Joseph Chappell Hutcheson, Jr. (1879-1973) was admitted to the State Bar in 1900. He practiced law with his father's firm, Hutcheson, Campbell and Hutcheson, until his election as Mayor of Houston in 1917. He served as U.S. district judge for the Southern District of Texas from 1918 to 1931, as federal appeals judge for the Fifth U.S. Circuit Court of Appeals from 1931 to 1948, and as chief judge of the Fifth Circuit Court until 1959.

Regional Growth and the Federal District Courts: The Impact of Judge Joseph C. Hutcheson, Jr., On Southeast Texas, 1918-1931

Charles Zelden

As the First World War came to a close, southeast Texas was a region in transition. "Improved transportation and the growth of closely related industries" had transformed much of the area into a "center of commerce," but the region had yet to adopt new patterns of interaction which were appropriate to its new status. Economically, socially, and politically, the region lacked a form, a structure, an organization that would carry it through the rest of the century.[1]

The next decade "served as an incubation period, a coming to maturity" for the region, as the social, political, and economic structure of southeast Texas coalesced into its modern form. While the region experienced a massive growth in size, wealth, population, complexity, and diversity, its inhabitants stretched the borders of their control and worked out the limits of life in this new world they had created. Many factors helped shape the direction, speed, and form of this growth. During the 1920s, the rapidly

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[1]Walter Buenger and Joseph Pratt, *But Also Good Business: Texas Commerce Banks and the Financing of Houston and Texas, 1886-1986* (College Station, 1986), 12, 39. On the economic situation, see David McComb, *Houston: The Bayou City* (Austin, 1969), chapter 4; John Spratt, *The Road to Spindletop: Economic Change in Texas, 1875-1901* (Dallas, 1955); Edwin Caldwell, "Highlights of the Development of Manufacturing in Texas, 1900-1960," *Southwestern Historical Quarterly* 68 (April 1965): 405-431; Harold Platt, "Energy and Urban Growth: A Comparison of Houston and Chicago," *Southwestern Historical Quarterly* 91 (July 1987): 1-18; Seth McKay and Odie Faulk, *Texas After Spindletop* (Austin, 1965); Dan E. Kilgore, "Corpus Christi: A Quarter Century of Development, 1900-1925," *Southwestern Historical Quarterly* 75 (April 1972): 434-443. On the social and political situation, see Writers' Program, Work Projects Administration, *Houston: A History and Guide* (Houston, 1942), 112; McComb, *Houston*, chapter 5; David McComb, *Galveston: A History* (Austin, 1986); Evan Anders, "Boss Rule and Constituent Interests: South Texas Politics During the Progressive Era," *Southwestern Historical Quarterly* 84 (January 1981): 269-292.

expanding economy extended its focus from the previous trinity of cotton, oil, and lumber to include a variety of new oil- and cotton-related industries. The transportation network, in place before the war, grew in use and importance along with these new industries. As the economy changed, so did the social and political life of the region. New patterns formed around the political alliance of oil, transport, and commerce that ruled the region for the next sixty years.[2]

Availability of out-of-state capital, land, and energy resources; the efforts of local merchants; the maturing of the oil business; increasing use of the ship channel; all these and more had significant impact on the region's expansion. However, such factors alone were not enough to shape the new structures of living in southeast Texas. While their presence ensured that change would occur, they provided no direction, no overall plan for the transformation. An additional component was necessary to bind these agents of change together into a unified whole. This instrument was the United States District Court, Southern District of Texas.

Federal district courts are forums which both adjudicate private rights and define and protect individual rights and duties. They represent the local region to the national government and yet serve as the part of the federal government that enforces public duties. In short, they are both national courts in a national judicial system and local courts serving local or regional needs. Each of these often contradictory functions has the potential ability to affect the region the court serves. As a forum for both public and private concerns, the district court has significant power to shape the economy and society of a region through its decisions. Defining the proper extent of public power, the district court can help or hinder the efforts of a city or a state to cope with the impact of growth and technology. As a tribunal for private adjudication, the court offers alternative forums friendly to certain actions while opposed to others. If these actions are a necessary part of doing business, the position of the court on the issue becomes critical in the growth of a region's economy. No matter what the function, the decision of the court carries wide ramifications.[3]

The power of a district court to shape the law's effects in a region was intensified at this time by the extensive autonomy district courts had in

[2]Harold Platt, "Houston at the Crossroads: The Emergence of the Urban Center of the Southwest," *Journal of the West* 18 (July 1979): 56.

[3]As Tony Freyer has noted, "the great bulk of the cases litigated in federal courts have involved relatively mundane, though nonetheless socially important questions, such as debtor-creditor relations, accidental liability, property transfers, and other matters of private right." To this list can be added more public questions such as the rights and duties of association, the limits of government regulation, and the extent of public control over individual actions. Tony Freyer, *Harmony and Dissonance: The* Swift *and* Erie *Cases in American Federalism* (New York, 1981), xii.

deciding cases. Since the 1842 case of *Swift v Tyson*, district judges held the power to decide cases based on a national common law which existed independently of state court decisions. Federal judges decided issues based on their individual conceptions of the common law, holding their views to be the applicable interpretation even when the decision reached was in opposition to the precedents of the state courts on similar issues. By the early twentieth century this authority to decide a case based on a national common law was generally used for most forms of action.[4]

The effect of this power was to make the district courts truly an alternate forum from that of the state courts. Federal judges decided the law as they saw fit, taking their precedents from federal cases and those state cases that they thought applicable. While most decisions reached by the federal courts were in line with those of the state courts, the potential for a different decision made the district courts an inviting forum for those who wished to bring change to a region. One never knew if a district judge might accept a new argument about some issue and thus rule in a new and influential way.

Created in 1902, the Southern District Court grew with the region as southeast Texas moved into the twentieth century. Organized to meet the needs of a quickly expanding territory, the court soon had a busy docket of diverse cases.[5] By the end of World War I, the court was hearing hundreds of cases every year. As southeast Texas grew to maturity in the decade that followed, this number increased. By 1931 the Southern District Court of Texas had the heaviest case load of any single-judge district court in the

[4]The *Swift* doctrine, as this discovery of a federal common law was termed, was overturned in 1938 by the case of *Erie R. R. Co. v Tompkins*, 304 U.S., 65. It did acknowledge one limit. Where an issue was covered by explicit local statutes those statutes and not the national common law ruled the case. However, interpretations by state courts about what those statutes meant were not held to affect the interpretation of a federal judge. See Freyer, *Harmony and Dissonance*. An example of how the *Swift* doctrine powers could be used in a manner having significant impact is found in the late nineteenth and early twentieth centuries, where the federal courts used their interpretations of the common law to protect large corporations from local discriminatory regulations. The result was to foster the economic growth and domination of the large, multi-state corporation in the twentieth century. See Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, Conn., 1979); see also Stephen Presser, *Studies in the History of the United States Courts of the Third Circuit* (Washington, 1983), chapter 4.

[5]The district encompasses the southeastern counties of Texas, from Polk, Trinity, and Madison in the north to Starr, Hidalgo, and Cameron in the south. It includes the entire Texas Gulf Coast except for Jefferson County and runs on its western side from the hill country east of Austin to just west of Laredo on the Rio Grande River. 32 *U.S. Statutes at Large*, 65; U.S. Congress, House Committee on the Judiciary, *Report #577*, 57th Cong., 1st Sess. (1902); *Congressional Record* (57th Cong., 1st Sess.), vol. 35, p. 2136-2137, 2357. On the case load of the court in its early years, see Southern District Court, Texas, *Docket Books*, 1902-1917, National Archives-Southwest Region, Fort Worth.

country. Only large, urban, multi-judge districts such as Southern New York or Northern Illinois had heavier case loads.[6]

The heavy case load of the district reflected both the region's size and its growing diversity and complexity. Taking in over six hundred miles of Texas coastline, the district contained three major and many minor ports, a rising population base, and a number of growing urban centers. The district court's docket included cases dealing with issues of admiralty, commerce, naturalization and immigration, crime, civil rights, patents, and government regulation. The court heard issues of constitutional importance and also adjudicated disputes significant only to those participating in the case. It acted as a forum for out-of-state litigants to receive a fair hearing and also heard cases of strictly local concern. The result of this large docket was that this court, as with all federal district courts, was called upon to serve concurrently many different social, political, economic, and institutional functions or roles—all of which significantly affected the direction and extent of the region's progress.

