BOOK REVIEWS

MR. JUSTICE SUTHERLAND. By Joel Paschal.* Princeton University Press, 1951. Pp. xii, 267. $4.00.

A recurring problem in the field of constitutional law is to determine the meaning of various provisions of the Constitution as applied to continually changing conditions. Some maintain that the Constitution means what the judges say it means. Others contend that the framers of the Constitution dictate the decisions in constitutional cases. Comes now the author with still another and even more novel rationalization: the Constitution meant, at least for George Sutherland, what Herbert Spencer would say it meant. If any central theme unites the various phases of Sutherland's career, to Mr. Paschal that theme is the Spencerian dialectics. In his words, "Sutherland walked in the shadow of Herbert Spencer."[1] The author goes to great lengths to demonstrate that Sutherland's every action was motivated by an attempt to conform to this particular school of social thought. Indeed, the sequence of the Sutherland story has been conveniently arranged to emphasize this belief. The first chapter is entitled "The Development of an Idea," and that idea is Spencerianism and laissez faire.[2] The second chapter, entitled "Misgivings," relates to Sutherland's experiences in Congress.[3] The chapter title was necessitated by Sutherland's indorsement of certain measures which indicate a wavering from the philosophical niche into which the author has placed him.[4] "Consecration," chapter three, is concerned with policies and developments of the Wilson administration which convinced Sutherland of the validity of his basic tenets.[5] "Application," chapter four, tells the story of how Sutherland and his conservative brethren on the Supreme Court planted

---

* Executive Secretary, North Carolina Judicial Society. Member of the North Carolina Bar.

1. P. 15.
2. Pp. 3-36.
3. Pp. 37-81.
4. *E.g.*, Sutherland, while in Congress, championed such measures as the Employer's Liability Act, the Pure Food and Drug Act, the eight hour day for federal employees, the Children's Bureau, the Postal Savings System and Workmen's Compensation. The author does not make clear what Herbert Spencer would think of these measures!
5. Pp. 82-114.

laissez faire into the Constitution.[6] "Overthrow," chapter five, treats of the iniquitous "New Deal" era, in which Sutherland saw his theories crumble before the onslaught of a constitutional revolution necessitated by the extreme circumstances of the time.[7]

In order to determine the validity of the author's premise, it would be helpful to state briefly the essentials of Spencerian dialectics and how Sutherland became imbued therewith. Basically, Spencer's philosophy embodied two concepts: (1) evolution and adaptation; (2) liberty. If left to his own devices, man's nature was such that he would adapt himself to every possible situation and thus overcome all obstacles to a perfect society. To Spencer, that which encouraged adaptation was good; that which prevented it was evil; therefore, society should place only the most limited restrictions on man's conduct. The role of the State was simply the settlement of disputes and the preservation of order. The idea of the survival of the fittest and the economic laws of laissez faire were, of course, an inevitable result of this theory.

If we are to believe Mr. Paschal, this philosophy was imparted to and remained an immutable truth for Sutherland by virtue of his early exposure to three confirmed believers in Spencerianism. The first, a Professor Maesar at Brigham Young University, was an avowed believer, and concededly had a tremendous influence on young Sutherland. The other two, Professors Campbell and Cooley of the Michigan Law School, espoused constitutional and jurisprudential doctrines strikingly similar to Spencer's philosophy. That these three persons were students of, and subscribed to, the philosophy of Spencer cannot reasonably be denied. But nowhere does the author bring forth any evidence that Sutherland himself ever studied Spencer, or for that matter, even knew of his existence and place of eminence in the social thinking of that day. Thus, it would appear that the author arrives at his underlying theme through an application of the principle of guilt by association. That his tutors were disciples is not sufficient to convince this reviewer that Sutherland was one of the faithful. While recognizing the powers of pedagogical persuasion and the role that experience and environment will inevitably play, one would like to think that the college trained man, in Sutherland's day as well as at present, is capable of formulating independent judgments. As one reviewer has wisely observed, "one cannot wholly dismiss the possibility that Sutherland might have been as inescapably imprisoned by his ironclad tenets

6. Pp. 115-155.
7. Pp. 156-207.

without such specialized impregnation. Others have cherished the same assured persuasion without the awareness of titular priests."[8]

While a great part of the book treats of Sutherland's activity and public service before his ascension to the high bench, this review will deal entirely with his judicial decisions and with the author's treatment thereof. When Sutherland was appointed by President Harding in 1922, he joined a court consisting of the recently appointed Chief Justice Taft, Justices Holmes, Brandeis, Stone, Sanford, Van Devanter, McReynolds, and Butler. The latter three, along with Sutherland, were destined to later become the "four horsemen" of New Deal fame. Holmes, Taft, and Sanford were subsequently replaced by Cardozo, Hughes, and Roberts. To these men were presented problems of import such as few others have been called upon to decide. While irreconcilable differences of opinion were soon to develop, the Court was pervaded by an air of intellectual tolerance.[9]

