CHAPTER 1

John Hessin Clarke and George Sutherland

Born three days after Taft, John Hessin Clarke had been on the Court for a scant five years when Taft became chief justice. Clark was appointed by Wilson in July 1916. Clarke had been a successful Ohio newspaper publisher and corporate lawyer.[1] He was campaigning for the Senate as a progressive Democrat when, at McReynolds's urging, Wilson appointed Clarke to the federal district court in July 1914. Although Taft was personally fond of Clarke,[2] he did not much "like" Clarke's "legal politico-economic views."[3] Taft regarded Clarke as representing a "new school" of "latitudinarian construction of the Constitution," "which if allowed to prevail will greatly impair our fundamental law."[4] Taft also deplored Clarke's tendency to dissent from the Court's opinions,[5] which, as Figure I-1 illustrates, was by far the most developed of anyone on the Court.[6]

Clarke was so supportive of state regulation, national power, and the rights of labor, that he was characterized in the popular press "as an ultra-radical,"[7] as a fit companion to Brandeis and Holmes on the left wing of the Court.[8] But Clarke fundamentally differed from Brandeis and Holmes in his attitude toward the law. Whereas Brandeis and Holmes prized legal craft and architecture, Clarke tended to regard law as an overtly political instrument of policy.

In Taft's view, Clarke made up his mind "as if each case was something to vote on as he would vote on it in the Senate or in the House, rather than to decide as a Judge."[9] Clarke "is much more of an orator than he is a lawyer," added Taft. "He has certain set notions against corporations and in favor of labor unions, which make him decide many cases before he hears them. Although he and Clarke often agreed, Holmes often commented to me on that feature of his judicial decisions."[10] Holmes himself regarded Clarke's opinions as "sentiment and rhetoric."[11] "He is a very dear, affectionate creature," Holmes observed, but "I wish his writing was more to my taste than I can pretend."[12]

Although Clarke was well liked on the Court,[13] he grew to detest the "bone labor" of "studying musty records of cases one-half of which are of no consequence

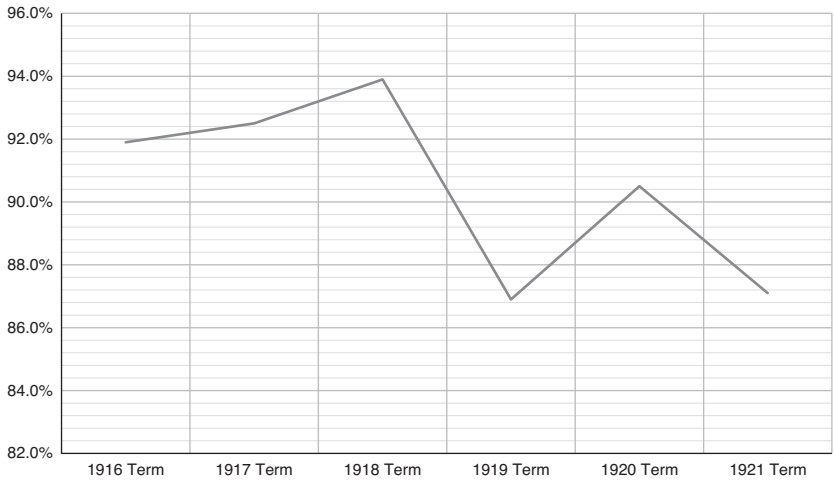

Figure I-3 Percentage of decisions in which Clarke participated and authored or joined an opinion for the Court, by term

in the world to anybody except the parties to them, and which never should have been permitted to go" to the Supreme Court.[14] Lacking an intrinsic concern with the law, Clarke began to find "the uninteresting grind of the Court"[15] "irksome in the extreme."[16] As he wrote Holmes: "What did I care whether a drunken Indian was cheated out of his lands before he died or not, or whether it was *constitutional* to clean out a ditch in Iowa & etc."[17] Clarke even congratulated Taft upon his appointment with the dour observation that "the late Chief Justice – peace to his ashes – did not much overstate the fact when he said that Supreme Court service was a dog's life."[18]

A year later, when Taft sent Clarke a copy of the Court's official letter of regret at Clarke's resignation, Clarke could not resist the opportunity to vent:

> I wonder if you would care to know that the feeling of relief I have from the irritating futility of the certioraris, from the Fourteenth Amendment nonsense, and from the necessity of spelling out reasons for the obvious is very like the sense of freedom that used to come to me a long while ago … at the end of a school year. The fictitious importance of official place is as dust in the balance to … the happiness of being able to do and say just what I please.[19]

Amused, Taft wrote back that while he "enjoyed much reading" Clarke's letter, "I gather from its tone that you did not know in writing it that we intend to print our letter to you and yours to us" in the U.S. Reports.[20]

Throughout his service on the Court, Clarke suffered particular humiliation from "the insulting and overbearing and contemptuous attitude of" James Clark McReynolds.[21] As Taft told the story to Elihu Root, "McReynolds has a masterful, domineering, inconsiderate and bitter nature. He had to do with Clarke's selection

as a District Judge, and felt, therefore, that Clarke, when he came into the Court, should follow him. And when Clarke, yielding to his natural bent, went often with Brandeis, McReynolds almost cut him. McReynolds has been childish in his relations to Clarke, and it has been a very uncomfortable thing for Clarke."[22] Although McReynolds has been much scored for his anti-Semitic intolerance of Brandeis and Cardozo, his brutal harassment of the vulnerable Clarke is certainly one of his blackest moments.[23] The hostility between Clarke and McReynolds is visible in Figures I-4 and I-5.

Throughout his tenure Clarke functioned at the margin of the Court, as Figures P-1 and I-2 suggest.[24] Figure I-3 shows that Clarke's identification with the Court was at a low ebb when Taft entered the Court. Although Figure I-4 evidences Clarke's general alignment with Brandeis, Figure I-6 demonstrates that even that relationship was deteriorating by the 1921 term.

We have evidence that Clarke began to speak of retirement as early as March 1921,[25] but what finally pushed him over the edge was the death of his sister Ida, his closest living relative, on March 3, 1922.[26] Clarke wrote Taft that "I am passing through an experience so crushing that it seems, for me, just now, the end of all earthly interests. My sister was both a sister and a brother to me all through life."[27] Clarke sunk into a deep depression, so that in July he could report that "my situation is quite paralyzing me. I mean I find myself without initiative or desire to go anywhere or to do anything, – all interest in life has so gone out of me."[28] By late August he had reached a decision:

> I have definitely decided to resign my office as of Sept. 18 when I shall be 65 years old. . . . [T]he death of my sister has taken all interest out of life for me

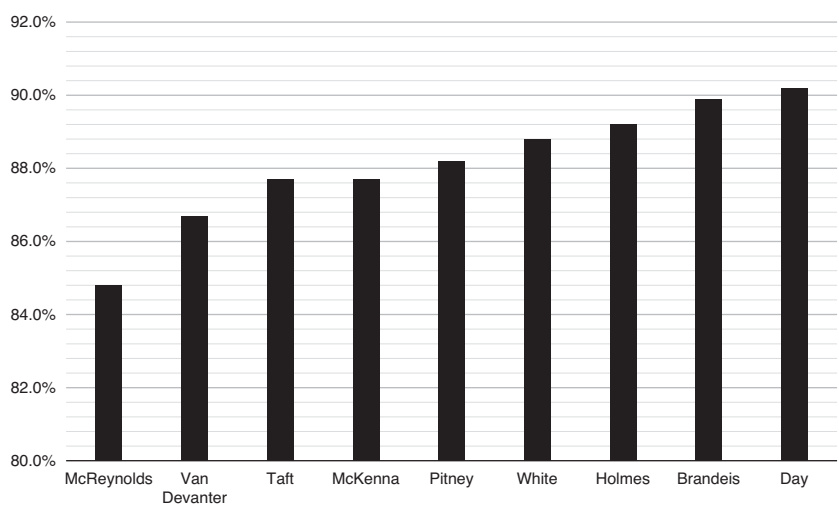

Figure I-4 Percentage of decisions in which Clarke participated and joined the same opinion as another justice, 1916–1921 terms

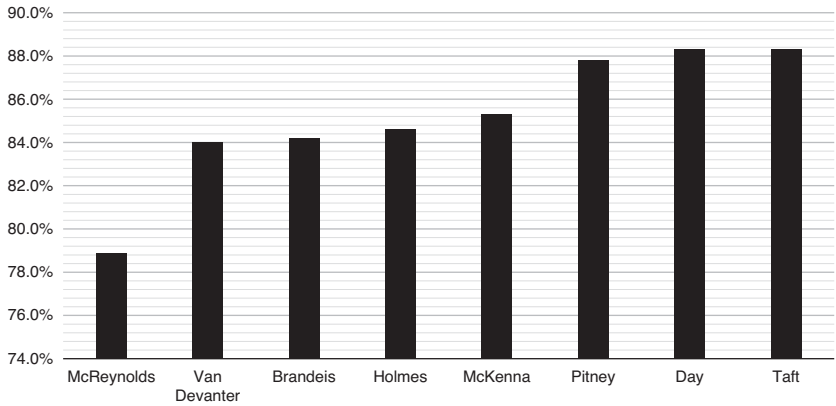

Figure I-5 Percentage of decisions in which Clarke participated and joined the same opinion as another justice, 1921 term