In the key period of the 1920s, the Southern District Court wielded all of its potential powers with particular intensity and effect. The court ruled significantly on the oil industry, on the extent of government power to shape and control the effects of growth, and on the private rights and public duties of the region's inhabitants. In ever-widening circles, the court extended the range and breadth of its judicial reach. From the simplest matters of individual private concern to complex issues of public responsibilities, the court expanded its inherent roles. In doing so, the court helped create a unified, alternative blueprint for the future of the region—a blueprint that was to be an instrumental force in shaping the social, political, and economic form that southeast Texas would ultimately take.

The influence of the Southern District Court stemmed primarily from one man: Joseph C. Hutcheson, Jr., who sat as judge of the district during the formative years of 1918 to 1931. The size of the court's case load, the ability of federal court judges to decide cases based on their personal interpretation of national common law, and the fact that unlike other district courts of comparable size the Southern District Court had only one judge, meant that it was Hutcheson's personality and judicial philosophy that integrated the various functions of the court, shaped the decisions, and helped create a unified conception of how southeast Texas should be organized. Through Hutcheson's attitudes and actions, the institutional powers of the Southern District Court evolved to shape particular events and situations and thereby help modify the region that the court served.

[6]See Walter P. Armstrong, "Joseph C. Hutcheson, Jr.: Chief Judge, Fifth Circuit Court of Appeals," *American Bar Association Journal* 35 (June 1949): 548. See also Southern District Court, Texas, *Docket Books*, 1918-1931, National Archives-Southwest Region, Fort Worth.

A Philosophy of Balance

John R. Brown, who sat with Hutcheson on the Fifth Circuit bench, once noted that "Hutcheson, the Judge, cannot be divorced from Hutcheson, the man. . . . what he does as a Judge, what he has done for the law, are the product of this total and unique personality." Variously called an "aristocrat" and "an old-time southern hot-head," Hutcheson was a man of "forthright and unconventional" outlook and deep learning, quick to grasp a point. According to Brown, "he ha[d] confidence in what the Judge [himself] knows, and knows he knows, and says he knows." An energetic man with "tremendous drive," Hutcheson often exhibited a tendency to impatience, combativeness, and argument. He was always an active participant in any endeavor he chose to undertake.[7]

Hutcheson's attitudes toward his judicial duties grew out of this quick, combative, and confident personality. As a judge, Hutcheson valued above all "the natural law principles upon which our freedom depends." He had "faith in the rights of man, faith in the Constitution. . . , faith in the law as liberator." Finally, he also had faith "in the principles and practices which, in Madison's immortal phrase, 'enable the government to control the governed, yet also oblige it to control itself.'" This view of government was at the heart of Hutcheson's judicial philosophy.[8]

Hutcheson was in many ways a man of the nineteenth century, believing implicitly in the importance of the individual and individual rights. He tempered this view, however, with an equally strong concern with the needs of what he called the "General Will." Law, to Hutcheson, had a purpose and a power to act to defend both the rights *and* duties of all citizens. Where a right was enjoined, it was the job of a court of law to enforce the practice of that right. Where a duty owed to society was not performed, the court's responsibility lay in enforcing the performance of that duty. Reaching a balance between individual rights and public duties was what law and justice were all about.

However, achieving such a balance was not an easy process. Hutcheson understood the tensions that existed between individual wants and social

[7]John R. Brown, "Hail to the Chief: Hutcheson, the Judge," *Texas Law Review* 38 (December, 1959): 140-146; Armstrong; Joseph C. Hutcheson III, interview by author, March 3, 1988; John R. Brown, interview by author, February 16, 1988. An example of the judge's combative nature was his lifelong praise of the accusatorial legal system and of the trial lawyer. As Hutcheson was fond of quoting, "'and now abideth Lawyer, law Teacher, and Judge, and the greatest of these is the Lawyer,' and when I say 'lawyer' I mean, 'Trial Lawyer.'" Joseph Hutcheson, "In Praise of Lawyers and Lawing," *Insurance Counsel Journal* 21 (July 1954): 238. See John Spivack, "Race, Civil Rights, and the United States Court of Appeals for the Fifth Circuit," (Ph.D. diss., University of Florida, 1978), 218-243, for a similar discussion of the form and impact of Hutcheson's legal philosophy.

[8]Hutcheson, "In Praise of Lawyers and Lawing," 241-242.

obligations. Notwithstanding the difficulty involved, Hutcheson believed that the ultimate obligation of a judge was in "the pursuit of justice," defined as a balancing of rights and duties. "A sense of justice," the judge quoted in a speech, "must and should have an important influence upon every well organized mind in the adjudication of cases. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. . . . In this it is like the polar star that guides the voyager."

Following the "rules of law, in their true spirit, to whatever consequences they may lead," was a sacred duty to Hutcheson. He saw law as the bulwark of all freedom and prosperity. "Where there was no law, . . . there was no freedom." Without obedience to the law there was no liberty. Yet once again, the key foundation to this belief was the dictates of moderation and responsibility. Obedience to law was a duty of all men, but only when law was viewed in its correct spirit. So viewed, "law. . .[was] not so much the limitation as the direction of a free and intelligent agent to his proper interest." If properly administered, law "prescribe[d] no farther than [what was] for the general good of those under that law." Where a law overstepped these bounds, it was invalid and needed correcting.[9]

In short, Hutcheson saw moderation and responsibility as underlying the court's function of defending law and justice. Hutcheson linked his version of Madison's model of proper government to everyday behavior. For if a man acted responsibly and with moderation, with due regard for the limits on his individual wants, he was acting in a "just" or "correct" manner. When this was achieved, the result was "social order" and "social peace." Where individuals refused to live by this standard, it was up to the courts to enforce responsible behavior. In achieving this, Hutcheson stressed what he called the "judicial hunch," an internal, often illogical, and always personal search for the proper response in deciding a case. For while "facts, facts and more facts are the stuff from which verdicts [were] made," the judge had to do more than just rule on the facts. He also had to balance out those facts in a search for the "truth" of the case; he had to decide what would be the "just" result based on these facts.[10]

[9]Hutcheson, "In Praise of Lawyers and Lawing," 241-242; *Duncan v Alger*, 25 Tex. 245; Hutcheson, *Law as Liberator: The Principle of Democracy in America: The Spirit of its Laws* (Chicago, 1937), 52, vi.

[10]Hutcheson, "Judging as Administration, Administration as Judging," *Texas Law Review* 21 (November 1942): 1-2; Hutcheson, "The Judgement Intuitive: The Function of the Hunch' in Judicial Decision," *Cornell Law Quarterly* 14 (1929): 274-288; Hutcheson, *Law as Liberator*. In arguing for the use and acknowledgement of the judicial hunch, Hutcheson was participating in the creation of the sociological jurisprudence movement, a forerunner to the legal realist movement. The argument of sociological jurisprudence was that judging was by nature an illogical and idiosyncratic effort—that legal decisions, like all other forms of decisions, were made not in a rational process, but by an internal and irrational working out of the facts in the judge's mind. The role of the judge, however, was to attempt to construct a logical (if intuitive) method to create continuity to the past. Hutcheson's views did not include the later legal realist theory that the law itself, not just the process of judging, was essentially irrational. See G. Edward White, *The American Judicial Tradition* (Oxford, 1976), 252, 270.

Hutcheson's stress on moderation in personal action did not mean, however, that he was against change, innovation, or activism. Hutcheson believed that law by its very nature underwent constant "modification . . . change [and] adaptation" to new circumstances. He agreed with the perception of the Supreme Court that "regulations, the wisdom . . . of which as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, would probably have been rejected as arbitrary and oppressive,. . .and that in a changing world it is impossible that it should be otherwise."[11] In the drive to bring about balance in the law, Hutcheson would often travel in unexpected directions, making decisions and interpreting laws in ways never done before. His belief in moderation and restraint had to do with the pace of this change. Hutcheson was a firm believer in Oliver Wendell Holmes's dicta that "judges do and must legislate, but they can only do so interstitially. They are confined from molar to molecular motions." Change was natural and desirable, but only at a controlled pace. A judge's far-ranging forays into new areas or interpretations of the law to achieve justice had to be limited enough to "avoid contact and placement in the midst of prior related categories [of law]." Otherwise the purpose of law would be defeated. Change, like the other functions of a court, had to be responsible.[12]

Hutcheson's personal views on the law strongly affected how he ran his court and made his decisions. In practice, Hutcheson always strove to achieve an equitable result. If the facts showed that one litigant had overstepped the bounds of moderation, failing to control his own actions, then Hutcheson would decide in favor of the other litigant. Where both sides in a case acted in a responsible manner, then justice required a more balanced, compromise decision. The goal was always to temper the demands of justice with the needs of the individual, to read the dictates of law within the necessity of change.

