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A pair of tasks are undertaken by Mr. Sentell in this article: First, he analyzes and compares the opinions of Justices Sutherland and Hughes on the substantive and procedural rights of individuals, and cites both contemporary and present day comment on these opinions. Second, he probes the more difficult problem concerning the probability of judges of highly dissimilar philosophies and backgrounds reaching consistent agreement in particular areas of the law.

I. Introduction

"We are not forced by the letter to do violence to the spirit and purpose of the statute."[1]

"[T]he result . . . necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice."[2]

A perusal of these two judicial pronouncements, overlooking the always questionable fairness of extraction from context, might ignite at least two querying sparks in the mind of an interested reader. The first inquiry might be the immediate one: Do these two expressions come from the hand of judges who, as it seems, entertain opposing theories as to the proper role of judicial review? An examination of their opinions regarding the happily never-ending contest between individual and state is here applied in an effort to quench that spark.

Hovering above this immediate plain are the clouds of the second and more important question which eventually merge with the first and become a part of the same horizon. It was perhaps Mr. Justice Cardozo who, with two short sentences, most effectively sowed the seeds from which this second question grows. Said the Justice: "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[3] While rather bold when made, this judicial confession, or the idea which it agitates, has today been carried to ever-expanding extremes. Indeed the inference which would seem to derive from the Cardozo "eyesight confession"—at least from its extensions—might appear

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1. Mr. Chief Justice Hughes in Sorrells v. United States, 287 U.S. 435, 448 (1932).
2. Mr. Justice Sutherland in Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 314 (1924).
3. Cardozo, The Nature of the Judicial Process 13 (1921).

to take on identity as the primary conclusion at the base of our process of judicial decision. That is to say, it would seem to indicate that given judges applying opposing approaches to a task at hand and possessing contrasting pre-Court backgrounds would not be in agreement (at least consistent agreement) in deciding cases. Hence our second question is finally formulated for us: Is there such a conclusion so invariably operating? Again, a detailed view of the individual rights opinions of two judges possibly so situated seems useful.

And if, as Mr. Justice Holmes[4] and the ordinary practicing attorney[5] believe, it is important to be able to predict judges' opinions, this examination of judicial eyesight hopefully attracts more than academic interest.

Looking to their pasts, it seems obvious that Mr. Chief Justice Charles Evans Hughes and Mr. Justice George Sutherland[6] did indeed possess pre-Court backgrounds sufficiently contrasting for our purposes. Hardly more different routes to our highest judicial tribunal could be imagined than the ones upon which they journeyed.

Hughes, born of strictly religious parents and reared in the industrialized State of New York, played a lead role on the official stage of life.[7] Receiving an abundant formal education and being projected at an early age into a busy New York corporate law practice, Hughes mounted an astonishing compass, indicated by the following points: legislative investigator (1905); Governor of the State of New York (1907); Associate Justice of the United States Supreme Court (1910); narrowly defeated candidate for the nation's Presidency (1916); Secretary of State during the Harding administration (1921); President of the American Bar Association (1924); Judge of the Permanent Court of International Justice (1928); and finally, Chief Justice of the United States (1930).

Sutherland, born in England and transplanted as an infant to what became the Mormon frontier State of Utah, climbed another ladder.[8]

4. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

5. Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in 5 LECTURES ON LEGAL TOPICS 337 (1928).

6. Due to the number of times mentioned, throughout the remainder of this article the two Justices will be referred to by last name only, without title.

7. Considerable literature on Hughes exists. See, *e.g.*, HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951); PERKINS, CHARLES EVANS HUGHES AND AMERICAN DEMOCRATIC STATESMANSHIP (1956); PUSEY, CHARLES EVANS HUGHES (1951) (two volumes); RANSOM, CHARLES EVANS HUGHES, THE STATESMAN AS SHOWN IN THE OPINIONS OF THE JURIST (1916); Allen, *The Opinions of Mr. Justice Hughes*, 16 COLUM. L. REV. 565 (1916); Chafee, *Charles Evans Hughes*, 93 PROC. AM. PHIL. SOC'Y 267 (1949); Mason, *Charles Evans Hughes: An Appeal to the Bar of History*, 6 VAND. L. REV. 1 (1952); Ribble, *The Constitutional Doctrines of Chief Justice Hughes*, 41 COLUM. L. REV. 1190 (1941).

8. See PASCHAL, MR. JUSTICE SUTHERLAND—A MAN AGAINST THE STATE (1951); Mason, *The Conservative World of Mr. Justice Sutherland, 1883-1910*, 32 AM. POL. SCI. REV. 443 (1938); Stephens, *Mr. Justice Sutherland*, 31 A.B.A.J. 446 (1945); Currie, Book Review, 4 STAN. L. REV. 313 (1952); Elmore, Book Review, 18 J.B.A.D.C. 535 (1951); Frank, Book Review, 61 YALE L.J. 598 (1952).

Receiving less than an abundant formal education, he was elevated by the first rungs to the frontier practice of law and immersion in local politics. Subsequent levels saw him as a senator in Utah's first state legislature (1896); a member of the national House of Representatives (1900); United States Senator (1905); President of the American Bar Association (1917); close adviser in Harding's "front porch campaign" (1920); and Associate Justice on the Supreme Court (1922).

For the analysis contemplated here, it is highly significant that Hughes and Sutherland were contemporaries, a factor which eliminates an otherwise bothersome variable in a comparison of this nature. Indeed, as their judicial services were performed at so nearly the same period,[9] a comparative study of their views in any particular realm affords an insight into two independently drawn interpretations of precisely the same world's demands. Thus to ask whether exposure to the ways of "big business" and almost continuous governmental service in the executive capacity on the part of Hughes, as opposed to the origin of "rugged individualism" and legislative approach to government experienced by Sutherland, would contribute to conflicting interpretations of these demands as they pertained to individual rights, is but to rephrase our basic question.

If it is human to err, then it is wise to qualify. Accordingly, it is readily conceded that every case presented to a court involves in some degree rights of the individual. Moreover, there exists no lack of judicial expression by either Justice here studied. During his combined seventeen years on the Court, Hughes wrote opinions in more than 400 cases. In sixteen years of service, Sutherland prepared slightly over 300 opinions. Still the popular solution of selecting a few of the "major" opinions which can be deemed "representative" of the views of each Justice must be rejected. Indeed, it might be questioned whether, particularly in the area of individual rights, the ever-changing fact situations of cases do not render virtually impossible the objective selection of such "representative" opinions. Then too, in the preparation of such an analysis, it is difficult to avoid being stirred by Mr. Justice Holmes' reference to Marshall's opinions: "My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by . . . ."[10]

Bending to these somewhat opinionated winds, what results is admittedly an examination of a considerable number of opinions. Slight solace may be taken in the fact that this is simply necessary. The attack will be

9. Hughes was on the Court from 1910 through 1916 and 1930 through 1941; Sutherland from 1922 through 1938. This, of course, resulted in an overlap of eight years when both men occupied the bench at the same time.

10. In Answer to a Motion That the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice, in HOLMES, SPEECHES 87, 90 (1913).

launched from three major sides: first, the opinions of the two Justices dealing with substantive rights of the individual; second, those involving his procedural rights; and third, opinions where express disagreement between the two Justices occurred. Within these categories the opinions have been loosely and arbitrarily classified to the extent that subject matter would seem to allow. Probably, there exists ample room for difference of opinion concerning the decisions which have been selected, and assuredly with regard to their classification. Nevertheless, within this forest the hunt will proceed.

II. SUBSTANTIVE RIGHTS OF THE INDIVIDUAL

Substantive and procedural rights of the individual, like Mr. Chief Justice Marshall's restrictions and state taxing powers, "though quite distinguishable, when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly, as to perplex the understanding . . . ."[11] Moreover, even when distinguishment is possible, Mr. Justice Reed has observed that "all declare for liberty and proceed to disagree among themselves as to its true meaning."[12]

Using these warnings as the pole, the vault will now be made to an examination of the opinions of Hughes and Sutherland as they occur in *a* classification of substantive individual rights.

A. Regulation of the Working Man

Essential to this discussion is a consideration of the views of the two Justices concerning the extent to which governmental regulatory powers are to apply to the individual as he earns his daily bread. Be he employer, employee, or the one-man operator, it is regulation of this nature which most immediately touches the pocketbook of the ordinary citizen and consequently to which, in many ways, he tends to be the most sensitive. Today's general acceptance of the idea that government either must, should, or does possess such regulatory power is in part the result of the many past judicial bouts in which the Supreme Court acted as the referee. Often the fulfilling of this role was an unenviable task.

While on the Court, both Hughes and Sutherland had occasion to express themselves in this area of individual rights.

Hughes' first such opportunity (while he was an Associate Justice) was in the now famous case of *Truax v. Raich*.[13] Speaking for the majority of the Court,[14] which held invalid the Arizona statute making it a criminal offense for an employer of more than five workers to employ less than

11. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441 (1827).
12. Breard v. Alexandria, 341 U.S. 622, 625 (1951).
13. 239 U.S. 33 (1915).
14. Mr. Justice McReynolds dissented.

eighty per cent "qualified electors or native born citizens of the United States," Hughes proclaimed the constitutional right of an individual to earn a living. In order to do so he was forced to cross two preliminary bars. To the objection to the plaintiff employee's standing to sue, Hughes pointed out that it was this employee who would ultimately shoulder the burden of the prohibition. Likewise unavailing, he felt was the fact that in this particular instance the employment was at the will of the parties: "The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and . . . the unjustified interference of third persons is actionable . . . ."[15]

While paying tribute to the authority of the state under its police power, Hughes would not permit this authority to camouflage the bald discrimination which this statute aimed at the employment of aliens. Indeed, "It requires no argument," he declared, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[16]

Thus at an early stage in his judicial career, Hughes indicated a sensitivity to the plight of the working man. Of course, here the choice was probably not an unduly difficult one for him to make—discrimination appeared upon the face of the statute and there was present the somewhat uncommon situation that by snuffing out the state enactment the interests of both employer and employee would be furthered.[17]

It was not until his return to the Court as Chief Justice, in 1930, that Hughes wrote his second opinion dealing with regulation of the working individual. In *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks*,[18] Hughes was required to choose not only between regulation and nonregulation but between rights of the employer and those of the employee. He was thus brought face-to-face with that special problem of liberty which John Austin had once described: "But speaking generally, a political or civil liberty is coupled with a legal right to it: and, consequently, political liberty is fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse."[19]

15. 239 U.S. at 38.

16. *Id.* at 41. Aside from protecting the immediate right of the individual, Hughes' concern was also with the state's ability, via such legislation, to water down Congress' exclusive control over immigration, "for in ordinary cases they cannot live where they cannot work." *Id.* at 42. This was reminiscent of Mr. Chief Justice Marshall's approach to state interference with imports control: "No goods would be imported if none could be sold." Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 439 (1827).

17. Indeed, while it is rather easy to summarize the decision as simply establishing the right of the alien to earn a living, Professor T. R. Powell, writing shortly afterwards, interpreted it the other way: "Under the decision of *Truax v. Raich* individuals must be free to select their employees, and to lay down such rules of selection, as they choose." Powell, *The Right To Work for the State*, 16 COLUM. L. REV. 99 (1916).

18. 281 U.S. 548 (1930).

19. 1 AUSTIN, LECTURES ON JURISPRUDENCE 283 (4th ed. 1873).

Specifically to be considered by the Court was the validity of an injunction, pursuant to the Railway Labor Act of 1926, restraining the company from interfering with the actions of its clerical employees in designating their bargaining representatives in a wage dispute by establishing and supporting a new union. In balancing the respective rights of the employer and employee in this situation, Hughes' opinion fastened upon the premise that freedom of choice on the part of each in the selection of such representatives was the foundation of the congressional scheme, a scheme he believed reasonable in view of the theretofore unsuccessful peace-promoting efforts in the railway labor area.[20] The insurance of this freedom, he concluded, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."[21]

In a sense then—for one of the injunction's provisions forced the company to rehire certain union-leader employees whom it had discharged—Hughes imposed a qualification upon the rights of the employer which he had proclaimed in the *Truax* case. Yet the two decisions can be rationalized: At bottom again was the element of unfairness and such unfairness was here prohibited rather than spawned by government regulation of the employer. This constituted, for Hughes, the vital distinction.[22]

Leaving the employer-employee relationship temporarily, two other opinions by Hughes illumine his beliefs as to regulation of individual workers occupying other capacities. The first of these opinions was written for the Court in *Smith v. Cahoon*.[23] Here was involved the cry for relief of an individual operating as a private carrier upon the highways of Florida, who had been arrested for violation of a state statute throwing a rather detailed net of regulation over "auto transportation companies" therein. The individual's contention that this net, as laid over him, was repugnant to the fourteenth amendment was upheld. Hughes based the holding upon the statute's failure to distinguish between common carriers and private carriers. Conceding a probable intent to apply to carriers properly subject to such regulation, Hughes declared this scheme, as applied to the individual, "manifestly beyond the power of the state."[24]

Indicating a rather keen concern with the position of such individuals, Hughes went further to warn bill drafters of the evils of attempting, by

20. In Pennsylvania R.R. Fed'n v. Pennsylvania R.R., 267 U.S. 203 (1925), the Court had denied such an injunction in a somewhat similar case, holding that the Transportation Act of 1920 was only morally, not legally, enforceable.

21. 281 U.S. at 570.

22. The decision's primary significance, as viewed by writers of the day, was its indicated departure from the Court's holdings in Adair v. United States, 208 U.S. 161 (1908), and Coppage v. Kansas, 236 U.S. 1 (1915), to the general effect that the employer's powers as to hiring and firing were unlimitable. Frankfurter & Greene, *Congressional Power Over the Labor Injunction*, 31 COLUM. L. REV. 385, 400 (1931); Comment, 40 YALE L.J. 92 (1930).

23. 283 U.S. 553 (1931).

24. *Id.* at 563.

use of a separability clause, to impose upon laymen the burden of picking out provisions in criminal statutes which might validly apply to them. He pointed out that the state court, which had upheld the statute because of such clause, had itself given private carriers no indication as to which of the provisions they were subject.

