BOOK REVIEW

THE DOUGLAS OPINIONS, edited by Vern Countryman. New York: Random House. 1977, Pp. xiv + 465. $17.95.

Introduction

Few Supreme Court Justices in our history have become household names: Holmes, Warren and Frankfurter come readily to mind; Brandeis, Hughes and Cardozo (and Learned Hand among lower court judges) perhaps; and Black, despite his monumental contributions, only maybe. There the list ends.[1] To this select group William O. Douglas must be added. Most Americans have some idea who he is and why they know of him; he is not one of the anonymous "they" on the bench.

One result of this widespread recognition is that Douglas has been no exception to the rule that over a long career, any public official is bound to develop some enemies.[2] From Franklin Roosevelt to Gerald Ford few people have been neutral about Douglas. Some businessmen literally abhorred him first as a member and then as chairman of the Securities and Exchange Commission. After Roosevelt appointed him to the Supreme Court in 1939, proponents of so-called judicial restraint[3] continually criticized him. Libertarians, on the other hand, have bestowed upon Douglas plaudits which would make even an egotist blush.

Professor Vern Countryman of the Harvard Law School has long been one of Douglas' greatest admirers. *The Douglas Opinions*,[4] his

1. Lack of public recognition is often due to factors well beyond the control of judges, such as poor journalistic coverage and apathy. Not even all law professors can name the present members of the Supreme Court of the United States. Some of our most distinguished judges, especially at the state level, are relatively unknown. The more light is beamed on the doings of the judiciary, the more recognition and respect it would receive.

2. Douglas has recalled maverick North Dakota Senator William Langer telling him: "Douglas, they have thrown several buckets of shit over you. But by God, none of it stuck. And I am proud." W. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 469-70 (1974).

3. This vague phrase is used here because of its currency and the fact that many who criticized Douglas were often misleadingly categorized under this label. "Judicial self-deniers," a phrase which Fred Rodell coined, is a more appropriate description. *See* Rodell, *Judicial Activists, Judicial Self-Deniers, Judical Review and the First Amendment—Or, How to Hide the Melody of What You Mean Behind the Words of What You Say*, 47 GEO. L.J. 483 (1959). *See also* Rodell, *For Every Justice, Judicial Deference is a Sometime Thing*, 50 GEO. L.J. 700 (1962).

4. THE DOUGLAS OPINIONS (V. Countryman ed. 1977) [hereinafter cited as OPINIONS].

third book about the Justice for whom he once served as law clerk,[5] is excellently edited, concise yet thorough. In the tradition of the genre, Countryman has arranged the Justice's opinions according to subject matter instead of presenting them strictly chronologically.[6] More chronological order within each section would have better shown Douglas' doctrinal development. A cohesive whole results, though, as the book lives up to the grandiose promise of its title.

So rich and rewarding are the many eloquent opinions, these major fragments of Douglas' fleece, to adopt Holmes' phrase, that choosing among them is difficult. But in two areas above all others, Douglas' presence looms largest. His treatment of the modern constitutional law of privacy, which he largely fathered, and his development of the First Amendment merit special discussion, not only because of their obvious importance,[7] but also because his opinions in these fields epitomize so

5. Since clerking for Douglas during the October 1942 Term, Countryman has written DOUGLAS OF THE SUPREME COURT (1959) and THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS (1974). *See also* the following articles by Countryman: *Justice Douglas: Expositor of the Bankruptcy Law*, 51 AM. BANKR. L.J., pt. 1, at 127, pt. 2, at 247 (1977); *The Contribution of the Douglas Dissents*, 10 GA. L. REV. 331 (1976); *"Even-Handed Justice"*, 11 HARV. C.R.-C.L.L. REV. 233 (1976); *Business Regulation*, 74 COLUM. L. REV. 366 (1974) (one of four collected articles in *Justice Douglas' Contribution to the Law*, 74 COLUM. L. REV. 353 (1974)); *The Constitution and Job Discrimination*, 39 WASH. L. REV. 74 (1964); Harper & Countryman, *Mr. Justice Douglas Dissents*, (N.Y.) Daily Compass, Apr. 6, 1952, at 21; *id.*, Apr. 7, 1952, at 5; *id.*, Apr. 8, 1952, at 8; *id.*, Apr. 9, 1952, at 7; *id.*, Apr. 10, 1952, at 7. In *Justice Douglas: Expositor of the Bankruptcy Law*, 51 AM. BANKR. L.J. 270 (1977), Countryman notes that Douglas "once said of the late Judge Jerome Frank, 'he had no peer in the world of corporate finance,' " and adds that he cannot locate nor could Douglas recall where this statement was made. *Id.* at 275 n.313. Dissenting in Alleghany Corp. v. Breswick & Co., 353 U.S. 151, 178 (1957), Douglas wrote that Frank "had no superior when it came to an understanding of the ways of high finance and to an analysis of regulatory measures dealing with it."