Equity: Constructive Justice

The combination of Hutcheson's personality and philosophy with the power of the Southern District Court strongly affected southeast Texas.

[11]Hutcheson, "The Judgement Intuitive," 276, quoting Justice Sutherland *in Euclid Valley v Ambler* 272 U.S. 365 (1926).

[12]*Ibid.*, 277, quoting Justice Holmes's dissent in *Southern Pacific v Jensen*, 244 U.S. 205; *ibid.*, 287.

These effects are most plainly seen in the district's equity cases, for two reasons. First, in equity the court functions as a forum actively affecting the lives and fortunes of individuals and groups. Litigants ask the court to ensure specific ends, through an affirmative use of judicial power, instead of just to adjudicate a conflict. Since the request is for the judge to either make something happen or see that some future act does not occur, the effects of the court's equity decisions are clearly visible. Second, equity cases required Hutcheson to make the sort of decisions that gave freest play to his personality and judicial philosophy. In an equity proceeding, someone always asks for "justice." The complainant turns to the court as a forum where a wrong can be righted. Providing justice where no other forum could provide a remedy is, in fact, the origin of equity jurisdiction.[13] As a result of this, Hutcheson, with his belief in the positive duty of the law to achieve justice, used his equity powers as a means of furthering certain ends.

An early equity case decided by Hutcheson, *The Galveston Electric Co. v The City of Galveston*, illustrates Hutcheson's goals and motivations even though it was determined primarily on technical grounds.[14] In 1920 the Galveston Electric Company, the owner and operator of Galveston's street cars, wished to increase its five-cent fares by two cents. The city, however, had an ordinance "irrevocably" fixing the fares of the city's street cars to five cents per passenger. To get around this law, the street car company turned to the district court for an injunction to restrain the city from enforcing this ordinance.

In the initial hearing Hutcheson granted the injunction, temporarily overruling the ordinance as a potential confiscation of private property without due process of law. He then appointed attorney Henry J. Dannenbaum as Master in Chancery (an appointed court expert who reports on technical matters to the court) to look into the case and see whether the five-cent rate was confiscatory. In late 1920 Dannenbaum made his report, arguing that with fares set at five cents the company was not getting a fair return on the value of its property, which he set at $2,000,000.[15]

In a final hearing on the case, held in early 1921, Hutcheson reversed the decision of the Master in Chancery, concluding that "the ordinance was not confiscatory." Hutcheson reevaluated Dannenbaum's report step by step before reaching his decision. Looking at such issues as replacement costs, developmental costs, and depreciation, the judge ruled that the true worth of the company's property was $1,500,000. Given an average yearly operating income of $618,000 and expenses of $475,395, Hutcheson found

[13]Frederic Maitland, *Equity: A Course of Lectures* (Cambridge, England, 1909).

[14]*Galveston Electric Co. v City of Galveston*, 272 F. 147. Discussion of the case is taken from Hutcheson's description in his decision.

[15]Houston *Post*, February 12, 1921.

that the company received a net return on its income of $142,405, or approximately a 9.5 percent return on its total value. This return, he ruled, was "not . . . so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise of its rate-making function."[16]

Before giving his decision, however, Hutcheson spoke at length on the judicial function and powers in such a case, clearly showing the influence of his judicial philosophy in his substantive decision. Ignoring the issue of an "irrevocable" rate limit (since the United States Supreme Court was at that time deciding on this issue), Hutcheson instead noted that the foundations of the rate-making power rested in tension between two principles of law. The first was the police power of the state, which gave a state the power to regulate private property if such property were put to a public use. The second was the Fourteenth Amendment, which guaranteed equal protection of law and prohibited the taking of property without due process. Both doctrines, Hutcheson argued, needed to be respected by the courts; both defended basic rights and duties. What resolved the tension between these two principles, he continued, was the "reasonableness" of a regulation. If reasonable (as defined by the courts), a regulation was acceptable, even though in effect it took a property in the public use. Only if a regulation was "unreasonable" should the rate be declared void.[17]

Hutcheson was following the established doctrine of the day in deciding the case in this manner. By the early 1920s the Supreme Court had handed down a long line of precedents on the judiciary's role in judging the "reasonableness" of a rate regulation.[18] Hutcheson, however, gave his own twist to this precedent. Quoting from the Supreme Court case of *San Diego Land Co. v National City*, Hutcheson noted that:

> Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates will necessarily have the effect to deny just compensation for private property taken for public use.[19]

Quoting from *Knoxville v Water Co.*, Hutcheson added that "no injunction ought to be granted [enjoining a regulation] unless in a case reasonably free from doubt. We think such a rule is, and will be, followed by all the judges of the federal courts." Though the high court itself did not follow this

[16]*Galveston Electric Co. v City of Galveston*, 272 F. 149, 164.

[17]*Ibid.*, 272 F. 164.

[18]On the Supreme Court's use of "reasonableness" as a standard for judging rate regulations, see Clyde Jacobs, *Law Writers and the Courts: The Influence of Thomas Cooley, Christopher Tiedeman and John Dillon upon American Constitutional Law* (New York, 1954); Gabriel Kolko, *Railroads and Regulation, 1877-1916*, (Princeton, 1965).

[19]*Galveston Electric Co. v City of Galveston*, 272 F. 150, quoting from *San Diego Land Co. v National City*, 174 U.S. 758.

procedure consistently, Hutcheson presented it as an iron-clad rule, a specific guide for judicial decision making.[20]

Hutcheson strongly believed that "municipal bodies . . . should not force public utilities to apply to the courts for protection," and therefore "it cannot but be a deplorable situation for any community to find itself in, if its legislative tribunal is so wanting in courage and fairness [that] the rates and practice which its public utilities are allowed to use are only those which fall just short of confiscation.'" However, he still felt bound by the facts of the case to rule that while unfair and just short of confiscation, the rates were not unconstitutional.[21]

Hutcheson concluded his essay on rate regulation by lecturing both sides in the case on what constituted proper behavior in such a situation. Quoting from a brief he had written as Houston city solicitor in 1914, Hutcheson noted that

> "The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The Legislature, and subordinate bodies to whom the legislative power is delegated, ought to do their part. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based." . . . [For] it is not amiss for me to say that the [city] council occupies a somewhat different position from that of a court, . . . and it should be its aim and purpose not merely to pronounce a legal judgement as to what rate would be short of confiscatory, but to arrive at and agree upon a fair rate though said rate should be considerably in excess of the lowest rates which the courts would sustain and allow. . . . In other words, if the company exhibits a spirit of fairness and concession, with the view of agreeing upon a fair and reasonable rate, it is clear that the council is not only authorized, but should endeavor, to meet them in that spirit.[22]

Hutcheson concluded his lecture with a warning.

> If at any time it should appear to me that any order made by me in this or any similar case now or hereafter pending before me is being used by the parties to it for any other purpose and to any other extent than its terms express . . . this court will, of its own motion, or upon application of the other party, amend or vacate the order so as to deprive the offending party of its benefits, and to that end the decrees in this and similar cases will be drawn.[23]

[20]*Gavleston Electric Co. v City of Galveston*, 272 F. 151, quoting from *Knoxville v Knoxville Water Co.*, 212 U.S. 16. On the actions of the Supreme Court, see Jacobs; Morton Keller, *Affairs of State* (Cambridge, Mass., 1977).

[21]*Galveston Electric Co. v City of Galveston*, 272 F. 153.

[22]Part of the brief was quoting from *Knoxville v Knoxville Water Co.*, 212 U.S. 18.

[23]*Galveston Electric Co. v City of Galveston*, 272 F. 153-154.

