FROM HERBERT SPENCER TO THE PRESENT DAY* (1915).

cer believed that man, society, and the state were all results of an immeasurably lengthy growth, and that this process was to be continued to the end of time. The dynamic force was supplied by the principle of adaptation. Spencer held that every organism contains within itself an undeniable impulse urging the establishment of harmony with its environment. He insisted that

whatever possesses vitality, from the elementary cell up to man himself, obeys this law . . . [Man] alters in colour according to temperature . . . gets larger digestive organs if he habitually eats innutritious food—acquires the power of long fasting if his mode of life is irregular, and loses it when the supply of food is certain—becomes fleet and agile in the wilderness and inert in the city—attains acute vision, hearing, and scent, when his habits of life call for them, and gets these senses blunted when they are less needful.<sup>27</sup>

So important to Spencer was this adaptive process that he made it the sole criterion of good and evil. That which encouraged adaptation was good; that which prevented it evil. If some outside agency should prevent the necessary adjustments, the result must surely be death and oblivion.

The second idea, that of liberty, proclaimed the freedom of the individual to effect the adaptation which nature demands. Individual happiness, in Spencer's view, was not to be found in externals; rather it was the result of the satisfaction of certain inner cravings, of self-realization.<sup>28</sup> Accordingly, the essential condition of happiness was the liberty to satisfy these cravings by the exercise of the faculties of adaptation. Given free play, and unimpeded by outside interference, these faculties were certain to produce, of their own force, a state of perfect equipoise and bliss. Spencer asserted that

progress, therefore, is not an accident, but a necessity. Instead of civilization being artificial, it is a part of nature; all of a piece with the development of the embryo or the unfolding of a flower. The modifications mankind have undergone, and are still undergoing, result from a law underlying the whole organic creation; . . . As surely as the tree becomes bulky when it stands alone, and slender if one of a group; as surely as the same creature assumes the different forms of cart-horse and race-horse, according as its habits demand strength or speed; as surely as a blacksmith's arm grows large and the skin of a labourer's hand thick; as surely as the eye tends to become long-sighted in the sailor, and short-sighted in the student; . . . as surely as the musician learns to

<sup>27</sup> HERBERT SPENCER, *SOCIAL STATICS* 74-75 (1883).

<sup>28</sup> Cf. Knight, *Determinism, "Freedom," and Psychotherapy*, 9 *PSYCHIATRY* 251 (1946), for a recent statement of a similar idea.



detect an error of a semitone amidst what seems to others a very babel of sounds; as surely as a passion grows by indulgence and diminishes when restrained; . . . as surely as there is any efficacy in educational culture, or any meaning in such terms as habit, custom, practice; so surely must the human faculties be moulded into complete fitness for the social state; so surely must the things we call evil and immorality disappear; so surely must man become perfect.<sup>29</sup>

The evolutionary progress toward a society capable of highest happiness was cruel, unrelenting, inevitable:

Pervading all nature we may see at work a stern discipline, which is a little cruel that it may be very kind . . . The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shouldering aside of the weak by the strong, which leave so many "in shallows and in miseries," are the decrees of a large, far-seeing benevolence. . . .

Power of application must be developed; such modification of the intellect as shall qualify it for its new tasks must take place; and, above all, there must be gained the ability to sacrifice a small immediate gratification for a future great one. The state of transition will of course be an unhappy state. Misery inevitably results from incongruity between constitution and conditions. All these evils, which afflict us, and seem to the uninitiated the obvious consequences of this or that removable cause, are unavoidable attendants on the adaptation now in progress. Humanity is being pressed against the inexorable necessities of its new position—is being moulded into harmony with them, and has to bear the resulting unhappiness as best it can. The process *must* be undergone, and the sufferings *must* be endured. No power on earth, no cunningly-devised laws of statesmen, no world-rectifying schemes of the humane, no communist panaceas, no reforms that men ever did broach or ever will broach, can diminish them one jot. . . .<sup>30</sup>

For Spencer, the state was the result of the great increase in population, which had produced a condition in which individuals, in following their adaptive urges, had begun to run afoul of each other. The state emphatically was not the result of a social quality in man. On the contrary, Spencer supposed that man was by nature solitary.

<sup>29</sup> SPENCER, *op. cit. supra* note 27, at 80.

<sup>30</sup> *Id.* at 352-356. *Of.* Sutherland's remarks in 1937: "The world is passing through an uncomfortable experience; and in many respects, will have to retrace its steps with painful effort. The tendency of many governments is in the direction of destroying individual initiative, self-reliance, and other cardinal virtues *which I was always taught were necessary to develop a real democracy.* The notion that the individual is not to have the full reward of what he does well, and is not to bear the responsibility for what he does badly, apparently is becoming part of our present philosophy of government." Sutherland to Henry M. Bates, April 21, 1937. Italics supplied.

Instead of desiring companionship, he wished nothing so much as to be left alone. That man still contained within himself vestiges of this aboriginal predilection for solitude, and had not perfectly adapted himself to the relatively new requirements of the social state, rendered inevitable by the growth of numbers—this was the all-sufficient explanation for the existence of evil, sorrow, and pain.

Since Spencer believed that the state was unnatural, and represented a deviation from the law of liberty, he was adamant in declaring that its activities should be limited to the adjustment of the difficulties which had made it seem desirable. The overcrowding of the earth had presented a new situation. Men were confronted with the alternatives of society or perpetual war. The role of the state, therefore, was to make society possible “by retaining men in the circumstances to which they are to be adapted.” When its true function of securing the adaptive process had been discharged, and man’s nature had become reconciled to society, the state was destined to wither away and to appear ultimately as the crude expedient of a primitive age.