6. The only exception to such an arrangement of which the writer is aware is ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS (I. Dilliard ed. 1963). "Why," Mr. Dilliard asks, "are the opinions presented in chronological order rather than grouped by categories . . . ? Because these cases came to the Supreme Court over the years, first one and then another, and not in neatly arranged related groups." *Id.* at xiii.

7. Emphasizing Douglas' substantive positions is not intended to downplay his deep belief in the importance of procedure. On the contrary, it goes to the core of his creed. "It is not without significance," he has stressed, "that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring), *reprinted in* OPINIONS, *supra* note 4, at 305. *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 775-80 (1969) (Douglas, J., dissenting); Douglas, *Procedural Safeguards in the Bill of Rights*, 31 J. AM. JUD. SOC'Y 166 (1948); Douglas, *A Crusade for the Bar: Due Process in a Time of World Conflict*, 39 A.B.A.J. 851 (1953); Douglas, *Charles E. Clark*, 73 YALE L.J. 3, 5 (1963).

As Douglas recalled, "I can still see in my mind's eye the beard of Chief Justice Hughes bristle as he reported to the conference a proposal to broadcast the proceedings before the

much of the man and judge.

I. The Privacy Opinions

The individualist, the nonconformist, the "eccentric"[8] and the dissenter[9]—those questioning the social order were among Douglas' central concerns. He had an abiding fear of the stifling effects of conformity on creativity and, by a rippling effect, on the vitality of democracy itself. "The democratic way," Douglas suggested, "rejects standarized thought. It rejects orthodoxy."[10] It gives the citizen elbowroom; he has a right to be different, to make a fool of himself if he wishes. Our security depends on our ability to talk as we please and to associate with whom we choose. Freedom to assert one's individuality,[11] which Douglas' privacy and First Amendment opinions so well exemplify, was the cardinal principle in his constitutional scheme.

In a series of cases decided over a score of years, the Court rejected Douglas' belief that, despite the lack of a constitutional provision so specifying, each individual is entitled to a sphere of personal autonomy for his unique ways and doings. "The right to be let alone is indeed the beginning of all freedom," he said in a lone dissent in *Public Utilities*

Court. His reaction was not that of the stodgy conservative opposed to change. His opposition welled up from a deep instinctive impluse to make the courtroom sacrosanct—to keep it a place of dignity where the quest for truth goes on quietly and without fanfare and where utmost precautions are taken to keep all extraneous influences from making themselves felt. He knew from broad experience that procedural safeguards—control of the means used to reach a result—are often as important as the ends themselves." "Judges, Juries and Bureaucrats," Address by W.O. Douglas, University of New Hampshire (Oct. 29, 1959).

8. *See* Note, *The Right of Eccentricity*, 29 HASTINGS L.J. 519 (1978).

9. *See* Dilliard, *Dissent from Llewellyn on Dissent*, 1962 WASH. U.L.Q. 53. " 'It is the right of dissent, not the right or duty to conform, which gives dignity, worth and individuality to man. As Carl Sandburg recently said, "There always ought to be beatniks in a culture, hollering about the respectables." ' " *Id.* at 59-60 (quoting W. DOUGLAS, AMERICA CHALLENGED 5 (1960)). Douglas considered Sandburg "our greatest twentieth-century humanist." W. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS, *supra* note 2, at 163.

10. Douglas, *The Black Silence of Fear*, N.Y. Times, Jan. 13, 1952, § 6 (Magazine), at 7. Free speech combats the "subtle, imponderable pressures of the orthodox," United States v. Rumely, 345 U.S. 41, 57 (1953) (Douglas, J., concurring), and "the suffocating influence of orthodoxy and standardized thought." Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 184. "If people are let alone in [their] choices, the right of privacy will pay dividends in character and integrity." Public Utilities Comm. v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 233.

11. When artificial barriers prevent the individual from exercising his choices, government has a responsibility to assist him in overcoming these obstacles. *See* DeFunis v. Odegaard, 416 U.S. 312, 336, 340 (1974) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 299: "The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant* [to law school] *or on his behalf*. . . . The key to the problem is consideration of such applications *in a racially neutral way*." (emphasis in original).