Sutherland was generally recognized as having the most ability among the conservatives.[10] Consequently, he became their spokesman and defender. During his sixteen year tenure on the court, he was called upon to write 281 opinions for the majority; he recorded 27 separate dissents. His opinions covered every aspect of constitutional law. Among the more significant was *Adkins v. The Children's Hospital*,[11] where a statute providing for a minimum wage for women was held unconstitutional. Sutherland argued that the provision was a violation of that liberty of contract guaranteed by the due process clause. By not considering the value of the services rendered, the provision was tantamount to confiscation of the employer's property. In addition, the statute treated women differently than men, and since Spencer denounced inequality, Paschal concludes that this was enough to convince Sutherland of the unsavory nature of this legislation. This opinion, of course, is no longer law, having been overruled by *West Coast Hotel Co. v. Parrish*.[12]

---

8. Powell, *Book Review*, 65 HARV. L. REV. 894, 895 (1952).

9. Soon after Sutherland's appointment, Holmes wrote to Pollock: "The meetings are pleasanter than I have ever known them." P. 115.

10. For an opposing view see PEARSON & ALLEN, THE NINE OLD MEN 198 (1937): "Justice Sutherland and Justice Van Devanter have much in common. Both are extremely conservative, and both owe their conservatism to a Western pioneer era which molded their youth. Both are ardent prohibitionists. Both are Old Guard Republicans. Both are courteous, likeable gentlemen, and both, in contrast to some of their reactionary colleagues, get along perfectly with the liberal justices with whom they are in frequent legal disagreement. But there is an outstanding difference between the two men: Van Devanter has brains. Sutherland has not."

11. 261 U.S. 525 (1923).

12. 300 U.S. 379 (1937).

One of Sutherland's most notable opinions is that of *Euclid v. Ambler*,[13] which remains today as the foundation upon which much of our municipal law is based. The Village of Euclid, a suburb of Cleveland, enacted a zoning ordinance which prevented the plaintiff from developing his land for industrial purposes. Rejecting the contention that the ordinance deprived plaintiff of his property without due process of law, Justice Sutherland wrote one of the most liberal of all constitutional opinions:

> While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[14]

Instead of accepting this opinion at its face value, and conceding that Sutherland, like the Constitution, was capable of adapting to changing conditions, the author proceeds to rationalize the opinion as Sutherland's method of paying deference to Spencer. The argument goes like this: The forbidden industrial plants would approximate nuisances with a resulting deprivation to the residential properties; since one of Spencer's principal concerns was the protection of the individual in the enjoyment of his own possessions, the ordinance would effectuate this end. The shallowness of this rationale becomes apparent when it is remembered that the owner of land susceptible to industrial development was more than somewhat deprived of the enjoyment of his possessions by the ordinance. A more logical explanation of the opinion would at least consider the fact that two divergent interests had come into conflict, requiring a decision one way or the other, depending upon which interest, in the opinion of the Court, outweighed the other. Mr. Paschal's misinterpretation, if such it be, would seem to be a direct result of his categorization of Sutherland as an unwaivering Spencerian. The author undoubtedly realized that to vindicate his basic premise, it would be necessary to fit all of Sutherland's opinions into their preordained mold. But it is often difficult, if not impossible, to put a gallon of old wine into a new quart bottle.

In other cases, however, Sutherland was more strict in his interpretation of the due process clause. In *Tyson v. Banton*,[15] the New York legislature had forbidden resale of theatre tickets at a price greater than fifty cents in excess of cost. Sutherland viewed his task

13. 272 U.S. 365 (1926).
14. *Id.* at 387.
15. 273 U.S. 418 (1927).

in this case to discover if the business involved was one of those "affected with a public interest." He concluded that the brokerage business was a mere appendage of the theatre, and the public had little interest in the sale of theatre tickets. The legislation was therefore invalid. In a similar case, *Ribnik v. McBride*,[16] New Jersey passed a statute regulating the charges of employment agencies. Again Sutherland struck down the act, on the theory that the public interest in this business was not such as to justify price control. The Court had not yet reached the place where it was willing to let the legislature make unchallenged determinations on these problems. Paschal's rationalization of this decision is typical: Sutherland, along with Spencer, knew that the answer to a man seeking a job was adaptation, "just as it had been for the pioneer in his struggle against the wilderness."[17]