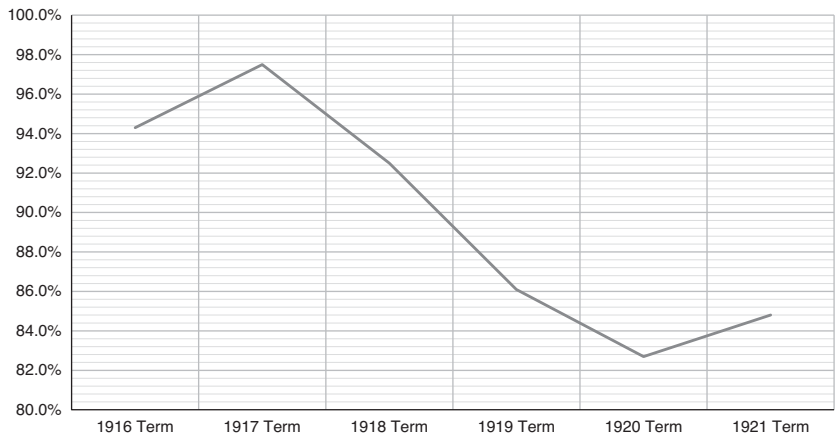

Figure I-6 Percentage of decisions in which Clarke and Brandeis participated and joined the same opinion, by term

and I see no reason for going forward doing work which for the most part has become irksome in the extreme to me. I feel that in my present state of mind I cannot do as good work even as I have been doing & that I owe it to the country as well as to myself not to work on with my enthusiasms quite dead. . . . [M]y spirit is broken & while I have the consolation of knowing that I did all in my power to make my sisters [sic] lives comfortable & happy yet my affections were so centered in them & the care of them that I cannot recover a normal outlook on life.[29]

"I wish to have time to get acquainted with my own soul before it parts from my body," Clarke said, and "to do what I can to urge our country – in a non-political way – to enter the League of Nations."[30]

On September 1, Clarke wrote Harding announcing his resignation effective on September 18, Clarke's sixty-fifth birthday.[31] Harding promptly issued a handwritten note accepting Clarke's offer, and he made known his intention to "send to the Senate the nomination of George Sutherland of Utah for the vacancy made by Justice Clarke's retirement."[32] On September 5 the Senate unanimously approved Sutherland, waiving the usual referral to the Judiciary Committee.[33] It would prove to be a significant turning point in the history of the Court.

Woodrow Wilson immediately grasped the momentous implications of the substitution. He wrote Clarke saying how "deeply sorry" he was at Clarke's resignation:

> Like thousands of other liberals throughout the country, I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow.
>
> In my few dealings with Mr. Sutherland I have seen no reason to suspect him of either principles or brains, and the substitution is most deplorable.
>
> The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common peoples [sic] sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I can see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action.[34]

For his part, by contrast, Taft believed that "Sutherland is a safe and good appointment, and the exchange of him for Clarke makes greatly for the strengthening the Court in the direction in which I would have it strengthened."[35] "I am very glad to have Sutherland substituted for Clarke in the Court," Taft wrote his brother. "Sutherland is a much abler man, a much sounder lawyer and not a hidebound conservative, but a reasonable one. He has tempered his views by long political experience – a process which makes him a much more useful Judge than one who, like Holmes, has had no political experience and proceeds as if the American Constitution were as malleable as the British Constitution."[36]

Like Taft, Sutherland came to the bench with a prominent national reputation. Born in 1862 in Buckinghamshire, England, Sutherland was brought to Utah the following year "when it was a thinly settled territory forming part of a vast, inhospitable wilderness identified on the maps of the day as 'The Great American Desert.'"[37] At a time when "nobody worried about child labor,"[38] Sutherland was forced to work at the age of 12,[39] eventually saving enough money to fund two years at what would become Brigham Young University[40] and a year at the University of Michigan Law School, where he studied under Thomas M. Cooley.[41]

Sutherland returned to Utah in 1883 and began a successful law practice. Sutherland became a member of Utah's first state legislature, Utah's representative to Congress, and, from 1905 to 1917, a United States senator from Utah. In the Senate, Sutherland "won a very high reputation as a constitutional lawyer. . . . He

was regarded as perhaps Elihu Root's weightiest colleague and compeer on constitutional questions."[42] In 1916, just a few weeks before losing his first popular election as senator,[43] Sutherland was elected president of the American Bar Association.[44] He remained "an intimate friend and close adviser" of his former Senatorial colleague Warren Harding, "coming nearer being the 'Colonel House' of the Harding Administration than any other man."[45]

Sutherland's record was not that of a thoughtless reactionary. He was actively involved in matters of legal and judicial reform.[46] He was "an acknowledged leader" of the movement for women's suffrage, having introduced a version of the Nineteenth Amendment in the Senate in 1915.[47] In the Utah legislature, Sutherland prepared and advocated for a statute imposing an eight-hour workday on mines and smelters. The statute was eventually upheld by the Supreme Court in the milestone case of *Holden v. Hardy*.[48] In the United States Senate, Sutherland was a strong supporter of La Follette's Seamen's Act of 1915,[49] so that Andrew Furuseth, the legendary president of the International Seamen's Union, came to regard Sutherland as "a lover of freedom . . . a man who in the protection of freedom to all men regardless of their station in life, may be trusted and relied upon under all possible conditions."[50]

In 1916, Samuel Gompers took "pleasure in saying that Senator Sutherland has been, not only sympathetic, but very helpful in the passage of many measures through the United States Senate which the organizations of Labor have urged for enactment,"

> such as the railroad men's Hours of Service Law; the Employers' Liability Law; the popular election of United States Senators; legislation in behalf of children; the right of petition; the literacy test contained in the Immigration Bills; Eight Hour legislation and Industrial Education and Vocational Trade Training measures.
>
> He has vigorously opposed the speeding up schemes, known as the "Taylor System" in Government establishments, and in behalf of the miners in the notable contests in West Virginia, Colorado, and Michigan, Senator Sutherland vigorously championed Federal investigations during those controversies and was otherwise helpful in obtaining the restoration of civil rights for the oppressed mine workers in the states mentioned. . . .
>
> He is one of the members of the United States Senate whom we always feel free to approach and solicit his assistance on matters proposed that will redound to the welfare of all the people.[51]

Sutherland was the prime intellectual force behind the effort to enact a federal workmen's compensation scheme for employees of common carriers engaged in interstate commerce.[52] Arguing that the displacement of traditional common law "rules and defenses" was constitutional because they were "no longer justly applicable to modern industrial conditions,"[53] Sutherland noted that there was "a growing feeling that the individualist theory has been pushed with too much stress upon the dry logic of its doctrines and too little regard for their practical operation from the humanitarian point of view."[54] John W. Davis recalls that as a member of the House

he was initially opposed to the workmen's compensation bill, but that Sutherland's "masterful report" in favor of the legislation's "advanced position" was so persuasive that it "completely converted me to its support."[55] Sutherland argued that the common law could be altered or abrogated, "with the limitation that those '*fundamental rights* which that system of jurisprudence . . . has always recognized' shall not be infringed, and that [legislation] must be 'within the limits of those *fundamental principles* of liberty and justice which lie at the base of all our civil and political institutions.'"[56]

Sutherland believed that the possibilities of reform were limited by the fact that "there are certain fundamental social and economic laws which are beyond the power, and certain underlying governmental principles, which are beyond the right of official control, and any attempt to interfere with their operations inevitably ends in confusion, if not disaster."[57] Sutherland was thus willing to require an eight-hour work day for some especially stressful forms of work, but not for all work, and he was utterly unwilling to accept legislation that sought to fix wages or prices.[58] He believed that "too much government carries us in the direction of tyranny and oppression, and, in the language of Wendell Philips, 'kills the self-help and energy of the governed.'"[59] He condemned efforts to exempt labor from the application of anti-trust laws as "utterly indefensible . . . class legislation."[60]

Sutherland deeply valued the institution of judicial review. He denounced reforms like the initiative, referendum and recall, because he viewed direct democracy as incompatible with "the preservation of the people's liberties."[61] He opposed the admission of Arizona to the Union because the territory's proposed constitution authorized the recall of judges, which Sutherland regarded as creating "not an 'empire of laws' to be executed with impartiality and exactness, but an empire of men who punish not according to some fixed and definitely prescribed rule, but according to their undefined, unrestrained, and unlimited discretion."[62] Believing in the necessity of constitutional principles endowed with "stability and permanency,"[63] Sutherland was appalled by Theodore Roosevelt's advocacy on behalf of the recall of judicial decisions.[64]