While Hughes undoubtedly was more immediately concerned with the drafting imperfections of this scheme than with the regulation aspect as such, the opinion does accent his continuing alertness to possible invasions of the working man's rights. And if, as has been suggested, "the history of civilization is in large measure a story of the development of transportation,"[25] Hughes' warning to would-be regulators here was a significant one.

The second of Hughes' opinions referred to above, the case of *Semler v. Oregon State Board of Dental Examiners*,[26] also dealt with state legislation regulating individuals in the independent-operator class. But here the class was a professional one. The statute assigned as cause for revocation of dental licenses various methods of advertising, including representation of professional superiority, the use of displays, and the like. A dentist protested that this regulation violated his rights under the fourteenth amendment and was contrary to article I of the Constitution since it impaired his obligations on various advertising contracts. Here the Court decided that police power which had been expressly rejected in *Truax* must triumph. Hughes quickly brushed aside the impairment of contract complaint, asserting that such contracts were necessarily subject to the reasonable protective power of the state.[27] To the plaintiff's insistence that this statute transcended the allowable profession-regulatory scheme in that it prohibited even truthful advertisement, Hughes conceded that due to the delicate nature of the public health interests involved, the legislature did indeed possess this power "even though in particular instances there might be no actual deception or misstatement."[28] Thus, in a forthright application, Hughes acknowledged that here conflict existed and that the right of the individual must bow to the public interest. It would appear, however, that it was the presence of this health interest, absent in the *Smith* case, plus a somewhat more clearly expressed legislative policy which, to Hughes, tipped the scales.

Sutherland did not have occasion to express himself on this type of working-man regulation in as many instances as did Hughes. During his fifth year on the Court, however, he wrote the opinion in *Connally v.*

25. Brown & Scott, *Regulation of the Contract Motor Carrier Under the Constitution*, 44 HARV. L. REV. 530 (1931).

26. 294 U.S. 608 (1935).

27. Hughes' approach here is reminiscent of the one he utilized shortly prior to this case in upholding the power of the national government in one of the "Gold Clause" cases. Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935).

28. 294 U.S. at 613.

General Construction Co.,[29] an opinion that fits rather appropriately into this classification. Before the Court was an individual contractor's challenge of an Oklahoma statute requiring state-engaged contractors to pay their workers "not less than the current rate of per diem wages in the locality where the work is performed," and imposing criminal sanctions for its violation. Holding this statute violative of the due process clause of the fourteenth amendment, Sutherland's opinion centered not upon the lack of state power to impose such requirements upon contractors, but upon the principle of vagueness in a criminal enactment. Neither the term "current rate of wages" nor "locality" were thought to be sufficiently definite to inform contractors as to conduct which would render them liable to penalty. Again the bill drafters could prepare themselves. Such an enactment, Sutherland declared, "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[30] For our purposes here, this opinion may be compared to that written by Hughes in the *Smith* case in that while it did not reach the issue of the power of the state to regulate, it did evidence a sensitiveness on the part of Sutherland to possible encroachments in this area.[31] Unlike *Smith*, there were here affected employees who would presumably have received higher wages had the statute been upheld; but as that aspect could be reached only after a holding on the vagueness contention, it probably would not have influenced Hughes' opinion in that case. As to Sutherland's general views in this area, it should be recalled that he silently concurred in Hughes' opinion in the *Semler* case, the situation there presented apparently indicating a line for both Justices to which the rights of the working individual could not extend.

B. Right of Expression

The right to express one's self, the transmission of an idea, is perhaps the one which most commonly leaps to the foreground whenever and wherever the rights of the individual are extolled. Few persons today would disagree with the classical declaration of Mr. Justice Cardozo defining this right as "the matrix, the indispensible condition, of nearly every other form of freedom."[32] And yet when one considers the diverse and conflicting undercurrents which surge beneath the deceptively smooth surface of this freedom, presented as they are in the context of the never-ending variety of pressures, hopes and fears which can engulf even a liberty-loving people, the relative recentness of the judicial establishment

29. 269 U.S. 385 (1926).
30. *Id.* at 391.
31. The case was criticized at the time as unduly restrictive. See 39 HARV. L. REV. 871 (1926).
32. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

of various forms of this right comes as little surprise.[33]

In this panorama of the views of Justices Hughes and Sutherland concerning the rights of the individual, account must be taken of the pioneering contributions made by each to the freedom of expression. That the majority of their opinions here are judicial landmarks whose principles remain quite active today serves to punctuate the significance of the two Justices in this phase of American judicial history.

Not being confronted with a right-of-expression case while Associate Justice on the Court, Hughes wrote his first opinion on the subject, and one of his most famous, during his second year as Chief Justice, in the case of *Stromberg v. California*.[34] Being contested was a statute passed as a consequence of an early "scarlet fever"[35] era in America—the "red flag law." The 19-year-old contestant, whose objectionable conduct consisted of directing the children of a summer camp in a daily pledge to such a banner, had been convicted under the California law which prohibited the display of a flag as (among other things) "a sign, symbol or emblem of opposition to organized government."[36] Hughes, in his opinion for the majority of the Court,[37] expanded the right of free speech protected under the "liberty" clause of the fourteenth amendment to embrace the exhibition of the flag. His next step was to set aside the conviction upon the ground, contrary to the holding of the state court, that the above quoted clause in the statute, invalid upon its face, was inseparable from possibly valid clauses of the enactment. As the trial judge had instructed the jury that a verdict of guilty could rest upon its finding that the flag was raised for any one of the purposes set forth in the statute, and as that verdict had been a general one, the conviction may have been founded upon the invalid clause alone. The contestant would thus have been denied "a

33. Illustrative of the divergency of convictions which can exist in this area, especially when developments are viewed from "today" and "yesterday" vantage points, is the following comparison: Writing in 1956, Professor Zechariah Chafee could surmise: "It is an important question whether the time has not come for state legislatures to give up concerning themselves with subversive activities and entrust the whole matter of the safety of the nation to the government of the nation." Chafee, *The Encroachments on Freedom*, The Atlantic Monthly, May 1956, p. 43. In 1925, immediately following the Supreme Court's decision in Gitlow v. New York, 268 U.S. 652 (1925), Mr. Charles Warren projected: "[T]his most recent development . . . may well awaken serious thoughts as to whether there is not danger now that the 'liberty' of the States is being unduly sacrificed to this new conception of the 'liberty' of the individual." Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433 (1926).

34. 283 U.S. 359 (1931).

35. The application of the phrase to this situation is Professor Howe's. Howe, Book Review, 55 HARV. L. REV. 695, 696 (1942).

36. Former Attorney General Francis Biddle thus defines such statutes: "These laws attempt to ban the symbolic expression of a point of view." BIDDLE, THE FEAR OF FREEDOM 22 (1951).

37. Justices McReynolds and Butler dissented.

fundamental principle of our constitutional system."[38] Hughes' opinion was hailed as the first actually to invalidate a state statute under the fourteenth amendment as depriving an individual of the right to freely speak his sentiments concerning the Government.[39]

The next freedom appropriate for discussion here[40] to concern Hughes was that of assembly (as well as speech) as presented by the case of *De Jonge v. Oregon.*[41] A representative of the Communist Party who had attended and addressed a gathering called by that party had been convicted under a criminal syndicalism law of Oregon. The basis of the conviction was that the Communist Party "teaches or advocates the doctrine of criminal syndicalism or sabotage." In overturning the state court's conviction, Hughes' opinion, by proclaiming peaceable assembly to be "a right cognate to those of free speech and free press and . . . equally fundamental,"[42] sank the ax of individual rights still deeper into virgin timbers.

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.[43]

Pointing to the difference in the outcome of this decision and the Supreme Court's affirmance of a state criminal syndicalism conviction ten years earlier in *Whitney v. California,*[44] Mr. Biddle has observed: "If between 1927 and 1937 the law had not changed, the Court had."[45] Differing fact situations in the two cases, however, would seem to render the basis for this conclusion at least arguable. As Hughes pointed out, in *Whitney* "the defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes."[46] It appears that at the time the case was accepted with full recognition of its evident limits.[47]

38. 283 U.S. at 369.

39. Foster, *The 1931 Personal Liberties Cases,* 9 N.Y.U.L.Q. REV. 64 (1931); Note, 31 COLUM. L. REV. 1148, 1149 n.5 (1931).

40. Hughes had written one other right-of-expression opinion in the meantime, Near v. Minnesota, 283 U.S. 697 (1931), which for reasons hereinafter explained is discussed in a later division of this paper.

41. 299 U.S. 353 (1937).

42. *Id.* at 364.

43. *Id.* at 365.

44. 274 U.S. 357 (1927).

45. BIDDLE, *op. cit. supra* note 36, at 105.

46. 299 U.S. at 363. This argument is further strengthened by the fact that Mr. Justice Brandeis, who concurred silently in *De Jonge,* was forced in a separate concurrence in *Whitney* to protest "to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the 14th Amendment." Whitney v. California, 274 U.S. 357, 379 (1927).

47. See Note, 46 YALE L.J. 862, 865 (1937); 85 U. PA L. REV. 532 (1937).

Rounding the circle in the right-of-expression arena, Hughes next had occasion to expound on freedom of press, a right which he had voluntarily but unnecessarily discussed very broadly in the *De Jonge* case. This time the offending statute had a Southern flavor: the city of Griffin, Georgia, had penalized a member of the religious sect known as Jehovah's Witnesses[48] for violating an ordinance requiring a permit from the city manager for literature distribution. The Georgia Court of Appeals had sustained the constitutional validity of the ordinace against contentions that it abridged both freedom of press and of religion.[49] In *Lovell v. City of Griffin*[50] Hughes' opinion for the Supreme Court[51] reversed the conviction and declared the ordinance unconstitutional on its face. Not concerning himself with the religion issue, Hughes construed the ordinance to prohibit the distribution of literature "of any kind at any time, at any place, and in any manner without a permit from the City Manager."[52] That the literature involved was not in the nature of newspapers was immaterial, as was the fact that the ordinance related to distribution and not publication. It still struck "at the very foundation of the freedom of the press by subjecting it to license and censorship."[53] Hence, the interest of the city in maintaining uncluttered streets proved an insufficient balance against the restrictive requirements of the regulation.

In indicating the importance of the *Lovell* decision, one authority believed it marked "a sharp turning-point in the law, and checked the use of permits for activities concerned with speech."[54]

While not minimizing the vast significance of the three Hughes opinions examined so far in regard to right of expression, a skeptic might have interjected at this point that even yet, in a sense, Hughes had not faced the acid test. First, one might argue that after getting over the initial hump in *Stromberg* of the idea of broadening the coverage of the fourteenth amendment with the consequence of invalidating state statutes, the later two decisions followed as a matter of course. Second, one might point out that no case thus far had presented a specific situation where there was a

48. In view of the number of cases in which they were later involved, it is interesting to note that this was the first appearance of members of this religious sect before the Supreme Court. CHAFEE, FREE SPEECH IN THE UNITED STATES 399 (1941).

49. Lovell v. City of Griffin, 55 Ga. App. 609, 191 S.E. 152 (1937).

50. 303 U.S. 444 (1938).

51. Mr. Justice Cardozo did not participate in the decision.

52. 303 U.S. at 451.

53. *Ibid.* The view has since been indicated that the result might have been different here had the state court not failed to interpret the ordinance, thus leaving "the Supreme Court with a free hand to construe" it as conferring unlimited and arbitrary power upon the city manager. Jefferson, *The Supreme Court and State Separation and Delegation of Powers*, 44 COLUM. L. REV. 1, 20 n.63 (1944). In view of Hughes' two prior opinions here discussed and the broad language of the ordinance itself, this contention is at least arguable.

54. CHAFEE, *op. cit. supra* note 48, at 405.

clear and pressing need on the part of the state for the regulation involved. Third, the doubter could contend, the statutes invalidated in all three cases were unquestionably rather broad, unconditional regulations, clearly capable of creating a substantial hardship. Would Hughes' pen write the same way if these elements were not present? His last opinion, written just prior to retirement, affords a partial answer.

The questions brought to the Court by the case of *Cox v. New Hampshire*[55] arose when a number of Jehovah's Witnesses were convicted of violating a state statute requiring a special license for staging parades or processions upon public streets. Taking no chances, the appellants had challenged the statute as abridging freedom of worship, speech, press, and assembly as it related to their "information march" on the sidewalks of Manchester. But this time the individuals were doomed to disappointment. Writing for a unanimous Court, Hughes upheld the validity of the statute. He relied heavily on the construction placed upon the enactment by the state supreme court to the effect that it interfered with expression freedoms only to the extent that they were carried out in "organized formations"; thus the evils of this interference might be more than offset by the need of a busy city to control traffic upon its streets. Under these findings and in the absence of evidence of actnal discrimination, Hughes thought the regulation not inconsistent with civil liberties but rather "one of the means of safeguarding the good order upon which they ultimately depend."[56] It did not matter that the statute itself did not provide standards for the guidance of the licensing authority—the state court had held that this authority's discretion must be exercised consistently and systematically toward the ends of public convenience.

Hence the skeptic might have smiled knowingly. When faced with a fact situation in which a substantial need for the regulation by government was shown to exist, where the regulation was not unconditional in its terms (compliments of the state court's construction), and where its language was not specifically leveled at the individual exercise of a basic freedom, Hughes showed that he was not shackled by a closed mind on the subject. Perhaps also involved was the idea which has been expressed elsewhere: "The right to free speech was won at no small price, and it is therefore necessary to exercise caution in connection with its extension lest reaction threaten the very right itself."[57]

Sutherland also contributed to the judicial history of the right of expression. He first approached the subject by writing the opinion for the Court[58] in the case of *United States v. Dickey*.[59] The defendant, the owner and

55. 312 U.S. 569 (1941).
56. *Id.* at 574.
57. Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 203 (1942).
58. Mr. Justice Stone did not participate.
59. 268 U.S. 378 (1925).

editor of several Missouri newspapers, had been indicted for printing and publishing income tax information which the federal govenment contended was lawfully condemned to secrecy. The defendant countered that in the event any law purported to make such condemnation, it contravened the first amendment guarantees of freedom of speech and press. Sutherland's opinion affirmed the dismissal of the indictment on the ground that an exception in the law, which required the Commissioner of Internal Revenue to make certain tax information available for public inspection, removed the ban of secrecy altogether. Accordingly, Sutherland did not reach in this case the right-of-expression issue. However, that such contention was made and that he was spokesman for the Court in reaching a result in effect favorable to that contention is perhaps significant.