Massachusetts v. Mellon,[18] which in effect precludes constitutional challenge of federal expenditures, was another Sutherland decision which was quite far-reaching and which remains controlling today. Without the practical prohibition there erected, the federal fiscal policies which in a large measure assisted the country in recovering from the chaotic economic experiences of the '30's might never have been possible. The effectiveness of the present day grant-in-aid program of federal-state relations depends upon the philosophy of the separation of powers which Mr. Justice Sutherland so clearly enunciated in the *Mellon* case.[19]

Sutherland was also instrumental in developing personal liberties to their present position of eminence. Two of his most important cases in this field were *Powell v. Alabama*[20] and *Grosjean v. American Press Co.*[21] In the *Powell* case the sixth amendment guarantee of the right to counsel was held enforceable against the states when their procedures violated "fundamental principles of liberty and justice."[22] In the

16. 279 U.S. 350 (1928). Olsen v. Nebraska, 313 U.S. 236 (1941), overruled both the *Tyson* and *Ribnik* cases.

17. P. 130.

18. 262 U.S. 447 (1923).

19. "Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.* at 488.

20. 287 U.S. 45 (1932). Another of Sutherland's contributions to civil liberties was the case of Berger v. United States, 295 U.S. 78 (1935), which is now the leading case on bias and prejudice at trial.

21. 297 U.S. 233 (1936).

22. This decision has been qualified by Betts v. Brady, 316 U.S. 455 (1942) and Palko v. Connecticut, 302 U.S. 319 (1937). The absolute guarantee of counsel provided by the Sixth Amendment is applicable to the states only where counsel is necessary

Grosjean case, Sutherland declared unconstitutional a Louisiana statute which imposed a license tax on newspapers of over 20,000 circulation. The issue was whether the tax amounted to an abridgment of the freedom of the press. Sutherland concluded that the purpose of the first amendment was to bar the adoption of any form of "previous restraint" upon printed publications or their circulation. The net result of the decision was to free the press from discriminatory taxation.

The decision which provoked Sutherland's most notable dissent was the *Minnesota Mortgage Moratorium* case.[23] The legislature of Minnesota had provided for a temporary stay of a creditor's right to the foreclosure of his mortgage. The Constitution spoke in unequivocal terms: "No state shall . . . pass any . . . law impairing the obligation of any contract."[24] Throughout its history this provision had uniformly been held to bar similar statutes.[25] Nevertheless, Hughes, C. J., held that a "temporary restraint" was permissible if made necessary by a great public calamity. This power, he was careful to say, was not created by the emergency; rather the emergency furnished the occasion for its use. Sutherland found it impossible to recognize the validity of the majority's reasoning. To him, "[i]f the provisions of the constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[26]

It is the author's treatment and discussion of this decision that appears to be one of the weakest points in the book. In fact, his appraisal of the dissenting opinion is very unfair to Sutherland. He suggests that the distinguished Justice would rather see the country go to "rack and ruin" than to concede that the contract clause was meaningless as applied to this emergency situation.[27] In support of his argument, the author cites a passage from Spencer's *Social Statics* which is a justification for the elimination of the more unfit and weaker members of society. There would appear to be at least three ready answers to the author's rationalization: First, Herbert Spencer, to my knowledge, was not sitting on the Supreme Court and did not write the dissent in the *Blaisdell* case. That Spencer would have dissented from the majority opinion in order to advance the idea of the "survival

under the circumstances to assure a fair hearing. See also Carter v. Illinois, 329 U.S. 173 (1947).

23. Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

24. U.S. CONST. Art. I, § 10.

25. Bronson v. Kinzie, 1 How. 311 (1843) (where a statute providing a stay of a year was overthrown).

26. 290 U.S. 398, 483 (1934).

27. P. 172.

of the fittest" certainly does not mean that Sutherland was motivated by the same reasons.

Secondly, the alternatives for Sutherland were not between judicially repealing the contract clause or letting the country go to "rack and ruin." A close reading of the opinion discloses that Sutherland would advocate a third alternative—that of amending the Constitution. He clearly pointed out that provisions of the Constitution "remain binding as the acts of the people in their sovereign capacity . . . *until they are amended* or abrogated by the action prescribed by the authority which created them . . . the remedy consists in repeal or amendment, and not in false constructions."[28] Later opinions also disclose that Sutherland preferred the remedy of amendment. In both the *Carter Coal* case [29] and *West Coast Hotel v. Parrish,*[30] he strongly advocated amendment by prescribed methods rather than by judicial construction.