Commission v. Pollak.[12] The Court there held that a privately-owned streetcar company could broadcast radio programs, including music, news, weather and commercial advertising, in its vehicles. Fearing the consequences of this "case of first impression,"[13] Douglas invoked the First Amendment guarantee of "the sanctity of thought and belief"[14] and the Fifth Amendment's protection of "liberty," which he construed as protecting individuals from a form of coerced listening.[15] Over the next decade he expanded and refined his argument.[16] In Douglas' view the Court's conclusion in *Frank v. Maryland*[17] that no search warrant was needed to enter an individual's home to investigate sanitary conditions "casts a shadow" over the Fourth Amendment's "guarantee [of privacy] as respects searches and seizures in civil cases."[18] His mood was funereal: "We witness indeed an inquest over a substantial part of the Fourth Amendment."[19] But "the right to be let alone," as Brandeis phrased it, is "the most comprehensive of rights and the right most valued by civilized men."[20] As later decisions showed, it was too embedded in the American character for government to deprive the individual of it for long. The right to be let alone became especially relevant in cases where the individual, in the face of official opposition, attempted to secure those "blessings of liberty" which are uniquely his. Controversies concerning the State of Connecticut's regulation of contraception thus became focal points for the evolving privacy doctrine.

Poe v. Ullman[21] was the second birth control case the Court considered.[22] Plaintiffs brought three declaratory judgment actions challenging the validity of Connecticut statutes prohibiting the use of contraceptives and the giving of medical advice for their use. Justice Frankfurter's plurality opinion noted that the use statute had not been enforced in the eighty years since its enactment.[23] Lacking was "the immediacy which is an indispensable condition of constitutional adju-

12. 343 U.S. 451, 467 (1952) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 232.

13. *Id.* at 467, *reprinted in* OPINIONS, *supra* note 4, at 232.

14. *Id.* at 468, *reprinted in* OPINIONS, *supra* note 4, at 232.

15. *Id.*

16. *See* Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579, 1583-84 (1978) [hereinafter cited as Note, *Constitutional Theory*].

17. 359 U.S. 360 (1959).

18. *Id.* at 374 (Douglas, J., dissenting).

19. *Id.*

20. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

21. 367 U.S. 497 (1961).

22. In Tileston v. Ullman, 318 U.S. 44 (1943), the Court held in a per curiam opinion that under the statute, a physician lacked standing to raise the constitutional rights of his patients.

23. Poe v. Ullman, 367 U.S. at 508.

dication. This Court cannot be umpire to debates concerning harmless, empty shadows."[24] The Court thus did not grant what Professor Fowler V. Harper, counsel for the appellants, in another connection had called "a peg on which to hang relief."[25] Justice Douglas vigorously dissented:

> What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. They are entitled to an answer to their predicament here and now.[26]

He went on to declare:

> If [the State] can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.
>
> That is an invasion of the privacy that is implicit in a free society . . . .
>
> This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.[27]

The First Amendment right of the doctor "to advise his patients according to his best lights" was "so obvious . . . as to need no extended discussion."[28] The statute as applied also deprived married couples of the "liberty" which the due process clause of the Fourteenth Amendment guarantees.[29] Finally, Douglas asked, "Can there be any doubt that a Bill of Rights that in time of peace," according to the Third Amendment, "bars soldiers from being quartered in a home 'without the consent of the Owner' should also bar the police from investigating

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24. *Id.*

25. 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS 678 (1956) (commenting on mental distress caused by defendant's conduct which amounted to a technical trespass to real property). Perhaps because Harper considered the right of privacy, which had experienced "[o]ne of the most spectacular developments in the law of torts during the past generation," *id.* at 677, a "catchall for a great number of cases in which mental suffering or other emotional distress was the primary injury sustained and for which no other substantive theory for relief was available," *id.* at 683-84, he did not advance it as one of his points in his brief or in oral argument.

26. Poe v. Ullman, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (citation omitted).

27. *Id.* at 521. (footnotes omitted).

28. *Id.* at 513.

29. *Id.* at 515.

the intimacies of the marriage relation?"[30]

It remained for a 1962 article by Norman Redlich,[31] written expressly to help the Court find a way out of the constitutional quagmire and declare Connecticut's anti-contraceptive law unconstitutional, to give Douglas' privacy theory its final form. Redlich argued that sexual relations within a marriage should be immune from governmental interference because they are among the Ninth Amendment rights "retained by the people."[32] In *Griswold v. Connecticut*,[33] the advocates of birth control were back at the barricades, having now been convicted of violating the statutes previously challenged in *Poe*. Harper was again their advocate, and he was so taken by Redlich's approach that he stressed it in his Jurisdictional Statement to the Supreme Court: "Professor Redlich, in an important article has pointed out that in interpreting both the Ninth and Tenth Amendments, 'the textual standard should be the entire Constitution.' . . . Certainly the aspects of privacy protected by the First, Third, Fourth and Fifth (privilege against self-incrimination) [Amendments] are comparable to the rights of the married women who sought medical instruction from these appellants."[34] But Harper was a dying man as he wrote this, and shortly thereafter he asked Professor Thomas I. Emerson, his friend and colleague of many years, to take over the case. Emerson was not as persuaded as Harper had been by Redlich's analysis.[35] Instead, he emphasized Connecticut's legislative silliness: the "Connecticut Anti-Contraceptive Statutes Deny Appellants the Right to Liberty and Property Without Due Process of Law in That They Are Arbitrary and Capricious, and Have No Reasonable Relation to a Proper Legislative Purpose."[36] The right of privacy was not forgotten. But in order to stress the main argument, it was downplayed and utilized only cautiously in the brief:

> The protected area of privacy is marked out in part by the First Amendment. . . . In short, . . . so the Third, Fourth and Fifth Amendments, while specifically mentioning only the major forms of invading privacy which were paramount at the time [of

30. *Id.* at 522.

31. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

32. *Id.* at 802-10. He also noted: "The last four words of the Tenth Amendment ['or to the people'] must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people possessed such rights there were *powers* which neither the federal government nor the states possessed." *Id.* at 807.

33. 381 U.S. 479 (1965).

34. Jurisdictional Statement at 17-18, Griswold v. Connecticut, 381 U.S. 479 (1965).

35. Harper was "a man of tremendous enthusiasm for whatever was the project [or idea] of the moment." Frank, Book Review, 18 STAN. L. REV. 274, 278 (1965).

36. Brief for Appellants at 21, Griswold v. Connecticut, 381 U.S. 479 (1965).

> their framing], embody a general principle which protects the private sector of life against "every unjustifiable intrusion by the Government."
>
> It can be argued, further, that the right of privacy is protected by the Ninth Amendment.[37]

Douglas adopted the combined Harper-Emerson-Redlich framework for the Court in *Griswold v. Connecticut*.[38] "[S]pecific guarantees in the Bill of Rights," he wrote, referring to the First, Third, Fourth, Fifth and Ninth Amendments, "have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[39] Born was the constitutional right of privacy. Because of Douglas' seminal interpretation, the Court had a doctrinal foundation on which to build in the future.[40]

II. A Functional View of the Law

Stark functionalism has always marked Douglas' approach.[41] Law to him was not a congeries of sterile formalisms mechanically applied to keep the governing principle pure and untainted by socio-economic considerations often viewed as outside the judge's ken.[42] Rather, ever since his days (nearly a half-century ago) as one of the small band of original legal realists,[43] he had viewed law as a group of interchangeable concepts which survive because of their adaptability to new situations and which develop as they are used. Douglas considered them in terms of their actual effect on their consumers. Were a principle outmoded or not performing its intended job from *his* viewpoint,[44] he discarded it and was creative enough to invent a new one in its stead.

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37. *Id.* at 79, 82. *See also* Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 YALE L.J. 638, 647-48 (1975).

38. 381 U.S. 479 (1965), *reprinted in* OPINIONS, *supra* note 4, at 234.

39. 381 U.S. at 484 (citation omitted), *reprinted in* OPINIONS, *supra* note 4, at 235.

40. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Roe v. Wade, 410 U.S. 113 (1973). On Douglas' later privacy opinions, *see generally* Note, *Constitutional Theory*, *supra* note 16, at 1586-87. *See also* Doe v. Bolton, 410 U.S. 179, 209 (1973) (Douglas, J., concurring), *reprinted in* OPINIONS, *supra* note 4, at 241; Eisenstadt v. Baird, 405 U.S. 438, 455 (1972) (Douglas, J., concurring), *reprinted in* OPINIONS, *supra* note 4, at 237.

41. *See, e.g.*, one of his earliest articles, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673, 674-76 (1929).

42. *See* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

43. *See* Hopkirk, *The Influence of Legal Realism on William O. Douglas*, in ESSAYS ON THE AMERICAN CONSTITUTION 59 (G. Dietze ed. 1964); Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 923-24 (1964).

44. "The starting point for decision pretty well marks the range in which the end result lies." Branzburg v. Hayes, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 191. "The place one comes out . . . depends largely on where one starts." Gori v. United States, 367 U.S. 364, 370 (1961) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 411. *See* EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 29.

To those who claimed that this was judicial legislation, Douglas replied that all judging, as Holmes long ago recognized, involves some legislating; it simply inheres in the judicial function since no law can conceivably provide for all situations.[45] Life is often inconsistent and is continually changing,[46] and judges must be responsive to the facts of

45. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUD. SOC'Y 104 (1948).