Sutherland's next brush with freedom of expression, the well-known case of *Herndon v. Georgia*,[60] might perhaps be more appropriately mentioned in the portion of this paper dealing with procedural rights. Yet the case presented a situation somewhat similar to those discussed herein and was later decided by the Court in another proceeding. Moreover, it may sometimes appear tempting to identify Sutherland's opinion in this case with his substantive views on individual freedoms in general. Herndon was a Negro Communist convicted in Georgia of attempting to incite insurrection by soliciting members for the Communist Party and distributing literature toward that end. Sutherland's opinion for the majority of the Supreme Court[61] declined to accept the case on appeal on the ground that Herudon had not raised the federal question (violation of his rights under the fourteenth amendment including freedom of speech) until he petitioned the state supreme court for a rehearing. To the appellant's argument that the federal question had not been present until the state supreme court decided the case by interpreting the statute differently from the trial court, Sutherland pointed to another case involving the statute which the state supreme court had decided prior to the appellant's motion for new trial[62] and charged the appellant with previous notice.[63]

When the Supreme Court later took jurisdiction of this controversy in a habeas corpus proceeding,[64] Hughes joined with the bare-majority opinion of Mr. Justice Roberts which released Herndon, while Sutherland sided

60. 295 U.S. 441 (1935).
61. Justices Cardozo, Brandeis, and Stone dissented.
62. Carr v. State, 176 Ga. 747, 169 S.E. 201 (1933).
63. Comments upon the decision ranged from its characterization as a "flagrant and inexcusable miscarriage of justice," 35 COLUM. L. REV. 1145, 1146 (1935), to its being an illustration of the "least sympathetic but for that reason all the more striking aspect" of the application of canons of judicial review which are designed to prevent, among other practices, that of asserting federal rights "as an afterthought—after the case has been lost on state grounds." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 93 (1935).
64. Herndon v. Lowry, 301 U.S. 242 (1937).

with the dissent of Mr. Justice Van Devanter. Yet in the first decision Hughes had silently concurred in Sutherland's jurisdiction-declining opinion.

The final and perhaps most significant of Sutherland's right-of-expression opinions to be discussed here[65] appeared in the case of *Grosjean v. American Press Co.*[66] There he slapped the wrists of the Louisiana legislature which had laid a "license tax" upon newspapers in the state having a specified circulation. Holding, for the first time,[67] that a state's power of taxation might be exercised in such manner as to constitute an abridgment of freedom of the press, Sutherland declared that "a free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves."[68] This tax, he viewed as "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[69] The circumstances of the case are perhaps helpful in throwing light upon what may have been Sutherland's convictions as to the right of expression. First, in writing as he did he was under the pressure of no binding precedents for, as noted above, this was the initial express subjection of the state's power of taxation to the freedom of press restriction. Second, the apparently reasonable contention was made that this particular tax was, in effect, a discrimination directed against the large newspapers in the state. While this factor may well have influenced his opinion, Sutherland expressly declined to base his holding upon it and discussed the right-of-expression problem exclusively.[70] It should further be observed that this case was decided two years prior to Hughes' opinion in *Lovell.*

From these opinions the conclusion might be drawn that Hughes and Sutherland were not at great variance in their beliefs as to the individual's right of expression. Hughes has been observed moving swiftly and effectively through the *Stromberg, De Jonge,* and *Lovell* cases in establishing important judicial guarantees. When the first two of these cases were decided, Sutherland was on the Court also, silently concurring. In siding

65. Sutherland also wrote one other right-of-expression opinion, Associated Press v. NLRB, 301 U.S. 103 (1937), which will be discussed in a later division of this article.

66. 297 U.S. 233 (1936).

67. 20 MINN. L. REV. 671, 672 (1936).

68. 297 U.S. at 250.

69. *Ibid.*

70. Professor Chafee thought this fact significant. See CHAFEE, *op. cit. supra* note 48, at 382. The argument might be made, however, that Sutherland may not have found this discriminatiou route wholly unobstructed in view of the Supreme Court's theretofore rather liberal treatment of the state chain-store taxes; for example, in Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (6-to-3 decision holding tax invalid on another ground), the Court brushed aside a discrimination because-of-number-of-units objection as it had done two years earlier in State Board of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931) (5-to-4 decision upholding tax), with Sutherland himself writing a strong dissenting opinion, *id.* at 543.

with the state in the *Cox* case, it might well be argued that Hughes did not close the door which he had theretofore opened but simply refused to remove it from its hinges. Sutherland, beginning with a sympathetic attitude in *Dickey*, was strict but not unduly so according to Hughes, in his *Herndon* opinion. And even that strictness must be viewed with less suspicion when his voluntary pioneering expressions in *Grosjean* are recalled.

Accordingly, it would appear from these opinions that neither Hughes nor Sutherland would unduly restrict Mr. Justice Holmes' classical "free trade in ideas"[71] and that both would concur in the moving statement of Judge Learned Hand describing the interest protected by the first amendment: "[I]t presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[72]

C. Color Cases

If today's popular color discrimination relief yardstick had to be applied to Hughes and Sutherland in this examination of their opinions concerning substantive rights of the individual, probably neither Justice would satisfactorily measure up to the demands of many. The reason for not applying it, of course, is simply its inappropriateness. The swell of public agitation over man's color and its perplexing ramifications, which was later to loose its torrents upon the Court, was still in its accumulation processes. Indeed, during his sixteen-year tenure Sutherland was not presented with a single instance in which to write an opinion dealing directly with this subject. The three such situations with which Hughes was confronted, while rather evenly spaced throughout his judicial career, involved surprisingly similar basic issues.

Two of Hughes' opinions in the color-line province, one written while Associate Justice, the other just prior to retirement as Chief Justice, dealt with the availability of railroad transportation facilities to Negroes. In the first of these cases, *McCabe v. Atchison, T. & S.F. Ry.*,[73] Negroes sued in equity to restrain a number of railroad companies from providing certain types of luxury cars for the use of white persons only, a result of Oklahoma's statute commanding separate facilities and permitting the hauling of such exclusive cars. The lower federal courts had dismissed the Negroes' contentions for the reasons, among others, that the state statute was not offensive to the fourteenth amendment and that the allegations of the plaintiffs' bill were vague and uncertain. In his opinion for the Court[74] Hughes

71. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).
72. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
73. 235 U.S. 151 (1914).
74. Mr. Chief Justice White and Justices Holmes, Lamar and McReynolds concurred in the result only.

upheld the dismissal of the bill, agreeing that its vagueness prevented presentation of sufficient grounds for an injunction. Before doing so, however, Hughes expressed his belief that the statute was unconstitutional. It was not the segregation of the races which troubled him but the fact that here the state was authorizing treatment of Negroes which was unequal in fact. The slight demand by Negroes for luxury car accommodations was, in Hughes' view, no justification:

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[75]

Upon this voluntary excursion by Hughes the minority of the Court apparently refused to follow.

Appropriately enough, the second case, *Mitchell v. United States*,[76] provided Hughes, twenty-seven years later, with an opportunity to demonstrate his *McCabe* principle. There Hughes' opinion for a unanimous Court reversed rulings of the Interstate Commerce Commission and the reviewing district court that a Negro traveling in interstate commerce on a first-class fare had not been denied protection under the Interstate Commerce Act when forced to move to an inferior coach as a result of the railroad's compliance with Arkansas' "separate coach law." Here again not segregation but equality of treatment was the key word, and Hughes, in what has been called a "particularly forceful statement,"[77] construed the provisions of the Interstate Commerce Act as identical with the equal protection requirement of the fourteenth amendment. Citing his *McCabe* opinion to refute the "insufficient demand" argument of the railroad, Hughes concluded that "if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."[78] Now forged was a concrete example of prohibited color discrimination in the transportation field, irrespective of the burden which it placed upon the railroad companies.[79]

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75. 235 U.S. at 161-62.

76. 313 U.S. 80 (1941).

77. Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 COLUM. L. REV. 201, 219 (1949).

78. 313 U.S. at 97.

79. Professor Fairman subsequently characterized the case: "In transportation, *Mitchell v. United States* established effectively the right of the Negro to enjoy first-class accommodations on railroads." Fairman, *Foreword: The Attack on the Segregation Cases, The Supreme Court 1955 Term*, 70 HARV. L. REV. 83, 91 (1956). The case has also been utilized to illustrate one of the values of judicial review of administrative procedures, *i.e.*, making possible "moral choices" by the Court in certain situations even though the administrative determination itself is not unreasonable nor irrational. Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 736 (1943).

Hughes' other color opinion was written in the interval between the two transportation cases and involved what was later to become the explosive problem of the color line in public education. In the much discussed case of *Missouri ex rel. Gaines v. Canada*,[80] Hughes' majority opinion[81] established the principle that a state (in this case Missouri) could not satisfy the equal protection requirements of the fourteenth amendment by providing for the college education of its Negroes in other states, if it was offering within its borders the same type of education to whites. While the composition may have been different, the theme was unmistakably the same—emphasis upon rigid equality of treatment. Indeed, this equality constituted the only compromising basis, thought Hughes, for the separation of the races at all. He found it "impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere."[82] The *McCabe* principle was again used to repel the "insufficient demand" contentions of the state.

Writers, immediately prior to the Supreme Court's public school desegregation decision in 1954, looked back upon this opinion by Hughes as originating a "new conceptual dynamics" which marked "a radical shift to a less ostrich-like requirement of actual substantial equality in the public schools."[83]

It might be observed in summary that Hughes, while blazing no new trails with his color opinions, was successful in giving substance to what had been rather general and vague "equal protection" principles, and in constructing a springboard for the leaps which were later made.[84] Perhaps he had in mind what Professor Borchard recalled was "the main purpose of the Fourteenth Amendment," *i.e.*, to give "equal protection for the Negro."[85]

D. Citizenship, Naturalization, and Immigration

"The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest: for this man is a Roman.' "[86] The relentless struggle of many

80. 305 U.S. 337 (1938).

81. Justices McReynolds and Butler dissented.

82. 305 U.S. at 350.

83. Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 393 (1954).

84. For one of the most recent of these leaps see Boynton v. Virginia, 364 U.S. 454 (1960), which holds, relying very substantially upon the principle of Hughes' *Mitchell* opinion, that an interstate Negro passenger is entitled, under the Interstate Commerce Act, to nondiscriminatory service in a restaurant operated in a bus terminal.

85. Borchard, *The Supreme Court and Private Rights*, 47 YALE L.J. 1051, 1063-64 (1938).

86. Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring).

individuals in the United States to attain this shield, which others of us brandish so thoughtlessly, is reflected in a somewhat separate but unusually dramatic segment of the Supreme Court's decisions. Of especial value for the purposes of this study is the fact that opinions by both Hughes and Sutherland represented the Court's initial consideration of certain phases of this segment.

Sutherland in particular, at a very early stage in his Court career, was exceedingly active in this area of individual rights. The problem which his first year on the bench required him to face was the eligibility of various individuals for naturalization in the United States, a question about which it seems particularly true that "the cause of laws can seldom be discovered in the laws themselves."[87] Specifically, the first issue was whether otherwise qualified Japanese could come within statutory restriction of naturalization eligibility to "free white persons" and "aliens of African nativity."[88] In *Ozawa v. United States*[89] and its companion case, *Yamashita v. Hinkle*,[90] Sutherland's opinions for a unanimous Court, construing the restrictions for the first time, answered in the negative. According to the intent of the framers of the original naturalization restrictions, Sutherland thought, the term "white person" imported a racial test and was synonymous with Caucasian.[91] This construction clearly excluded the Japanese. To afford an idea of the influence which Sutherland's opinion in this case carried, it may be noted that it was not until 1953 that surveyors could hail the extention of naturalization rights to Japanese as "an important step forward."[92]

No sooner had Sutherland's opinions settled the issue for the Japanese than the same question was posed concerning "a high caste Hindu of full Indian blood." Here Sutherland's prior construction caused difficulty; it had been assumed by many that, at least scientifically, the Hindu was a member of the Caucasian race.[93] Accordingly, in order to maintain the Court's philosophy of the naturalization statute, Sutherland's opinion in the case of *United States v. Thind*[94] was forced to further restrict the restriction. The word "Caucasian" which he had imposed as a definition, he explained, was a "word of much flexibility" and while synonymous with "white per-

87. Randall, *Nationality and Naturalization: A Study in the Relativity of Law*, 40 L.Q. REV. 18 (1924).

88. "So far as the *naturalization* law is concerned, Congress has made this a black and white man's country." McGovney, *Race Discrimination in Naturalization*, 8 IOWA L. BULL. 129 (1923).

89. 260 U.S. 178 (1922).

90. 260 U.S. 199 (1922).

91. The cases are said to be representative of American decisions utilizing the "intent" approach to statutory interpretation. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 n.13 (1930).

92. *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 706-07 (1953).