In such a philosophy, the role of the state was plainly confined to the settlement of disputes and the preservation of order. Justice was to be discovered by harking back to the original rights of man as they existed before the state had become necessary. Its administration was to be motivated by a desire to maintain, in so far as possible, all the privileges man had enjoyed in his original solitary condition. This was in accordance with the theory that man, by becoming a member of society, had surrendered no right save that of acting in a manner incompatible with the equal liberty of others.

Spencer, therefore, was certain that when the state passed beyond these confines and attempted meliorative functions it was straying from its true purposes. Moreover, any such attempt was bound to fail; since the evils which the state might seek to rectify resulted entirely from non-adaptation, the only remedy was adaptation, which interference by the state tended to prevent. For example, Spencer believed that any contribution by the state to the relief of the poor was not only an unjustifiable spoliation of the wealthier classes, on whom the burden would fall, but an essay in futility as well. “It defeats its own end,” he declared:

Instead of diminishing suffering, it eventually increases it. It favors the multiplication of those worst fitted for existence, and, by consequence, hinders the multiplication of those best fitted for existence—leaving, as it does, less room for them. It tends to fill the world with those to whom life will bring most pain, and tends to keep out of it those to whom life

will bring most pleasure. It inflicts positive misery, and prevents positive happiness.<sup>31</sup>

Although the state was thus faced with certain failure when it encroached on forbidden territory, this failure was not the only price exacted for the disregard of eternal truths. The assignment of one function to one organ was an essential condition of the highest efficiency. Accordingly, when the state embarked on tasks outside its role of preserving order, there was necessarily a diminution of its ability to perform its legitimate mission. Moreover, such adventures only whetted the appetites of legislators. Once the first forbidden step was taken, there was sure to be pressure to follow it with others: "The State's misdoings become . . . reasons for praying it to do more!"<sup>32</sup>

Enough has been said to show that Spencer believed that the state should be a wholly negative force of police, limiting its activities to enforcing contracts, suppressing insurrection, and repelling foreign invasion. It had no warrant for controlling education, for promoting commerce and industry, nor even for enforcing sanitation. Furthermore, once a mistake had been made it was vain to think that it could be rectified by more legislation. "Nature will not be cheated," he declared:

Every jot of the evil must in one way or other be borne—consciously or unconsciously; either in a shape that is recognized, or else under some disguise. No philosopher's stone of a constitution can produce golden conduct from leaden instincts. No apparatus of senator, judges, and police can compensate for the want of an internal governing sentiment. No legislative manipulation can eke out an insufficient morality into a sufficient one.<sup>33</sup>

Forms of government were therefore not considered to be of much importance. Whatever the form and wherever the sovereign power lay, government was perforce the inevitable enemy of liberty. "The divine right of majorities" he attacked as a superstition no less pernicious than that of the divine right of kings.<sup>34</sup> Certainly a majority should have absolute dominion in those matters which called forth the state, but beyond this it had not the slightest authority. In all other matters the right of resistance remained to each citizen, even though he should stand alone against the world. Liberty, not majority rule, was held to be the

<sup>31</sup> *Id.* at 416.

<sup>32</sup> HERBERT SPENCER, *THE MAN VERSUS THE STATE* 97 (1944). A similar idea was voiced repeatedly by Sutherland. *Cf.*, for example: "Subversions [of the Constitution] are . . . fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course." *Tyson & Bro. v. Banton*, 273 U.S. 418, 445, 47 Sup.Ct. 426, 71 L.Ed. 718 (1927).

<sup>33</sup> SPENCER, *op. cit. supra* note 27, at 295-296.

<sup>34</sup> SPENCER, *op. cit. supra* note 32, at 174ff.

true index of democracy. The man of genuine democratic feelings was said to love freedom "as a miser loves gold, for its own sake and quite irrespective of its advantages. . . . Flimsy excuses about 'exigencies of the state,' and the like, can not trap him into [acts] of self-stultification."<sup>35</sup>

The evidence that Spencer exerted a decisive influence on Sutherland is not confined to the fact that Maeser was such an unquestioning disciple nor to Sutherland's repeated acknowledgment of his debt to Maeser. The remarkable correspondence between Spencer's views and those expressed by Sutherland throughout his public career leaves no room for doubt. For Sutherland, as for Spencer,

the liberty of the individual to control his own conduct is the most precious possession of a democracy and interference with it is seldom justified . . . . If widely indulged, such interference will not only fail to bring about the good results intended, 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.<sup>36</sup>

Sutherland likewise accepted the Spencerian theory of inevitable progress. In 1907, for example, he spoke to the Senate of a "law of evolution" to which "every thing in the universe" is subject. He continued:

I am glad to believe that in some way I do not understand there is at the very heart of things some mighty power which silently and surely, if slowly, works for the exaltation and uplifting of all mankind. I am not religious in the ordinary acceptation of the term; I have no patience with mere forms or mere creeds or mere ceremonies; but I do believe with all the strength of my soul that "there is a power in the universe, not ourselves, which makes for righteousness." I am an optimist in all things. I do not believe that the world is getting worse. I feel sure it is getting better all the time.

I am no believer in the fall of man. Man has not fallen. He has risen and will rise. In the process of evolution he has so far progressed that he is able to stand erect and look upward . . . . and so while he sees the heights he ascends them only with slow and toilsome effort. But he does ascend. . . .

There are occasional lapses, the goings forward and the slippings back, the fallings down and the risings up, and, thank God, the . . . ultimate triumph if the resolution be sound at the core.<sup>37</sup>

Most important of all, however, is Sutherland's adherence as a justice of the Supreme Court to Spencer's views on the correction of social

<sup>35</sup> SPENCER, *op. cit. supra* note 27, at 268-269.

<sup>36</sup> *Private Rights and Government Control*, 42 A.B.A.REP. 197, 202 (1917).