46. As if Douglas were trying to prove the correctness of Ralph Waldo Emerson's observation that "a foolish consistency is the hobgoblin of little minds," *compare* his statement in Ginsberg v. New York, 390 U.S. 629, 655 (1968) (dissenting opinion) ("[I] find the literature and movies which come to us for clearance exceedingly dull and boring . . . .") *with* his statement in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting) ("I never read or see the materials coming to the Court under charges of 'obscenity' . . . ."), *reprinted in* OPINIONS, *supra* note 4, at 229. *See also* United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting) ("Most of the items that come this way denounced as 'obscene' are in my view trash."); Smith v. California, 361 U.S. 147, 168 (1959) (Douglas, J., concurring) ("I have read [this book]; and . . . it is repulsive to me . . . ."). Obviously, his curiosity piqued on occasion, Justice Douglas peeked.

But inconsistency is not the same as change, and Douglas has never been afraid to admit that he was wrong in the past and to overrule himself. *Compare*:

a) Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (opinion by Frankfurter, J., with six Justices, including Black, Douglas & Murphy, JJ., concurring *sub silentio*) (minor Jehovah's Witnesses required to salute the flag in school) *with* Jones v. City of Opelika, 316 U.S. 584, 623 (1942) (separate opinion of Black, Douglas & Murphy, JJ.) (occupational tax on sale of religious books suppresses free exercise of religion) *and* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring) (flag salute required of Jehovah's Witnesses is unconstitutional).

b) Zorach v. Clauson, 343 U.S. 306 (1952) (opinion by Douglas, J.) (upheld a New York City public school "released time" program), *reprinted in* OPINIONS, *supra* note 4, at 150, *with* Engel v. Vitale, 370 U.S. 421, 437 (1962) (concurring opinion strongly advocating complete separation of church and state) *and* Tilton v. Richardson, 403 U.S. 672, 696 (1971) (Douglas, J., dissenting in part)("The mounting wealth of the churches makes ironic their incessant demands on the public treasury." (footnote omitted)), *reprinted in* OPINIONS, *supra* note 4, at 165. *See also* Wheeler v. Barrera, 417 U.S. 402, 431 n.2 (1974) (Douglas, J., dissenting) ("Although I was with the majority in [Everson v. Board of Education, 330 U.S. 1 (1947)], I have since expressed my doubts about the correctness of that decision, *e.g., Engel v. Vitale*, [370 U.S. at 443]; *Walz v. Tax Comm'n*, [397 U.S. 664, 703 (1970) (dissenting opinion)]"), *reprinted in* OPINIONS, *supra* note 4, at 167 n.59.

c) Valentine v. Chrestensen, 316 U.S. 52 (1942) (opinion by Roberts, J.) (commercial speech is not protected by the First Amendment) *with* Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (the *Valentine* "ruling was casual, almost offhand. And it has not survived reflection.") *and* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 397-98 (1973) (Douglas, J., dissenting) ("Commercial matter, as distinguished from news, was held in Valentine v. Chrestensen . . . not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided.").

d) Goldman v. United States, 316 U.S. 129 (1942) (Douglas joined the opinion of the Court which, adhering to Olmstead v. United States, 277 U.S. 438 (1928), held that wiretapping by federal officials did not violate the Fourth Amendment) *with* On Lee v. United States, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting) ("I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*. Reflection on them has brought

experience[47] which give lawsuits their charge. Douglas considered the emphasis on rules, precedent, technique and analysis, ingrained in lawyers in law school, both overdone and illusory.[48] He realized with Jerome Frank (who, he admitted, "had my heart—and, to a great degree, my mind")[49] that "what William James called 'the wild fact'—the obstinate rock on which brittle theories break"[50]—often plays the decisive role when the judge must choose between competing legal rules.

Those who exalted the supposed virtues of legal certainty did not complain, though, when in an admittedly "rather obscure"[51] 1944 case[52] Douglas devised the modern system of public utility ratemaking. He developed a formula that enabled a utility to earn a return sufficient to attract capital and thus, as he later said, to "keep going":[53]

> "[F]air value" is the end product of the process of rate-making not the starting point . . . . The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.
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> . . . Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judical inquiry . . . is at an end. The

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new insight to me. I now feel that I was wrong in the *Goldman* case."), *reprinted in* OPINIONS, *supra* note 4, at 333.

See also Note, *Constitutional Theory, supra* note 16, at 1589 n.62; note 79, *infra.*

47. The One remains, the many change and pass;
Heaven's light forever shines, Earth's shadows fly;
Life, like a dome of many-coloured glass,
Stains the white radiance of Eternity . . . .