93. See 11 CALIF. L. REV. 349 (1923).

94. 261 U.S. 204 (1923).

son," was "not of identical meaning."[95] Rather, it was to be interpreted "only as that word is popularly understood."[96] As thus understood it did not apply to the Hindu; consequently, the shield of United States' citizenship was not one he could bear. Again, though strict, the interpretation apparently met with the approval of Congress which, it has been pointed out, was continuing to permit its application eighteen years later.[97]

Two years after his naturalization opinions, Sutherland projected his views of the rights of the individual into a related realm—immigration. In the two opinions which he prepared here, his literal approach was adhered to. In the first of these cases, *Chung Fook v. White*,[98] the issue was whether the alien wife of a native-born citizen, in entering the country, was entitled to the same privilege, freedom from detention for disease treatment, that was expressly established for the wife of a naturalized citizen. Sutherland's opinion for the Court, affirming a denial of a writ of habeas corpus, held that she was not. Unlike his naturalization opinions, Sutherland was not here concerned with what Congress might have intended; it was what it had actually said that was important. To read into the privilege which it had established for the naturalized citizen a similar privilege for the native-born citizen would be "usurping the legislative function," and beyond the power of the Court whose duty was "simply to enforce the law as it is written . . . ."[99]

In the second case, *Commissioner of Immigration v. Gottlieb*,[100] a wife and infant son, natives of Palestine, wished to enter the country to join their husband and father, a rabbi of a New York synagogue. Though immigration quotas had been filled, the lower federal courts held their entrance permissible in view of an exception in the excluding provisions of the immigration act which specifically applied to ministers, their wives and children. The Supreme Court, however, in an opinion by Sutherland, reversed this permission on the ground that the exception in the act, by its terms, modified only the listed class of excluded aliens which immediately preceded it, namely, those aliens coming from the barred Asiatic zone. Palestine was not in this zone. Another provision in the quota law which purported to give admission preference so far as possible to wives and children of ministers and other professional classes and which the lower courts had also relied upon as indicating the spirit of Congress was likewise brushed aside. Recognizing the case as one involving distressing hardship, Sutherland could understand the lower courts' conclusion, but still he was not at liberty to substitute for the plain words of the law "a rule based

95. *Id.* at 208.
96. *Id.* at 214-15.
97. Note, *The Nationality Act of 1940*, 54 HARV. L. REV. 860, 864-65 (1941).
98. 264 U.S. 443 (1924).
99. *Id.* at 445-46.
100. 265 U.S. 310 (1924).

upon other notions of policy or justice."[101]

These cases deal with the legal foundations of naturalization and immigration; it was left to Hughes, as Chief Justice, to deal directly with the issue of citizenship. This he did, approximately fifteen years later, in the case of *Perkins v. Elg*,[102] characterized at the time as "a vitally significant decision."[103] United States' citizenship authorities were contending that a native-born individual who as a minor was taken to Sweden by her parents where she resided for seventeen years, her father voluntarily expatriating himself from the United States, had lost her citizenship though shortly after attaining majority she had returned here to reside permanently. Hughes' opinion for the Supreme Court[104] disagreed. Seemingly approaching the question from a pole opposite to that of Sutherland, Hughes examined treaties, expartiation statutes, and a hostile opinion of the Attorney General, but concluded that citizenship was a right of the individual, relinquishment of which generally required voluntary action which a minor in these circumstances could not take. Upon returning to this country at majority, the individual had claimed her right and was thus entitled to a declaratory judgment confirming her citizenship.[105] In establishing this right of election for minors caught in such situations, perhaps Hughes' approach is most clearly represented by one sentence: "Rights of citizenship are not to be destroyed by an ambiguity."[106] While the decision was apparently welcomed as settling the law on a theretofore undetermined point, one expressed criticism was that it itself imposed a somewhat ambiguous test; that is, it left open the problem of when and in what manner the election had to be made.[107] Writers were later to indicate that Congress had utilized the decision, placing its own standards therein.[108]

Considering the foregoing opinions, the postulates of Sutherland and Hughes in this rather unsung province of individual rights seem rooted in soils of dissimilar texture.[109] Of course, it must be conceded that the precise questions which the two Justices were required to ponder were not identical. The six opinions here discussed might at first glance lead one to

101. *Id.* at 314.
102. 307 U.S. 325 (1939).
103. Orfield, *Expatriation of American Minors*, 38 MICH. L. REV. 585 (1940).
104. Mr. Justice Douglas did not participate.
105. Procedurally, the decision was acclaimed as materially, but properly, extending the scope of the Federal Declaratory Judgment Statute. See 52 HARV. L. REV. 322 (1938); 28 GEO. L.J. 125 (1939).
106. 307 U.S. at 337.
107. Sandifer, *The Elg Case: Election of Citizenship at Majority by Minors*, 14 U. CINC. L. REV. 423, 442 (1940).
108. See *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 733 (1953).
109. The opposing opinions of the two Justices in United States v. Macintosh, 283 U.S. 605 (1931), tend to confirm this conclusion. That case will be discussed in a later division of this article.

hazard the prediction that while it would be most difficult to conscientiously assert that Sutherland would not have agreed with Hughes' opinion in the *Elg* case, an a fortiori difficulty would not be experienced in venturing that Hughes would not have joined with Sutherland in all the latter's naturalization and immigration opinions. But when it is recalled that each of Sutherland's opinions was written for a unanimous Court, even that prediction seems extreme.

In a different vein, this segment of opinions would seem to warn that Professor John Chipman Gray's famous quotation of Bishop Hoadly is not to be passed over lightly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law-Giver to all intents and purposes, and not the person who first wrote or spoke them."[110]

III. Procedural Rights of the Individual

A. Invasion by Presumption

In the realm of procedural rights of the individual, probably no one device more conclusively or effectively binds the hands of the accused person than do the chains of the criminal statutory presumption. As with the development of most liberty encroachments (however justifiable), so here, annoyingly plausible but nonetheless opposing contentions clamor for recognition. On the one side of the scales is poised the earnest plea in certain instances for efficient law enforcement; on the other the instinctive belief of a democratic society that prior to conviction the state must overwhelmingly prove its charge. Both Hughes and Sutherland were once called upon to read these scales.

Hughes' exposure to the quandary occurred shortly after his ascendance to the Court for the first time, in the celebrated case of *Bailey v. Alabama*.[111] Facing him for disposition was a Negro laborer's attack on an Alabama statute making it criminal to contract, with fraudulent intent, to perform services, thereby obtaining an advancement, and then to fail either to return the advancement or perform the services. Tacked to this prohibition was the provision that the failure itself, without just cause, either to perform or to return constituted prima facie evidence of the fraudulent intent. Furthermore, a state rule of evidence prevented the defendant from testifying as to his uncommunicated motives, purposes, or intentions.[112] In writing the opinion for the majority of the Supreme Court,[113] Hughes dealt with this statute on the basis of the thirteenth amendment,

110. Gray, The Nature and Sources of the Law 100 (1909).

111. 219 U.S. 219 (1911).

112. Indeed, the thought has been advanced that this rule of evidence might well have played a large part in determining the result reached. Brosman, *The Statutory Presumption*, 5 Tul. L. Rev. 178, 186 (1931).

113. Justices Holmes and Lurton dissented.

"a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."[114] By means of this statutory presumption, Hughes held, the state was in effect punishing the laborer as a criminal for not performing the service or paying the debt; such treatment necessarily cast him in the role of a peon, struggling within that infamous scheme of involuntary servitude. Hence, in Hughes' estimation the scales tipped clearly against this invasion by presumption, for "there is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."[115] That the original agreement was voluntary on the part of the laborer was immaterial.[116]

Fourteen years after Hughes' opinion, Sutherland encountered the statutory presumption, in his case a federally created one, appearing in an act aimed at the unlawful importation of opium. Actually, the presumptions were multiple: first, unexplained possession of the opium was presumptive of knowledge that it had been unlawfully imported; second, opium found within the country after the year 1913 was presumed to have been imported subsequent to the prohibitory deadline, 1909. In *Yee Hem v. United States*,[117] Sutherland, writing for a unanimous Court, sustained the validity of these presumptions declaring them neither illogical, unreasonable, nor arbitrary. Conceding that perhaps the effect of the statute was to lend artificial value to the facts from which the presumption was drawn, Sutherland countered that this "is no more than happens in respect of a great variety of presumptions not resting upon statute."[118] Facing the individual's somewhat ingenious contention that the practical effect of the statute was to compel him to be a wituess against himself, Sutherland put this aside "with slight discussion," on the ground that the statute itself left "the accused entirely free to testify or not, as he chooses."[119]

While it is true that both opinions here discussed did basically involve

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114. 219 U.S. at 241. Hughes thus initiated utilization of this amendment in the area where, aecording to one observation, it has had its greatest, and practically only, later-day effect. Note, *The Reach of the Thirteenth Amendment*, 47 COLUM. L. REV. 299 (1947).

115. 219 U.S. at 245.

116. Perhaps one of the most realistic interpretations of the substance of the opinion was its description as simply a recognition that, according to the circumstances, the degrees of compulsion exerted by such statutes must be considered in defining involuntary servitude, and that the degree here reached, a criminal penalty, was too extreme. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 161 (1935).

117. 268 U.S. 178 (1925).

118. *Id.* at 185.

119. *Ibid.* This holding, it might be observed, would have pleased William Howard Taft who agreed with the legal philosopher, Jeremy Bentham, in his criticism of the rule against compelling the defendant to testify: "He [Bentham] says it [the rule] can only be supported by the fox-hunter's reason—that it is right that the criminal or the fox should have a little start . . . ." Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 9 (1905).

the mental balancing of the government's need for the statutorily created presumption against the fundamental right of the individual, this is about as far as the similarity can be extended. Accordingly, it would not seem fair to plunge blindly into an attempt to catalogue the two Justices as harboring opposing views on this particular subject. The situations which they were required to examine were simply too different to make such a classification feasible. In *Yee Hem* Sutherland was met with a statute carrying the strong moral stigma against opium, a subject commonly regarded as requiring effective federal regulation. In *Bailey*, on the other hand, while the state would naturally possess an interest in the efficient administration of law, in the final analysis the primary interest to be secured by Hughes' upholding the presumption would have been a purely private one.[120] Therefore, while the two opinions reached opposing results as to the presumptions, perhaps, so far as the actual light which this sheds on the basic beliefs of Hughes and Sutherland, the most profiitable conclusion is no conclusion.[121]

B. What Price Conviction

What price, in the medium of individual rights, is reasonably to be exacted in the name of efficient law enforcement or the collective protection of individuals in a society? This is a question which at some point confronts every judge. One writer's definition, which perhaps hits as close to home as any, of the judge's answer to this question is "a judicial reaction to utilitarian assumptions."[122] The various modes by which the question was conveyed to Hughes and Sutherland and their respective reactions to it are now to be considered.

Hughes' first "stimuli" came early during his first term of service on the Court in the form of the companion cases, *Wilson v. United States*[123] and *Dreier v. United States*.[124] The particular claims to be balanced were, on the one hand, the demand of an investigating grand jury for the production of corporate books and records and on the other, the insistence by the president of the corporation of his right to withhold these materials on the grounds of his regular custody over them, their containing personal correspondence, and his belief that their contents would tend to incriminate

120. This observation has also been drawn relating to imprisonment for debt, *i.e.*, that private interest can "seldom" justify such imprisonment. Comment, 37 YALE L.J. 509, 513 (1928).

121. In striving to shun automatic and dogmatic conclusions in such instances, one can appreciate the confession once deceptively made by Professor Powell: "If I knew just what I am driving at, I should drive on more boldly." Powell, *Commerce, Congress, and the Supreme Court, 1922-1925*, 26 COLUM. L. REV. 521, 522 (1926).

122. Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749, 760 (1933).

123. 221 U.S. 361 (1911).

124. 221 U.S. 394 (1911).

him. "Reacting" for the majority of the Court in both cases,[125] Hughes gave the nod, excepting the purely personal papers of the individual, to the grand jury. It did not matter that the investigation was actually directed at the president; the records demanded were those of the corporation over whom the state had regulatory power which could not be made to depend upon the particular custody in which the records were found. In this situation the personal privilege of self-incrimination would not be heard as to corporate officers; indeed, to do so "would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy."[126] For purposes of this analysis, it is perhaps significant that even an admiring writer of the day was forced to concede that in this opinion "Justice Hughes broadly interpreted . . . against the right of individuals . . . ."[127] And more recently, commentators have looked back upon the case as the origin of a trend under which the personal privilege "has been considerably circumscribed without an adequate treatment of the policy considerations . . . ."[128]

Hughes' next evaluation in this area was not made until his return to the Court as Chief Justice, in the case of *Sgro v. United States*.[129] Here the right asserted by the individual, who had been convicted under the National Prohibition Act, was one of those so thoroughly plowed under during the infamous star chamber proceedings[130]—protection against an illegal search warrant. In his opinion for the majority,[131] Hughes condemned a warrant which had purportedly been reissued, by a simple change of date, after not having been executed within ten days of its original issue, as required by the Prohibition Act. Declaring that the fourth amendment and legislation regulating the issuance of search warrants "should be liberally construed in favor of the individual,"[132] Hughes concluded that the "probable cause" requirement for issuing the warrant must be read in connection with the ten-day deadline upon its execution. So read, the reissuance proceeding was a nullity.

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125. Mr. Justice McKenna dissented in the *Wilson* case and concurred specially in *Dreier*.

126. Wilson v. United States, 221 U.S. 361, 385 (1911).

127. Allen, *The Opinions of Mr. Justice Hughes*, 16 COLUM. L. REV. 565, 573 (1916). Justification for the opinion was based upon Hughes' "impatience with wrong doing," *id.* at 584, which, it will be seen, does not exactly square with some of his later opinions. There were different interpretations of the exact point decided by the case. One was that the corporate officer had implicitly waived *his* personal privilege, 25 HARV. L. REV. 96 (1911), while another thought that the officer was only denied the right to assert the *corporation's* privilege, Note, 30 COLUM. L. REV. 103, 106 (1930).

128. Note, *Quasi Public Records and Self-Incrimination*, 47 COLUM. L. REV. 838, 844 (1947).

129. 287 U.S. 206 (1932).

130. Glenn, *Evidence Obtained by Illegal Search and Seizure*, 22 KY. L.J. 63, 64 (1933).

131. Justices Stone and Cardozo dissented. Mr. Justice McReynolds concurred separately.

132. 287 U.S. at 210.

Later during the same month, *Sorrells v. United States*,[133] another Prohibition Act violation case, furnished Hughes the occasion to again address the issue of the proper price of conviction. In considering the individual's defense, entrapment, for the first time,[134] a majority of the Supreme Court via Hughes' opinion[135] reversed the trial court's refusal to submit the issue to the jury. Hughes viewed as clearly sufficient to warrant the finding of entrapment the Government agent's actions in misrepresenting himself to the individual, playing upon his war experience sympathies, and repeatedly begging him for liquor. Disagreement was expressed with the concurring opinion of Mr. Justice Roberts in two respects. In utilizing the principle of legislative intent, Hughes held that an individual so entrapped was not guilty under the Prohibition Act but that the question must be determined by the jury. The concurring opinion argued that while the individual was guilty in the sense that he had committed the act which the law prohibited, it was the trial court's duty to dismiss an indictment founded on such entrapment without permitting the issue to go to the jury. To this argument Hughes retorted that "clemency is the function of the Executive."[136] Deploring the Government agent's actions, Hughes thought that "such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation . . . ."[137]

Thus in the Court's initial construction of the entrapment defense, Hughes established what might be called in a technical sense an ultra-liberal standard in favor of the individual; that is, when the jury found that the defendant's rights had been so invaded, even though he had actually committed the literally prohibited act, he was to be regarded as innocent. However, in a less technical but more practical sense, the concurring opinion would seem the more libertarian. For in preventing the case from being transferred to the jury, it would make the court itself, in the interest of proper judicial administration, the guardian of the defendant's rights.