Hutcheson was very serious in making this warning. Living up to its dictates, though, often led the judge in unexpected directions. This can be seen in the 1928 case of the *Brotherhood of Railway and Steamship Clerks, etc. v Texas and New Orleans Railroad Co.* The case began in July 1927 when the Brotherhood of Railway and Steamship Clerks of the Southern Pacific Lines, a local union representing clerical workers of the Texas and New Orleans Railroad, requested a temporary injunction against the Texas and New Orleans to enjoin the railroad and its officials from forming, supporting, and recognizing as the sole representative of the employees a company union, known as the Association of Clerical Employees, Southern Pacific Lines. At issue was an allegation by the Brotherhood that the Texas and New Orleans, a subsidiary of the Southern Pacific, was attempting to break the Brotherhood and replace it with the company-controlled association. If this occurred, argued the Brotherhood, it would mean the end of effective representation for the workers. More importantly, the Brotherhood argued that the Association had been formed by fraudulent means, and for the sole purpose of denying the Brotherhood the chance of arbitrating for a ten-cent-an-hour pay raise.[24]

Deciding this case raised three problems for Hutcheson. First, the Brotherhood's call for an injunction was a case of first impression. The union was asking for the injunction under the Railway Labor Act of 1926.[25] No case on this issue had arisen under this act. The only case relating to the problems raised in the controversy, involving the Pennsylvania Railway, was of questionable applicability.[26] As a result, Hutcheson had no prece-

[24]On fears of the Brotherhood, see Houston *Post Dispatch*, July 26, 1927. On intimidation, see "Exhibit 'B'," in U.S. Circuit Court of Appeals, Fifth Circuit, *Transcript of Record*, #5406, *Tx and NO Railroad Co. v Brotherhood of RW and SS Clerks* (1928), 48-73, hereafter cited as *Transcript of Record*. The railroad felt it could not afford a ten-cent per hour increase in wages. An increase of this magnitude, in the opinion of H. M. Lull, Vice President of the Texas and New Orleans, would have cost the railroad over $340,000 per year. The railroad also feared they would lose arbitration as they had in a recent arbitration case in west Texas. The creation of the Association, therefore, was meant to derail the attempts at arbitration originated by the Brotherhood. The railroad used intimidation, subsidization, and a bribe of $75,000 to gain enough signatures to reasonably claim the Association as the legitimate representative of the railroad's employees and thus to refuse arbitration with the Brotherhood. Letter from Lull to A. D. McDonald, May 24, 1927, quoted in full in *Brotherhood of Railway and Steamship Clerks, etc. v Texas and New Orleans Railroad Co.*, 25 F. (2d) 873-874. See also Houston *Post Dispatch*, July 26, 1927, on impact of a positive decision for the union.

[25]44 U.S. Statutes at Large, 577.

[26]*Pennsylvania, etc., Federation v Pennsylvania Railroad Co.*, 267 U.S. 203, 45 S. Ct. 307, 69 L. Ed. 574. This decision dealt with injunctive enforcement of a ruling of the now defunct United States Railroad Labor Board. For the problems with this in the present case, see *Texas & N.O. Railroad Co., et al. v Brotherhood of RW and SS Clerks, et al.*, 33 F. (2d) 13-16 (Fifth Circuit, 1928).

dents to help him decide what the law required. In fact, he did not even have a guide to help him decide whether to hear the case at all.[27]

The second problem was in the use of an injunction to assist a labor union in combating an attempt to create a company union. Most instances of injunctions being used in previous labor disputes had been by companies attempting to enjoin a union from striking. Little experience existed as to how to use an injunction to help a union.[28] Further, because of past abuses of the injunctive process in labor disputes, Section 52 of the Judicial Code prescribed that "no restraining order or injunction shall be granted by any court of the United States or a judge thereof in any case between an employer and employee . . . growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right."[29] Was a limit on the right to organize a union freely a "property right" within the meaning of this act? Was the act even applicable to such a situation? Again this question raised an issue of first impression for the judge to decide.

The third problem was not legal but social. Hutcheson was a native Texan, born and raised in Houston. Son of an ex-Congressional Representative for the Houston District, valedictorian of his class at the University of Texas law school, Hutcheson was a respected and established member of the Houston bar and community. In 1917 he had been elected mayor of the city and one year later appointed to the district court bench. Judge Hutcheson therefore had strong social ties with the city's elite, including the officials and attorneys of the Southern Pacific Railroad. His half-brother, Palmer Hutcheson, was a member of Baker and Botts, the Texas law firm acting as main counsel for Southern Pacific.[30] While there is no reason to

[27]In its briefs and oral argument the railroad questioned the jurisdiction of the court on this issue on a number of grounds, from the constitutionality of the statute under which the injunction was asked for to the applicability of an equity hearing "for an abstract right, the enforcement of which would lead to no definite result." "Argument for the Defendant," District Court of the U.S. for the Southern District of Texas, Houston Division, *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, in *Briefs: United States Supreme Court October Term*, 1929, No. 469, p. 2, hereafter cited as *Briefs*. See also discussion by Hutcheson in *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, 25 F. (2d) 873.

[28]See Felix Frankfurter and Nathan Green, *The Labor Injunction* (New York, 1930), especially chapter 3. On uses of injunctions against unions, see Gerald Eggert, *Railroad Labor Disputes: The Beginnings of Federal Strike Policy* (Ann Arbor, 1967); Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," *Journal of American History* 79 (December 1987): 904-925.

[29]30 U.S. Statutes at Large, 730. Quoted in "Argument for the Defendant," *Briefs*. See also discussion by Hutcheson in *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, 25 F. (2d) 873-875.

[30]Armstrong, 546-550, 614-618. See also Joseph C. Hutcheson III, interview, on Judge Hutcheson's social position and the tensions generated by this case.

think that any overt or special pressure was brought to bear on Hutcheson, there must have been an underlying expectation that he would not define justice in this case in direct opposition to the interests of the social and economic class to which he himself belonged.

Although the case was a difficult one, Hutcheson based his decision on the goal of equitable justice central to his judicial philosophy. He began with the assumption that Congress and the courts had both the power and the duty to "insure that in the settlements of [labor] disputes each side shall be represented by those of its own selection, uninfluenced by the action of the other," and that the right to "work and to continue to work under arrangements which will insure fair wages and working conditions is a proper right . . . [that] the court has the power . . . to protect." Given this duty, Hutcheson ordered that the temporary injunction requested by the Brotherhood be placed upon the Southern Pacific Railroad, enjoining the railroad and its officials from "in any way or manner interfering with, influencing, intimidating, or coercing . . . any of said clerical employees" of the railroad from "their free and untrammeled right of self-organization." Specifically, the railroad was prohibited from supporting in any manner the Association of Clerical Employees, Souther Pacific Lines.[31] The order did not, however, prohibit the Association from attempting to organize without company help. If the Association could organize and gain the support of a majority of the clerks without company help, the judge would not hinder this process. The key issue to Hutcheson was the guarantee that "employees should have the right to organize in the manner that they please, so long as they are not influenced and coerced by their employer." What form this organization took was beyond the concern of the court.[32]

All in all the decision was a mild one. Little but a hands-off attitude was required of the railroad. The goal was to balance the gains and losses of both litigants. Both sides, in turn, claimed to be happy with the decision. John Crocker, attorney for the Brotherhood, said that the decision was "all we wanted." Edward Tallichet, counsel for the railroad, argued that "they got about 12.5 per cent and we got the balance. While it means that our officers can not advise the men to enter the new union, it guarantees the men the right to organize themselves as far and as freely as they like."[33] The dispute between the union and the railroad appeared to be amicably solved. But Hutcheson found that "the ink was hardly dry upon the order of injunction" before the railroad had "proceeded to nullify it by recognizing

[31]"Order for Temporary Injunction," *Transcript of Record*, 84.

[32]"Nothing in this injunction shall be considered authority to prevent any employee of the Railroad . . . from organizing as many unions as he wants to in any way he wants to." Hutcheson, "Opinion of the Court," *Transcript of Record*, 77, 82.

[33]Houston *Post Dispatch*, July 30, 1927.

as truly representative the Association, all of whose authorizations had been filed with the defendant . . . before this suit was filed, and the most of which had been obtained, as found by the court, by the use of means in violation" of the law.[34]

As a result of such activities, the Brotherhood brought before the court an information alleging that the railroad had violated the temporary injunction. In October 1927, Hutcheson issued an order to the Texas and New Orleans Railroad to show cause why they should not be held in contempt for their actions. Four months later Hutcheson handed down his decision on the contempt charges. In language much more forceful than that used in the original injunction decision, he noted:

> While it is hard to believe that a Railroad and its officials would deliberately seek to set at naught both the legislative and the judicial power of the United States, it is difficult to avoid the conclusion that the violation of the statute and of the injunction which followed its violation, was the result of a strong and settled purpose to defy both, and that the spirit of heady violence to obtain its ends, which has so often exhibited itself in these labor disputes, in the conduct of employees when the injunction was the other way, is not absent here.[35]

The railroad's efforts were directed to "having a vote on both sides of the table, its own side and that of its employees." Judge Hutcheson simply could not allow such inequitable activities, clear violations of the intent of his decision. He felt it incumbent to take stronger action, in line with his philosophy and the warning he gave to the city of Galveston in 1921.