P. SHELLEY, ADONAIS—AN ELEGY ON THE DEATH OF JOHN KEATS (1821) (lines 460-63).

48. This attitude still, happily, has its counterpart in philosophy. *See* W. BARRETT, THE ILLUSION OF TECHNIQUE (1978). Its modern origins are found in William James, "the master of us all," as someone has called him, and in his protégé, Horace Kallen. *See* Ratner, *Some Central Themes in Horace Kallen's Philosophy*, in VISION & ACTION: ESSAYS IN HONOR OF HORACE M. KALLEN ON HIS 70TH BIRTHDAY 83 (S. Ratner ed. 1953).

49. Douglas, *Jerome N. Frank*, 10 J. LEGAL EDUC. 1 (1957).

50. *Id.* at 9.

51. N.Y. Times, Oct. 29, 1973, at 29, col. 1.

52. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). Douglas thought that this case had the "most impact" of any opinion he wrote. N.Y. Times, Oct. 29, 1973, at 29, col. 1. Countryman, though, did not include it in his civil liberties-oriented book. Douglas' influence in many fields other than civil liberties has often been noted. *See* Countryman, *Justice Douglas: Expositor of the Bankruptcy Law*, 51 AM. BANKR. L.J. 127, 247 (1977); Countryman, *Justice Douglas' Contribution to the Law: Business Regulation*, 74 COLUM. L. REV. 366 (1974); Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920 (1964); Dunne, *Justice Douglas and the Law of Banking*, 91 BANKING L.J. 307 (1974); Hopkirk, *William O. Douglas—His Work in Policing Bankruptcy Proceedings*, 18 VAND. L. REV. 663 (1965).

53. N.Y. Times, Oct. 29, 1973, at 29, col. 1.

> fact that the method employed to reach that result may contain infirmities is not then important.[54]

Whose ox is being gored depends upon one's values.

Despite the occasional doubts common to all people,[55] Douglas was always sure of his values, and he had the self confidence to stand by them regardless of the sporadic storms they caused.[56] He gladly accepted the responsibility of his office and was never one to be pushed by the windy seas of a pervasive skepticism. He realized, of course, that there are limits to the judicial commission, to what courts can and cannot do. The Court, he emphasized, does not "sit as a superlegislature";[57] but it must guarantee those essentials without which no democratic society can survive.

III. The First Amendment Opinions

Douglas is, of course, best known for his devotion to First Amendment liberties.[58] No other Justice in history has been such a fervent defender of these freedoms for so long. "The right of the people"[59] to exercise every word of the First Amendment, Douglas felt, was absolute and unqualified. He would have nothing of "balancers" and others who would weaken its expansive mandate. His belief was that

> all of the "balancing" was done by those who wrote the Bill of

54. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 601, 602 (1944) (citations omitted).

55. Some of these doubts emerge in his opinions as fact-skepticism. A study of Douglas' application of this approach would be most useful. *See* J. FRANK, COURTS ON TRIAL 74 (1949); Davis, *Mr. Justice Douglas*, 74 COLUM. L. REV. 347, 351 n.17 (1974). Since the death of Edmond Cahn, fact-skepticism has lacked a leading academic spokesman. It is high time for the legal professoriate to rediscover fact-skepticism's virtues so that courts will implement the approach on a daily basis.

56. *See, e.g.*, Schlesinger v. Holtzman, 414 U.S. 1321, 1322 (1973) (Douglas, J., dissenting)(on application for stay), *reprinted in* OPINIONS, *supra* note 4, at 48-50; Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (Douglas, Circuit Justice) (on reapplication to vacate stay), *reprinted in* OPINIONS, *supra* note 4, at 45-48; Rosenberg v. United States, 346 U.S. 273, 310 (1953) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 312-14. "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, 331 U.S. 367, 376 (1947), *reprinted in* OPINIONS, *supra* note 4, at 83.

57. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952). *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Berman v. Parker, 348 U.S. 26, 32-33, 35-36 (1954); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949); Olsen v. Nebraska, 313 U.S. 236, 246 (1941).

58. Douglas has not always been interested in First Amendment questions, however. His pre-Court career as a law professor and government administrator was spent largely in the sphere of corporate and securities law, and his friends "for the most part, do not recall his having at this time any particular concern with the broader problems of society." Hopkirk, *supra* note 43, at 73 n.55. He had developed no explicit judicial philosophy, as he simply did not have the "time to reflect" upon such matters. James, *Role Theory and the Supreme Court*, 30 J. POL. 160, 168 n.21 (1968).

59. *See* W. DOUGLAS, THE RIGHT OF THE PEOPLE (1958).

