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JUSTICE DOUGLAS' CONTRIBUTION TO THE LAW

During his thirty-five years of service on the Supreme Court of the United States, Justice Douglas has had an opportunity to write opinions on an extraordinary variety of subjects embracing virtually every area of the law. His views in some areas have directed the law's course of development. And even where the Court majority has pursued a different path, Justice Douglas has forcefully left his mark in a multitude of separate opinions. In four short articles below, based on addresses delivered in Washington, D.C., this fall at a Convocation honoring Justice Douglas for his record tenure on the Supreme Court, Professors Emerson, Dorsen, Ares, and Countryman discuss some of the Justice's most important contributions in the areas of, respectively, the first amendment, equal protection of the laws, constitutional criminal law, and business regulation.

THE FIRST AMENDMENT

THOMAS I. EMERSON*

Many of Justice Douglas' contributions to first amendment law are well known and, while often criticized, are widely appreciated. As did Justice Brandeis, he starts from broad philosophical premises that envision the first amendment as the keystone of an open democratic society. He looks upon the specific guarantees of the first amendment—freedom of speech, press, assembly and petition—as but concrete examples of the more fundamental right to full freedom of expression in all its manifestations. And he has never been reluctant to interpret the first amendment in ways which make its great underlying principles meaningful in the light of contemporary events.

Justice Douglas' views, in terms of specific first amendment doctrine, have also been the subject of extensive comment. Like other liberals of his time, he initially endorsed the clear and present danger test as the measure of the government's right to restrict expression. In his dissent in Dennis v. United States, the first Smith Act prosecution to reach the Supreme Court, he even assembled detailed factual data to show that the teachings and writings of the American Communist Party did not in any way threaten overthrow of the government. Shortly after that decision Justice Douglas, following Justice

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2. U.S. CONST. amend. I. Because this article focuses exclusively upon Justice Douglas' treatment of the amendment's provisions relating to free expression, I have omitted textual reference to the free exercise of religion and the establishment clauses.
Black, moved to the so-called "absolutist" position. His view was, and still is, that any conduct that constitutes expression and is not so "closely brigaded with illegal action as to be an inseparable part of it[,]"\(^4\) is entitled to full protection against government prohibition or regulation. Moreover, unlike Justice Black, Justice Douglas took a broad view of what constitutes "expression." The Black-Douglas position has been vigorously denounced as totally unworkable. Nevertheless, assuming one adopts a common sense, functional definition of expression, the full-protection test is not only wholly viable but also better able to effectuate the purposes of the first amendment than any other doctrine yet devised.

It is unnecessary to comment here in detail upon Justice Douglas' fired-up commitment to the principles of the first amendment, his boundless energy in defending that constitutional guarantee in the Supreme Court, and his immense courage in holding to his position without compromising his views to fit the current pressures. All these characteristics of his work are likewise known and appreciated.

There are two aspects of Justice Douglas' contribution to the first amendment, however, that have received less attention than those just mentioned. The first of these is his remarkable ability to grasp the realities of the system of freedom of expression and to formulate legal doctrine which takes those realities into account.

Most constitutional principles have a tendency to lose their vitality on the long journey from the Supreme Court to the streets, to the police station, to the prosecutor's office, and to the local courts. The rules are handed down from on high, in broad and abstract phrases. There is often a failure of communication, however, somewhere between the source and the human beings at the site of application. Moreover, there is an inevitable proclivity in local power structures to ignore, to evade, or to pay lip service only. An institution such as the Supreme Court must engage in a never-ending struggle both to formulate workable rules and to keep a constant counter-pressure upon those who respond by inaction or evasion. The great capacity of the Warren Court to function on this level was one of its principal glories. These efforts have been frequently denounced as "activism" but, in fact, they are essential to transform constitutional principles into effective working rules for everyday life.

Justice Douglas, together with Justice Black, was in the forefront of this movement on the Warren Court and still continues his fight for the reality principle. Nowhere has this approach been more important than in the first amendment area. Justice Douglas has not only grasped the theory of the first amendment; he has also understood the apparatus of repression and sought to

attacked it at every point. There are countless examples in Justice Douglas' opinions, but two extracts will suffice.

Dissenting in *Adler v. Board of Education* in 1952, for example, Justice Douglas perceived the pernicious effects of loyalty oaths for teachers and classroom discussion:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. . . . A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

Or take note of his description in 1972 of the current encroachments on our liberties, as he concurred in the Court's decision that the executive branch could not conduct national security wiretaps without regard to normal constitutional protection. This opinion, it should be remembered, was written before the disclosures of Watergate:

> [W]e are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned. . . .

> When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients.

To some critics, Justice Douglas' sense of reality has seemed overwrought; they have argued that he has overstated the facts and overemphasized the threat to first amendment freedoms. But history has surely vindicated him. To the extent that our system of freedom of expression shows vitality, we owe a great debt to the clear vision and insistent realism of Justice Douglas' opinions.

The second feature of Justice Douglas' analysis in the first amendment field that has not been widely recognized is his emphasis upon the amend-

6. Id. at 510.
ment's personal fulfillment aspects. This development stems ultimately, I believe, from Justice Douglas' comprehension of the way in which our society tends to succumb to its own institutions and vested interests. He has observed how we seem to be losing the capacity to direct our own lives according to rational plan, and how we appear overwhelmed by a managerial structure that is taking us toward disaster according to its own bureaucratic laws rather than being guided by human choice. Justice Douglas has responded sympathetically to those forces in American life that have sought to resist these trends. Thus, he has understood the deeper significance of the civil rights movement, the black revolution, the organizers for peace and, above all, the youth culture. He sees these social phenomena as legitimate strivings toward a more open, more fraternal, more rational, and more self-fulfilled society. And he has sought to transform the basic principles of constitutional law in order to protect and foster these new values against society's effort to suppress them.

All this is reflected in Justice Douglas' view of the first amendment. He sees the first amendment as much more than a weapon to prevent the government from interfering with freedom of speech, press, assembly and petition in narrow terms. He views it not only in Mill's sense as performing a social function in maintaining a marketplace of ideas, or in Meiklejohn's sense as essential to the working of the democratic process, but also as supplying the constitutional grounds for protecting each person in seeking to realize his or her individual potential as a man or woman. He would, through the first amendment, guarantee to each person freedom of the mind, freedom of conscience, freedom of lifestyle, and freedom to expand, grow and be oneself. He is utilizing the first amendment as a counter to all the pressures of modern life toward conformity, bureaucracy and a purely plastic existence. In this respect, Justice Douglas has given a totally new dimension to the first amendment.

One of the earliest statements of these views appears in Justice Douglas' dissenting opinion in *Public Utilities Commission v. Pollak*, arguing in 1952 for a right of privacy:

> Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses and to believe what one wishes are important aspects of the constitutional right to be let alone.\(^\text{11}\)

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8. See J. MILL, ON LIBERTY (1859).
11. Id. at 467-68.