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MR. JUSTICE SUTHERLAND: A MAN  
AGAINST THE STATE, by Joel Francis Paschal.  
Princeton University Press, Princeton, 1951. Pp. xii,  
267. \$4.00.

Francis A. Allen

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ciliation of two high values—conceding to each state the responsibility for working out the quality of its justice, while yet assuring to the individual at least the essentials of fair treatment, albeit not the particular guaranties enumerated in Amendments One to Eight.

The reviewer closed the book with the thought that, interesting and important as are all of the comments, the most significant reflection is suggested rather than expressed in the text. Every position is advanced accurately and defended with effective strokes—one recalls the author's strength when an advocate at the bar. The present state of constitutional development is marked, sometimes with a certain note of resignation but never with the accent of despair. There have throughout our history been patriots whose attachment to their own opinions was more assured than their faith in the American nation. Justice Roberts is not of their number. He is never one to spread alarm even though at some points his views may not prevail. One knows that, like the justice to whose memory the lectures did honor, Justice Roberts has faith that the future may be greater than the thought of even the wisest of patriots.

*Charles Fairman\**

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As the author, himself, recognizes, this is not conventional biography. Indeed, it is scarcely biography at all. No clear-cut picture of Mr. Justice Sutherland as an individual human being emerges from these pages. Information with reference even to the basic milestones of his career is sparingly offered. Mr. Paschal, rather, has devoted himself to the study of the acquisition and application by Sutherland of a theory of government. Within these limitations—and perhaps, in part, because of them—the author has produced a valuable, if not particularly engaging, work.

It is Mr. Paschal's thesis that Sutherland, largely as a result of his formal education under men like Cooley and Campbell at the Michigan Law School and his early professional associations at the bar, was profoundly influenced in his intellectual develop-

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ment by the speculations of Herbert Spencer. The Spencerian creed in its social and political applications was founded on the proposition that the maximum of human happiness results in that situation in which individuals have achieved a successful adaptation to their environment. This adaptation can be fully accomplished only where the greatest individual freedom of action is permitted. Governmental intervention, since it interferes with the operation of natural evolutionary forces, was, therefore, to be viewed with suspicion and hostility. Mr. Paschal's thesis, of course, leaves certain important questions unanswered. Many members of Sutherland's generation were subjected to the impact of Spencerian thought; yet there were those who eventually escaped its thralldom. Why Sutherland was not one of these is not fully explained. Perhaps it is a question of the sort which can never be completely answered.

In any event, except for a brief and rather chaste flirtation with reform during the Progressive Era, Sutherland adhered with remarkable consistency to his Spencerian assumptions. Nor did he permit himself to doubt that those were the assumptions upon which the American constitutional system is based. Unfortunately for the permanence of Sutherland's contribution, they are assumptions that have not withstood the ravages of time. In the whole history of thought there has probably been no more rapid eclipse of a widely-held philosophical system than that of Herbert Spencer. In a recently-published history of western philosophy written by a compatriot of Spencer, the latter's name is not so much as listed in the index.<sup>1</sup> Perhaps the most serious deficiency in the Spencerian system, as Mr. Paschal rightly points out, was that it provided no mechanism by which theory could be adjusted to the underlying social facts. It was Sutherland's fate to attempt application of the Spencerian formula throughout a period when those facts were in rapid flux. Eventually the discrepancy between theory and fact became intolerable; and the constitutional point of view which has come to be associated with Sutherland's name was at least temporarily overthrown.

This is not to say that much of Sutherland's work has not survived the deluge. His opinion in *Massachusetts v. Mellon*<sup>2</sup> still serves as the foundation for broad exercise of the federal spending powers. Ironically enough, those powers have been employed

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1. Russell, *A History of Western Philosophy* (1945).

2. 262 U.S. 447 (1923).

to produce governmental intervention of the sort which Sutherland undoubtedly disapproved. His opinion in *Powell v. Alabama*,<sup>3</sup> dealing with the problem of federal judicial supervision of state criminal procedures, may be regarded as the starting point of one of the most significant modern developments of constitutional doctrine. Finally, Sutherland's views as to the power of the federal government in the area of foreign relations have received no serious challenge in the court.<sup>4</sup>

Because he did not clearly understand that in the modern society, individual freedom may be lost through the exercise of unrestrained power by private groups as well as through encroachments by government, Sutherland often misconceived the nature of the problem of liberty. Yet his sincere dedication to the cause of liberty cannot be doubted. And those who question the relevance of much of Sutherland's thought in reconciling the current insistent demands of liberty and authority have not themselves achieved such conspicuous success as to justify complacent scorn of Sutherland's efforts in behalf of individual freedom.

The author's analysis is skillfully developed and temperately presented. Certainly, something is lost in the failure of the book to scrutinize the whole man. Yet there are compensations; and it may be that the work produces an increased impact by confining its attention to the intellectual world of Mr. Justice Sutherland. The book represents a worthy contribution to the literature of the court.

*Francis A. Allen\**

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3. 287 U.S. 45 (1932).

4. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937).

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