After his service in the Senate, Sutherland grew increasingly concerned over the nation's "mania for regulating people," a "craze for change" that drove "a widespread demand for innovating legislation."[65] He particularly objected to "the tremendous increase during late years in the number and power of administrative boards, bureaus, commissions and similar agencies," because he regarded bureaucracy as a form of "*petty* despotism."[66] He emphasized that government "must not be allowed to wander too far from its normal and traditional functions, nor interfere overmuch with the liberty of the individual to work out his destiny here . . . in his own way."[67] Sutherland believed that "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 except where necessary to protect the liberties or rights of other individuals or to safeguard society."[68] He asserted that "doubts should be resolved in favor of the liberty of the individual and his power to freely determine and pursue his own course in his own way."[69]

As Sutherland ascended to the Court, therefore, he was, like Taft, a national figure of a strongly conservative bent, who could nevertheless boast a genuine

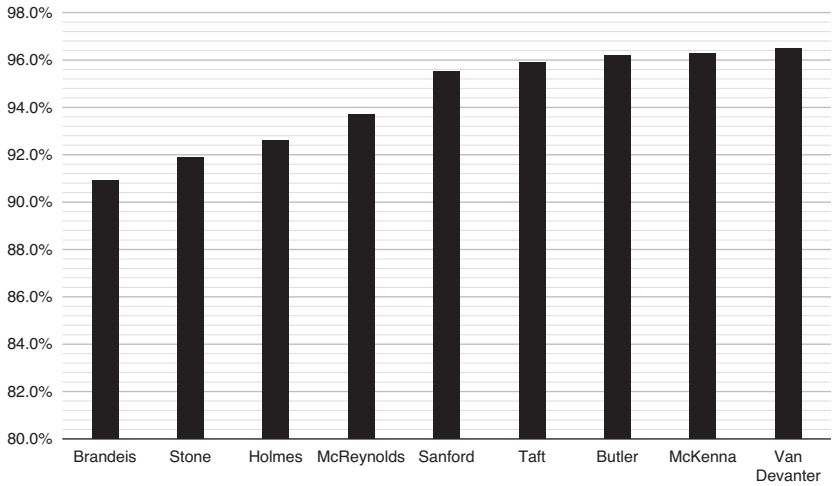

Figure I-7 Percentage of decisions in which Sutherland participated and joined the same opinion as another justice, 1922–1928 terms

record of achievement. He exuded gravitas. Sutherland and Taft had enjoyed a long professional relationship.[70] Taft wrote Sutherland an extended letter of welcome to Court, noting that "you now come into the Court with a general opinion as to the functions of the Court similar to my own."[71] Taft confided to Van Devanter that Sutherland "will be one of our kind I think."[72]

It is apparent from Figure I-7 that Sutherland's voting on the Taft Court was most naturally aligned with its conservative wing. Figure I-8 suggests that this tendency might have been even more pronounced in conference. Yet Sutherland, like Taft, was capable of flexibility and adjustment. While he could lead the conservative charge against price regulation,[73] he could also author a profoundly innovative opinion sanctioning urban zoning.[74] Figure I-10 reveals that Sutherland exercised substantial influence on the voting of his peers; he was comparatively successful in persuading colleagues to shift their votes at conference and join his opinions. Figure I-9 illustrates that as a general matter Sutherland was also quite accommodating to views other than his own. William O. Douglas remembers him as "a tempered and reasonable man who also, as his decisions indicate, was zealous in upholding the rights of individuals before the law."[75] He was, in Brandeis's words, a man of "character & conscience."[76] He was also personally charming and prepossessing.[77]

During his time on the Taft Court, Sutherland suffered recurring bouts of illness, the effects of which are illustrated in Figures I-11 and I-12.[78] But Sutherland's lucid, systematic, and articulate intelligence nevertheless catapulted him into a position of intellectual leadership on the conservative wing of the Court.[79] Because of what even Taft regarded as the "rather . . . formal cut" of his "mind,"[80] Sutherland was driven to implement the full range of his "rather

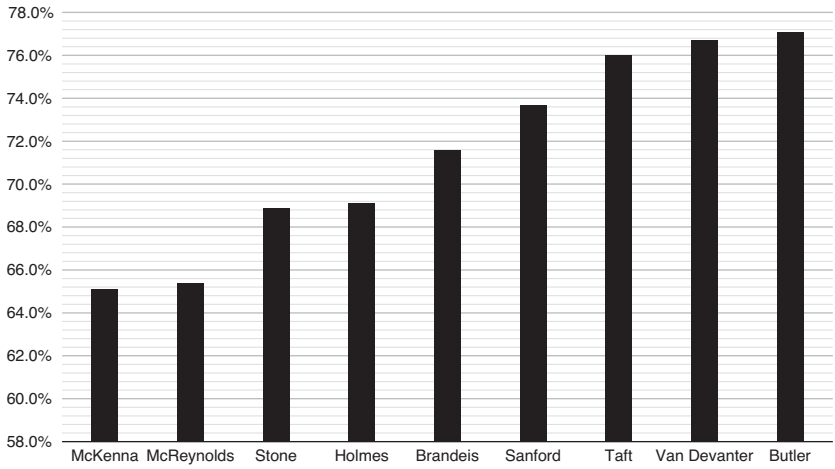

Figure I-8 Percentage of decisions in which Sutherland participated and voted with another justice in conference

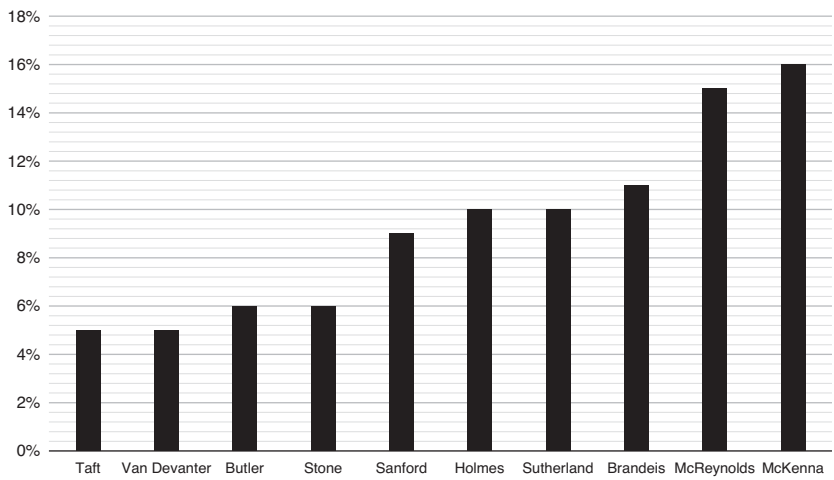

Figure I-9 Percentage of decisions in which a justice participated and was willing to change a conference vote to join a Court opinion or to join a Court opinion despite registering uncertainty in conference

conceptualist notions of the meaning and application of the Fourteenth Amendment."[81] Taft's innate practical good sense led him at first to resist this tendency,[82] but, as his own health deteriorated, Taft ultimately came to rely increasingly on Sutherland's stiffer, more unbending formality.[83]

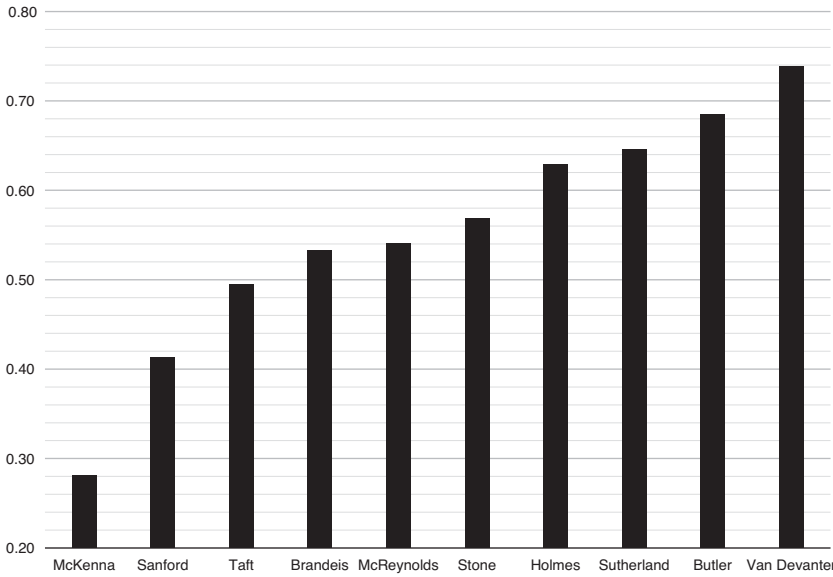

Figure I-10 Number of votes recorded at conference that switch to join the opinion of a justice, divided by the number of that justice's opinions in conference cases