Hughes' final opinion to be examined here was rendered in the celebrated case of *Brown v. Mississippi*.[138] Again protecting the rights of the individual, this time against state encroachment, Hughes' opinion for a unanimous Court spread the mantle of due process in the fourteenth amendment to cover reversal of a murder conviction based solely upon confessions admittedly coerced by brutality. Paying tribute to the freedom of the state

133. 287 U.S. 435 (1932).
134. Note, 41 YALE L.J. 1249, 1251 (1932); 1 GEO. WASH. L. REV. 371 (1933).
135. Justices Roberts, Stoue, and Brandeis concurred separately. Mr. Justice McReynolds dissented.
136. 287 U.S. at 449.
137. *Id.* at 441.
138. 297 U.S. 278 (1936).

to regulate the procedure of its courts, Hughes qualified this freedom as one "of constitutional government . . . limited by the requirement of due process of law," not to be substituted by a "trial by ordeal."[139] The methods used in obtaining the confessions, he held, were "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[140] At the time, the opinion was deemed "especially significant" due to the few such cases which had been before the Court,[141] and was elsewhere read as definitely extending the fourteenth amendment to guarantee protection against self-incrimination.[142]

It was Sutherland's lot to juggle conviction prices in two cases and in neither would he buy the Government's product. In considering the individual's unlawful search and seizure contention in *Byars v. United States*,[143] Sutherland had to determine both a question of law and a question of fact in order to prevent what he felt was infringement by the federal government upon the procedural rights of the individual. In his opinion for a unanimous Court, he overturned the conviction for possession of certain counterfeit stamps by declaring the law to invalidate a search warrant based merely upon the affiant's "belief," and determining the fact that there had been such participation in the search by a federal officer as to render it a federal undertaking.[144] It was not material, said Sutherland, that the wrongful search actually turned up evidence of the federal statute's violation: "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light . . . ."[145] Such invasions, he concluded, "strike at the substance of the constitutional right."[146]

In the second case, *Powell v. Alabama*,[147] the Supreme Court added a

139. *Id.* at 285.
140. *Id.* at 286.
141. 36 COLUM. L. REV. 832, 833 (1936).
142. 12 IND. L.J. 66 (1936). As recently pointed out, the physical violence employed in this case made it unnecessary for the Court to decide a technical question as to the confession rule which later became important when the coercion employed was more "psychological," viz., whether it was the methods used which rendered the confessions void or their unreliability. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 235 (1959).
143. 273 U.S. 28 (1927).
144. It was necessary for Sutherland to construe this into a federal search because of the Court's holding in Weeks v. United States, 232 U.S. 383 (1914), that the fourth amendment did not exclude from a federal trial evidence wrongfully obtained by state officials. Sutherland's holding here was tagged the "silver platter" doctrine by Mr. Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78-79 (1949), and continued to rule the Court's decisions until 1960 when the doctrine was overturned in the case of Elkins v. United States, 364 U.S. 206 (1960). See Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).
145. 273 U.S. at 29. For a discussion of this point see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 21 (1930).
146. 273 U.S. at 34.
147. 287 U.S. 45 (1932).

new link in the chain of the fourteenth amendment and Sutherland's opinion for the majority[148] became one of his most famous.[149] Involved was the fairness of the trial accorded the well known "Scottsboro boys" in their rape prosecution by the State of Alabama. In reversing their conviction, Sutherland's opinion read into the fourteenth amendment for the first time[150] the guarantee of right to counsel in a capital case. After doing so, he proceeded to declare that the trial judge's appointment of "all the members of the bar" for the arraignment of the boys and the rather vague designation of a defense attorney on the morning of the trial "was little more than an expansive gesture"[151] and did not constitute the required "effective appointment of counsel."[152] The defendant in such a case could not be "stripped of his right to have sufficient time to advise with counsel and prepare his defense,"[153] one of the "immutable principles of justice which inhere in the very idea of free government . . . ."[154]

While Sutherland's opinion was hailed as "undoubtedly stretching due process to a point hitherto unknown,"[155] others pointed realistically to its express limitations.[156] It was also pointed out that the case could have reasonably been decided upon narrower grounds: either upon the "mob violence" holding of *Moore v. Dempsey*,[157] or upon just the denial of opportunity to employ counsel prior to trial.[158] Thus it might be said that in requiring an "effective appointment of counsel," Sutherland was voluntarily setting an above-the-market price on conviction in such cases.[159]

A conclusion is undoubtedly demanded here that both Hughes and Sutherland were notably sensitive to the rights of the individual in this area of the law concerning encroachments by both federal and state law enforcement processes. Considered from this viewpoint exclusively, Hughes' opinion in the *Wilson* case is the only black mark upon the record. And yet, in view of his expressions in *Sgro*, *Sorrells*, and *Brown*, in all of which

148. Justices Butler and McReynolds dissented.

149. One writer dates the development of constitutional doctrine in the field of "federal judicial supervision of state criminal justice" from the decision in this case. Allen, *supra* note 142, at 215.

150. Note, *1947-48 Term of Supreme Court: Appointment of Counsel Under the Fourteenth Amendment*, 48 COLUM. L. REV. 1076, 1077 (1948); 8 WIS. L. REV. 370 (1933).

151. 287 U.S. at 56.

152. *Id.* at 71.

153. *Id.* at 59.

154. *Id.* at 68.

155. 23 J. CRIM. L., C. & P.S. 841, 842 (1933).

156. Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 277 (1933).

157. 261 U.S. 86 (1923). For a statement of this point see 23 J. CRIM. L., C. & P.S. 841, 844 (1933).

158. 32 COLUM. L. REV. 1430, 1431 (1932).

159. Sutherland's dissenting opinion in a later case, Nardone v. United States, 302 U.S. 379 (1937), indicated at least one area where he did not consider law enforcement prices too high. This opinion will be discussed in a later division of this paper.

Sutherland silently joined, plus his silent support of Sutherland's opinion in *Powell*, it is difficult to assert that he was really the less sensitive of the two. Moreover, in attempting to formulate any such judgment of individual contributions here, the speculation must be placed at the top of the list that probably both Justices, in each of these opinions, were inwardly fighting another battle. For, as postulated by one writer, "perhaps more than in any other field, the manner of dealing with persons accused of crime is of concern to the state alone."[160]

C. Trial by Jury

"[T]he English law of evidence . . . ," wrote Professor James Bradley Thayer in 1898, "is the child of the Jury."[161] While not disagreeing with this thesis, a present day English jurist, in speaking of the jury institution, was moved to observe: "Theoretically it ought not to be possible to successfully enforce the criminal law by such means."[162] What then is the answer to this indicated paradox? If the latter assertion is true, then what accounted for the former? And what, in theory or otherwise, is actually objectionable to trial by jury? Perhaps Dean Francis X. Busch summarizes the answers to both these questions: "[I]ts faults admitted—occasional verdicts induced by passion, prejudice, ignorance and misdirected advocacy—it stands out in the long history of trial methods as the surest safeguard yet devised to protect the rights and redress the wrongs of the common man."[163] Moreover, predicts Dean Busch, "the *right* of trial by jury, still definitely associated in the public mind as one of the ancient and proven safeguards of individual rights, . . . will continue as an essential part of our judicial system."[164] Now to be examined are the comparative roles played by Hughes and Sutherland in furthering the continuance of this much-discussed right.

Hughes wrote three opinions, all while Chief Justice, in which the jury trial system was involved. In each of these cases he took for granted the existence of the right itself but was concerned with the fairness of the particular manner in which it had been accorded. That he consistently maintained a high standard for this measure of fairness may here be recalled. In *Aldridge v. United States*[165] Hughes' opinion for the majority of the Court[166] reversed a District of Columbia murder conviction, finding unfairness in the trial judge's refusal to permit the Negro defendant to

160. Nutting, *The Supreme Court, The Fourteenth Amendment and State Criminal Cases*, 3 U. CHI. L. REV. 244 (1936).
161. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 47 (1898).
162. DEVLIN, TRIAL BY JURY 5 (1956).
163. BUSCH, *Preface* to LAW AND TACTICS IN JURY TRIALS at v (1949).
164. *Ibid.*
165. 283 U.S. 308 (1931).
166. Mr. Justice McReynolds dissented.

question prospective jurors on their *voir dire* as to racial prejudice, in view of the fact that the deceased was a white man. In shading the "general rule" of the day "that the extent to which *voir dire* examinations should go rests in the sound discretion of the trial judge,"[167] Hughes enunciated his fear in certifying the possibility of allowing a prejudiced juror to sit. "No surer way," he declared, "could be devised to bring the processes of justice into disrepute."[168] Surveyors posted the case as one of the "striking instances" of the Supreme Court's "concern with practice and procedure in the lower federal courts."[169]

Hughes' other two opinions in the jury trial realm concerned two of the "Scottsboro boys," whose earlier convictions had been overturned by Sutherland for denial of right to counsel, as discussed above.[170] In *Norris v. Alabama*,[171] Hughes' opinion for the Court[172] reversed the second conviction of one of the boys on the grounds, contrary to the holding of the state supreme court, that the "long-continued, unvarying, and wholesale exclusion of negroes from jury service" in both the county of indictment and the county of trial denied him equal protection of the laws.[173] In order to reach this conclusion, which the Court had been accused of purposely avoiding,[174] Hughes was forced into a pure determination of fact and, consequently, an examination of the evidence which had been presented during the trial. This was necessary, he held, to determine whether a federal right, specifically claimed in the state court, had been "denied in substance and effect."[175] It was this delibrate approach of the opinion, which "seems to depart from long-established practice . . . ."[176] rather than expansion of individual rights, which rustled the leaves of comment.[177]

The other case, *Patterson v. Alabama*,[178] considered and decided at the same time by the Court, presented the same contention as *Norris* but with the supposedly vital distinction that his bill of exceptions had been struck by the state supreme court upon the sole ground that it had not been filed within the time required by state rules of procedure. Accordingly, con-

167. Moore, *Voir Dire Examination of Jurors*, 17 GEO. L.J. 13, 15 (1928).
168. 283 U.S. at 315.
169. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 300 n.52 (1931). Others saw it as a mere extension of a rule "well settled" in state courts. 5 So. CAL. L. REV. 166, 167 (1931).
170. See text accompanying notes 147-59 *supra*.
171. 294 U.S. 587 (1935).
172. Mr. Justice McReynolds did not participate.
173. 294 U.S. at 597.
174. Note, *Discrimination Against Negroes in Jury Service*, 29 ILL. L. REV. 498, 499 (1934).
175. 294 U.S. at 590.
176. Note, 55 HARV. L. REV. 644, 649 (1942).
177. See 35 COLUM. L. REV. 776, 777 (1935); 33 MICH. L. REV. 1252, 1254 (1935). The decision "gave a new impetus to the fight against this type of discrimination." Note, 52 HARV. L. REV. 823, 828 (1939).
178. 294 U.S. 600 (1935).

tended the state, no *federal* right had been denied. Conceding that the state court "was undoubtedly at liberty"[179] so to act, Hughes' opinion for the same members of the Court[180] nevertheless remanded the case on the basis of *Norris:* "We are not satisfied that the court would have dealt with the case in the same way if it had determined the constitutional question as we have determined it."[181] "We should not foreclose that opportunity."[182] Thus, with the life of the individual at stake, Hughes, confessing that his conviction could be legally reaffirmed in the state court, could not bring himself to close the door without one last invitation for reconsideration.[183]

While none of Sutherland's four opinions dealing with trial by jury are inconsistent, they do render somewhat difficult the attempt to derive a conclusion as to his basic beliefs upon the subject. The matter first confronted him during his second year on the Court in the case of *Riddle v. Dyche.*[184] Considered was the habeas corpus plea of an individual contesting a felony conviction on the ground that it had been accomplished by a jury of only eleven men. Following rather rigid procedural ideas, which have been previously observed, Sutherland for a unanimous Court wrote that the use of habeas corpus here, "an independent civil suit,"[185] constituted an improper attempt to impeach the trial record collaterally and could not be allowed. Thus the jury-defect contention was not reached. Yet, as will be noted, Sutherland himself was later to recall the opinion as indieating a less than absolute requirement of trial by jury.

His next opinion considered the right in an entirely different context. In *Michaelson v. United States,*[186] Sutherland, again for a unanimous Court, held constitutional a provision of the Clayton Act requiring a jury trial at the instance of the accused in certain contempt proceedings. In doing so, he was facing what Professors Frankfurter and Landis had previously described as "one of those vexing constitutional issues . . . ." whose "solution is much entangled with old English history," at the bottom of which "lies the doctrine of the separation of powers."[187] In permitting this extension of the right to trial by jury, Sutherland reached a number of

179. *Id.* at 605.
180. Mr. Justice McReynolds did not participate.
181. 294 U.S. at 606.
182. *Id.* at 607.
183. Of this opinion it was said that the limits of the practice of remanding "have been extended very appreciably . . . ." 35 COLUM. L. REV. 941, 942 (1935). In fact, Patterson was retried in the state, reconvicted, and imprisoned with the Supreme Court denying certiorari, 302 U.S. 733 (1937). See 2 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 1018 (1954).
184. 262 U.S. 333 (1923).
185. *Id.* at 336.
186. 266 U.S. 42 (1924).
187. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 HARV. L. REV. 1010, 1011-12 (1924).

interesting determinations. First, in overcoming the lower court's contention that the court's power to enforce its equity decrees was "inherent" and hence beyond congressional control, he construed the extension to relate exclusively to criminal contempts—"between the public and the defendant"[188]—which constituted "an independent proceeding at law . . . ."[189] Over these contempts, said Sutherland, and as to inferior federal courts, Congress could constitutionally extend the right of jury trial.[190] Second, to the argument that the individuals here attempting to utilize the provision were on strike and hence not "employees," Sutherland flatly asserted that the employment status was not a prerequisite. Third, and rather uncharacteristically, he concluded that though the word "may" in the provision "strictly and grammatically considered" limited the jury-trial grant to the judge's discretion, to so construe it "would be to subvert the plain intent and good sense of the statute."[191] Regardless of the correctuess of the technical distinctions which Sutherland drew here, one might have thought his approach considerably different from the attitude indicated in the *Riddle* case. It must be remembered, however, that in the end he was only holding that Congress could provide a jury trial in certain well-defined cases. Indeed, his next opinion appeared to confirm that he had undergone no real change of heart.