<sup>37</sup> 41 CONG.REC. 1499 (1907).

maladies. A single illustration will suffice: the dissent in the *Minnesota Moratorium* case.<sup>38</sup> To begin with, Sutherland believed that the problem faced by debtors such as Blaisdell was due to their own "indiscretion and imprudence." The malady from which they were suffering was not a social one at all. Their difficulties could not be "relieved by legislation," and could be prevented only by an assurance "that a full compliance with contracts would be exacted." The problem faced by the Blaisdells was for Sutherland the Spencerian bogey of non-adaptation. In his view, they should be forced to adapt or perish. "Policy and humanity" were dangerous guides in such a situation. After all, said he:

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to have been learned. . . .<sup>39</sup>

Sutherland seems to have derived more than ideas from Spencer. To a degree, he appropriated his cold, impersonal style, and to a still greater extent he appropriated the Spencerian method. For all the data with which he buttressed his arguments, Spencer was not concerned primarily with facts, nor did they furnish him his point of departure. Instead, he began with a theory to which the facts must necessarily conform. When they did not conform, it was because the essential ones had not been discovered. This deductive method was characteristic of Sutherland. His calm dismissal, in the *Adkins* case,<sup>40</sup> of the factual evidence which seemed to demonstrate the desirability of a minimum-wage law is one of the most striking examples. Such evidence, declared Sutherland, was "interesting but only mildly persuasive." As he explained it, the apparent gain attributed to the minimum wage statutes was "quite probably . . . due to other causes." Facts which did not conform to the Spencerian theory of struggle could not be accepted. Instead, he called for evidence in terms of that theory:

No real test of the economic value of the law can be had during periods of maximum employment . . . That will come in periods of depression and struggle for employment, when the efficient will be employed at the minimum rate, while the less capable may not be employed at all.<sup>41</sup>

<sup>38</sup> *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 Sup.Ct. 231, 78 L.Ed. 413 (1934).

<sup>39</sup> *Id.* at 471-472.

<sup>40</sup> 261 U.S. 525, 43 Sup.Ct. 394, 67 L.Ed. 785 (1923).

<sup>41</sup> *Id.* at 560.

## IV

Sutherland left the Brigham Young Academy in the summer of 1881 when he became forwarding agent for the contractors building the Rio Grande Western Railroad.<sup>42</sup> Fifteen months later he made the long trip to Ann Arbor to enter the University of Michigan Law School. When Sutherland matriculated, the Michigan Law School was riding the crest of a nationwide fame. Its students came from all parts of the country in response to a catholic invitation which excluded only those under eighteen years of age and those unable to furnish "certificates giving satisfactory evidence of good moral character." The dean of the school was the celebrated judge and scholar, Thomas McIntyre Cooley. Of almost equal eminence was James Valentine Campbell, Chief Justice of the Michigan Supreme Court, who was also a member of the faculty for many years.

The system of instruction was simple, consisting only of lectures and moot-court work.<sup>43</sup> There were ten lectures a week of an hour each. No subject required more than thirty lectures for its exposition, and several were disposed of with only one or two. Although a state institution, the law school put no particular emphasis on Michigan law and procedure, but strove, by the inculcation of general principles, to equip its graduates to practice in any common-law jurisdiction.

In Sutherland's day the curriculum included two courses relating to constitutional law and theory. The first was given by Judge Campbell under the general heading, "The Jurisprudence of the United States." Later Cooley lectured on the general principles of constitutional law. After each lecture the two judges entered in their record book the subjects covered. From these titles and from student notebooks it is possible to get a fairly precise idea of the nature of the instruction and its content. Campbell gave thirty-one lectures, all of which dealt with the Constitution and laws of the United States.<sup>44</sup> He confined himself,

<sup>42</sup> Gray, *supra* note 4, at 2.

<sup>43</sup> The material in this and the following paragraphs is taken from the record book kept by the faculty and the notebooks of De Forrest Paine, Alexander Hamilton, Jr., and Marshall Davis Ewell, students in the Law School in this period. The record book and the notebooks are in the University of Michigan libraries. I should like to acknowledge here the assistance given me in the use of these materials by Dean E. Blythe Stason.

<sup>44</sup> The lecture topics as recorded by Campbell for the term Sutherland was in his class were: Lectures Introductory to United States Jurisprudence; Historical Antecedents; Legal Position of the Continental Congress; Defects of the Articles of Confederation; General Purposes of United States Constitution; Some Special Considerations; Some Restrictions on State Action; Bills of Credit—Retrospective Laws; Protection of Contracts; Judgments and Other Public Acts; Rights of Citizens; Sources of United States Law; United States Law—Places Subject to

on the whole, to particulars, but he made one highly significant excursion into the realm of constitutional theory. This had to do with the foreign relations power—the field in which Sutherland won a lasting pre-eminence with his opinion in the *Curtiss-Wright* case.<sup>45</sup> There, it will be recalled, he expressed for the Court the view that the foreign relations power, not being dependent on the Constitution, is not limited by its provisions.

There can be little doubt that it was Campbell who planted such an idea in Sutherland's mind. In his lectures, the Chief Justice hammered home to his students what one of them characterized as "his one-sided view of the separation of the colonies from Great Britain."<sup>46</sup> What this "one-sided view" was appears in the following quotations from student notebooks recording Campbell's remarks:

In 1774 the Colonies were joined in anticipation of a war with Great Britain which broke out in 1775 and resulted in their independence. . . . The Congress of 1774 answers to nothing today except our convention and was nothing more or less than a popular assembly.