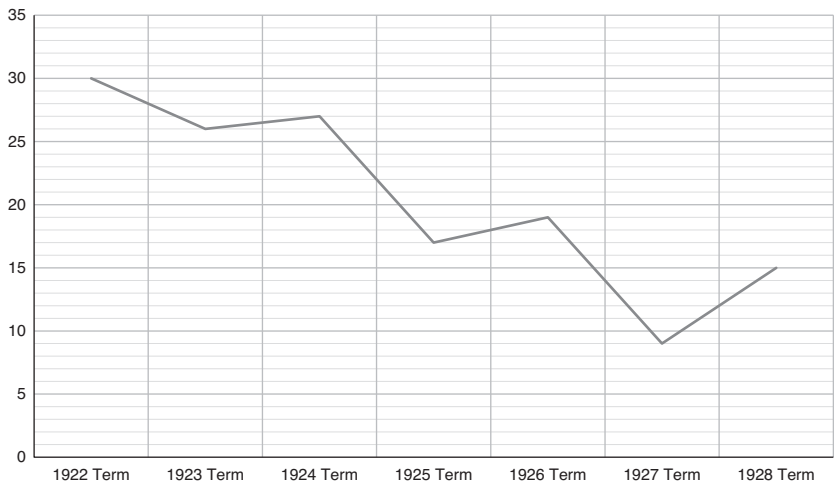

Figure I-11 Number of opinions authored by Sutherland, by term

The abstract and formal clarity of Sutherland's approach earned him the honor in 1964 of having written "more opinions that have been specifically overruled than any other Justice in the history of the Supreme Court. Of those opinions

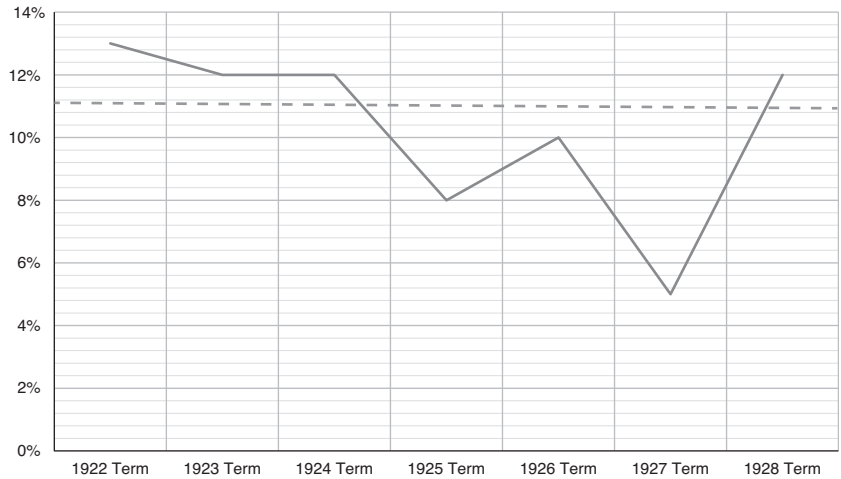

Figure I-12 Percentage of Court's opinions authored by Sutherland, by term. An even distribution of cases would assign 1/9, or 11%, to each justice.

repudiated by name since the reconstruction of the Court in the late 1930s, Sutherland was the author of more than 20 per cent."[84] The substitution of Sutherland for Clarke, in short, steered the Court sharply to the right. It signaled, commented *The Nation*, "a drear outlook indeed."[85]

Notes

1. Clarke receives a full-scale biographical treatment in HOYT LANDON WARNER, THE LIFE OF MR. JUSTICE CLARKE: A TESTAMENT TO THE POWER OF LIBERAL DISSENT IN AMERICA (Cleveland: Western Reserve University Press 1959).
2. "Clarke is a good fellow and I like him. He is a manly, generous, courageous man." WHT to Horace D. Taft (September 7, 1922) (Taft papers). *See* WHT to William R. Stansbury (September 5, 1922) (Taft papers).
3. WHT to Horace D. Taft (September 13, 1922) (Taft papers).
4. William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE REVIEW 1, 19–20 (1920).
5. "There is a good deal of dissent in the Court, which I deprecate. Three of the nine are pretty radical, and occasionally they get some of the brethren, which is disquieting; but still we must work on and keep the Constitution as strong in its useful operation as we can." WHT to Sir Thomas White (January 8, 1922) (Taft papers).
6. Figure I-3 demonstrates that Clarke manifested a willingness to dissent from the time he first joined the Court.
7. *A New Supreme Court Justice*, 132 THE OUTLOOK 50 (September 13, 1922). For a study of Clarke's jurisprudence, see David M Levitan, *The Jurisprudence of Mr. Justice Clarke*, 7 MIAMI LAW QUARTERLY 44 (1953).
8. Figure I-4 demonstrates that Clarke was indeed close to Brandeis, although somewhat less so to Holmes. Clarke's relationship with Brandeis was definitely cooling as Taft became chief justice, as Figure I-6 demonstrates. Clarke differed from Holmes and Brandeis in his substantive view of civil liberties. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921); Leach v. Carlile, 258 U.S. 138 (1922). He also differed in his understanding of anti-trust law, *see, e.g.*, American Column and Lumber Co. v. United States, 257 U.S. 377 (1921); and in his approach to private tort law, see, e.g., United Zinc & Chemical Co. v. Van Britt, 258 U.S. 268 (1922).
9. WHT to Elihu Root (September 13, 1922) (Taft papers). Taft observed that Clarke's "views are so fixed by his prejudices with respect to certain classes of cases that even Holmes has said to me that he made up his mind in advance of the argument." *Id. See* WHT to Charles D. Hilles (September 9, 1922) (Taft papers). "Clarke," observed Brandeis to Felix Frankfurter, "practically never changes his views." *Brandeis-Frankfurter Conversations*, at 305 (June 18, 1922).
10. WHT to Horace D. Taft (September 7, 1922) (Taft papers). Brandeis remarked to Frankfurter that Clarke "'always "dilated with a wrong emotion," as Rufus Choate said, on the subject, sustaining power of carrier to limit amount of his liability.' And F.F. added: 'or Employers Liability cases.' 'Yes, and Employers Liability cases. Those cases never wearied of calling forth his long and weary dissent.' I [Brandeis] said to him [Clarke] about Employers Liability, 'Don't you see that the worse the law is the more it will stimulate the unions to demand workmen's compensation laws, for the union railroad men are to blame, for having resisted it.' 'No – he would shake his head and go on writing dissents.'" *Brandeis-Frankfurter Conversations*, at 332 (August 3, 1924).
11. OWH to Harold Laski (March 26, 1922), in 1 HOLMES-LASKI CORRESPONDENCE, at 413. Laski believed that Clarke, although "a nice fellow," possessed "an obstinate and pedestrian mind." Harold Laski to OWH (September 6, 1922), *id*. at 446.

12. OWH to Harold Laski (March 26, 1922), *id*. at 413. Holmes later wrote Laski that "I didn't admire Clarke's rhetoric, but he believed it – which is something." OWH to Harold Laski (September 10, 1922), *id*. at 445.
13. Warner, *supra* note 1, at 114. McKenna confided to Taft that "I had affection for Clarke." JM to WHT (October 23, 1922) (Taft papers). Upon Clarke's retirement, Holmes wrote Laski that "I shall miss his affectionate companionship." OWH to Harold Laski (September 10, 1922), in 1 Holmes-Laski Correspondence, at 445. When Clarke retired, Holmes sent him a sad, warm note: "I shall miss you in every way. . . . I shall miss your tales and the affectionate feelings that you radiate and generate. I shall miss your criticism and I repeat I shall miss you." OWH to JHC (September 6, 1922) (Holmes papers).

    Curiously enough, Clarke's closest attachment on the Court was to his ideological opposite, the conservative Willis Van Devanter. Clarke considered his friendship with Van Devanter "much the pleasantest of my life in Washington and I shall always regret that it did not begin earlier. It is a rare thing in this life to meet a man one can trust without reserve as I know I could trust you." JHC to WVD (September 8, 1922) (Van Devanter papers). The normally staid and reserved Van Devanter responded in kind: "To me our relations have been so comfortable, so very different from almost all others, that I shall miss you as I have never missed any one before. I feel that I have been leaning on you without realizing it – going to you as to a living and ever dependable fountain." WVD to JHC (September 3, 1922) (Clarke papers). Van Devanter regarded Clarke "as the embodiment of courage, gentleness and large vision." *Id. See also* WVD to JHC (October 4, 1922) (Van Devanter papers) ("Personally I have much difficulty in reconciling myself to your absence. I knew my attachment for you was strong, but it was even stronger than I realized.").
14. John Hessin Clarke, *Methods of Work of the United States Supreme Court Judges*, 20 Ohio Law Reporter 398, 402, 407 (1922). *See* John Hessin Clarke, *Observations and Reflections on Practice in the Supreme Court*, 8 American Bar Association Journal 263 (1922). Clarke wrote that "the most trying fact of it all was the conferences. So futile for the most part and so little like what I had imagined, and what the country imagines they must be." JHC to WVD (July 28, 1924) (Van Devanter papers). Five years later he wrote Van Devanter that "those Saturday conferences" "were the greatest disappointment of my service at Washington." JHC to WVD (April 6, 1929) (Van Devanter papers).
15. JHC to WVD (October 2, 1922) (Van Devanter papers).
16. JHC to WVD (August 23, 1922) (Van Devanter papers). *See* JHC to WHT (August 31, 1922) (Taft papers) ("I may add in the confidence of our friendship that the work has become extremely irksome to me and I feel that I cannot spend the few years that remain to me over cases for the most part such as I would not have accepted during many years of my practice."). After his retirement, Clarke wrote Taft that his "impatience with the trifling and technical character of much of the work I was obliged to do" had "been growing on me for several years so that I couldn't restrain something of expression of it in my New York Address." JHC to WHT (September 12, 1922) (Taft papers). Clarke's New York address is reproduced in the American Bar Association Journal, *supra* note 14. Of Clarke's complaint, Brandeis wryly observed to Frankfurter that "I am reminded of: 'Wenn ich ein Künstler wär, ich mahlte traun nur hübsche mädchen interessante Frauen.' [If I were an artist, I would

paint only pretty girls and interesting women.] Holmes, J. would have a different opinion of the 'unimportant cases.'" LDB to Felix Frankfurter (October 2, 1922), in BRANDEIS-FRANKFURTER CORRESPONDENCE, at 121.