Finally, if Sutherland had actually thought that the result of his position was to foreclose his country's survival, he no doubt would have reappraised that position and gone along with the majority. Several of his opinions make this abundantly clear, and the only apparent reason for Paschal's not recognizing that fact is his pre-occupation with justifying the constitutional developments of the New Deal period. In *United States v. Macintosh,*[31] Sutherland stated: "We are a nation with a duty to survive."[32] National survival to Sutherland was an absolute, overshadowing even the great principles of the Constitution itself. From this philosophy came the case of *United States v. Curtiss-Wright Export Corp.*[33] which will be discussed *infra.*

These points of disagreement with the author's conclusion are mentioned not merely for the sake of argument. Ascribing undisclosed reasons and motivations to a judge's actions is a delicate matter, and one to be undertaken only when a writer is convinced of the soundness of his position. This is particularly true with a biographer, whose handling of his subject may play a great part in determining the subject's place in history. Hostility to the subject's views may easily lead to superficiality, inaccuracy, and unfairness. Often a leading decision becomes so well-established in our jurisprudence that we lose the ability to perceive that it might have been decided differently. One should always remember that a judge is not a legislator and has not a legis-

28. 290 U.S. 398, 451 (1934) (emphasis added).
29. Carter v. Carter Coal Company, 298 U.S. 238 (1936).
30. 300 U.S. 379 (1937).
31. 283 U.S. 605 (1931).
32. *Id.* at 625.
33. 299 U.S. 304 (1936).

lator's freedom in making the law. He must operate within the framework of what he conceives to be the judicial process. Unless a writer is careful, he may let a single act of "sinfulness" cloak with obscurity a thick catalog of good deeds.[34]

Uppermost in Sutherland's repertoire of good deeds stands an opinion that probably will long endure—*United States v. Curtiss-Wright Export Corp.*[35] There it was established that the government of the United States is not limited in the field of foreign relations by the Constitution. Its power in this realm derives not from the Constitution, but from the United States' membership in the international community. The facts of the case were as follows: Defendant was indicted for selling arms, in violation of a Congressional Joint Resolution and a presidential proclamation, to a country involved in a Bolivian dispute. To Sutherland the resolution was designed to affect a situation entirely external to the United States and therefore was not to be judged by the instrument designed to control internal affairs, *i.e.,* the Constitution. The crucial issue for Sutherland was the role of the United States in international affairs. Sutherland thus reasoned that:

> 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. . . . 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. . . . As a member of the family of nations, the right and power of the United States . . . are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."[36]

The result of the case was to give the President a *carte blanche* in the international sphere. While Sutherland may have been guilty of letting the concept of national sovereignty obscure the inextricable connection between internal and external affairs, many, including Mr. Paschal, derive much comfort from the fact that there is no constitutional restraint on this country's participation in world affairs. If that participation should in any measure contribute to the settlement of what now appear to be insoluble international controversies and disputes, Mr.

34. See *The Writing of Judicial Biography—A Symposium,* 24 IND. L.J. 363 (1949).

35. 299 U.S. 304 (1936).

36. *Id.* at 316-317.

Justice Sutherland will have won, and justly deserve, a place in the hearts of all mankind.

Ford G. Lacey†

INTRODUCTION TO THE STUDY OF LAW. By Bernard C. Gavit.* Brooklyn: The Foundation Press, Inc., 1951. Pp. xvi, 388. $4.25.

The reviewer of a book of this sort, described by the author as "not a law book" but a "book about law," must at the outset know the author's purpose. Dean Gavit has designed this book for three groups of readers: The first-year law student; the pre-law student; and the layman with "abnormal curiosity to know and understand at least a little about our legal system."[1] For the first group the book is designed to help the student through the difficult orientation period. It will assist the pre-law student with his decision concerning the study of law and in this connection it is believed that an effort should be made to bring the book to the attention of all those advising such students and that its study should be recommended. Any layman with an "abnormal curiosity" about law will find a reading of this book rewarding and satisfying.

It is in no sense a reference book and, except for Chapter VIII, is almost entirely without documentation. The author's lurking fear that his "elementary" book would be thought "superficial" is not in the least a likely judgment of any reader. Of course, it was necessary to omit some important matters, and opinions may well differ in some details, but there is nothing superficial in what is contained in the volume. Furthermore, the avoidance of "doubts" and "exceptions" is justified in a book about law.

Concerning decisions of inclusion and exclusion, I suspect the chapter "What is Law" was the most difficult to write. With respect to the subject matter of this chapter, determined controversy exists. Dean Gavit contrasts the concept of law as it is used in science, economics, ethics and religion with "lawyer's law." In the latter, the place, control and interplay of government makes considerations of expediency and convenience necessary. In these matters his only purpose is "to give the reader some insight into and some understanding of what law

† LL.B., 1952, Indiana University.

* Professor of Law, Indiana University.

1. Preface, P. iii.