> Rights. By casting the First Amendment in absolute terms, they repudiated . . . timid, watered-down . . . versions . . . .
>
> Hence, matters of belief, ideology, religious practices, social philosophy, and the like are beyond the pale and of no rightful concern of government, unless the belief or the speech, or other expression has been translated into action.[60]

No government agency could properly interfere with this cherished prerogative of the true "governors."[61]

Often obscured is the fact that, regardless of his final viewpoint, throughout most of the first half of his record-breaking thirty-six year tenure, Douglas was a faithful adherent to the "clear and present danger" balancing test.[62] Even as late as 1951, in his dissent in *Dennis v. United States*,[63] he claimed that "[t]he freedom to speak is not absolute . . . . This record, however, contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation."[64] And the following year he stated in *Beauharnais v. Illinois*:[65]

> My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to

60. Branzburg v. Hayes, 408 U.S. 665, 713, 715 (1972) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 191, 193.

61. Douglas took very seriously Madison's profound belief that while "[i]n Europe charters of liberty have been granted by power," in America we find "[c]harters of power granted by liberty." 6 THE WRITINGS OF JAMES MADISON 83 (G. Hunt ed. 1906), *quoted in* Cahn, *A New Kind of Society*, in THE GREAT RIGHTS 5 (E. Cahn ed. 1963). "[T]he censorial power," said Madison, "is in the people over the Government, and not in the Government over the people." 3 ANNALS OF CONG. 934 (1834). Thus, Douglas asked, "[s]ince when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet." Colten v. Kentucky, 407 U.S. 104, 122 (1972) (Douglas, J., dissenting). *See* Broadrick v. Oklahoma, 413 U.S. 601, 620 (1973) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 173; Laird v. Tatum, 408 U.S. 1, 28 (1972) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 58.

62. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (citation omitted)), *reprinted in* OPINIONS, *supra* note 4, at 180-81; Craig v. Harney, 331 U.S. 367, 377 (1947) ("The fact that the discussion at this particular point of time was not in good taste falls far short of meeting the clear and present danger test."), *reprinted in* OPINIONS, *supra* note 4, at 83.

63. 341 U.S. 494, 581 (1951).

64. *Id.* at 581, 587 (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 199, 202.

65. 343 U.S. 250 (1952).

prevent disaster.[66]

Yet, he continued, "[t]he First Amendment is couched in absolute terms—freedom of speech shall not be abridged."[67] This was Douglas' first specific reference to the nature of the *terms* of the Amendment. By early 1954, his transformation was complete. He began to apply the Amendment's unchanging words to a wide variety of factual settings. "Any such scheme of censorship," he wrote, concurring in the Court's per curiam decision in *Superior Films, Inc. v. Department of Education*[68] that admitted movie censorship boards in New York and Ohio were unconstitutional, "would be in irreconcilable conflict with the language and purpose of the First Amendment."[69] He went on to state his now uncompromising view:

> The First and the Fourteenth Amendments say that Congress and the States shall make "no law" which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that "no law" does not mean what it says, that "no law" is qualified to mean "some" laws. I cannot take that step.[70]

If Douglas' "evolution to absolutism"[71] was gradual, his conversion was total. Shortly, he was observing that "[t]he First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence."[72] Dissenting from the Court's holding in *Roth v. United States*[73] that "obscenity is not expression protected by the First Amendment,"[74] he proclaimed his faith: "I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, econom-

66. *Id.* at 284-85 (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 183.

67. *Id.* at 285.

68. 346 U.S. 587 (1954) (*per curiam*).

69. *Id.* at 588 (Douglas, J., concurring).

70. *Id.* at 589.

71. *See* Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974).

72. Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 224. *See also* Beilan v. Board of Educ., 357 U.S. 399, 415 (1958) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 353. "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech . . . .' There are no exceptions," Douglas told an Indian audience in 1955. "The mandate is in terms of the absolute . . . . [T]here is no leeway for legislative innovations. The prohibition is all-inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy." W. DOUGLAS, WE THE JUDGES 307 (1956).

73. 354 U.S. 476 (1957).

74. *Id.* at 492.

ics, politics, or any other field."[75] Under Douglas' First Amendment regime, individual expression comes ahead of group preferences or governmental convenience. The citizen is the sole keeper of his conscience.[76]

Conjoined with Douglas' emphasis on the literal language of the First Amendment was his insistence that only speech which is "so closely brigaded with illegal action as to be an inseparable part of it" could be suppressed.[77] Although intimations of this philosophy had appeared in one of his earlier decisions,[78] not until 1957 did he enunciate it fully. He employed it first in a lecture[79] and then in *Roth*.[80] Ulti-

75. Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 224.

76. *See id.* For a study of Douglas' opinions in this area, *see* Fleischman, *Mr. Justice Douglas on Sex Censorship*, 51 L.A.B.J. 560 (1976).