17. JHC to OWH (September 12, 1922) (Holmes papers).
18. JHC to WHT (July 1, 1921) (Taft papers). Clarke would later greet his successor, George Sutherland, with a note that apologized for "delay sending my congratulations until you should be safely anchored in what the late Chief Justice, with candor & with what later on seemed to me entire accuracy, described as 'a dogs life.' But most men do not think so ill of it and I am writing to wish you every happiness and the largest measure of success in the discharge of the duties of your great office." JHC to GS (October 4, 1922) (Sutherland papers).
19. JHC to WHT (October 31, 1922) (Taft papers). Clarke added: "I shall watch the work of you all with a critical but friendly eye and shall take occasion in a half-dozen speeches which are scheduled to say a word in your behalf. . . . The lawyers may damn the Court but nevertheless as yet they trust and all but revere it. There is magic in the long black robe, My Masters, – 'motley's the only wear.'"
20. WHT to JHC (November 2, 1922) (Taft papers). The official exchange of letters appears at 260 U.S. v (1922). Clarke was quite proper in his formal response, sublimating his irritation into "the expression of the hope that the bill pending in Congress to modify the imperative statutory jurisdiction of the Court may soon become a law, so that you may not be so burdened with unimportant cases as you now are, and so have more time and strength for the consideration of the many causes of great public concern constantly coming before you, and the decision of which is so fateful to our Country." *Resignation of Mr. Justice Clarke*, 260 U.S. v, vi–vii (1922).
21. WHT to Horace D. Taft (September 7, 1922) (Taft papers). *See* WHT to Warren G. Harding (September 5, 1922) (Taft papers) ("It seems a curious circumstance, though I could explain it, that [Clarke] and McReynolds were bitter enemies, due largely to McReynolds' overbearing and insulting attitude toward Clarke.").
22. WHT to Elihu Root (September 13, 1922) (Taft papers). Clarke himself termed the situation "deplorable and harassing." JHC to Woodrow Wilson (September 9, 1922) (Wilson papers). When Clarke eventually retired in 1922, McReynolds refused to sign the Court's traditional letter of regret. 260 U.S. v (1922). "We have written a letter of regret to Clarke," Taft wrote his son Robert, "which McReynolds would not sign. . . . This is a fair sample of McReynold's [sic] personal character and the difficulty of getting along with him. Fortunately no love is lost between him and Clarke." WHT to Robert A. Taft (October 26, 1922) (Taft papers).
23. According to Dean Acheson, Clarke "had the misfortune to offend Justice McReynolds as my boss had, but whereas Justice Brandeis was untouched by the fact that Justice McReynolds never spoke to him, this upset Justice Clarke deeply. Justice Holmes tried for years to patch this up, but you couldn't patch these things up with Justice McReynolds. . . . Eventually [Clarke] threw in the towel [and] resigned from the Court." Dean Acheson, *Recollections of Service*, 18 ALABAMA LAWYER 355, 363 (1957). It should be noted that when Taft gently questioned Clarke "whether you do not give undue weight in your conclusion to certain phases of your judicial life which were outrageous and exasperating but which in retrospect will not seem important," WHT to JHC (September 5, 1922) (Taft papers), Clarke responded by asking Taft not to "think that I was influenced by the boor. I am of a temperament much too combative when unfairly treated to permit such a thing to

influence me to such a decision as I reached. Rather it would have kept me there to see it through, unpleasant though it was." JHC to WHT (September 12, 1922) (Taft papers).

24. Figure I-3 illustrates by term how likely Clarke was to author or join an opinion for the Court.
25. WARNER, *supra* note 1, at 112.
26. *Id.* at 133 n.3. Clarke's only other sister, Alice, had died on March 28, 1921. *Id.* Clarke was a lifelong bachelor.
27. JHC to WHT (March 7, 1922) (Taft papers). Clarke wrote Van Devanter that "I am passing through waters that are deep & dark & cold. I have always, heretofore, been able to summon resolution sufficient to enable me to meet conditions before me but this is so frustrating that I continue to be overwhelmed by it entirely." JHC to WVD (March 7, 1922) (Van Devanter papers).
28. JHC to WVD (July 7, 1922) (Van Devanter papers).
29. JHC to WVD (August 23, 1922) (Van Devanter papers).
30. JHC to WHT (August 31, 1922) (Taft papers). Taft wrote Van Devanter that "I am greatly surprised to hear of Clarke's determination to retire, for while I knew that he was saying things that indicated his impatience with the burden of his duties of the Court, I did not suspect that it was really serious. . . . Clarke was so contemptuous of McReynolds' statements that he was going to retire that he would hardly make them himself without intending to carry them through." WHT to WVD (August 31, 1922) (Taft papers). On Clarke's career after resignation, see Carl Wittke, *Mr. Justice Clarke – A Supreme Court Judge in Retirement*, 36 MISSISSIPPI VALLEY HISTORICAL REVIEW 27 (1949).
31. JHC to Warren G. Harding (September 1, 1922) (Harding papers). The *New Republic* would term the "retirement of Mr. Justice Clarke from the Supreme Court at the youthful age of sixty-five . . . little short of an affront to our most venerable institution." Walton H. Hamilton, *The Ages of the Justices*, 32 NEW REPUBLIC 168 (1922).
32. *Justice Clarke Out of Supreme Court*, NEW YORK TIMES (September 5, 1922), at 1.
33. 62 CONG. REC. 12169 (September 5, 1922).
34. Woodrow Wilson to JHC (September 5, 1922) (Wilson papers). Wilson's concern was echoed in some press reports. "The public really has a grievance in Justice Clarke's resignation," ran one editorial. "He occupied a strategic place. He is a liberal among conservatives, and he was needed." *Justice Clarke's Resignation*, NEW YORK GLOBE AND COMMERCIAL ADVERTISER (September 5, 1922), at 14. The *Chicago Tribune* remarked that Clarke's replacement by Sutherland "will leave Justice Brandeis the only 'radical' member of the court." *Sutherland to Succeed Clarke on U.S. Bench*, CHICAGO TRIBUNE (September 5, 1922), at 12. *The Nation*, by contrast, took the position that Clarke's resignation "alters the complexion of the Supreme Court not at all, for he has been succeeded by ex-Senator Sutherland, a lawyer of the conventional type but possessed of ability and learning, who can be depended upon to uphold the existing order and defend property against all comers quite as strongly as his predecessor."115 THE NATION 267 (1922).

Clarke himself took exception to Wilson's suggestion that he and Brandeis were natural allies:

> Judge Brandeis and I were agreeing less & less frequently in the decision of cases involving what we call, for want of a better designation, liberal principles. It is for you to judge which was falling away from the correct standards.

> During the last year in the Hardwood Anti-Trust Case [American Column and Lumber Co. v. United States, 257 U.S. 377 (1921)], which I wrote, B and Holmes dissented, B writing an opinion. It is one of the most important anti-trust cases ever decided by that Court for it involved for the first time "the open competition plan" which was devised with all the cunning astute lawyers & conscienceless businessmen could command to defeat or circumvent the law. . . .
>
> In the last child labor case [Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922)] I alone dissented. Unfortunately the case was considered and decided when one of my sisters was dying and I could not write a dissenting opinion. . . .
>
> In a personal injury case involving the doctrine of attractive nuisance [United Zinc & Chemical Co. v. Van Britt, 258 U.S. 268 (1922)] the Chief Justice & Justice Day joined in an opinion which I wrote dissenting from the rule that contributory negligence of a trespassing child of tender years barred recovery in a case of flagrant poisoning of the water in a pool in an unfenced common in which two children perished when bathing. . . . You doubtless noted how we differed with respect to war legislation.
>
> There is much more, but this will suffice to show that in leaving the Court I did not withdraw any support from Judge Brandeis. One or the other of us was shifting or had shifted his standards so that in critical or crucial cases we were seldom in agreement. Our personal relations, of course, continued entirely cordial.

JHC to Woodrow Wilson (September 9, 1922) (Wilson papers). On Clarke's deteriorating voting relationship with Brandeis, see Figure I-6.