In 1775 they acted as a government and took necessary steps to carry on war and their power was at once recognized, and this Congress took the responsibility of declaring the independence of the thirteen colonies without even consulting their constituents. At the suggestion of Congress the colonies organized their state governments.<sup>47</sup>

The first Congress represented the colonies and the people; but not the governments of the colonies *viz.* The colonies in the first Congress were not represented as they are now. They did many things in the first Congress that would not be allowed to Congress now. It is impossible in case of war not to interfere with the relations of other governments. Therefore there must be some tribunal or committee which should represent the American people in war, as in 1776, in reference to foreign nations; to hold the people together under one head. Congress was therefore a revolutionary power, and took all the duties of government upon it.<sup>48</sup>

---

U. S. Jurisdiction; Law of Nations; Law of Nations; Same Subject; Law of Nations concluded; Congressional Power; Regulation of Commerce; Naturalization; Bankruptcy; Post Office; Coinage; Maritime Offenses; Copyright; Copyright; Patents; Patents; Patents; Patents; Judicial System of the United States; Judicial Power; United States Courts; Judicial System of United States concluded.

<sup>45</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 Sup.Ct. 216, 81 L.Ed. 255 (1936).

<sup>46</sup> Manuscript notebook of Alexander Hamilton, Jr. 96 (1880). No notebook is available covering the exact period when Sutherland was in attendance at the University, but it is reasonable to assume he heard what earlier students had been told.

<sup>47</sup> Manuscript notebook of Marshall Davis Ewell 8 (1866).

<sup>48</sup> Hamilton notebook 156 (1880).

No state either before or after the revolution has ever been regarded as a nation. Before the revolution the colonies expected Parliament to regulate national affairs. The government of the United States in fact preceded the present state governments.<sup>49</sup>

Discussing the situation as it exists under the Constitution, Campbell laid great stress on the continued applicability of the law of nations. He told his students:

The implications of knowledge of laws in the Constitution are from 1st the law of nations . . . rules applying to all governments of whatever kind without which no government can exist. . . . In our own government we must possess every power that has been found to be absolutely necessary to all other nations. A nation may be regarded in two lights: first as to its duties to other nations and second as to its duties to its inhabitants; and these two relations must harmonize in order to have prosperity in the nation.

The law of nations does not deal with internal duties but external, and there must somewhere be a power to regulate the external as well as the internal relations of a nation.<sup>50</sup>

Finally, Campbell had a word on the duty of the courts. Judges, he said,

cannot question the power that makes a treaty. It is only their duty to enforce. It is wholly political and not in the least judicial.<sup>51</sup>

How completely Sutherland followed Campbell can be seen by glancing briefly at his opinion in the *Curtiss-Wright* case, where he asserted:

The two classes of powers [internal and external] are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the

<sup>49</sup> Manuscript notebook of De Forrest Paine 259 (1872).

<sup>50</sup> Ewell notebook 6-7 (1866).

<sup>51</sup> Paine notebook 280 (1872).



Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Britannic Majesty and the "United States of America."

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.<sup>52</sup>

The foregoing material convincingly supports the thesis that Campbell was largely responsible for the opinion in the *Curtiss-Wright* case. Of course, his interpretation of Revolutionary history was not original with him. Justice Story took much the same view in his *Commentaries*,<sup>53</sup> and Abraham Lincoln,<sup>54</sup> George Bancroft,<sup>55</sup> and Von Holst<sup>56</sup> gave it popular currency. Yet it was Campbell's advocacy that proved decisive. Sutherland's complete acceptance of his views is one of the

<sup>52</sup> *United States v. Curtiss-Wright Export Corp.*, *supra* note 45, at 315-318.

<sup>53</sup> JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 144-167 (5th ed. 1873).

<sup>54</sup> In his famous message to Congress on July 4, 1861. See RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 3228 (1897).

<sup>55</sup> See generally his *HISTORY OF THE UNITED STATES OF AMERICA*, vols. 4 and 5.

<sup>56</sup> H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* 1-64 (1889).

clearest and most dramatic examples in our history of the power and responsibility of the teacher.<sup>57</sup>

At Michigan, in Sutherland's day, the exposition of the greater part of constitutional theory was reserved, appropriately, to Cooley.<sup>58</sup> In 1882, when Sutherland was his student, Cooley was conceded to be the "greatest American writer on Constitutional Law" and "the most frequently quoted authority."<sup>59</sup> In 1868 he had published his great *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*.<sup>60</sup> Cooley's design is suggested by the title of his book. The *Treatise* is concerned with *limitations*, and in the Preface Cooley specifically avowed his "sympathy with the restraints which the caution of the fathers has imposed upon the exercise of the powers of government."<sup>61</sup> In his definition he made it quite clear that the state was a voluntary association of individuals for their own advantage.<sup>62</sup> He was careful to point out that individual rights were antecedent to both states and constitutions, and that the latter did not "measure the rights of the governed."<sup>63</sup> He quoted with approval the following excerpt from a Missouri case:

<sup>57</sup> It is likely that Sutherland got much more from Campbell than I have indicated. In 1903, for example, he offered the Senate a method of constitutional interpretation drawn almost verbatim from Campbell's lectures. See 44 CONG.REC. 2080-2081 (1909).

