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While egalitarianism is an American theme as old as the nation itself, the principle of equality did not receive explicit recognition in our constitutional text until 1868, when the fourteenth amendment became law. Using a double-negative form of expression that continues to plague us to this day, the framers of the amendment forbade any state to "deny to any person within its jurisdiction the equal protection of the laws." This short provision has been the source of the most significant constitutional development of our time, and Justice Douglas has been the leader of that development.

The egalitarian ideal came naturally to a young man who had grown up in modest circumstances in the far West in the early part of the 20th century, and who had, by exceptional intellect and driving energy, become a leading scholar in the most rarefied of academic environments. As a teacher of the law of public utilities and corporate finance, he was concerned about the abuses that can result from the concentration of economic power; as Chairman of the Securities and Exchange Commission, he had a chance to translate that concern into government policy. It was no surprise that when Justice Brandeis retired in 1939, he passed the word to President Roosevelt that he would be pleased to be succeeded by William O. Douglas. It is a compliment to both men to say that Justice Douglas was a fitting successor to Justice Brandeis.

Egalitarianism is one of those protean concepts that can be found almost anywhere by an analyst who is looking for it. Yet it is fair to say that the theme looms large in Justice Douglas' opinions over a broad range of doctrinal areas. In antitrust law, he has consistently supported governmental attacks on monopoly power.[1] He wrote many of the Supreme Court's opinions laying to rest the doctrine of economic due process and freeing government to act positively in the field of social legislation.[2] He was an important participant in the extension of

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[1] *E.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 315 (1949) (dissenting opinion); United States v. Columbia Steel Co., 334 U.S. 495, 534 (1948) (dissenting opinion).

[2] *E g.*, Olsen v. Nebraska, 313 U.S. 236 (1941); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

the guarantees of the Bill of Rights to state criminal proceedings—thus offering the Constitution's protections to those at the bottom of the social-economic scale who are most frequently caught in the snares of the criminal law.[3] An early critic of vagrancy laws,[4] he wrote the Court's opinion in the modern case that brought such laws within narrowly circumscribed bounds.[5] In that opinion, he remarked that the people "generally implicated by the imprecise terms of the ordinance" were "poor people, nonconformists, dissenters, idlers," who were apt to be the victims of discriminatory enforcement.[6] And even Justice Douglas' celebrated first amendment absolutism has been aimed mainly at the protection of "nonconformists" and "dissenters."[7]

The values of egalitarianism, then, can be defended in a great many doctrinal contexts outside the equal protection clause. Yet it was that clause which Justice Douglas used to achieve his most far-reaching doctrinal results in the cause of equality. The clause was originally designed primarily as a weapon against racial discrimination, and it was natural for Justice Douglas to read it for all it was worth in bringing the Constitution to bear on this problem. In particular, he pressed the Supreme Court to treat many kinds of "private" racial discrimination as the functional equivalent of state action.[8] While he sometimes did not succeed in persuading a majority of the Court,[9] he regularly infused judicial discussion of the state action issue with a brand of realism that was refreshing—especially given the artificiality of so many opinions in this doctrinal area.[10]

It surely was Justice Douglas' vision of an egalitarian society that led him to agonize over *DeFunis v. Odegaard*.[11] (It is an accident of history that he is, in the medical sense, color-blind.[12]) In his view, an

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[3] Justice Douglas joined Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947), and regularly supported the progressive "selective incorporation" of the Bill of Rights into the 14th amendment.

[4] *See* Douglas, *Vagrancy and Arrest on Suspicion* 70 YALE L.J. 1 (1960).

[5] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[6] *Id.* at 170.

[7] *See e.g.*, Dennis v. United States, 341 U.S. 494, 581 (1951) (dissenting opinion); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (concurring opinion); Terminiello v. Chicago, 337 U.S. 1 (1949); Adderley v. Florida, 385 U.S. 39, 48 (1966) (dissenting opinion).

[8] *E.g.*, Evans v. Newton, 382 U.S. 296 (1966); Lombard v. Louisiana, 373 U.S. 267, 274 (1963) (dissenting opinion).

[9] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (dissenting opinion); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359 (1974) (dissenting opinion).

[10] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (concurring opinion).

[11] 416 U.S. 312, 320 (1974) (dissenting opinion).

[12] See Rodell, *As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith a Random Anniversary Sample, Complete with Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned from a Forty-Year Friendship*, 16 U.C.L.A.L. REV. 704, 705 (1969).

applicant to a state law school must have his or her application "considered on its individual merits in a racially neutral manner."[13] One may not share the position that race is irrelevant in such a context, and yet understand how a Justice strongly dedicated to the egalitarian ideal might balk at a racial preference whose aim is to equalize. The issue is every bit as difficult as Justice Douglas saw it to be, and if he did not resolve it, neither has the nation.

Justice Douglas' major doctrinal contribution to the growth of equality was made in those areas of equal protection that extend beyond the guarantee of racial equality. As early as 1942, he laid the doctrinal foundations for what came to be known, a generation later, as "the new equal protection."[14] By the 1960's, he was able to lead a majority of the Court in accepting the idea that government can constitutionally discriminate against certain disadvantaged groups[15] or against the enjoyment of certain fundamental interests[16] only upon a showing of the kind of necessity implicit in the phrase "a compelling state interest." Given the Court's retreat from the economic-liberty model of substantive due process, and its lavish rhetoric about the evils of judicial intervention to second-guess legislative choices, this doctrinal development was striking. *Of course* Justice Douglas built on a rising historical tide of egalitarianism; the point is that he *did build.*

There is irony in recognizing Justice Douglas' doctrinal leadership. He is a Justice who is supposed to be so "result-oriented" as to care nothing for the articulation of principle. But his legacy to us in the equal protection area is precisely a legacy of doctrinal principle. True, he often painted with a broad brush. When one wishes to stake out a broad principle, that is quite appropriate, and may even be necessary. As well as any other Justice of his time, Justice Douglas told us what the factors were that caused him to decide as he did. That is surely the most important test of a good opinion; if the opinion also can integrate and consolidate doctrine, so much the better. But it is not easy both to consolidate and to innovate in the same breath. Justice Douglas was doctrinally innovative, and he usually[17] explained the bases of his innovations so that neither a lower court nor a legislator would have difficulty understanding them. Constitutional growth demands such justices—perhaps not nine of them at a time, but certainly in some mini-

[13] 416 U.S. at 337.

[14] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[15] *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

[16] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[17] *But see* Levy v. Louisiana, 391 U.S. 68 (1968).

mum supply. For his egalitarian vision of America, and for the doctrinal underpinnings he supplied to our era's egalitarian movements, we can give thanks.