35. WHT to George Wickersham (September 18, 1922) (Taft papers).
36. WHT to Horace D. Taft (September 13, 1922) (Taft papers). *See* WHT to Charles D. Hilles (September 9, 1922) (Taft papers) ("I think Sutherland is judicial, and he certainly has ability. His mind is rather of a formal cut, but his wide governmental experience and his really very excellent knowledge of constitutional and other law, together with his knowledge of practical politics (for that helps on the Bench), will make him a great improvement on his predecessor as a Judge.").
37. George Sutherland, *A Message to the 1941 Graduating Class of Brigham Young University*, June 4, 1941, p. 2 (Sutherland papers) ("*Message*"). Harlan Stone believed that Sutherland's "life experiences and his outlook were typically American and typical also of those Justices who came to this Court from beyond the Mississippi River during the period between the outbreak of the Civil War and the first World War." *In Memory of Honorable George Sutherland*, 323 U.S. clxi, clxix (1944).

    The standard biography of Sutherland is JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (Princeton University Press 1951). Sutherland has also received a book-length treatment in HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (Princeton University Press 1994). For shorter studies, see Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WILLIAM & MARY BILL OF RIGHTS JOURNAL 249 (2002); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WILLIAM & MARY BILL OF RIGHTS JOURNAL 1 (1997); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 UNIVERSITY OF COLORADO LAW REVIEW 1127 (1999); R.A. Maidment, *A Study in Judicial Motivation: Mr. Justice Sutherland and Economic Regulation*, 1973 UTAH LAW REVIEW 156; John Knox, *Justice George Sutherland*, 24 CHICAGO BAR RECORD 16 (1942); R. Perry Sentell, Jr., *The Opinions of Hughes and Sutherland and the*

Rights of the Individual, 15 VANDERBILT LAW REVIEW 559 (1962); Harold M. Stephens, *Mr. Justice Sutherland*, 31 AMERICAN BAR ASSOCIATION JOURNAL 446 (1945); John F. Reinhardt, *Mr. Justice Sutherland*, 12 UNIVERSITY OF KANSAS CITY LAW REVIEW 43 (1943); Alpheus Thomas Mason, *The Conservative World of Mr. Justice Sutherland*, 32 AMERICAN POLITICAL SCIENCE REVIEW 443 (1938).

38. Sutherland, "*Message*," *supra* note 37, at 4.
39. David Burner, *George Sutherland*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2133 (Leon Friedman & Fred L. Israel, eds., New York: Chelsea House Publishers 1969).
40. PASCHAL, *supra* note 37, at 5–15. At the time the institution was known as the Brigham Young Academy. Sutherland's favorite teacher at the Academy was Karl G. Maeser. Sutherland, *Message*, *supra* note 37, at 8–13. Paschal reports that Maeser was a firm believer in the philosophy of Herbert Spencer. PASCHAL, *supra* note 37, at 9. Sutherland was not himself a Mormon, although he maintained close ties to the Mormon community. In 1921, he reported that "I don't agree with the Mormon theology, but I do have the utmost respect for the Mormon people. They are law-abiding, industrious, home-loving, debt paying, honest and conscientious people and I am glad to number among them some of my very warmest friends. Years ago I objected very seriously, of course, to the practice and teaching of polygamy, but that has been abandoned for many years and is today as dead as slavery. . . . I have no affiliation with any church, and I have no favorites among them. I think the churches on a whole do an immense amount of good and I should not like to see them established. The Mormon Church today, so far as my observation goes, measures up to the others in this respect." GS to W.W. Baldwin (January 15, 1921) (Sutherland papers).
41. PASCHAL, *supra* note 37, at 9, 15–20.
42. *Justice Clarke's Retirement*, NEW YORK TIMES (September 6, 1922), at 14. "Chief Justice Taft has been quoted as saying that Mr. Sutherland was the greatest constitutional lawyer in the Senate, and numerous other eminent members of the bar have expressed the same opinion. . . . [T]he opinion expressed . . . is that Mr. Sutherland was the ablest lawyer in Congress. That opinion was expressed by John W. Davis." *The New Supreme Court Justice*, NEW YORK TIMES (September 10, 1922), § 7, at 3. In February 1921, Sutherland received an honorary Doctor of Laws Degree from George Washington University. The citation read: "Foremost amongst the modern expounders of Constitutional Law; consistent advocate of strict adherence to the American system of Government as absolutely essential to individual liberty, national security and international harmony." William Miller Collier to GS (February 23, 1921) (Sutherland papers).
43. GS to George M. Hanson (December 31, 1916) (Sutherland papers). Sutherland had previously been elected senator by the Utah state legislature.
44. Sutherland said of his election as American Bar Association president that "it really was a greater honor than being elected to the Senate, because nothing influences" the American Bar Association "except the belief that they are doing the right thing." GS to George M. Hanson (December 31, 1916) (Sutherland papers).
45. *The New Supreme Court Justice*, *supra* note 42, at 3.
46. "In matters of judicial administration, Sutherland was always one of the most enlightened and progressive men in the Senate." PASCHAL, *supra* note 37, at 55. In the Senate, Sutherland was a leader in the movement to revise and recodify provisions

of the federal criminal and judicial codes. *Id.* at 53–54. *See* George Sutherland, *The Nation's First Penal Code*, 189 NORTH AMERICAN REVIEW 107 (1909).

47. 53 CONG. REC. 75 (December 7, 1915). *See* PASCHAL, *supra* note 37, at 92 (Sutherland "lost no opportunity to further the cause. He spoke at memorial services for a militant suffragist. He received delegations from various women's organizations, counseling them as to their tactics and providing them good copy. The women, for their part, acknowledged that he was their 'powerful ally' and praised him for his 'generous help and support.'"); ARKES, *supra* note 37, at 3–12; David E. Bernstein, *Revisiting Justice George Sutherland, the Nineteenth Amendment, and Equal Rights for Women*, 20 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 143 (2022). Sutherland's speech in support of what would eventually become the Nineteenth Amendment, which was reproduced and distributed in pamphlet form, may be found at 53 CONG. REC. 11318–19 (July 20, 1916) ("Any argument which I may use to justify my own right to vote justifies . . . the right of my wife, sister, mother, and daughter to exercise the same right. . . . [O]ther superstitions which in the past have denied women equal opportunities for education, equality of legal status – including the right of contract and to hold property – and all the other unjust and intolerant denials of equality have disappeared, or are disappearing, from our laws and customs.").
48. 169 U.S. 366 (1898). On Sutherland's role, see 48 CONG. REC. 6797 (May 20, 1912) ("I believe very thoroughly in the 8-hour day. I have been an advocate of it for many years. As a member of the legislature of my own State in 1896 I had the honor of assisting in the preparation and enactment of the 8-hour law . . . applying to mines and smelters. . . . I would make this line of division – it is not a very accurate line; not a line that could probably be laid down in exact words in legislation; but, roughly speaking, I would make this line of division – wherever a man is engaged in mechanical work or in manual work which requires the use of the same muscles, hour after hour, I would make the 8-hour day compulsory. . . . I would not apply that to the farm, because on the farm the man is engaged in the open air; he is engaged in a multitude of tasks. . . . But in the mechanical pursuits I believe thoroughly that the 8-hour day in the end will be better for both the employer and the employee. . . . We cannot make such a law that will be effective unless it is compulsory; we can not very well leave to an arrangement between the employer and the employee, because in a contest of that kind I think the employee would usually be at a disadvantage as compared with the employer.").
49. Pub. L. 63-302, 38 Stat. 1164 (March 4, 1915). In the words of Andrew Furuseth, Sutherland "became an earnest champion of legislation which would restore to us our rights as men. . . . There was nothing that he could do that he did not gladly do. There was no time that he was not ready with encouragement and advice and any action that would advance the legislation." Andrew Furuseth to D.O. Jacobs (July 5, 1916) (Sutherland papers).
50. *Id.* Furuseth urged labor in Utah to support Sutherland in the 1916 election. "I would think it a great national loss, a real national misfortune, to lose Senator Sutherland from the United States Senate." *Id.*
51. Samuel Gompers to O.E. Asbridge (June 30, 1916) (Sutherland papers).
52. *Message of the President of the United States Transmitting the Report of the Employers' Liability and Workmen's Compensation Commission*, Sen. Doc. No. 338, 62nd CONG. 2nd SESS. (February 21, 1912) ("*Report*"). As president,

Taft praised the "very able and satisfactory" report of the Commission, which had been chaired by Sutherland. Taft noted that "the discussion of the constitutional questions which have arisen in respect to the validity of the bill is of the highest merit." *Id*. at 6. Taft "sincerely" hoped that Sutherland's "carefully drawn bill" would be expeditiously passed. *Id*. at 5, 8. *See* William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KENTUCKY LAW JOURNAL 3, 18–19 (1916) (questioning why the federal Workman's Compensation Act, "which has been prepared with great care by Senator Sutherland to meet constitutional and other objections" has not yet passed Congress). Although a federal workmen's compensation bill was not adopted until 1916, Taft in the interim created a compensation scheme for Canal Zone employees that was based upon Sutherland's bill. For a discussion, see PASCHAL, *supra* note 37, at 65–69.