<sup>58</sup> The Cooley lecture topics were: Introductory Address; Introduction to Constitutional Law; General Principles and Definitions; The Same Subject; The Charters of English Constitutional Liberty; The Same Subject; General Principle of Constitutional Right; The Same Subject; General Principles—The Right of Revolution; Territorial Government—Steps in the Formation of States; The Purpose in Forming a Constitution and Apportionment of Powers; The Checks and Balances of Government—Judicial Powers and Their Finality; the Apportionment of Power by State Constitutions; The Same Subject; Power of the Legislative Department—Vested Rights and Its Control in Respect to Them; The Same Subject—Control of Remedies; Vested Rights—Retrospective Laws; Legislative Control of Estates; Domestic Relations; Due Process of Law; Protection to Civil Liberty by State Constitutions; The Same Subject; Religious Liberty; Protection in Liberty and Property against Unwarranted Judicial Action; Political Rights—the Right to Assemble and Discuss Public Affairs: To Petition, To Bear Arms; The Liberty of Speech and of the Press; Appropriation of Private Property to Public Use—Under the War Power; Under the Treaty Making Power; The Power of Taxation and the Restriction Upon It; Constitutional Protection of Private Property—Appropriation of Private Property to Public Use; The Same Subject. In the discussion of Cooley which follows, for purposes of clarity and convenience I rely on his *Constitutional Limitations* rather than the student notebooks. The same material generally was presented in the lectures as in the book.

<sup>59</sup> BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION* 34-35 (1942), quoting from 1 G. J. CLARK, *LIFE SKETCHES OF EMINENT LAWYERS* 204 (1895).

<sup>60</sup> Edward S. Corwin has said that Cooley's book is "the most influential treatise ever published on American constitutional law." See his *LIBERTY AGAINST GOVERNMENT* 116 (1948).

<sup>61</sup> THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 12 (1st ed. 1868).

<sup>62</sup> THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 1 (7th ed. 1903).

<sup>63</sup> *Id.* at 68.

What is a constitution and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights which they possessed before the constitution was made, it is but the framework of the political government, and based upon the pre-existing condition of law, rights, habits, and modes of thought. There is nothing primitive in it: it is all derived from a known source. It presupposes an organized society, law and order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. *A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation and are boundless in extent and incapable of definition.*<sup>64</sup>

From such a conception of the Constitution, it was easy for Cooley to argue that large areas were protected by the "law of the land" from the depredations of legislatures. The plain design of this law was to exclude "arbitrary power from every branch of the government."<sup>65</sup> "The principles upon which process is based" and not "any considerations of mere form" were to determine whether "due process" had been observed.<sup>66</sup> Vested rights were not to be thought of in "any narrow or technical sense," but rather as implying an interest "which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice."<sup>67</sup>

In sketching the bounds of permissible legislative action, Cooley regarded as fundamental the axiom that "equality of rights, privileges, and capacities unquestionably should be the aim of the law."<sup>68</sup> If some people should be deprived of their capacity to contract, it could "scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict."<sup>69</sup> Cooley then advanced the thought—one his pupil committed to memory for use years later—that those who sought to justify such deprivations "ought to be able to show a specific authority therefor, instead of calling upon others to show how

<sup>64</sup> *Hamilton v. St. Louis County Court*, 15 Mo. 1, 13 (1851). The italics are added.

<sup>65</sup> COOLEY, *op. cit. supra* note 62, at 504.

<sup>66</sup> *Id.* at 505.

<sup>67</sup> *Id.* at 508.

<sup>68</sup> *Id.* at 562.

<sup>69</sup> *Id.* at 561.

and where the authority is negated.”<sup>70</sup> The police power was said to extend only to the enactment of “those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.”<sup>71</sup> It did not include a general power to regulate prices, as such an exertion by the state was held to be “inconsistent with constitutional liberty.”<sup>72</sup>

On this point the professor had to contend with the recently decided case of *Munn v. Illinois*,<sup>73</sup> in which the Supreme Court sustained the regulation of storage charges in grain elevators. His point of attack was that eventually used by the Court and by Sutherland himself—an emphasis on Chief Justice Waite’s rather superfluous quotation from Lord Hale, that businesses “affected with a public interest” could be regulated. Cooley commented:

The mere fact that the public have an interest in the existence of the business, and are accommodated by it, can not be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices.<sup>74</sup>

Businesses were affected with a public interest, in the constitutional sense, only when they derived some unusual advantage from the state.

Such was Sutherland’s introduction to the formal study of the Constitution. As he had learned from Spencer that *laissez faire* had a cosmic sanction and application, just so he derived from Cooley the conviction that the Constitution affirmed this truth. Indeed, this harmony was so perfect that Sutherland was constrained to believe with Professor Maeser that it was the result of divine intervention.

When, after forty years, Sutherland became a justice of the Supreme Court, his opinions echoed the ideas of his preceptor. If it was a question of regulating the prices charged by theatre ticket brokers, Sutherland could answer that:

<sup>70</sup> “Freedom of contract is . . . the general rule and restraint the exception.” Sutherland for the Court in *Adkins v. Children’s Hospital*, 261 U.S. 525, 546, 43 Sup.Ct. 394, 67 L.Ed. 785 (1923).

<sup>71</sup> COOLEY, *op. cit. supra* note 62, at 829.

<sup>72</sup> *Id.* at 870.

<sup>73</sup> 94 U.S. 113, 24 L.Ed. 77 (1877).

<sup>74</sup> COOLEY, *op. cit. supra* note 62, at 872-873.

It may be true . . . that, among the Greeks, amusement and instruction of people through the drama was one of the duties of government. But certainly no such duty devolves upon any American government.<sup>75</sup>

If the question was regulation of the ice industry in the state of Oklahoma, he could respond:

Here we are dealing with an ordinary business . . . It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which . . . the community is dependent upon . . . but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home.<sup>76</sup>

Again, if the nature and broad purposes of the Constitution were being discussed, Sutherland could quote Cooley directly:

It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no steady and imperceptible change in their rules as inheres in the principles of the common law . . . A court or a legislature which should allow a change in public sentiment to influence it in giving a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty . . . What a court is to do, therefore, is *to declare the law as written* . . . The meaning of the Constitution is fixed when it is adopted.<sup>77</sup>

The magnitude of Sutherland's debt to Cooley is perhaps best illustrated by one of the few instances in which he decided in favor of the claims of governmental power—the zoning case of *Euclid v. Ambler*.<sup>78</sup> There, it will be recalled, Sutherland broke away from his conservative colleagues to write the opinion of the Court sustaining the challenged ordinance. Since the ordinance was doubtless the result, in part, of the heavy concentration of population in the Cleveland area, the Justice could see some general theoretical justification for it. From Cooley he was able to

<sup>75</sup> *Tyson & Bro. v. Banton*, 273 U.S. 418, 441, 47 Sup.Ct. 426, 71 L.Ed. 718 (1927).