The well known case of *Patton v. United States*[192] brought before the Justices the question of whether individuals charged with a crime punishable by imprisonment could, after their trial in federal district court had progressed substantially, give binding consent to the trial's proceeding with only eleven jurors after one juror had become ill. Instead of pursuing the line of reasoning which one might have deemed his *Michaelson* opinion to indicate, Sutherland's statement for the Court[193] answered in the affirmative. In following a theory previously postulated[194] but far from settled or demanded by precedents in the lower courts,[195] Sutherland's opinion gave birth in the Supreme Court to the view that the right to trial by jury as guaranteed by the Constitution (article III and the sixth amendment) is a

188. 266 U.S. at 67.

189. *Id.* at 64.

190. Professor Powell intimated his belief that the holding was so narrowly confined as to lack much significance. Powell, *Commerce, Congress, and the Supreme Court, 1922-1925*, 26 COLUM. L. REV. 521, 547 n.56 (1926).

191. 266 U.S. at 70. The opinion was criticized for its deficiency in establishing any correct standards, Note, 9 MINN. L. REV. 368, 372 (1925), and praised for bringing "to a satisfactory conclusion" a long-standing problem, 19 ILL. L. REV. 449 (1925).

192. 281 U.S. 276 (1930).

193. Mr. Chief Justice Taft did not participate. Justices Holmes, Brandeis and Stone concurred in the result.

194. See Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 738 (1927).

195. See Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934); 30 COLUM. L. REV. 1063, 1064 (1930).

privilege which could be waived—not only to the extent of one juror, but entirely. Citing his *Riddle* opinion as "out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case,"[196] Sutherland thought that to deny the power of waiver here would be to "convert a privilege into an imperative requirement."[197] To the contention that public policy prohibited such waivers, especially as to felonies, Sutherland was of the opinion that the degree of the crime made no substantial difference, pointing out further that this same public policy allowed an individual to plead guilty "and thus dispense with a trial altogether."[198] At any rate, he concluded, "The public policy of one generation may not, under changed conditions, be the public policy of another."[199]

At this point it might have appeared that as to the individual's right to trial by jury, Sutherland had traveled the full circle. But one last stop yet remained. This stop was made in his opinion for a unanimous Court in *District of Columbia v. Colts*,[200] a case making inquiry as to whether the federal constitution required a jury trial for an individual summarily convicted of reckless driving in the police court of the District of Columbia. Apparently deviating somewhat from his settled course, Sutherland held that it did. Professing to remember the common law's summary proceedings as well as to recognize that certain "petty offenses" were not included within the constitutional jury-trial guaranty,[201] Sutherland imposed as a test for these offenses not the measure of the punishment provided but "the nature of the offense."[202] Reckless driving, he found, "is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[203] Thus the crime fell within the guaranty of article III.[204]

A summary comparison of the beliefs of the two Justices concerning the

196. 281 U.S. at 300.

197. *Id.* at 298.

198. *Id.* at 305. The opinion also contained dictum to the effect that the Government's consent was necessary for such a waiver and it may be that this requirement was imposed with a view to satisfying the interests of "public policy."

199. *Id.* at 306. While writers seemed to feel the necessity of justifying the decision, the apparent general conclusion was that it could be done. See Griswold, *supra* note 195, at 669; BUSCH, *op. cit. supra* note 163, at 64; 10 B.U.L. REV. 546, 548 (1930).

200. 282 U.S. 63 (1930).

201. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). For a recent and sharp attack on this position and especially on the above article see Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959), which, while conceding the existence of summary trials in England and the colonies, argues that these less serious offenses were not excluded from the guaranty of the Constitution.

202. 282 U.S. at 73.

203. *Ibid.*

204. One commentator thought that as compared with the *Patton* opinion, this decision gave "effect to a somewhat inconsistent policy." Comment, *The Petty Offense Category and Trial by Jury*, 40 YALE L.J. 1303, 1305 (1931).

right to trial by jury cannot be arrived at easily. Hughes' opinions evidence a continuing and alert insistence upon absolute fairness in the accordance of this right.[205] Certainly, none of Sutherland's opinions indicate disagreement with this principle. With aspects of the existence of the right itself, Hughes was not confronted. Sutherland, on the other hand, has been observed permitting Congress to provide the right in a rapidly developing field of the law (*Michaelson*), cloaking the absolute right with an important limitation (*Patton*), and extending it to an area which previously had been considered rather insignificant (*Colts*). Except for the *Colts* opinion, Sutherland cannot be said to have evidenced a particular tenderness toward the individual's right to trial by jury.[206] Perhaps an appropriate general conclusion for this section was that drawn by Father Snee: "A fair trial is indispensable for justice; trial by a common-law jury is not, but it is one of the fairest methods known and has met the test of centuries in the Anglo-American tradition."[207]

D. Improper Conduct of Court Officials

Basic to procedural rights of the individual in America is the assurance that when accused of crime he enters upon his trial presumed an innocent man and remains so until proven guilty by the state. Moreover, in the attempt to rebut this presumption various though sometimes illusive standards of fair play are to be maintained. Perhaps at the bottom of these standards is the belief that though criminal prosecution must and should be vigorous, somewhere along the line an impartial analysis is essential. The libertarian John Stuart Mill ranked this "impartiality" as "that first of judicial virtues . . . , an obligation of justice . . . , a necessary condition of the fulfillment of the other obligations of justice."[208] Whether in fact such a standard has been maintained in particular instances is the often thankless decision which the Supreme Court is called upon from time to time to render. Fortunately for this survey, both Hughes and Sutherland each worded one such decision.

Hughes' composition was formulated as the opinion for a unanimous Court in the case of *Quercia v. United States*,[209] which involved a narcotics conviction in a federal district court. Prior to the jury's verdict, the trial judge had charged in regard to a particular mannerism of the defendant: "It is rather a curious thing, but that is almost always an indication of

205. Hughes wrote one other jury trial opinion, United States v. Wood, 299 U.S. 123 (1936), to be later discussed herein.

206. Sutherland's other jury trial majority opinion, Dimick v. Schiedt, 293 U.S. 474 (1935), fits more appropriately into a later portion of this article.

207. Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW 91, 116 (Sutherland ed. 1956).

208. Mill, *Utilitarianism* (1914), in FULLER, THE PROBLEMS OF JURISPRUDENCE 459, 517 (temp. ed. 1949).

209. 239 U.S. 466 (1933).

lying."[210] In reversing this conviction, Hughes drew upon the words of Sir Matthew Hale to recognize that the federal judge in such a trial is not a mere moderator but that he may assist the jury "by showing them his opinion even in matters of fact."[211] Still, said Hughes, there is a limit: "[A]n expression of opinion upon the evidence . . . should not be one-sided."[212] The limits in this case, he concluded, had been transcended.[213]

The judge, however, is not the only cog in the wheels of justice which must turn unweighted—there is also the prosecutor. Dean Pound has complained:

> Under our legal system the way of the prosecutor is hard, and the need of "getting results" puts pressure upon prosecutors to use the "third degree," to suppress evidence, to bulldoze witnesses, and generally to indulge in that lawless enforcement of law which produces a vicious circle of disrespect for law.[214]

It was just such action by a prosecutor with which Sutherland had to deal in *Berger v. United States*.[215] During the trial in the district court, a counterfeiting prosecution, the prosecuting attorney had misstated facts in his cross-examination of witnesses, bullied witnesses, and apparently pretended to understand that a witness had said something which he had not. In writing the opinion of reversal for the Court, Sutherland lectured all Government attorneys in general. Such an attorney

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . is not that it shall win a case, but that justice shall be done.[216]

Especially here, held Sutherland, in view of the otherwise weak case of the Government, such conduct could not be permitted to go unchecked. The "misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."[217]

Though the number of their opinions in this area was limited, both Hughes and Sutherland evidenced devotion to the impartiality theme in the trial of the accused individual. With them the innocence or guilt of this individual was one question; the manner in which this innocence or guilt was established was quite another—and of far greater importance.

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210. *Id.* at 468.
211. *Id.* at 469.
212. *Id.* at 470.
213. Various writers have maintained that this whole issue of the extent of the judge's freedom in such a case boils down to the controversy as to whether the jury system has outlived its usefulness. See, *e.g.*, Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915); Note, 22 GEO. L.J. 324, 341 (1934).
214. POUND, CRIMINAL JUSTICE IN AMERICA 186 (1930).
215. 295 U.S. 78 (1935).
216. *Id.* at 88.
217. *Id.* at 89.

E. Jurisdictional Rights of the Individual

The crucial position occupied by courts in the regulation of our society and the American belief that this should be so[218] sometimes renders it difficult to bear in mind that their far-reaching substantive powers are for nought unless directed at matters properly within their jurisdiction. The Supreme Court must decide whether, in particular cases, this jurisdictional limitation has been observed. Although Sutherland wrote no opinions in this area, Hughes spoke for the Court in three such cases here to be noted.

In *Clairmont v. United States*,[219] decided during Hughes' first term on the Court, an Indian who had been convicted of introducing liquor into a reservation in violation of a federal law pleaded the court's lack of jurisdiction since at the time of his arrest he was still riding on a railroad which ran *through* the reservation. Considering this somewhat ingenious defense for a unanimous Court, Hughes' opinion concluded that indeed the federal government's grant of right of way to the railroad company had withdrawn that narrow strip of land from the Indian reservation thereby causing jurisdiction over it to fall to the state where located. As the conviction had been for actual introduction and as the Indian had thus never entered Indian territory, the lower court's actions were held to constitute a violation of his jurisdictional rights. Apart from the moral which it affords—avoid being an Indian-giver to Indians—the opinion can be seen as representing an early appreciation by Hughes of the significance of this particular individual protection.

After he became Chief Justice, Hughes wrote his second opinion dealing with an individual's lack of jurisdiction contention in the popular case of *Blackmer v. United States*.[220] There he considered the propriety of a contempt judgment by the Supreme Court of the District of Columbia against Blackmer, a citizen of the United States domiciled in France; the defendant had been convicted of failing to appear as a witness for the Government in the criminal case resulting from the Teapot Dome oil scandal. In holding that the rights of the individual had not been violated by the federal act which provided for service of subpoena abroad and satisfaction of the contempt judgment out of his property located within the United States, Hughes' opinion for the Court[221] was said to put "at rest a number of problems which have long needed an authoritative determination."[222] Hughes thought that it could not "be doubted that the United States pos-

218. One German writer describes this position as follows: "The judge, or the Federal Supreme Court, thus becomes in the United States the first chamber, wholly unprovided for in the Constitution, with an absolute right of veto." ROMMEN, THE NATURAL LAW 198 (1947).

219. 225 U.S. 551 (1912).

220. 284 U.S. 421 (1932).

221. Mr. Justice Roberts did not participate.

222. 30 MICH. L. REV. 968 (1932).

sesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal" and that the duty of this citizen to attend courts and give testimony when properly summoned was such an instance.[223] The service of subpoena and notice plus the tender of traveling expenses by a United States Consul constituted the underpinning of due process upon which the entire proceeding rested. Moreover, contempt was defined as not such a criminal prosecution under the sixth amendment as to require the presence of the defendant. Hughes brushed aside the argument that the act limited the use of such subpoena power to the Government, thus discriminating against defendants, by pointing out that "the petitioner, a recalcitrant wituess, is not entitled to raise the question."[224]

Though seemingly indicating a rather harsh approach when contrasted with his *Clairmont* opinion, actually the two cases involved situations so different that such contrast is not feasible. Moreover, it may not be too farfetched to speculate that as Secretary of State, Hughes may have become especially sensitive to the difficulties fostered by instances of this nature to the effective administration of law and order.[225]

In this jurisdictional rights field it may be as one writer has stated: "Actually there is no possibility of a *conflict* of laws as in every case there is some controlling sovereign force."[226] However, a more practical outlook would seem to require a somewhat different formulation: "Experience has clearly demonstrated . . . that many such problems care little for state lines."[227] At any rate, the final opinion of Hughes here, written for a unanimous Court in *Bowen v. Johnston*,[228] dealt with such a problem. To be reviewed was the denial by lower federal courts of the petition for writ of habeas corpus by an individual who had been convicted of murder in the federal district court in Georgia. Though the offense had been committed in a federal park in the state, the lack of jurisdiction argument was founded on the contention that the United States did not possess exclusive jurisdiction over the park. In looking to the cession legislation of Georgia concerning this park area, Hughes agreed that criminal jurisdiction was expressly reserved to the State by the original grant. However, he found, the State twenty-seven years later had passed another cession act purport-

223. 284 U.S. at 437.

224. *Id.* at 442.

225. It might be observed that a holding of this nature had been predicted as early as 1913: "If the sovereign of domicile has this power, it would seem a fortiori that the sovereign of allegiance would equally have such power . . . ." Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 283, 296 (1913).

226. Smith, *The Constitution and the Conflict of Laws*, 27 GEO. L.J. 536, 542 (1939).

227. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752 (1938).

228. 306 U.S. 19 (1939).

ing to convey exclusive jurisdiction to the United States over any land so acquired for stated functions "or for any other purposes of government." Hughes held, on the basis of an opinion which had previously been rendered by the Judge Advocate General, that this open-end provision was sufficient to vest exclusive criminal jurisdiction over the park in the federal government, and that hence the individual's petition had been properly denied. At least two aspects of Hughes' opinion here seem rather strange. First, the greater portion of the opinion consisted of his struggle to justify reviewing the case on habeas corpus. Having concluded that struggle, he then almost summarily denied the petition. Second, he first stated that the Georgia statutes would decide the jurisdictional problem. In reaching his final determination, however, he relied wholly upon a federal interpretation of those statutes.