53. *Report*, *supra* note 52, at 14.
54. George Sutherland, *The Economic Value and Social Justice of a Compulsory and Exclusive Workmen's Compensation Law*, reprinted in Sen. Doc. 131, 63rd CONG. 1st SESS. (1913), at 11. Sutherland would as a justice remain firm in his support of workmen's compensation statutes. *See, e.g.*, Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923); Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928).
55. *The New Supreme Court Justice*, *supra* note 42, at 3.
56. *Report*, *supra* note 52, at 34 (citing Hurtado v. California, 110 U.S. 516, 535–36 (1884)). Sutherland viewed "fundamental" rights and liberties in a decidedly nonpositivistic way. Explaining why Congress could not violate fundamental rights and liberties when legislating for the territories, for example, Sutherland observed that although congressional power over federal territories was otherwise plenary, "such of these individual and civil rights as are beyond the interfering power of Congress, are guaranteed by the fundamental principles of free government rather than by the direct force of the Constitution in which they are formulated. They cannot be denied to the inhabitants of any territory subject to the control of the United States, because they are inherently inviolable; and the Constitution is resorted to not as supreme law for their enforcement but as high proof of their existence and incontrovertible nature." GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 69 (New York: Columbia University Press 1919). Although to modern ears Sutherland's conclusions seem to sound in natural law, Sutherland more probably saw the source of fundamental law to lie in historical experience. *See* George Sutherland, *The Courts and the Constitution*, Sen. Doc. No. 970, 62nd CONG. 3rd SESS. (1912), at 5 ("We learn to distinguish what is wise and righteous from what is wrong and foolish by experience which compels our assent rather than by precept, which only advises our understanding."). Often when Sutherland spoke about natural laws that legislation could not alter, see, e.g., *infra* note 57, he seemed to be referring to the inevitable consequences of failing to take adequate account of the power of individual incentives.
57. George Sutherland, *Principle or Expedient?*, in PROCEEDINGS OF THE 44TH ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 265 (Baltimore: Lord Baltimore Press 1921). Sutherland continued: "These laws and principles may be compared with the forces of nature whose movements are entirely outside the scope of human power." *Id*. at 265–66. *Compare* WILLIAM HOWARD TAFT, LIBERTY UNDER LAW: AN INTERPRETATION OF THE PRINCIPLES OF OUR CONSTITUTIONAL GOVERNMENT 42 (New Haven: Yale University Press 1922) ("The lesson must be learned . . . that there is only a limited zone within which legislation and governments

can accomplish good. We cannot regulate beyond that zone with success or benefit. . . . If we do not conform to human nature in legislation we shall fail.").

58. In 1916, Samuel Gompers asked Sutherland his opinion on legislation that would impose an eight-hour workday on all workers. Samuel Gompers to GS (January 7, 1916) (Sutherland papers). Sutherland's reply is worth quoting at length:

> Just how far the statute law should go in dealing with private industrial relations is a difficult and sometimes delicate question. I have always favored laws which had for their object the substantive betterment of workers, such as those which enforce proper sanitary conditions, safety appliances and machinery, adequate, and as far as possible automatic compensation for injuries, and so on. I have also favored, and still favor, by legislation the eight-hour day in industries such as mining, smelting and other industries where long employment is injurious to health. In addition to this, I am in favor of an eight-hour day in all mechanical industries and in all work where the same set of muscles are continuously employed, or where the same strain and attention is continuously required about the work. But whether [an eight-hour day for all workers] should be compelled by legislation, or brought about by the efforts of the employees, aided by public sentiment, is a matter about which I am in serious doubt.
>
> The State is justified in stepping in wherever its police activities are involved, as they are involved in the cases that I have mentioned. If the State undertakes to go further and interfere in the relations of employer and employee, while in many instances and perhaps for a time that interference might result in the betterment of conditions from the point of view of the workmen, there is grave danger that it may be utilized in other instances and in the course of time, to his positive detriment.
>
> Whenever you concede the power to the State to interfere in such matters, you have effectually conceded it whether the results be good or evil. For example, if we once undertook by legislation to fix wages, they may be a first fixed at a high sum, but under this concession they may sometimes be fixed at a very inadequate sum. . . .
>
> My own impression is that the matter of hours of labor, except as stated above, and except in Government work, like the matter of wages can be more safely left to private arrangement in view of the fact that the numerical strength of the labor unions today constitutes a set-off for the money strength of the employer. . . .
>
> P.S. We must be careful not to overdo our legislation and take from the individual the strengthening effect which comes from the struggle to help himself.

GS to Samuel Gompers (January 15, 1916) (Sutherland papers). Sutherland resolutely opposed "the economic folly of attempting to control the movement of prices of ordinary commodities by legislation."

> Not only is any such attempt futile from a practical view point, but it constitutes a distinct departure from . . . great political principle. . .. The power to fix prices by law or administrative order has been uniformly denied by the courts save in those exceptional cases where the business or the service is clothed with a public interest. In all other cases the owner has an inherent, constitutional right to the market price, fixed by what is called the "higgling of the market," irrespective of the extent of his profits. Such a right is, indeed, itself essential property which stands upon an equality with life and liberty, under the guaranties of the Fifth and Fourteenth Amendments.

Sutherland, *Principle or Expedient?*, *supra* note 57, at 277.

59. GEORGE SUTHERLAND, SUPERFLUOUS GOVERNMENT: AN ADDRESS BY SENATOR SUTHERLAND OF UTAH 2 (Cleveland: Cleveland Chamber of Commerce 1914).
60. 51 CONG. REC. 11804 (July 8, 1914) (discussion of 38 Stat. 609, 652 (1914), prohibiting expenditure of Department of Justice funds for enforcing anti-trust

laws against labor). On Taft's view of such efforts, see *Gompers and the Law* (January 12, 1921), in VIVIAN, at 525 ("a vicious abuse in seeking to array a class against the whole body, politic and social.").

61. Sutherland, *The Courts and the Constitution*, *supra* note 56, at 11. Sutherland addressed the question at length in a famous speech, 47 CONG. REC. 2793–803 (July 11, 1911), which was republished in pamphlet form as *Government by Ballot*. Taft's views on the initiative, referendum and recall were essentially similar. *See* WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 42–95 (New Haven: Yale University Press 1913). *See id.* at 64 ("The strongest objection to these instruments of direct government . . . is the effect of their constant use in eliminating all distinction between a constitution as fundamental law, and statutes enacted for the disposition of current matters. . . . It minimizes the sacredness of those fundamental provisions securing the personal rights of the individual against the unjust aggression of the majority of the electorate.").
62. 47 CONG. REC. 2800 (July 11, 1911). *See id.* at 2802 ("The moment a provision for the recall of the judges of the Supreme Court shall be written into the Federal Constitution, that moment will mark the beginning of the downfall of the Republic and the destruction of the free institutions of the American people."). As president, Taft took a similar position, vetoing the congressional resolution admitting Arizona to the Union. *See Special Message of the President of the United States Returning without Approval House Joint Resolution No. 14*, H. Doc. No. 106, 62nd CONG. 1st SESS. (August 5, 1911), at 2 ("This provision of the Arizona constitution, in its application to county and State judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government that I must disapprove a constitution containing it."). Sutherland's first published address in favor of a strong and independent judiciary was in 1895. *See* George Sutherland, *The Selection, Tenure and Compensation of the Judiciary*, in REPORT OF THE SECOND ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH 47–60 (Grocer Printing Co. 1895) ("Without an honest, capable and independent judiciary, no State can long maintain its dignity nor respectability among the people of the earth." The judiciary "stands 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 and insignificant.").
63. 47 CONG. REC. 2794 (July 11, 1911).
64. George Sutherland, *The Law and the People*, 2 CONSTITUTIONAL REVIEW 90, 93–94 (1918) (reprinting an address delivered on December 13, 1913) ("The demand for the recall of judicial decisions proceeds upon a theory which completely disregards the nature of the judicial function, which is not to register the changing opinions of the majority as to what the Constitution and law ought to be, but to interpret and declare the Constitution and law as they are, whether such interpretation satisfies the desires of many or none at all. . . . The effect of the plebiscite will not be to enact a rule for future guidance, binding the majority as well as the minority, but will be simply to give passing expression to the fleeting opinion of the temporary majority, having no binding force upon the less instructed or the more instructed majority of another day. Like idle words written upon the sands the construction of today will disappear tomorrow, only to reappear at a later date, as the sentiment of the majority ebbs and flows."). Taft held quite similar views.