Hutcheson therefore ordered that a remedial order be entered which completely disbanded the Association as now constituted and which reestablished the Brotherhood as the sole representative of the clerks until such time as the workers chose to change their representation in a vote without "dictation or interference." Further, the officers of the Texas and New Orleans were limited in all ways from affecting the freedom of activity of the Brotherhood, even where they were acting on their own authority and initiatives. The judge then ordered the rehiring of all members of the Brotherhood who had been fired for their organizational activities. Finally, in a private meeting in his chambers three days later, Hutcheson threatened the officers of the Texas and New Orleans with jail sentences if they did not accept the dictates of the order within ten days.[36]

Hutcheson's decisions in the conflict between the railroad and its workers exemplify the effect of the judge's character and beliefs on the actions of the federal district court. Where early in the case Hutcheson had attempted to

[34] *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, 24 F. (2d) 426-433.

[35] *Ibid.*, 426.

[36] *Ibid.*, 432-434; Houston *Post Dispatch*, February 12, 1928.

have as little direct effect as possible on the labor dispute, simply asking all sides to play by the rules, in 1928 he actively denounced one side of the conflict and chose the Brotherhood to represent the workers by judicial fiat. In the injunction hearing, Hutcheson was only willing to see "proof . . . sufficient to show that there has been enough activity of company officers, whether upon real or apparent authority is immaterial, to bring about a condition of company influence on self organization" of a workers' union. Yet in the contempt hearing he saw "the evidences of activity in violation of the statute, and of the injunction occurring since," that presents "an appearance of purpose and of resolution . . . which is wholly inconsistent with the claim of the defendant of neutrality between these rival associations."[37] The actions of the railroad had not changed between the first hearing and the second, except possibly to intensify somewhat. The difference in the two hearings stemmed from Hutcheson's anger at the railroad's disregard for the law and the court.

His anger is even more apparent in a rehearing on the injunction and the contempt which occurred in April 1928. In this hearing, the railroad once again argued that they had done no wrong, and that their actions were completely legal. They therefore requested that both the contempt charge and the injunction be vacated. Rather than vacating the decisions, however, Hutcheson defended and expanded on his decisions in language as strong as that used in the contempt hearing. To Judge Hutcheson, the activities of the railroad constituted a conspiracy from which "every proceeding taken thereafter sprang . . . [and] which explains the vigorous and determined effort to seat the company union as the sole representative of the employees and gives full color to the persistent efforts thereafter to destroy the influence and activity of the Brotherhood." Given the blatant actions of the railroad, Hutcheson made the injunction permanent and continued the contempt order in full force. A wrong clearly existed, and in Hutcheson's view it was a duty of the court to create a remedy for a wrong wherever possible.[38]

Definitions of Duty

In equity, then, the impact of Hutcheson's judicial values is clearly visible. As early as 1921, Hutcheson stated his expectations of proper behavior for those utilizing his court: honesty and fairness when before the court and moderation in their actions after the court had handed down its decision. In decisions such as that helping the labor unions, he showed the creative directions in which the use of this conception of proper behavior

[37] "Opinion of the Court," *Transcript of Record*, 80; *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, 24 F. (2d) 432.

[38] *Brotherhood of RW and SS Clerks v Texas and N.O. Railway Co.*, 25 F. (2d) 875-876.

could lead him. His concern for duty led him to involve himself in issues of justice beyond the courtroom, as well. One example was his somewhat unorthodox approach to criminal matters.

Criminal cases dominated the dockets of the district courts of the nation throughout the late nineteenth century. By 1900 over 59 percent of cases terminated in the federal courts were criminal cases. This dominance lessened slightly in the first decades of the twentieth century, as the number of civil cases exploded, but rebounded in the 1920s. Reflecting developments in the social makeup of the nation, criminal cases—consisting mostly of cases arising from the effects of World War I, immigration, and prohibition—rose 370% from prewar levels throughout the decade. Yet despite this increase, on the national level, criminal cases received mostly routinized, minimal effort. On average such cases took only three months to be processed.[39]

The Southern District of Texas experienced the increase of criminal cases during this period. Ruling on between five hundred and two thousand criminal cases a year on charges varying from misdemeanors under the Volstead Act and the Immigration Acts to felonies such as counterfeiting, smuggling, and postal fraud, criminal cases took up a significant portion of the court's docket. Yet, in contrast to the national norm, Hutcheson placed unusual emphasis on his criminal docket. As Walter Armstrong has noted, the judge's "concern for the thousands of people he had to sentence" in criminal cases was "the heaviest burden under which . . . Hutcheson labored on the district bench."[40]

Viewing jails as the "grammar schools of crime," Hutcheson was often lenient with first offenders. He was a pioneer in the creation of a federal probation law, working through the Prison Conference and the National Probation Association to enact such a statute. Before the enactment of a national probation law in 1925, Hutcheson adopted a system of dismissing, waiving, or delaying the sentences of "deserving" defendants, setting low bail, or using the pauper's oath in place of fines. This way Hutcheson saved many defendants from prison.[41]

Nor did the judge forget those he did send to prison. He realized that his "duty to these people did not end, but in fact really began, when, after conviction or plea of guilty, they came helpless under the power of the law."

[39]David Clark, "Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century," *Southern California Law Review* 55 (November 1981): 65-152.

[40]Armstrong, 547-548.

[41]*Ibid.* See also Joseph Hutcheson, "The Local Jail," *American Bar Association Journal* 21 (February 1935): 81-85, 88. For Hutcheson's views on probation, see *United States v Maisel*, 26 F. (2d) 275 (1928).

On various occasions Hutcheson visited the local jails of the district. What he found there "amazed" him. As he noted in an article in the *American Bar Association Journal*:

> Leaving every other consideration aside, I was impressed with the economic and spiritual loss to society, through the effect on keeper and kept, of the practice of locking a man up in a cage and then after a time turning him out again on society, anti-social now after the treatment, training and associations he had there, when perhaps he was only unsocial and this in a limited way when he went in. This was not common sense. It was not democratic. It was not humane. It certainly was not social justice.[42]

As with his general legal philosophy, a concern with social justice, broadly but personally defined, underlay Hutcheson's criminal law decisions. Visits to jails and the awful burden of having to sentence defendants to them revealed to Hutcheson the fact that "most of these persons coming before me for judgement and for jailing were not people set apart, public enemies, but average, ordinary, underprivileged common men." Such individuals did not deserve to go to jail. This was especially the case with those charged with misdemeanors such as prohibition violations. These individuals, Hutcheson believed, had "become offenders to make a living because their betters, at least their betters in having money and opportunity, would have and pay for what they took the chance to sell." Punishing the seller while ignoring the buyer was not, as Hutcheson saw it, equitable. While the selling of alcohol exhibited a disregard for the law which Hutcheson abhorred, the concurrent lack of responsibility shown by the buyer angered the judge even more. As a result, he was renowned in the district for his leniency in prohibition cases. So too, for similar reasons, was he reputed to be lenient in immigration cases.[43]

If, on the other hand, Hutcheson felt that a defendant was deserving of punishment, he was just as willing to be strict, even severe. Social justice, as Hutcheson understood it, required not only the protection of individual rights but the defense of society. Where an individual by his actions wilfully denied his duty to act in a lawful manner, Hutcheson was ready to decide on the necessary penalties. Yet even with a deserving party, Hutcheson always tried to find the most appropriate form of punishment. If a jail term was the appropriate sentence, Hutcheson made such a sentence; if sarcasm and

[42]Hutcheson, "The Local Jail," 83.