It can thus perhaps be concluded that Hughes' opinions did not evidence a willingness to skate on thin ice for the individual in the jurisdictional rights pond. Due to the wholly different situations presented by the three cases, however, a more definite conclusion would seem unwarranted.

F. The Adequacy of Special Procedures

Though admittedly falling within the "catch-all" realm of this discussion, it does not seem improper that the opinions of Hughes and Sutherland noticed in this section should be lumped under the above label. For, conceding them to be widely varying both as to fact and law, basically the common concern is as to the adequacy of procedures unusual to a greater or lesser extent, whether judicial, legislative, or administrative, in providing to the individual those fundamental rights to which he can legally lay claim. The very existence of such opinions should, in a realistic sense, afford comfort to the ordinary citizen, evidencing as they do the guardianship function performed not only by the two Justices here studied but by the Court as an institution.

In his opinion for the Court in *Graham v. West Virginia*,[229] Hughes upheld the validity of state legislation providing for a procedure, instituted by information and determined by a jury, whereby additional punishment was imposed upon a prisoner found to have a prior conviction. Finding such procedures to be anchored soundly in English history, Hughes thought that the prisoner was "not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates [his] . . . guilt and justifies heavier penalties . . . ."[230] It was unnecessary that this additional punishment be imposed at the time of the prisoner's last conviction for the question as to his previous conviction "is a distinct issue, and it may appropriately be the subject of separate determination."[231] An indictment was held

229. 224 U.S. 616 (1912).
230. *Id.* at 623.
231. *Id.* at 625.

unessential to the procedure as the commission of an offense was not in issue. Thus, Hughes concluded, "there is no basis for the contention that [Graham] . . . has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged."[232]

In *Burns v. United States*[233] the Court was called upon to determine whether a lower court had acted arbitrarily in summarily revoking the probation of an individual under one sentence because of his misconduct while serving a prison term under another sentence. In writing the opinion for this somewhat unusual situation, Hughes examined probation both as an institution and in terms of the federal act. He came to view probation as a privilege rather than a right, requiring "an exceptional degree of flexibility"[234] in its revocation as well as its conferment. Still, Hughes declared, "while probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."[235] But, after holding that probation was not a matter of contract, Hughes found here an "implied" condition, *i.e.*, no misconduct while serving the other sentence. Hence it might be argued that this basis for his conclusion to the effect that though summary, the hearing was not improper or inadequate, was inconsistent with his overall approach to the case. Nevertheless, the discretion of the lower court was upheld.[236]

Hughes' next opinion showed that he did not possess a closed mind to the individual in this area. In the case of *Berman v. United States*[237] the petitioner found himself caught in an appellate log jam. After conviction in a district court, suspension of sentence and imposition of a two-year probation order, he had been fearful that the circuit court might dismiss his appeal. Thus upon his request, the district court reimposed the prior sentence and suspension and added a fine of one dollar to each count, from which the individual again appealed. The circuit court reached the conclusion that the first sentence had been rendered interlocutory by the second, and that the second sentence presented no issue for decision as it had been imposed at the instance of the petitioner. Hughes' opinion for the Supreme Court reversed the circuit court, holding that as the first sentence had been a final judgment and properly appealed, the district court had lacked jurisdiction during the pendency of that appeal to impose the second sentence.

232. *Id.* at 631. The complaint has since been aired that, though Hughes' opinion in this case settled the validity of these recidivist statutes, "the hostility of judges and the leniency of jurors have combined to prevent the full operation of the laws in the courts." Note, *Court Treatment of General Recidivist Statutes,* 48 COLUM. L. REV. 238, 251 (1948).

233. 287 U.S. 216 (1932).

234. *Id.* at 220.

235. *Id.* at 223.

236. For a description of the various aspects of probation as an institution shortly after this case see Chute, *The Progress of Probation and Social Treatment in the Courts,* 24 J. CRIM. L., C. & P.S. 60 (1933).

237. 302 U.S. 211 (1937).

Observing that the petitioner was a lawyer, subject to disbarment because of the conviction, Hughes pointed out that "his civil rights may be determined solely by reference to the judgment,"[238] and that "if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication."[239]

The case which was cause for Hughes' final opinion in this area, *Minnesota ex rel. Pearson v. Probate Court*,[240] involved the effort of an individual to halt a probate court's proceeding against him under a state statute providing for examination and commitment of "psychopathic personalities" having tendencies toward sexual misconduct. Hughes indicated that but for the state court's construction, the statute's definition of these personalities might have been void for vagueness. However, he held, that construction to the effect that the statute could be applied only to "those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses"[241] must be accepted by the Supreme Court. The denial of equal protection contention was quickly disposed of by holding the classification made by the statute to rest on a "rational basis."[242] As to due process of law, Hughes declared: "We fully recognize the danger of a deprivation of due process in proceedings dealing with . . . a psychopathic personality . . . and the special importance of maintaining the basic interests of liberty . . . where the law though fair on its face . . . may be open to serious abuses in administration . . . ."[243] He concluded, however, that as no particular application of the statute was contested and as the procedure for examination and commitment set forth appeared fair on its face without construction by the state court, the individual's procedural objections were premature.

Sutherland wrote three opinions that fall within the bounds of this section. The first of these, *Barry v. United States ex rel. Cunningham*,[244] dealt with the investigatory procedure of the United States Senate, a subject with which, from experience, he was undoubtedly familiar and perhaps somewhat sympathetic. Specifically, the Senate issued a warrant commanding that Cunningham be taken into custody and brought before it to answer questions concerning the election of a senator from Pennsylvania. Cunningham then brought a writ of habeas corpus in the federal courts on the ground that he had been arrested for contempt for lawfully refusing to

238. *Id.* at 213.
239. *Ibid.*
240. 309 U.S. 270 (1940).
241. *Id.* at 273. One comment observed: "The Minnesota statute . . . is by far the broadest piece of legislation on the subject yet to be enacted." 32 J. CRIM. L., C. & P.S. 196, 197 (1941).
242. 309 U.S. at 274.
243. *Id.* at 276-77.
244. 279 U.S. 597 (1929).

answer certain questions. For a unanimous Court, Sutherland's opinion reversed the circuit court's agreement with Cunningham. Holding that the Senate's actions amounted only to an attachment to procure the relator's attendance and not to a judgment of contempt, Sutherland emphasized the judicial nature of the Senate's powers over elections. As thus considered and in view of the relator's previous refusals to answer these questions, the issuance of a subpoena prior to the warrant was found unnecessary. Likewise, it was impossible to say that the information sought would not be helpful, for "the presumption in favor of regularity, which applies to courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority."[245] Thus Sutherland, with considerable force, denied such rights of the individual in these circumstances.[246]

The individual's interest prevailed in his second opinion. The question certified to the Supreme Court in the case of *United States v. Benz*[247] was as follows:

> After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?[248]

Sutherland's opinion for the Court answered in the affirmative, holding that unlike increasing the sentence, which would constitute double jeopardy, such mitigation was within the court's power. Sweeping away language seemingly to the contrary in a prior case[249] upon the ground that it was limited to a construction of the Probation Act,[250] he declined to discuss "the conflicting state cases [and] . . . the conflicting decisions of lower federal courts . . . ."[251] Sutherland likewise refuted the Government's contention that this action by the court was a usurpation of the executive's pardoning power by defining sentence reduction by amendment as "a judicial act as much as the imposition of the sentence in the first instance."[252]

Sutherland's final opinion in the case of *Jones v. SEC*[253] is, of course, a

245. *Id.* at 619.
246. Four years earlier, Dean Wigmore had pleaded for such a holding, wondering, "How is intelligent legislation conceivable without the power to compel disclosure of needful facts?" 19 ILL. L. REV. 452, 453 (1925).
247. 282 U.S. 304 (1931).
248. *Id.* at 306.
249. United States v. Murray, 275 U.S. 347, 358 (1928).
250. One commentator thought the stroke a little too light here and saw this holding as challenging the validity of prevailing doctrine. Note, 44 HARV. L. REV. 967, 968 (1931).
251. 282 U.S. at 309.
252. *Id.* at 311.
253. 298 U.S. 1 (1936).

well-known one. It involved the question whether an individual had the right to withdraw a registration statement after being notified by the Commission to appear for a hearing thereon. Upholding the existence of such a right in the individual, Sutherland's opinion for the majority of the Court[254] analogized it to that possessed by a plaintiff in a suit at law or equity which does not cause "plain legal prejudice" to the defendant.[255] There were no adversary parties, and Sutherland could not see how rights of the general public could be prejudiced by the withdrawal of an application which had never gone into effect. Sutherland then took the opportunity to lecture the Commission rather sternly; its action, he declared, "violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws . . . ."[256] Moreover, as a result of permitted encroachments of administrative bodies generally, "we shall . . . , while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."[257]

For a conclusion here based on what Aristotle might have described as "corrective justice" (distribution based on arithmetic as opposed to geometry), the results of these special procedure opinions might be tabulated as follows: Of the four opinions written by Hughes, all dealt with judicial procedures—three holding against and one for the individual; the most strained being the *Burns* opinion where Hughes imported the language of contracts to uphold the judge's discretion in matters of probation. Sutherland's opinions were assorted, dealing with legislative, judicial, and administrative procedures—in two of which he sided with the individual and in one against; the forceful language used in the *Barry* and *Jones* cases indicated rather strong, but contrary, feelings on his part in this area.

IV. Discord

Perhaps significant in itself is the fact that of the numerous cases thus far discussed calling forth opinions by Hughes and Sutherland, in not one is there found disagreement between the two Justices. Certainly this fact alone is not here proposed as any sort of test or conclusion, for many of the opinions were written by each at a time when the other was not on the Court. Nevertheless, it can simply be stated that there has now been

254. Justices Cardozo, Brandeis and Stone dissented.
255. 298 U.S. at 19.
256. *Id.* at 23.
257. *Id.* at 24-25. This case had a penchant for raising temperatures. Two years later Dean Landis, within the confines of three pages, applied the following terms to it: "the process of thought . . . still startles"; "an outburst"; "indicates . . . a field where calm judicial temper has fled"; "unguarded language"; "invective"; "hyperbole"; "excoriation." Landis, The Administrative Process 138-40 (1938).

presented a substantial body of common-ground decisions by the two Justices in various phases of individual rights.

The object of this section is to show that this unity was not without its exceptions; there are cases, few but important, in which Hughes and Sutherland entertain opposing views as to particular rights of the individual. These disagreements are valuable, of course, in relieving one from being forced to rely entirely, in comparing beliefs of the two Justices, upon reluctantly drawn predictions founded on the shifting sands of opinions dealing with situations radically distinguishable. However, after engaging in such forecasts, it is somewhat reassuring to discover this discord, at least in a few instances, in areas where one might reasonably have suspected its existence. These cases, in which the two Justices harbored opposing determinations and in which at least one of them wrote an opinion for his division of the Court, covered a period of time ranging from 1931 to 1937. They will be discussed chronologically.

The only situation affording an instance of direct expressions of conflicting opinion, *i.e.*, where Sutherland wrote the majority opinion and Hughes the dissent, was *United States v. Macintosh*[258] and its companion, *United States v. Bland.*[259] As might reasonably have been expected from previous consideration herein,[260] the right of an individual to become a citizen of the United States was involved. More specifically, the question was whether an otherwise well qualified applicant for naturalization who would promise to take up arms in defense of the country only with the qualification that he must personally believe the war to be morally justifiable, came within the terms of the federal act requiring of the applicant an oath "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." Sutherland's opinion exhibited no hesitancy in answering that he did not. Basing his decision squarely upon the previous case of *United States v. Schwimmer*,[261] Sutherland conceived citizenship as a privilege subject to whatever conditions Congress might decide to impose. That Congress had here deemed the duty to bear arms on the part of such applicants essential, he laid to the reason that though "we are a Christian people . . . ." honoring obedience to God, "also, we are a Nation with a duty to survive . . . whose government must go forward upon the assumption . . . that unqualified . . . submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."[262]

Hughes, in his opinion for the minority, while expressly refusing to

258. 283 U.S. 605 (1931).
259. 283 U.S. 636 (1931).
260. See text accompanying note 109 *supra.*
261. 279 U.S. 644 (1929).
262. United States v. Macintosh, 283 U.S. 605, 625 (1931).

reject the *Schwimmer* decision and while conceding Congress' power to require an arms-bearing promise of naturalization applicants, contended that Congress had not so required in fact. And, arguing that the majority opinion was simply reading this requirement into the Naturalization Act, Hughes charged an offense which Sutherland dreaded above all others—that he was encroaching upon a "'legislative' function."[263] Observing that "there are other and most important methods of defense, even in time of war, apart from the personal bearing of arms,"[264] Hughes asserted that the naturalization oath was in substance the same as that required of civil officers generally. He could not bring himself to believe that it had been Congress' intention to demand "that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power."[265]

The nature of the problem here involved indicates that this was indeed a decision which might reasonably have fallen upon either side; hence it is this contrast of the "reasons why" views of the two Justices in this area which becomes instructive.[266] It will be recalled that it was the interpretation of Hughes which prevailed when, fifteen years later, this case was overruled.[267]

Decided only a few days following the *Macintosh* decision, the famous case of *Near v. Minnesota*,[268] termed by one authority as "one of the most important of all the free speech cases in the Supreme Court,"[269] presented the next occasion for Hughes and Sutherland to part company. In the Court's spotlight was a Minnesota statute which classified scandalous and defamatory publications as nuisances and, unless the publisher could show the matters in question to be true and published with good motives, provided for a permanent injunction against their publication. Under this statute and at the suit of the county attorney, such an injunction had been laid upon the owner of a periodical which had charged gross inefficiency on the part of city officials. Hughes, in an opinion for the majority of the Court which was hailed as establishing "definitely" that freedom of press was embodied in the liberty protected by the fourteenth amendment,[270] invalidated the law. Echoing Blackstone's condemnation of "previous restraint," Hughes described various aspects of the statute—its applica-

263. 283 U.S. at 628 (dissenting opinion).
264. *Id.* at 631.
265. *Id.* at 634.
266. Professional opinion was likewise divided. Dean Wigmore termed the minority principle "nothing less than the right of individual secession." *United States v. Macintosh—A Symposium*, 26 ILL. L. REV. 375, 379 (1931). Professor Green saw the result of the majority holding as "something that the majority judges read into the Constitution." *Id.* at 394.
267. Girouard v. United States, 328 U.S. 61 (1946).
268. 283 U.S. 697 (1931).
269. CHAFEE, FREE SPEECH IN THE UNITED STATES 381 (1941).
270. 30 MICH. L. REV. 279 (1931).

tion in stifling criticism of government, the meager defense which it allowed the individual, and its prohibition of entire future publication—as "the essence of censorship."[271] Pointing public officers damaged by false accusations to the libel laws, Hughes thought that the complexity and importance of modern government "emphasizes the primary need of a vigilant and courageous press . . . ."[272]

Sutherland joined in the dissenting opinion by Mr. Justice Butler which, while not denying freedom of the press to be protected by the fourteenth amendment, argued that the maliciousness of the articles here in question presented a clear case of abuse of that freedom and required state regulation. The fact that the statute might be applied in a manner repugnant to this liberty in some future instance should not now, he contended, be considered.[273]

There next followed, in this caravan of conflicts, two cases within an area where again, it will be recalled from previous examination,[274] discord might well have been anticipated—the right to trial by jury. The first of these cases, *Dimick v. Schiedt*,[275] presented the protest of a plaintiff whose motion for a new trial in a personal injury suit upon the ground of an insufficient jury verdict was denied by the trial judge on the condition that the defendant agree to a certain increase in the damages. This time it was Sutherland who wrote the majority opinion, affirming the circuit court's reversal of the trial judge's actions upon the reasoning that thereby the plaintiff's right to trial by jury as provided by the seventh amendment had been abridged.[276] Holding that that amendment simply adopted the jury trial rules of the common law as they existed in 1791, Sutherland declared that to allow the judge so to act "is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly

271. 283 U.S. at 713.