65. George Sutherland, *Private Rights and Government Control*, in REPORT OF THE FORTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 201 (Baltimore: Lord Baltimore Press 1917). Taft also complained of the "disease of excessive legislation." TAFT, POPULAR GOVERNMENT, *supra* note 61, at 41. "The amount of useless legislation in the states of this country is appalling," he said, "and is one of the most distressing signs of the times." *Id.* at 42.
66. Sutherland, *Private Rights and Government Control*, *supra* note 65, at 204. "[T]he things which organized society exacts from its members must be particularized as far as practicable by definite and uniform rules. Liberty consists at last in the right to do whatever the law does not forbid, and this presupposes law made in advance . . . and interpreted and applied after the act by disinterested authority. . . . It is, therefore, of the utmost importance that the authority which interprets and executes the law should not also be the authority which makes it. . . . The danger . . . which is threatened by the multiplication of bureaus and commissions consists in the commingling of these powers." *Id.* at 204–5. Sutherland especially objected to the establishment of the Federal Trade Commission. *Id.* at 206–8.
67. Sutherland, *Principle or Expedient*, *supra* note 57, at 281.
68. Sutherland, *Private Rights and Government Control*, *supra* note 65, at 202.
69. *Id.* Sutherland would subsequently transform this view into constitutional law in his opinion for the Court in Adkins v. Children's Hospital, 261 U.S. 525, 545–46 (1923): "Freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."
70. Sutherland had strongly supported Taft in the 1912 election. PASCHAL, *supra* note 37, at 78–81. Sutherland's efforts were credited as an important factor in holding Utah as one of the two states to give their electoral votes to Taft. *Id.* at 81. Sutherland had also supported Taft when Louis Brandeis attacked Taft's secretary of the interior, Richard Ballinger. *Id.* at 61–62. Sutherland had also, like Taft, opposed Brandeis's appointment to the Supreme Court. *Id.* at 116–17; A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS 157–59, 204–6 (New York: McGraw Hill 1964).
71. WHT to GS (September 10, 1922) (Sutherland papers). Sutherland replied, "I am looking forward with real pleasure to working by your side, and our outlook on things in general is so much the same that I am sure it will be not only a work of pleasure but of cooperation as well." GS to WHT (September 19, 1922) (Taft papers).
72. WHT to WVD (August 19, 1922) (Van Devanter papers).
73. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923); Tyson & Brother v. Banton, 273 U.S. 418 (1927); Ribnik v. McBride, 277 U.S. 350 (1928); Williams v. Standard Oil Co., 278 U.S. 235 (1929).
74. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
75. WILLIAM O. DOUGLAS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS: THE COURT YEARS 1937–1975, at 12 (New York: Random House1980).
76. *Brandeis-Frankfurter Conversations*, at 330 (July 6, 1924).
77. Sutherland was personally well liked by all members of the Court. Stone said of him that "his relations with all of his associates were characterized by a personal regard and esteem which found their source in mutual respect." 323 U.S. clxx (1944). Although Brandeis's initial reaction was to be "much disappointed in Sutherland," because "he is a mediocre Taft, has all the latter's weaknesses," *Brandeis-*

Frankfurter Conversations, at 310 (November 30, 1922), Brandeis eventually established a "cordial friendship" with Sutherland. PASCHAL, *supra* note 37, at 117; ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 537 (New York: The Viking Press 1956). Brandeis commented when Sutherland decided to leave the bench that "his resignation will be regretted by all the Court despite the views on which we have disagreed. He is a man of unusually high character & of true patriotism, as he considers the public welfare." LDB to Jacob H. Gilbert (January 5, 1938), in BRANDEIS FAMILY LETTERS, at 551. "Justice Roberts relates that it was a regular thing for Holmes, on his entry into the conference room, to make for Sutherland, and bending over so low that their heads were almost touching, longingly plead, 'Sutherland, J., tell me a story.' Justice Roberts adds that this entreaty was unfailingly honored to the accompaniment of roars of judicial laughter." PASCHAL, *supra* note 37, at 116.

78. *See, e.g., infra* Chapter 26, at note 150; *infra* Chapter 33, at notes 40–41. Sutherland remained in frail health throughout his service on the Taft Court. At the end of the 1924 term, for example, he was "very tired and far from well." GS to Henry M. Bates (May 16, 1925) (Sutherland papers). His blood pressure soared "to over two hundred" and he "had to drop out for a time." WVD to JHC (June 12, 1925) (Van Devanter papers). He spent three weeks vacationing that summer with Van Devanter in Canada. WHT to GS (July 7, 1925) (Sutherland papers). Taft resolved "to be more careful in the distribution of work to Sutherland." WHT to LDB (July 6, 1925) (Taft papers). Sutherland's blood pressure caused him to miss three weeks of the 1925 term. WHT to Mrs. Frederick J. Manning (January 10, 1926) (Taft papers). Taft was forced to continue "letting up on Sutherland." WHT to Charles P. Taft (June 5, 1927) (Taft papers).

Sutherland was absent from Court from October 3, 1927, to January 3, 1928, 275 U.S. v, seeking medical help in Baltimore for a bad case of "chronic colitis." Thomas R. Brown to WHT (December 22, 1927) (Taft papers). Taft encouraged Sutherland's medical leave. WHT to GS (October 3, 1927) (Sutherland papers) ("I infer that your chief trouble is the worry that you have over being absent from the Court. I told you then, as I tell you now, that that ought not to worry you in the slightest, that we are all ready and can do the work, and that what we are most anxious to do is to get you well again so that you can enjoy and do the work you are capable of doing in the Court. . . . We all love you, George, and we would all regard it as the greatest loss to the country to have you become discouraged over your work, and we realize what great importance it is to the country that you should be restored to your working capacity. That can not be done without your giving up work and separating yourself from it."). Taft promised Sutherland's doctor that Taft would "save" Sutherland "from some of the usual work, and I shall do it conscientiously." WHT to Thomas R. Browne (December 26, 1927) (Taft papers). *See* WHT to Robert A. Taft (January 1, 1928) (Taft papers) ("Sutherland is coming back to us, but with the injunction from his physician that he shall not work the full speed, and we are going to cut out his passing on certioraris, and I shall not give him any heavy cases.").

The effects of illness on Sutherland's productivity during the 1925 and 1927 terms may be seen in Figures I-11 and I-12.

79. Ted White has observed that of the Four Horsemen "only Sutherland escaped the crisis of 1934–36 with his reputation intact. He had so eloquently articulated the theoretical underpinnings of Fieldian jurisprudence that his opposition to the New

Deal seemed on a higher level." G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 194 (New York: Oxford University Press 1976). *See* Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 AMERICAN BAR ASSOCIATION JOURNAL 1183, 1185–86 (November 1972) ("It is particularly significant to see Sutherland chosen as near-great by so many 'liberal' professors.").

80. WHT to Charles D. Hilles (September 9, 1922) (Taft papers). In conversation with Frankfurter, Brandeis described Sutherland as "Far-Western Bourgoisie [sic]. More cultured than Butler but mechanical & his law is collected but not digested. But fine character." *Brandeis-Frankfurter Conversations*, at 338 (n.d.). At one point Brandeis commented to Frankfurter that "Sutherland's branch bank opinion almost makes me excuse his minimum wage doings." LDB to Felix Frankfurter (January 31, 1924), in BRANDEIS-FRANKFURTER CORRESPONDENCE, at 155. *See* First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924).
81. HFS to Learned Hand (January 29, 1945) (Stone papers). Stone added, "I nevertheless was very fond of him, and am well aware of great contributions which he made to the work of the Court during the years I sat on the Bench with him." *Id*.
82. *See, e.g*., Adkins v. Children's Hospital, 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting) ("I have always supposed that the Lochner Case was . . . overruled *sub silentio*.").
83. *See infra* Chapter 25. Taft nevertheless continued to differ from Sutherland in a number of important respects. So, for example, Taft was a far greater supporter of national power than Sutherland, who believed "in the rigid exclusion of the national government from those powers which have been actually reserved to the states." Sutherland, *Private Rights and Government Control*, *supra* note 65, at 212. *See, e.g*., Board of Trade v. Olsen, 262 U.S. 1 (1923); Missouri *ex rel.* Burnes National Bank v. Duncan, 265 U.S. 17 (1924); Lambert v. Yellowley, 272 U.S. 581 (1926); Nigro v. United States, 276 U.S. 332 (1928). Taft was a more consistent supporter of administrative regulation than was Sutherland, who was opposed to government agencies like the FTC. *See supra* note 66 and accompanying text. *See, e.g*., FTC v. Curtis Publishing Co., 260 U.S. 569 (1923); FTC v. Western Meat Co., 272 U.S. 554 (1926). Taft was a greater supporter of tough enforcement measures for prohibition than was Sutherland. *See, e.g*., Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923); Carroll v. United States, 267 U.S. 132 (1925); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926); WHT to Horace D. Taft (December 12, 1926) (Taft papers). Taft was also a far more consistent supporter of federal taxation than was Sutherland. United States v. Flannery, 268 U.S. 98 (1925); McCaughn v. Ludington, 268 U.S. 106 (1925); Irwin v. Gavit, 268 U.S. 161 (1925); Ray Consolidated Copper Co. v. United States, 268 U.S. 373 (1925); Marr v. United States, 268 U.S. 536 (1925); Edwards v. Douglas, 269 U.S. 204 (1925); Chase National Bank of the City of New York v. United States, 278 U.S. 327 (1929); Bromley v. McCaughn, 280 U.S. 124 (1929).
84. J. Francis Paschal, *Mr. Justice Sutherland*, in MR. JUSTICE 204 (Allison Dunham & Philip B. Kurland, eds., University of Chicago Press 1964).
85. "It now looks as if Mr. Harding would have the making over of the Supreme Court, which is a drear outlook indeed. . . . There is plainly nothing to be hoped for from the court until there is a spirit of greater liberalism in the country." 115 THE NATION 267 (1922).