[43]*Ibid.* For an example of Hutcheson's lenient view toward deserving prohibition defendants, see *United States v Echols*, 253 Fed. 826 (1918). For an example of a case in which the judge took a harsher stance toward the defendant over the Volstead Act, see *United States v Smith*, 43 F. (2d) 173 (1930). For Hutcheson on immigration, see *United States* ex rel. *Louros v Lindsey*, 51 F. (2d) 303 (1931), and *United States* ex rel. *Dobra v Lindsey*, 51 F. (2d) 141 (1931).

ridicule would be more appropriate than a jail sentence he would use it, and in a devastatingly effective manner. As one contemporary commentator put it, "He could and did "dress down" offenders—criminals who had swindled poor people, officers who had taken bribes or had taken undue advantage of their authority, lawyers who didn't play by the rules—with a cold fury that made your skin crawl."[44]

Despite his often advanced views on social justice, there were limits to Hutcheson's definition of fairness. The judge was very much a man of his time and place. A lifelong southerner and the son of a Confederate soldier, Hutcheson, while not blatantly racist, did accept the dictates of segregation. Among civil rights activists Hutcheson had a bad reputation. Hutcheson, they believed, viewed blacks as if they were "a lower type of individual and an inferior race," and thus held "against Negroes repeatedly."[45]

A particularly sensitive example occurred over the issue of black voting rights in state Democratic primaries. In 1927 Justice Holmes had ruled in the case of *Nixon v Herndon* that while "states may do a good deal of classifying that is difficult to believe rational, . . . there are limits [to this power], and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right" to vote in a primary election. Encouraged by this decision, a group of prominent black Houstonians, led by James Grigsby and Owen DeWalt, set out to challenge the Texas Democratic Party's ban on black voting in primaries. In July 1928, they appeared before Hutcheson requesting that a temporary injunction be placed upon the executive committee of the Harris County Democratic Party. Their argument was that the executive committee was intending to follow a resolution passed by the state executive committee to the effect of denying blacks the right to join the party and hence to vote in the primary. The plaintiffs contended that since the State of Texas authorized the Democratic Party to run primaries in the state, the party's executive council was acting under state authority. Such action, the Houston blacks argued, were a clear violation of the Fourteenth and Fifteenth Amendments. In line with Justice Holmes's dicta in *Nixon*, they argued that to allow such a ban on voting to continue was both unconstitutional and inequitable.

In deciding the case, Hutcheson did not accept the argument of the petitioners. He found that the state executive committee resolution was

[44]Unnamed newspaperman, quoted in Armstrong, 548. Attempting to match the punishment to the crime is a goal common to many judges. However, Hutcheson is uniquely vocal on the subject.

[45]Quoted in Darlene Hine, *Black Victory: The Rise and Fall of the White Primary in Texas* (Millwood, N.Y., 1979), 115, 217.

"purely party action." Though the state of Texas did authorize the party to run primary elections, the party was still a private, voluntary organization, able to limit its membership as it chose. Lacking the right to join the Democratic Party, no "invasion of [the plaintiffs'] legal rights" had occurred. And where no legal rights were threatened, no decision on relief need be made. Hutcheson therefore denied the request for a restraining injunction.[46]

In the *Brotherhood* case, no established legal rights had clearly been threatened. Hutcheson had made his decision in the case with no precedent either for the decision or for whether it should even be heard. Hutcheson ruled as he did because of his belief that workers had a right to self-organize and to work under fair wages and conditions. Since he acknowledged these rights, he then had a duty to use the powers of the court to protect them. Hutcheson's refusal to intervene in the primary process with *Grigsby v Harris* therefore stemmed from not acknowledging primary voting as a right rather than from the simple lack of precedent or technicalities about the private nature of the party system. It shows the limits of Hutcheson's vision of the law and of social justice.

Hutcheson's decision not to help blacks gain their right to vote was not completely based on racism. He was more than willing to help a deserving Negro or Hispanic defendant in a criminal case, and race apparently had little to do with how the judge sentenced a defendant. Hutcheson's actions in support of labor unions potentially helped black workers as much as white ones. Like many other white Southerners, Hutcheson would respond with paternalistic concern to individual blacks asking for his help and protection. A demand for full and equal rights for the race as a whole was another matter.

The difference lay in the rights being requested and the form of that request. The rights associated with criminal and labor issues were economic and personal in nature. Those associated with voting were political. This difference is significant. Hutcheson, like many jurists of his generation, saw legal rights in primarily economic terms. The economic basis of the right to work, for example, is self-evident. He saw the causes of crime in terms of economic want rather than in the prevailing moralistic terms of guilt versus innocence, natural depravity versus uprightness of character. Like other contemporary jurists, Hutcheson focused primarily on economic issues. While he pursued his vision of social justice to surprising extremes, so long

[46]*Grigsby v Harris*, 27 F. (2d) 942. In August 1928 Hutcheson denied a request from the plaintiffs in this case for permission to appeal directly to the Supreme Court. *Grigsby v Harris*, 27 F. (2d) 945. See also James SoRelle, "The Darker Side of 'Heaven': The Black Community in Houston, Texas, 1917-1945," (Ph.D. diss., Kent State University, 1980), 179-180.

as economic issues were involved, Hutcheson simply did not see political rights as needing special protection.[47]

A Matter of Balance

A concern with equitable justice can again be seen shaping Hutcheson's decisions in the technical issues raised by admiralty and commercial law. Specifically, Hutcheson used the process of the "judicial hunch" to weigh complex issues and arrive at a fair decision. In a 1929 article, Hutcheson described how this process worked in admiralty. Noting how "collision cases in admiralty furnish excellent illustrations of the difficulty of arriving at a sound fact conclusion by mere reasoning upon objective data," Hutcheson argued that

> in these cases, as every trier knows, the adherents of the respective ships swear most lustily in true seagoing fashion for their side. . . . If a judge were compelled to decide the case by observing the demeanor of the witnesses alone, he would be in sad plight, for . . . the shrewdest, smartest liars often make the most plausible and satisfactory witnesses, while the humblest and most honest fellows often, upon the witness stand, acquit themselves most badly.

"Fortunately," he continued,

> in these cases the judge may, reconciling all the testimony reconcilable, and coming to the crux of the conflict, . . . re-enact the drama and as the scene unfolds with the actors each in the place assigned by his own testimony, play the piece out, watching for the joints in the armor of proof, the crevices in the structure of the case or its defense.

Having done this, the judge then replayed "over and over" in his mind the facts of the case "until finally, when it seems impossible to work any consistent truth out of it, the hunch comes, the scenes and the players are rearranged in accordance with it, and lo, it works successfully and in order."[48]

This process worked in any number of admiralty cases. Often the problem was not so much to determine the facts as to decide who was at fault and thus deserving of censure, making the judge's decisions subjective in nature. For example, in early 1928 the *Hornby Castle* was steaming up the Houston

[47]Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (Fall, 1985): 293-331. See also Alfred Kelly, Winfred Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 6th ed. (New York, 1983), chapter 23. It should be noted that Hutcheson, while on the Fifth Circuit Bench, did accept and uphold the Supreme Court's decision in *Brown v Board of Education* requiring desegregation. However, he was often "disturbed by the activism—judicial and otherwise—bred by racial unrest." Harvey Couch, *A History of the Fifth Circuit, 1891-1981* (Washington, D.C., 1983), 114. See also Spivack, 255.

[48]Hutcheson, "The Judgement Intuitive," 282-283.

ship channel. Ahead of the *Castle* were two vessels, a barge traveling slowly in the same direction as the *Castle*, and the steamer *Cody* traveling down the channel toward the barge and the *Castle*. Following customary practice, the *Castle* signaled that it would pass the barge on the left and then cross the channel to pass the *Cody* on the right. However, the *Castle* swung too wide in passing the barge and, in danger of grounding on the bank, collided with the *Cody*.

Neither party disputed these facts. Established doctrine held that it was each vessel's duty to abide by the signals given when passing in a narrow channel. If a ship broke this agreement, it was at fault for the collision. However, an equally valid doctrine argued that once a ship was in danger, all pre-existing contracts as to passing in a channel were voided. Avoiding a collision, and fault for a subsequent accident, thus became the duty of the ship not in danger.[49]

Since either doctrine could be applied equally well to the case, what the law required depended entirely on Hutcheson's interpretation. The *Castle's* counsel argued that the *Cody* was traveling too fast, making it impossible for the *Castle* to avoid hitting her. The *Cody's* attorney replied that the cause of the accident was negligence by the *Castle's* pilot. Hutcheson noted that "under the circumstances the burden rests heavily on the *Castle* to relieve herself from fault," since she played the active part in the collision. While the judge listened with interest to the *Castle's* argument of innocence, "upon further reflection and considerations" he felt that there was no evidence of wrongdoing by the other ship or of a sequence of events beyond the control of the crew of the *Castle*. This being the case, Hutcheson decided that the crew of the *Castle* had acted irresponsibly and were at fault for their negligence.[50]

In cases where the actions of one litigant seemed to Hutcheson to be irresponsible, he ruled against them. However, the issues facing the judge were often ones in which fault was either nonexistent or equally shared between both parties. In such cases, Hutcheson worked to balance the interests and needs of both parties in the case. Commercial law provided many of these actions. Lacking issues of responsible behavior to weigh, in such situations Hutcheson used the "judicial hunch" to achieve a just decision.[51]

[49]*The Hornby Castle*, 26 F (2d) 387. For a general discussion of the negligence principle in tort law, see G. Edward White, *Tort Law in America* (New York, 1980), 60-114. See also F. L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice Since 1800: An English Study with American Comparisons* (reprinted, Ann Arbor, 1970).