<sup>76</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 Sup.Ct. 371, 76 L.Ed. 747 (1932).

<sup>77</sup> COOLEY, *op. cit. supra* note 62, at 88-89, quoted by Sutherland in *Home Building and Loan Association v. Blaisdell*, *supra* note 38, at 452. Sutherland omitted the following passage: "The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments."

<sup>78</sup> 272 U.S. 365, 47 Sup.Ct. 114, 71 L.Ed. 303 (1926).

draw a specific legal argument. The professor had called attention to the "line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all."<sup>79</sup> In his opinion sustaining the zoning ordinance, Sutherland made it clear that he believed the law would not lessen the value of any right. He concluded, therefore, that "it cannot be said that the landowner has suffered or is threatened with an injury" which gave him standing to challenge the statute.<sup>80</sup>

## V

The capstone of Sutherland's education was supplied by the Supreme Court of the United States. The first thirty-five years of his life almost exactly paralleled the development whereby the Court was won to the ideology of laissez faire. Maeser and Cooley were conclusively proved to have been right. This spectacular vindication of the faith affected the beliefs of people considerably less susceptible than Sutherland. In his case, it remained a vital influence until his death. It must be considered, therefore, if only summarily.

The major prophet on the Court of the new day was Stephen J. Field,<sup>81</sup> who was to wrest from John Marshall the record for tenure. In the course of his long career as a justice, Field eventually won an impressive victory in persuading the Court to abandon its more or less tolerant view of legislative action. Field's substitute was a theory of supra-constitutional rights enforceable in the courts irrespective of popular majorities. It was first advanced by him in 1871 in the *Legal Tender Cases*.<sup>82</sup> He was then speaking, it should be noted, for a minority.

For acts of flagrant injustice [he wrote], there is no authority in any legislative body; even though not restrained by an express constitutional prohibition. For as there are unchangeable principles of right and morality without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny.<sup>83</sup>

<sup>79</sup> COOLEY, *op. cit. supra* note 62, at 855, quoting from *Vanderbilt v. Adams*, 7 Cow. (N.Y.) 349, 351 (1827).

<sup>80</sup> *Euclid v. Ambler*, *supra* note 78, at 396.

<sup>81</sup> An excellent and thoroughly readable biography is Carl Brent Swisher's *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* (1940). See also Graham, *Justice Field and the Fourteenth Amendment*, 52 *YALE L.J.* 852 (1943). On the general development of constitutional law in the last part of the century, see Corwin, *Social Planning Under the Constitution*, 26 *AM.POL.SCI.REV.* 1 (1932), and Mason, *The Conservative World of Mr. Justice Sutherland, 1888-1910*, 32 *AM.POL.SCI.REV.* 443 (1938).

<sup>82</sup> 12 Wall. 457, 20 L.Ed. 287 (1871).

<sup>83</sup> *Id.* at 670.

Two years later the *Slaughter-House Cases*<sup>84</sup> brought before the justices, for the first time, the Fourteenth Amendment. The result was a decision announcing that, except in regard to recently liberated slaves, the states' legislative power remained unimpaired. In a noteworthy dissent,<sup>85</sup> Field protested that the rights of citizens were antecedent to the creation of a state and could not "be destroyed by its power." The due process clause of the Fourteenth Amendment, if constitutional provision were needed, was to be construed as a substantive limitation on the states. He developed this theory still further, again in dissent, in the *Munn* case<sup>86</sup> three years later. By liberty, Field said, something more was intended than "mere freedom from physical restraint or the bounds of a prison." It meant freedom

to act in such manner, not inconsistent with the equal rights of others, as [one's] judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop [one's] capacities, and give to them their highest enjoyment.<sup>87</sup>

Field's great quarrel with his brethren was really over the question of judicial supremacy. Were judges bound to respect legislative determinations of reasonableness, as Waite had indicated in the *Munn* case? In the years immediately following that decision, it seemed that the answer would continue to be in the affirmative. Indeed, the situation was such that, as late as 1890, there was a demand for still further amendment of the Constitution to the end that property rights should be rendered secure from the threat of popular majorities.<sup>88</sup> Relief came quickly thereafter, however. In that very year, the first *Minnesota Rate Case*<sup>89</sup> was decided. By this decision, the Court claimed for the judiciary the right to determine the ultimate reasonableness of utility rates. All possible doubt of the Court's intention to rule was erased in 1895 by the decisions rendered in *Pollock v. Farmers Loan & Trust Company*,<sup>90</sup> *United States v. E. C. Knight Company*,<sup>91</sup> and *In re Debs*.<sup>92</sup>

In the first of these cases, the Court heard Joseph Choate assail the income tax as "communistic," and responded with the finding that it was a direct tax and therefore invalid unless apportioned. Justice Field

<sup>84</sup> 16 Wall. 36, 21 L.Ed. 394 (1873).

<sup>85</sup> *Id.* at 83-111.

<sup>86</sup> *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877).

<sup>87</sup> *Id.* at 142.

<sup>88</sup> Marshall, *A New Constitutional Amendment*, 24 AM.L.REV. 908 (1890).

<sup>89</sup> *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418, 10 Sup.Ct. 702, 33 L.Ed. 970 (1890).