272. *Id.* at 720. Hughes' opinion here, said one writer, "epitomizes a doctrine to which he is firmly committed." Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1085 (1931). Another, however, viewing the decision as settling only a very local situation, thought that the acclaim given it "by many liberals . . . is not narrowed to its facts." Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 779 (1942).

273. It has been pointed out that not only Hughes and Sutherland but every member on the Court switched positions in *Near* from that which they had occupied one month earlier in O'Gorman & Young, Inc. v. Hartford Ins. Co., 282 U.S. 251 (1931), which had upheld a state statute interfering with freedom of contract. Comment, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech*, 41 YALE L.J. 262 (1931).

274. See text accompanying notes 205-07 *supra*.

275. 293 U.S. 474 (1935).

276. Many years prior to this case Professor Scott had predicted that such action by the judge would *not* be unconstitutional, provided the inadequate verdict was not a result of compromise or an erroneous instruction. SCOTT, FUNDAMENTALS OF PROCEDURE 126-31 (1922).

by a tribunal which has no power to assess.' "[277] In answer to the seemingly meritorious contention that there was no practical difference in the recognized practice of permitting the judge so to act where the jury verdict was excessive and here where the verdict was inadequate, Sutherland answered flatly to the effect that he would prefer to change the former: "[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[278]

Hughes concurred in the minority opinion of Mr. Justice Stone whose entire argument is well summarized by the following sentence: "The seventh amendment . . . is concerned with substance and not with form";[279] that is, the precise English rule of 1791, if there had been such a rule, was not binding here as long as the essentials of a common law jury trial were preserved. The powers of a trial judge to grant motions for new trial and to make determinations as to the permissible limits of a recovery must certainly be sufficient to infuse validity into his actions in this case.[280]

One might think these opinions to be exactly opposite to what should have been expected from the previous discussion, *i.e.*, that Sutherland was upholding, while Hughes would restrict, the individual's unfettered right to a jury trial. On the other hand, perhaps the most reasonable conclusion is that Sutherland was adopting a very restrictive approach, while Hughes conceived the right as adjustable to modern demands. In this view the immediate result in this particular instance was rather incidental.

The second jury trial case, *United States v. Wood*,[281] involved the validity under the sixth amendment of a 1935 act of Congress overturning a 1909 Supreme Court decision[282] which had held that an employee of the Government was not qualified to serve as a member of a petit jury in the District of Columbia in criminal trials. Having been convicted of larceny in a police court by a jury composed in part of three recipients of Government compensation, the defendant contended that the congressional act was invalid in denying him the right of trial by an impartial jury. The circuit court had agreed with the defendant. Hughes' opinion for the majority reversed the circuit court, holding that the act of Congress had been effective in rendering Government employees competent to serve on such juries and that no constitutional rights of the defendant had been denied. But

277. 293 U.S. at 487.

278. *Id.* at 486.

279. 293 U.S. at 490 (dissenting opinion).

280. It is deemed sufficient simply to recall summarily Hughes' dissent in Slocum v. New York Life Ins. Co., 228 U.S. 364, 400 (1913), where a majority of the Court held unconstitutional, on grounds similar to those in this case, the trial judge's entry of a judgment *non obstante veredicto*, even though he should have directed a verdict for the defendant originally. While disagreeing with this holding, Hughes conceded that had there been facts to be tried by the jury to begin with, the judge would be precluded from substituting his judgment, other than by granting a new trial.

281. 299 U.S. 123 (1936).

282. Crawford v. United States, 212 U.S. 183 (1909).

it was Hughes' approach in reaching this conclusion which seems somewhat unsatisfactory from the viewpoint of consistency; for the first direction in which he turned for an answer was to "the practice in England prior to the adoption of the Amendment, or in the colonies"[283]—the source which he had held, via Mr. Justice Stone's dissent in *Dimick*, to be practically immaterial. It is true that he also based his conclusion on the alternate ground that even in the face of such a rule at common law, Congress would have had the power to change it; but only after disapproving of the *Crawford* case because the Court which decided it had not been sufficiently informed of English precedents. Moreover, in supporting his conclusions with the "substance not form" contention which had been advanced by Stone in *Dimick*, he did not once refer to that case, decided only a year previously, where the contention had been rejected. Hughes concluded his opinion, however, with a discussion of what may well have constituted the basis for his decision, *i.e.*, the irrationality of automatically imputing bias simply by virtue of Government employment.[284]

Sutherland joined in a brief dissenting statement to the effect that the holding of the *Crawford* case should control.

In the spring of 1937, when the Supreme Court was being subjected to the historic attack of President Roosevelt,[285] it upheld the constitutionality of the National Labor Relations Act in a series of decisions which surprised many.[286] In one of these cases, *Associated Press v. NLRB*,[287] Hughes and Sutherland again disagreed on the issue of freedom of press; here however, in contrast to the *Near* case, it was Sutherland who was claiming the freedom. The question was whether the act, utilized so as to force A.P. to reinstate an editorial employee who had been dismissed for union activities, amounted to an unconstitutional abridgment of that freedom. Hughes silently concurred with the majority opinion of Mr. Justice Roberts which held that under these circumstances it did not, for "the publisher of a newspaper . . . has no special privilege to invade the rights and liberties of others."[288]

Sutherland's dissenting opinion distinguished those liberties enumerated in the fifth amendment and qualified by the phrase "due process of law," from the first amendment freedoms which he saw as "guaranteed without

283. 299 U.S. at 134.

284. The soundness of extending the holding in this case to other types of trials was later criticized. *The Supreme Court, 1949 Term*, 64 HARV. L. REV. 114, 126 (1950).

285. See 1 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 241-43 (1954); JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

286. "[T]hese decisions are indeed surprising reversals of judicial attitude toward the exercise of federal power." Note, *The Wagner Act Decisions Studied in Retrospect*, 32 ILL. L. REV. 196 (1937).

287. 301 U.S. 103 (1937).

288. *Id.* at 132-33.

qualification." These latter rights, including freedom of the press, thus stood "in a category apart . . . incapable of abridgment by any process of law."[289] Echoing his *Carter Coal Co.* opinion,[290] Sutherland would place very strict limitations upon Congress' power to regulate the relations of private employer and employee. Obviously, he thought, this limitation had here been exceeded for "if freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom."[291]

The final instance of discord between the two Justices over rights of the individual arose, several months prior to Sutherland's retirement, in the case of *Nardone v. United States*.[292] Involved was the somewhat sensitive question of the admissibility in federal courts of evidence obtained by Government agents by means of wire tapping; more specifically, the problem was whether the Court's decision in *Olmstead v. United States*[293] to the effect that such evidence was admissible had been changed by Congress through a provision in the Federal Communications Act to the effect that "no person" should intercept and divulge communications to "any person." Mr. Justice Roberts' opinion for the majority of the Court, in which Hughes joined, held that the change had been effected and that the evidence was not now admissible. To the contentions that the word "person" in the act should not be construed to include federal agents and that indeed the act itself had merely provided for a transfer of jurisdiction between regulatory agencies, the majority replied that in the uncertainty created by the controversy over the morality of wire tapping, these considerations could not be deemed controlling.[294]

Remaining faithful to his majority position in the *Olmstead* case, Sutherland here wrote a dissenting opinion which was somewhat reminiscent of his agreement with Mr. Justice Butler's dissent in *Near v. Minnesota*.[295] The power of federal law enforcement officers to obtain evidence in this manner was one, he said, which was necessary for the protection of society as a whole. As Congress had not expressly forbidden the practice, the ambiguous word "person" should not be given a meaning which might well have been not intended. Citing words of Mr. Justice Story to the effect that "the general words of a statute ought not to include the government, or

289. 301 U.S. at 135 (dissenting opinion).
290. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
291. 301 U.S. at 137 (dissenting opinion).
292. 302 U.S. 379 (1937).
293. 277 U.S. 438 (1928).
294. It appears that this holding of the majority was generally criticized. It was said to indicate "a thoroughly unrealistic approach," Editorial Note, 6 GEO. WASH. L. REV. 326, 329 (1938); an instance of the Court's "leaning over backward," *The Supreme Court of the United States*, 28 GEO. L.J. 789, 792 (1940); a change by the Court in "moral considerations," 86 U. PA. L. REV. 436, 437 (1938).
295. 283 U.S. 697, 723 (1931) (dissenting opinion).

affect its rights . . . ,"[296] Sutherland condemned the majority's holding as empty of "all sense of proportion" and submerging the necessity of public protection against crime "by an overflow of sentimentality."[297] It is of interest that both sides of the Court placed the problem for decision in exactly the same setting. The very uncertainty which forced the majority into holding the evidence inadmissible was relied upon by the minority to urge a contrary result.[298]

It becomes clear then that with Hughes, Sutherland, and the rights of the individual, all were not at one; discord, infrequently but persistently, is found. But rather than concluding from this discord that one of the Justices was more sympathetic to these rights than the other, one finds that he must adhere more strictly than ever to the warning issued by Professor Freund: "In some cases it is far from clear with which side the interests of civil liberty are to be identified."[299]

V. CONCLUSION

At the beginning of this paper quotations were set forth which seemed to indicate directly opposing philosophies of the proper approach to statutory interpretation on the parts of Justices Hughes and Sutherland. The fundamental question was then posed as to the probability, indeed the possibility, of judges who subscribed to such conflicting theories and who emerged from such contrasting backgrounds being able to reach anything resembling consistent agreement in any particular area of the law.

Since then the two Justices have been followed through a myriad of opinions held together by one common link—their concern, or lack of concern, for the rights of the individual. It has been attempted not only to present a fairly complete summary of their views on this important subject, but to afford some idea of the general fact of outside approval or disapproval of these views, both at the time of their revelation and in light of later developments. Summary comparisons and contrasts of the indicated beliefs of the two Justices have been interspersed throughout, whenever there was thought to be sufficient common thread to make possible the weaving.

At this point the conclusion seems forthcoming that the indicated difference in approaches was a reality. Not only in the interpretation of laws but in approaching situations in general, with the exception of a very few detours on the part of both, Sutherland would travel the more restrictive

296. 302 U.S. at 386 (dissenting opinion).

297. *Id.* at 387.

298. For an account of the extent to which this decision was later carried by the Court see Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 535 (1946).

299. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 534 (1951).

and Hughes the less literal road to a solution of the problem at hand. And yet it is submitted that once that solution was reached, with thought-provoking consistency it was the individual's interest which prevailed.

In the light of their opinions alone (for a line must be drawn somewhere) it would be difficult to conceive of Hughes' being more sensitive and alert to the possibilities of encroachment upon individual liberties than he was. But Sutherland was not as far behind as the lack of complimentary literature would lead one to believe. Taken together, their opinions fill a vast gap in the theretofore unestablished or unsettled phases of judicial respect for the common man.

The two Justices have been observed moving almost as one against statutes whose vagueness was capable of operating to the disadvantage of the working man; molding precedents protecting man's right of expression which remain vitally alive today; and hurling a flat refusal to the demand for liberty sacrifices in return for the conviction of criminals. Likewise in concurrence were their opinions in demanding that proper conduct by federal court officials which insures a defendant basic impartiality; in maintaining a watchful vigilance over those special procedures where a curtailment of individual interests is always a possibility; and in joining arm in arm to establish requirements for fairness in state trial procedures for such offenders as the Scottsboro boys.

With the maintenance of independent standards for these individual rights, discord between the two Justices in certain areas was more than a remote contingency. For example, Hughes' undeniably more liberal approach in favor of the individual under the general heading of citizenship and naturalization has been noticed. And in the realm of trial by jury, while the contributions of both Justices were considerable, Sutherland's philosophy appeared the more restrictive.

In certain subject areas, however important, enough common ground to render feasible a comparison was simply lacking. Here may be included such areas as statutory presumptions, color cases, and jurisdictional limitations.

Finally then, does not the negative answer to the fundamental question analyzed in this article serve to cast Mr. Justice Cardozo's "eyesight confession"[300] in the role of a premise rather than a conclusion? Moreover, can not this premise be utilized as one of the stones in the foundation of our system of judicial review rather than in bringing to the top what some may consider its weaker side? For as this study would tend to indicate, starting with the premise, the expected conclusion by no means necessarily follows. Thus while our key position of judge necessarily and properly is filled by a human being, entering the Court not from a secluded greenhouse, but from one of the many main streets of life, at bottom there re-

300. See text accompanying note 3 *supra.*

mains the assurance that case law as we know it consists of far more than the haphazard breaking of personality-inspired judicial deadlocks.