[50]*The Hornby Castle*, 26 F (2d) 387.

[51]An example of Hutcheson's use of the social justice standard in a commercial case took place in 1921. In 1917 Joseph Alexander had requested his agent, Jesse Martin, to deposit in the Security Bank and Trust Company of Wharton County a certain amount of money. Martin did

Take for example a 1926 case arising between the St. Louis and San Francisco Railroad and the Republic Box Company. The Republic Box Company had contracted with W. S. Clark, the shipping agent of the Gulf, Colorado and Santa Fe Railway, to ship materials to the East Side Packing Company of East St. Louis. In the contract the Republic Box Company clearly stated that the goods would be shipped over the Santa Fe railroad at a rate of 32.5 cents per hundred pounds. The exact route to be used, however, was left to be decided by the railroad. The shipment was subsequently delivered by the St. Louis and San Francisco Railroad, acting for the Santa Fe Lines, which received the payment as per the contract.

At issue in this case was the adequacy of this rate. Because of the particular routing of the Santa Fe lines which owned no direct tracks to St. Louis, the railroad had to contract with a second railroad, the St. Louis and San Francisco, to haul the goods to East St. Louis. While 32.5 cents per hundredweight of goods delivered was the legal rate for railroads shipping directly between Houston and St. Louis, transshipment of the goods to a second carrier to complete shipment was chargeable at a higher rate. The rate of 32.5 cents paid to the St. Louis and San Francisco was legally an undercharge, and the railroad was suing the Republic Box Company to recover the balance it felt it was owed.

No one in the case was obviously at fault. The railroad claimed that it was simply seeking a just return for its efforts. Republic Box had specified shipping on the Santa Fe lines, which required use of the St. Louis and San Francisco line. Through the Interstate Commerce Commission, Congress had ruled that the railroad was entitled to a larger return than 32.5 cents, so the box company should pay the railroad the balance. Republic Box argued that it had contracted with the Santa Fe lines to ship the goods at 32.5 cents and was not liable for any undercharge caused by the Santa Fe's decision to ship along a line with a higher legal rate than that specified. Fault, if any, rested either with the Santa Fe, for choosing the wrong carrier, or with the

this, but placed the money under his own name to cover a debt he owed to the bank. The bank allowed this even though it knew that Martin was unlikely to have such an amount of money at that time. When, in 1918, Alexander attempted to get the money from the bank, he found that the bank had appropriated the money deposited by Martin. Alexander then sued the bank for his money. In deciding this case, Hutcheson noted that, "[n]o character of case better illustrates the principle of the equitable maxim, 'Ubi jus ibi remedium' [where there is an action there is a remedy] than that of tracing trust moneys misappropriated by banks with the connivance, or through the active agency, of a depositor . . . " Since the bank had knowledge of Martin's financial position and the likelihood that the money was fraudulently acquired, the judge ruled that "the defendant [the bank] having been found in default ex maleficio, through a deliberate and knowing misappropriation of complainants' funds, this court will be slow to erect out of [such] a transaction . . . [a means] by which the bank could keep the fruits of its wrong." *Alexander et al. v Security Bank and Trust Co. et al.*, 273 Fed. 258.

St. Louis and San Francisco for agreeing to ship at such a low rate.

In deciding this case, Hutcheson had to weigh the right of the railroad to charge a legally determined rate for its services against the right of an individual company to set by contract its requirements and obligations. At issue was an unavoidable dispute growing out of the complexities of commerce. Neither party had wronged the other: the railroad delivered the goods as promised, the box company paid the agreed-upon charges. Hutcheson therefore chose to interpret the law in light of both the particular case and the best interests of the region.

Hutcheson acknowledged the justness of the railroad's contention that "instances of individual hardship cannot change the policy which Congress has embodied in [a] statute." However, he said, "it is also true that courts will not literally enforce rates where the individual circumstances of the particular case make it certain that the invocation of the principle is an absurdity." The effects of finding in the railroad's favor would be unacceptable, Hutcheson felt. To thus require that a shipper know "the tariff [rates] better than railroad agent[s]," so that he would not ship on a line which could charge a higher rate than was contracted for, was "unreasonable." It would be much fairer to "[compel] railroad companies and their agents to exercise ordinary care and good faith in quoting and applying rates, or to abide by the consequences of their failure so to act." This would make "the business of shipping freight . . . not . . . as perilous to the shipper as it has been" and generally be for the good of the economy.[52]

The effect of Hutcheson's judicial philosophy was to set an outer limit on individual and group action. Stressing individual responsibility, Hutcheson used the law and his court to rein in what he considered irresponsible actions. Where corrective action was needed, he used the power of the court to provide it. Yet Hutcheson always attempted to balance out the punishment to match the extent of fault. Where no fault existed on either side, he worked to balance the interests of the individual litigants with the wider needs of society.

The Might of the Law

The powers of the federal district courts at this time were broad, and Hutcheson never hesitated to use them. He also used the considerable force of his personality to underscore his ideas of justice. He did not like disrespect for the law at any time, and when his own decisions were not heeded he was swift to act. A contemporary described him as follows:

[52]*St. Louis and San Francisco Railway v Republic Box Co.*, 12 F. (2d) 441. It should be noted that Hutcheson's views of equitable justice had a part in this decision. "In addition, I am of the opinion that . . . the shipper having designated the route and the rate, the carrier was just as responsible for the loss to the shipper, and just as little entitled to recover the full legal rate from it." *Ibid.*, 443.

> The Hutch is an old-time Southern hot-head, and a real overstepping of his ideas of right and wrong, and particularly his ideas of fairness and justice, was like monkeying with a naked bolt of lightning.[53]

Hutcheson's opposition to those who ignored the law shows up at its most extreme in the 1932 case of *Constantin v Smith*, in which he held the governor of Texas in contempt of court. Although Hutcheson was by this time on the circuit court bench, and the case was appealed from the Eastern District of Texas, it illustrates the lengths Hutcheson would go in applying his judicial philosophy. At issue in this case was a Texas oil conservation act that limited the output of Texas oil pumps in an effort to raise the price of oil in a depressed market.[54] Faced with district court opposition and organized resistance to the act, the Governor of Texas, Ross Sterling, declared that "an organized and entrenched group" of oil producers were "in a state of insurrection against the conservation laws." The governor therefore declared martial law across the east Texas oil fields, sending the state militia under the command of General Jacob Wolters to restore order. In response, oil producers obtained a temporary injunction to the martial law order from the Eastern District Court. The governor ignored this, however, arguing that martial law superseded any injunction. The case then was appealed to a three-judge court with Hutcheson presiding.[55]

Though the case raised many issues, of interest here is Hutcheson's view that the governor had misused his power and exceeded his authority in calling out the militia. The first problem with the governor's actions was the partisan nature of the proclamation of martial law. The governor claimed that he had called out the militia to prevent violence, not oil production. "Do you mean, that the Governor . . . is stopping oil production, not for the benefit of the industry, but because he is afraid people will begin shooting at each other?" Hutcheson asked the governor's counsel. He did not accept the governor's claim that this was so. As Hutcheson saw it, the only riot apparent in east Texas was "a riot of producers trying to get oil out of the ground." Hutcheson wondered aloud if the state militia was taking orders from the big oil companies, so perfectly did their actions fit the needs of these companies.[56]

The second problem was that civil courts still adequately existed in the region. This made the calling of martial law a violation of the first article of the Texas Constitution's Bill of Rights. Hutcheson noted that "when the governor calls out the troops in Texas, he calls them out, not as a military, but as a civil officer . . . " As such, he and the militia remained at all time under the dictates and duties of civil law. "Under constitutions like ours, military dictatorships may not be established by executive fiat." Property rights were to be adjudicated by the courts and not by executive decree. Hutcheson therefore ruled that the defendants "have been without warrant of law interfering with and illegally depriving the plaintiffs of their undoubted right to operate their own properties in a prudent and reasonable way . . . and, that, from further interference, . . . they must be enjoined." It was not the conservation or regulation of the oil industry that disturbed Hutcheson; in at least two other cases he had upheld the state's right to regulate use of oil resources, and at one point permitted the state militia to stay in the oil fields to "help" the Railroad Commission enforce its regulations. The issue in *Constantin v Smith* was the governor's overstepping the bounds of legitimate executive power. Hutcheson saw it as his duty to use the power of the judiciary to right the balance disturbed by Sterling's actions.[57]

Hutcheson was just as capable of using his courtroom manner to ensure proper behavior. An example of this occurred in February 1923, when Edward Clarke, former acting imperial wizard of the Ku Klux Klan, was scheduled to appear before a Houston grand jury on charges that he had violated the Mann "white slavery" act. Successfully indicting Clarke, however, would not be easy. During the early 1920s the Klan was a strong force in Houston, variously estimated as containing anywhere from 4000 to 8000 members. Whatever their actual numbers, the Klan was certainly large enough in 1923 to make it likely that the grand jury would include some Klan members, who might well refuse to indict Clarke. Hutcheson was especially worried about this possibility, since in the past several klansmen had informed the judge that Klan membership imposed "an obligation when sitting on a jury, to give to klansmen different and other protections than those which the law gives other defendants." Regardless of his attitudes toward the Klan's beliefs, Hutcheson, like many of the city's most powerful men, did not approve of their placing themselves above the law. In particular, Hutcheson would not allow such a "reversing [of] the rule of law" to occur in his court.[58]

[53]Unnamed newspaperman, quoted in Armstrong, 548.