<sup>90</sup> 157 U.S. 429, 15 Sup.Ct. 673, 39 L.Ed. 759 (1895).

<sup>91</sup> 156 U.S. 1, 15 Sup.Ct. 249, 39 L.Ed. 325 (1895).

<sup>92</sup> 158 U.S. 564, 15 Sup.Ct. 900, 39 L.Ed. 1092 (1895).

made known the Court's fear that this assault on capital was but the beginning, that it would be "but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness."<sup>93</sup>

Only three months before the *Pollock* case, the Court had occasion to declare that the activities of the Sugar Trust were not subject to the power of Congress. The result was the virtual nullification of the Sherman Act for more than a decade, and the curtailment of the commerce power to the point of impotence.

The *Debs* case supplied the business community with protection from interference originating in yet another quarter. There, in the absence of a statute authorizing such procedure, the Court approved the issuance of an injunction restraining Debs and the other leaders of the Pullman strike of 1894 from interfering, by either speech or act, with the operation of the railroads. Justice Brewer, speaking for the Court, declared that "the strong arm of the National Government could be put forth to brush away all obstructions to the *freedom* of interstate commerce."<sup>94</sup> The fact that the injunction had broken the strike was cited as proof of "the wisdom of the course pursued by the Government."<sup>95</sup> Private employers were not slow to take the hint, and the injunction was sped upon its notorious career in the "settlement" of labor disputes—a career which abated only with the Norris-LaGuardia Act in 1932.<sup>96</sup>

The result of the Court's vast extension of its powers was to endow it, in some quarters at least, with a prestige it had not enjoyed since the days of Marshall. More and more, the justices were called upon to determine the political destiny of the country. To all such invitations they responded with an alacrity which discouraged any doubt of their superior qualifications. The judges themselves, perhaps a little intoxicated by their power and the homage paid them, were not inclined to be apologetic for the new state of affairs. When Justice Field retired in 1897, he unblushingly reminded his brethren that they constituted the "safeguard that keeps the whole mighty fabric of government from rushing to destruction."<sup>97</sup> And Justice Brewer, in 1893, could see no reason why judges should not govern. The great body of them, he asserted,

<sup>93</sup> *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, 607, 15 Sup.Ct. 673, 39 L. Ed. 759 (1895).

<sup>94</sup> *In re Debs*, 158 U.S. 564, 582, 15 Sup.Ct. 900, 39 L.Ed. 1092 (1895). The italics are mine.

<sup>95</sup> *Id.* at 598.

<sup>96</sup> 47 STAT. 70-73 (1932), 29 U.S.C. §§ 101-115 (1946).

<sup>97</sup> 168 U.S. 717 (1897). Field sagely concluded, "This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours."



are as well versed in the affairs of life as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while as for speed, is there anything quicker than a writ of injunction?<sup>98</sup>

The wonders performed by the justices must have impressed Sutherland as he watched the course of constitutional development. In law school, he had been assured that the sound and enlightened view, the intellectually respectable view, was that of the minority. Now this minority had converted itself into a majority. What better proof was needed of the wisdom of his teachers? One who began his law school career in 1932, fifty years after Sutherland, might well understand his reaction. He, too, perhaps was told by some of his teachers that the majority view was unsound, that the dissents of Holmes, Brandeis, Stone, and Cardozo must prevail. Now that the revolution has been accomplished, he experiences the elation of having been one of the advance guard. Almost certainly he concludes that his teachers had the answers. For him, as for Sutherland, the tendency may be to ask whether the Court has not finally reached a good, safe resting place.

There is other evidence, considerably less speculative, that the Court of 1895 impressed itself on Sutherland's consciousness. His entire subsequent career confirms the fact. For him, as for the justices, popular government, unrestrained by judges, was unthinkable and sure to result in self-obliteration. He absorbed not only this Court's general outlook but its particular conception of federalism, liberty, and property. In 1909 he explicitly asserted his high opinion of the 1895 Court. Its members, he declared, "were as magnificently equipped in learning and ability as any who have sat in that august tribunal before or since"; moreover, if, in the *Pollock* case, they appeared to set at naught prior rulings of a hundred years, it was but the correction of a century of error.<sup>99</sup>

## VI

How faithfully, in later years, Sutherland followed the teachings of Maeser, Campbell, Cooley, and the 1895 Court is apparent. A final word remains to be said of some of the early manifestations of the influence of the three school men. On leaving Michigan in 1883, Sutherland prac-

<sup>98</sup> Quoted in ALPHEUS T. MASON, *BRANDEIS, A FREE MAN'S LIFE* 102 (1946).

<sup>99</sup> 44 CONG.REC. 2096 (1909).

ticed law in Utah until his election to the House of Representatives in 1900. His experiences followed the familiar pattern of the successful frontier lawyer. In 1894, he was one of the organizers of the Utah State Bar Association. The next year he was one of the speakers at the annual meeting.

His subject was "The Selection, Tenure, and Compensation of the Judiciary."<sup>100</sup> In addition to recommendations on each of these issues, the speech contained some interesting revelations of Sutherland's early conception of the nature of law and of the judicial function. To bolster his argument for an indeterminate tenure for the judiciary, Sutherland adduced a comparison of its task with that of the legislature. Legislators, he explained, must always be concerned with the "changing needs and views of the people" and should reflect these changes. A wholly different situation was said to obtain with the judiciary. "Judges," he said, "do not make laws, but declare them; the rules which govern their deliberations and decisions are to a large extent fixed and permanent, in no wise to be controlled by temporary considerations or policies." This being true, the judge of one era could easily satisfy the demands of another. Even so great a legislator as Daniel Webster "would stand aghast in the attempt to legislate for the people of the present day"; but an eminent jurist like Chancellor Kent could be transplanted with ease. He would be able, merely "by reading the statutes which have been enacted since his death" to "serve the commonwealth quite as well as any of the present incumbents"!<sup>101</sup>

The mission of the judiciary also came in for review. The judicial department was said to stand "as a shield to prevent the exercise of oppressive and arbitrary power on the part of the government itself, whose creature it is, against the citizen, though never so humble or insignificant. Its duty is to protect the individual against the unjust demands of society."<sup>102</sup> Since their function was to "declare and apply the law," courts frequently had "the 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 the whole world.<sup>103</sup> Hence the judicial department "is and should be the strongest" branch of the government.

