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William M. Beaney
University of Denver

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Justice William O. Douglas: The Constitution in a Free Society

WILLIAM M. BEANEY*

It is not easy to assess the significance of William O. Douglas' career as an associate justice from 1939 to 1975 because he has been such an extraordinary public figure off the bench. Judges in general, and state supreme court justices in particular, are expected to be rather conservative, relatively colorless persons. Their public and private lives are supposed to be humdrum and circumspect. Clearly, Justice Douglas was not cast in this mold. Beginning with his youthful trip by railroad freight cars from his home in Yakima, Washington to law school at Columbia until the very end of his term on the Court, he was on numerous occasions an outspoken advocate of ideas and a supporter of causes that aroused controversy.¹ In both his public and private life he insisted on being his own man, unfettered by judicial conventions.

There was little in his early activities after graduation from Columbia Law School to suggest the controversial nature of his career after appointment to the Supreme Court in 1939 by Franklin D. Roosevelt. He practiced law briefly in the huge Cravath Firm in New York, and subsequently in his native Yakima, Washington. He then taught at Columbia, moved to Yale, and quickly became identified as a prominent member of the realist school of jurisprudential thought, with a special interest in the interrelationships between law and business. He left Yale for a position with the Securities and Exchange Commission in 1934, was appointed a member in 1936, and chairman in 1937. While thought to be antibusiness when appointed chairman, he quickly developed good relations with the business world and, at the time of his appointment to the Court, was criticized chiefly for being too friendly towards Wall Street.

Douglas' career on the Supreme Court was an unusual blend of two roles—that of a national and international public figure and that of an associate justice. We must summarize his non-judicial actions and writings in a few words. He spoke out on domestic and international

* Professor of Law, University of Denver.

¹ For a biographical sketch see Frank, *William O. Douglas*, in 4 L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2447 (1969).

issues, traveled frequently abroad and spoke on world problems, called and marched for reforms in environmental and other areas, climbed mountains, fell off horses, flirted with politics in the 1940's, and wrote endlessly on a variety of subjects, both legal and non-legal. What he did, said, and wrote provoked public criticism and led to attempts in Congress, including one by then Congressman Gerald R. Ford, to invoke the impeachment process. Nor was his private life exempt from criticism, commonly by those in and out of government who found his ideology and judicial pronouncements distasteful.

Although Justice Douglas did not fully embrace the libertarian role for which he is best known at the very outset of his judicial career, his concern for minorities and dissenters became his most famous judicial contribution. In 1940, in the *Minersville v. Gobitis*² case, he was a member of the Court majority which voted to uphold a state flag salute requirement. Three years later he recanted.³ He had some wavering moments with respect to church-state issues between 1947 and 1962,⁴ but finally became a supporter of total separation. His original view that obscenity was not protected by the first amendment was replaced by one that disdained a censorship role for the Court.⁵ With but few exceptions his philosophy was dominated by a deep commitment to protecting individual and group liberties. While acknowledging the necessity for state or federal regulation of certain business practices, and of government intervention to assist those who were victims of social and economic distress, Justice Douglas feared and opposed big government and its intrusive bureaucratic ways. Many of his opinions reflected fears that bureaucratic agencies were oppressing weak individuals. He wanted the Court to accept more cases involving apparent injustices to individuals who were ill-prepared to help themselves.⁶

² 310 U.S. 586 (1940).

³ See *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴ Compare his position in *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and *Zorach v. Clauson*, 343 U.S. 306 (1952) with his strong advocacy of total separation in *Engel v. Vitale*, 370 U.S. 421, 437 (1962) (concurring opinion).

⁵ In his dissent in *Dennis v. United States*, 341 U.S. 494, 581 (1951) (dissenting opinion), he regarded obscene publications as undeserving of first amendment protection. He later advocated total freedom for publications in *A Book, etc. v. Attorney-General*, 383 U.S. 413, 424 (1966) (Fanny Hill case) (concurring opinion). In 1973 he called attention to his rejection of his earlier view that the first amendment did not protect commercial matter in publications. See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 397 (1973) (dissenting opinion).

⁶ Justice Douglas was the great dissenter from denials of certiorari. See the statistics in COMMISSION ON DIVISION OF THE FEDERAL COURT APPELLATE SYSTEM, REPORT A-88 (1975). A large number of the cases involved individual rights.

His faith in free speech and the democratic process was almost boundless. As his dissent in *Dennis v. United States*⁷ revealed, he feared government censorship far more than the possible dangers from the mouthings of Communist leaders. He feared the tyranny of legislatures or administrative agencies, which in their quest for orthodoxy in views and behavior frequently reflected a limited or corrupted version of democracy. His theory of democratic action was conditioned by the central position in his philosophy of the Bill of Rights. Popular action, whatever its form, could take place only under the guidelines of the Bill of Rights. Majority action was limited by the declared rights of minorities. While rejecting natural law thinking, the combination in his thought of the functional approach, which concentrated on the way law affected people in the real world, and a heavy emphasis on the rights of individuals frequently led to results that to some observers smacked of a personal or intuitive response.

The fact that Justice Douglas was more than a practicing libertarian has frequently been overlooked. He was expert in ratemaking and other regulatory matters affecting business.⁸ He had a keen sense of how legislatures and administrative agencies operated and was unwilling to express judicial deference where their actions harmed individuals. He was alert to issues involving "invidious discrimination" in classifications, as his opinion in *Skinner v. Oklahoma* reveals.⁹ While his discovery of a right of privacy based on "emanations" and "penumbras" in *Griswold v. Connecticut*¹⁰ has been jeeringly received, it is hardly less "judicial" than using "liberty" as a sponge for incorporating new rights into the fourteenth amendment.

Perhaps the reason why younger people both within and without the legal profession have regarded Justice Douglas more highly than have their elders, is because he has always reflected a powerful concern over the fate of the individual confronted by increasingly impersonal governmental and business organizations. Individual rights and equality of rights are to Justice Douglas the important weapons to use in any fight against arbitrary laws and official actions. They are a necessary supplement to the political process in which the late Justice Frankfurter reposed total confidence. As Justice Douglas wrote in *We the Judges*,

⁷ 341 U.S. 494 (1951).

⁸ See *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944).

⁹ 316 U.S. 535 (1942), *Skinner* offers an early example of the "strict scrutiny" test in equal protection cases.

¹⁰ 381 U.S. 479 (1965).

"The Constitution is a compendium, not a code; a declaration of faith, not a compilation of laws."¹¹

When future historians reflect on the era that ends with Justice Douglas' retirement, surely his role in shaping the Constitution into a more effective shield for the rights of individuals, and in stressing the Bill of Rights as essential to the maintenance of a free society, will give him a strong claim to a place in the gallery of outstanding American jurists.

¹¹ W. DOUGLAS, *WE THE JUDGES* 429 (1956).