77. *Id.*

78. "Intimations" is used because in one paragraph in his dissenting opinion in Dennis v. United States, 341 U.S. 494, 581 (1958) (Douglas, J., dissenting), Douglas mixed a variant of the clear and present danger test with the speech-overt act standard: "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.' The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson 'that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.' The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action." Dennis v. United States, 341 U.S. 494, 590-91 (1951) (Douglas, J., dissenting) (quoting 12 HENING's STAT. (Virginia 1823), c. 34, p. 84), *reprinted in* OPINIONS, *supra* note 4, at 204.

79. " 'Clear and present danger' has become merely a convenient excuse for suppression. Yet in my view the only time suppression is constitutionally justified is where speech is so closely brigaded with action that it is in essence a part of the overt act . . . . It is not enough that the words excite people or cause unrest or disturbance . . . . Speech may, of course, be so close a companion of action as to be an overt act, as when fire is shouted in a crowded theatre." W. DOUGLAS, THE RIGHT OF THE PEOPLE, *supra* note 59, at 34.

80. 354 U.S. at 514 (1957) (Douglas, J., dissenting): "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. As a people, we cannot afford to relax that standard." (Citations omitted). In the same opinion, Douglas stated that "[g]overnment should be concerned with antisocial conduct, not with utterances." *Id.* at 512-13. *See* OPINIONS, *supra* note 4, at 223. Query: Could not conduct be "antisocial" and still not be illegal, *i.e.*, simply violative of social *norms* but of no positive law?

Another indication of Douglas' change between *Dennis* and *Roth* is that in the former he had stated that "obscenity" should not be constitutionally protected: "[T]he teaching of

mately, it became his test in First Amendment cases.[81] The "danger" to social order must not be merely "clear and present" or "serious and imminent";[82] there must be a direct violation of a valid statute.[83]

It is because of his opinions in cases concerning our most cherished liberties that the name William O. Douglas will long shine brightly. In bringing together the choicest of Justice Douglas' opinions,[84] Professor Countryman has performed a signal service to the citizens of this nation who have the opportunity to live their lives as they choose because of these freedoms.

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methods of terror and other seditious conduct should be beyond the pale [of the First Amendment] along with obscenity and immorality." Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting), *reprinted in* OPINIONS, *supra* note 4, at 199.

81. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 398-99 (1973) (Douglas, J., dissenting); Brandenburg v. Ohio, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring), *reprinted in* OPINIONS, *supra* note 4, at 205-07; A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 426, 433 (1966) (Douglas, J., concurring in the judgment); Speiser v. Randall, 357 U.S. 513, 536–38 (1958) (Douglas, J., concurring). *See also* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 296-97 (1957) (Douglas, J., dissenting).

In *Brandenburg*, Douglas stated that "[a]ction is often a method of expression and within the protection of the First Amendment." 395 U.S. at 454. Yet, he also declared: "Picketing, as we have said on numerous occasions, is 'free speech plus.' That means that it can be regulated when it comes to the 'plus' or 'action' side of the protest." *Id.* at 455 (citations omitted).

82. Craig v. Harney, 331 U.S. 367, 373 (1947) (Douglas, J., opinion of the Court) *reprinted in* OPINIONS, *supra* note 4, at 81.

83. In 1957, Douglas joined in Justice Black's concurring-dissenting opinion in Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J., concurring in part and dissenting in part), which emphasized the speech-overt acts distinction. *See also* Justice Black's dissent in Dennis v. United States, 341 U.S. 494, 579 (1951) (Black, J., dissenting), a doctrinal forerunner of his *Yates* opinion. *Yates* was argued in October, 1956, but was not handed down until June, 1957, after Douglas' lectures were delivered. In the interim, Black and Douglas discussed the shape the former's *Yates* opinion would take. That Douglas' final formulation resulted partly from his talks with Black is but one of many examples of their mutual influence. Just as Douglas would be the first to admit Black's impact on him, so Black "felt a unique bond with Bill Douglas and always maintained a special kinship with him . . . . 'The fella is a genius . . . ,' " he would tell his son and others. H. BLACK, JR., MY FATHER: A REMEMBRANCE 240 (1975). *See* Black, *William Orville Douglas*, 73 YALE L.J. 915 (1964).

84. So much of the man is reflected in his opinion writing style: crisp, concise, direct, forthright, devoid of legal sesquipedalisms and boilerplate prose. He did not perform those mental gymnastics so dear to the minds of many law teachers. *See* Anon Y. Mous [Frank], *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 639-41 (1943); Frank, Book Review, 54 HARV. L. REV. 905, 912 (1941). As John P. Frank has observed, Douglas is "the only Justice in history who demonstrably could make his living as a professional writer on non-legal subjects." J. FRANK, MARBLE PALACE 142-43 (1958).

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