As a young lawyer, Sutherland devoted much time to the usual extra-legal activities. He made patriotic addresses and took part in local politics. Even before his admission to the bar, he had identified himself with the "Liberal" Party.<sup>104</sup> This party had its origin in the non-Mor-

<sup>100</sup> 2 REP. UTAH BAR ASS'N 47 (1895).

<sup>101</sup> *Id.* at 57.

<sup>102</sup> *Id.* at 47.

<sup>103</sup> *Id.* at 48.

<sup>104</sup> J. MARINUS JENSEN, HISTORY OF PROVO, UTAH 188 (1924).

mons' reaction to the closed, equalitarian, cooperative economy developed by the Church in the years after 1868.<sup>105</sup> Some indication of the party's program is furnished by its Congressional candidate's letter accepting the nomination in 1876. "I desire," the aspirant wrote, "the establishment of the supremacy of law, freedom of thought, freedom of speech and freedom of action in Utah—to establish a system under which everyone may freely and fully exercise his own individuality, choose his own business, political, and social relations."<sup>106</sup>

After the death of Brigham Young in 1877 the Mormon economy began to lose its equalitarian emphasis. Ownership was allowed to become centralized. The barrier to trade with non-Mormons was removed. By 1890 the process was completed. As Bernard De Voto says, "Israel had to make terms with finance," and hence developed "not in the direction of Rochdale, New Harmony, the Oneida community, Brook Farm, the United Order or the Kingdom of God—but in the direction of Standard Oil."<sup>107</sup> Also in 1890, the Church prohibited any further contracting of polygamous marriages. With these developments, the Liberal party went out of existence and Sutherland promptly became an active Republican.

Of Sutherland's early political utterances, one is of interest even today. It reveals the essential identity of the mind of the twenty-four-year-old attorney of 1886 with that of the Supreme Court Justice of 1937. The city council of Provo, in the face of a clearly preponderant opposing sentiment, had issued licenses for the sale of liquor. For this disregard of the popular will the councilmen were soundly berated by the city newspaper. Sutherland defended them with a reply reminiscent of Burke. The city fathers, he explained, were under no obligation to heed the voice of the people. Indeed, they should not. They had only to satisfy "their own consciences and their own reason of the rightfulness, policy, justice, consistency and legality of any contemplated legislation." When they had done this, he concluded, they could, "with a good deal of propriety, invoke Mr. Vanderbilt's somewhat profane and summary disposition of a stiff-necked and unappreciative public."<sup>108</sup>

<sup>105</sup> A good account of the rise of the Liberal Party may be found in R. W. BASKIN, *REMINISCENCES OF EARLY UTAH* (1914). What I have to say about the Mormon economy is drawn principally from Gardner, *Cooperation Among the Mormons*, 31 Q.J.ECON. 461-503 (1917).

<sup>106</sup> BASKIN, *op. cit. supra*, at 25.

<sup>107</sup> FORAYS AND REBUTTALS 122 (1936).

<sup>108</sup> Territorial Inquirer (Provo), Dec. 10, 1886. *Of* the following from Sutherland's dissenting opinion in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401-402, 57 Sup.Ct. 578, 81 L.Ed. 703 (1937): "It has been pointed out many times . . . that this judicial duty [that of passing on the constitutionality of a statute] is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statutes. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court . . . to give

## VII

The first phase of Sutherland's career may be said to have ended in 1900 when he first sought and won national political office. By that year his education was complete. There were, of course, details here and there to be filled in, but he had accumulated the intellectual resources on which he was to draw in the years which lay ahead. Maeser, Campbell, Cooley, and the Supreme Court of the United States all had contributed to the process. Had they allied themselves beforehand, they could hardly have produced a more nearly perfect harmony.

A perfect harmony, however, was not essential to their influence. Sutherland followed even when there was an aberration from the central theme. Four years after Sutherland's death, one writer<sup>109</sup> assumed the task of explaining the Justice's startling departure in the *Curtiss-Wright* case from the rigorous constitutionalism which characterized all his other efforts. He discovered that Sutherland had articulated his theory of the foreign relations power as early as 1909,<sup>110</sup> and had reiterated it in his Blumenthal lectures at Columbia a decade later.<sup>111</sup> The writer concluded that "the whole theory and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court."<sup>112</sup> Indeed it had. We can now add that a teacher, James Valentine Campbell, began the engraving on October 9, 1882.

---

due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him* . . . If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence."

<sup>109</sup> Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946).

<sup>110</sup> Sutherland, *The Internal and External Powers of the National Government*, SEN.DOC. No. 417, 61st Cong., 2d Sess. (1909).

<sup>111</sup> CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919). I might add that it was Sutherland's enthusiastic praise of Campbell in this work, and in that cited in the note above, that led me to suspect his great importance. In both places, Sutherland leans heavily on Campbell's opinion in *Van Husan v. Kanouse*, 13 Mich. 303, 313 (1865). There it is argued that a power essential to government but prohibited to the states must of necessity be in the national government.

<sup>112</sup> Levitan, *supra* note 109, at 478. . .