[54]On background to this case, see Norman Nordhauser, *The Quest for Stability: Domestic Oil Regulation, 1917-1935* (New York, 1979), chapter 6.

[55]A three-judge court was a special court called to rule on issues of special constitutional importance. Consisting of two district court judges and a circuit court judge, the decisions of this court were appealable directly to the Supreme Court. On three-judge courts, see Joseph Hutcheson, "A Case for Three Judges," *Harvard Law Review* 47 (March 1934), 795-826.

[56]Quoted in Nordhauser, 89.

[57]*Constantin v Smith*, 57 F. (2d) 227, 239-241. For related actions, see *MacMillan v Commission*, 51 F. (2d) 400; *Henderson v Commission*, 56 F. (2d) 218; *People's Petroleum Co. v Sterling*, 60 F. (2d) 1041; Nordhauser, 90.

[58]Houston *Post*, March 2, 1923; *ibid.*, February 27, 1923; Casey Greene, "Guardians Against Change: The Ku Klux Klan in Houston and Harris County, 1920-1925," *The Houston Review* 10 (no. 1, 1988): 3-20.

As a result of this fear of Klan involvement, prior to the impaneling of the grand jury Hutcheson "took the precaution of having the department of justice investigate" the members of the panel and report to the Court who on the jury were "members of the Klan." Then, in open court, the judge asked each jury member under oath if he belonged to the Klan. Before letting them answer, Hutcheson warned them that he had had each of them investigated and that he now had the "facts." Hutcheson added that to lie in answering a question from the Court while under oath was basis for "prosecution for perjury." If, however, the members of the jury "voluntarily" disclosed their membership in the Klan, and swore to uphold the duty of a grand juror, Hutcheson would allow them to sit on the jury.

Hutcheson then asked whether anyone from the jury wished to relate any affiliation he had with the Klan. When no juror immediately stepped forward, the judge called the roll, "giving each man an opportunity to state the truth of the matter." From the questioning it soon became apparent that six members of the jury were Klansmen, and one an ex-member of the Klan. Hutcheson then asked each whether they could do their duty as jurors even if it required ruling against a Klan member. The only response from the cowed jurors was silence. Taking the silence as an affirmation to his question, Hutcheson noted with sarcasm how pleased he was that "we are all going to do what is right, because we are members of the United States court, and what we belong to on the outside don't mean anything when we get into the federal court." He then impaneled the jury, which indicted Clarke the following month.[59] In such a manner, Hutcheson used the powers of his office and personality to achieve the result he wanted: an absolute obedience to the dictates of the law, especially the law as decided in Hutcheson's court.

A Lasting Impact

Through all the thousands of cases heard by the Southern District Court during the twelve years that Judge Joseph C. Hutcheson sat on its bench runs the common thread of Hutcheson's personal judicial philosophy. No matter what issue was in question, Hutcheson stressed the twin themes of responsibility and moderation in determining the outcome of the case. He sought equity through rewarding responsible behavior and punishing irresponsible actions. He tried to balance the needs of the individual and of society by setting limits to what would constitute acceptable action. He insisted on respect for the law, and did not hesitate to bring the full force of his powers and personality to bear on anyone who flagrantly disregarded the court.

[59]Houston *Post*, February 27, 1923.

The impact of his judicial philosophy was extensive. The cases heard by the federal court were wide-ranging in their scope and significance. Arising out of the tensions inherent in a growing region, the docket of the Southern District Court reflected the growing complexity of life in twentieth-century Texas. From issues of government regulation to the concerns of private citizens to the balancing of business interests, the strains of a changing region ultimately led litigants to the District Court.

The results of these cases, in turn, shaped and directed the transformations the region was experiencing. This shaping process occurred on two levels. The first was the direct effect a decision had on the participants in a case. For example, the *Brotherhood* case affected the working conditions of over five thousand laborers in the district. Hutcheson's negative decision in the *Grigsby* case strongly reinforced the existing denial of full political participation for the region's black inhabitants. Such examples can be easily added to as the thousands of cases heard by the court are examined.

The second level related to the indirect impact of these cases on individuals and groups not directly associated with litigation. When Hutcheson reached a decision, he not only affected the litigants in the case but also sent a strong message to all potential litigants in the district that he would decide similar controversies in similar ways. Hence, in supporting the right of railroad workers to bargain collectively through their own union, Hutcheson implicitly served notice to all employers that workers in southeast Texas had the right to freely choose their bargaining representatives without management influence. In deciding the *Castle* case, Hutcheson informed all vessels in the district's waterways that strict rules of negligence and responsibility were to be enforced. In ruling that in commercial matters the law would be applied liberally to suit the needs of both the case and the business, as with the Republic Box case, Judge Hutcheson informed the district that the court would set limits to business activities where deemed appropriate. In this way Hutcheson's particular decision making style affected a broad spectrum of issues: labor, race relations, crime and vice, transportation, banking, rate regulation, and general business practices. For each issue, the position of the court as set by Hutcheson created an applicable precedent, a rule for future activity in the region.

These indirect effects therefore acted to shape (or more specifically, to constrain) the activities of many of the individual, commercial, and governmental sectors of the region. They set an outer limit, a barrier, on actions that the court was likely to deem acceptable. It was not necessary for the court to continually decide cases on these issues for this impact to be felt. Once Hutcheson had made a number of decisions on an issue, the pattern would be clear to all. Even if potential litigants did not know of this bias in the court, their lawyers would. Hence the very availability of the court as an alternative forum, made significant by Hutcheson's expansive views of

federal jurisdiction, gave the court a strong influence on the economy, society, and politics of the region.

In essence, Hutcheson's personal standards of responsibility and moderation were transmitted to the region; one either acted in a manner that the judge would consider responsible, or one might find oneself brought into Hutcheson's court for judgement—a judgement that was likely to go against anyone contravening Hutcheson's standard of acceptable conduct. This threat of judicial revision of personal or institutional actions was made even more real by the extensive and discretionary jurisdiction granted to the federal courts by the *Swift* decision. With the average judge this right to interpret the dictates of the law in a given situation was a powerful mechanism for the shaping the actions of both those who used the court and those who lived in the region of the court's jurisdiction.[60] With a judge of forceful character and a firm judicial philosophy, such as Hutcheson, the impact of the *Swift* doctrine was greatly magnified.

Many factors brought change to southeast Texas in the 1920s. Transportation, land availability, energy resources, and individual drive, to name only a few, were key instruments encouraging the massive growth of the region. These factors would have caused the region to change its patterns even if the Southern District Court had not existed, or if some other man had been its judge. However, the federal court as controlled by Judge Hutcheson did play an important role in shaping the way these factors interacted in creating the unified whole, the complete society, that was in place by the 1930s. The court was like a prism, reflecting events whose origins were external to itself, but refocusing and redirecting those events into new configurations once they had entered its domain.

An unforeseen result of the common thread shaping the decisions of the Southern District Court was thus the creation or evolution of a blueprint for the economic, social, and political structure of the region. It was a blueprint which emphasized growth, but with limits on the means used to achieve that growth; an outlook which supported the expanding social and economic elite of the region, but placed limits on the range of their actions; and a position that stressed individual rights, but only in relation to individual duties. It was a view, in other words, which sought both stability and progress—and, to achieve this result, stressed balanced, moderate, and responsible action within a large area of acceptable practice. In this manner, the court played an important role in shaping the final structure that southeast Texas worked out to govern itself in the twentieth century.

[60]Freyer, *Harmony and Dissonance*; Freyer, *Forums of Order*.