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The Court Years, 1939-1975: The Autobiography of William O. Douglas

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Book Reviews

THE COURT YEARS: 1939-1975. By William O. Douglas. New York: Vintage Books, 1981. Pp. 434. $5.95 (softbound).

Reviewed by James E. Bond†

The Court Years, the last volume of William O. Douglas' autobiography, demonstrates that the Justice was exactly what his judicial opinions showed him to be—an irrepressible and opinionated partisan who could by turns be superficial and profound, disingenuous and candid, cantankerous and charming. His character and temperment might have made him a charismatic President. They surely would have made him an eccentric law school dean. That he narrowly missed both offices and was instead appointed to and remained on the Court for thirty-six years was unfortunate, for he was singularly ill-suited to judicial office. Uninterested in the craft of judging and uncommitted to any principled theory of the judicial function, he contented himself with championing those causes dear to his heart. While the United States Reports thus record his enthuisiasms on the transient social and economic issues of his day, his opinions offer no insight into the difficult art of constitutional adjudication. He certainly offers none in this volume of entertaining, anecdotal recollections of persons, cases, and events.

Justice Douglas confides early in this volume that his first Chief gave him all the insight he needed when Hughes advised him:

> Justice Douglas, you must remember one thing. At the Constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.[1]

The new Justice feigned shock at the advice: "I had thought of the law in the terms of Moses," he says.[2] Douglas was then forty years old. He had graduated with honors from the Columbia Law School

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1. W. DOUGLAS, THE COURT YEARS 8 (1981).
2. *Id.*

where he had studied under Stone. He had taught at the Yale Law School during the heyday of legal realism. He had worked with Tommy Corcoran, Felix Frankfurter, and the other architects of Roosevelt's New Deal. He had played poker with the President and his cronies into the wee morning hours during which the old Court was excoriated for its "horse and buggy" interpretations of the Constitution. Douglas' claim that he nevertheless still could not admit to himself that "the 'gut' reaction of a judge . . . was the main ingredient of his decision" is but one of many such disingenuous claims that at points transform his autobiography into a charming work of fiction.[3]

From beginning to end, Justice Douglas made his gut reactions the lode-star of his judicial decision-making. For example, he insistently urged his brethren to take up some one of the Vietman War protest cases and declare that "presidential war" unconstitutional.[4] For him the issue was simple. The war was wrong; ergo, it was unconstitutional. The question of justiciability did not trouble him because he viewed it as a mere ploy by which the Court could avoid making the hard (politically hard, that is) but right (morally right, that is) decision. With his infallible instinct for the moral jugular of the case, he had no interest in its legal capillaries. Consequently, neither briefing nor oral argument in any particular case would change his mind. The Justice simply wanted a case—any case—through which he could vent his outrage at the Vietnam War. That he could not judicially identify himself with the liberal side of the most important political question of the late 1960's must have frustrated the Justice who, both before and after, managed to record in his opinions his sympathy for every other important liberal cause from free speech to free abortions.

For those many declarations of belief in liberal theology he was—and still is—lionized by his fellow true believers. They hail him for his courageous and compassionate commitment to social justice, apparently believing that a Justice is commissioned to do

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3. *Id.* Among my other favorites is his assertion that during his tenure relations among the Justices were amicable. This was a Court that failed to send a letter to Justice Roberts when he retired because they could not agree on how much regret to express. This was also the Court whose private jeolousies exploded into public recriminations when Justice Jackson, who believed that Justice Douglas and Justice Black's private machinations had denied him the Chief Justiceship, denounced the Justices in a press conference at Nuremburg.

4. W. DOUGLAS, *supra* note 1, at 151-52.

good in an evil world. A Justice, however, takes an oath to decide those cases entrusted to him according to the law. That oath obliges him to labor diligently to ascertain what the lawgiver intended and then honestly to apply the law thus understood to the particular case before the Court. Justice Douglas liked to pretend that he himself worked in that very tradition. The Constitution was not a value free document, he would remind his critics; and he was merely enforcing "specific constitutional guarantees."[5]

Of course, Justice Douglas was correct that the Constitution was not a value free document. The framers believed in self-evident truths, and they self-consciously embodied them in the Constitution. They did not view phrases like "due process," "the privileges and immunities of citizenship," or "republican government" as vague abstractions. For the framers those phrases had a substantive content which reflected the values born of their experiences. Ascertaining those values and thereafter resolving a contemporary case by applying constitutional text in light of those values are among the most difficult tasks of constitutional adjudication. Justice Douglas never discharged those tasks. He simply assumed that the framers shared his values and proceeded to construe the Constitution as if he had written it. He doubtless would have winked in agreement with another Hughes statement: "We live under a Constitution, but the Constitution is what the judges say it is."[6]

Justice Douglas said the Constitution was a "plan . . . to take government off the backs of the people when it came to specified civil rights."[7] He applied that philosophy with such crude vigor that he invariably voted against the government in tax cases, for example. No Hamlet, he. His opinions on obscenity reflected the same simplistic literalism. Presumably, the right to traffic in pornographic materials was one of the "specific civil rights" for which the patriots had shed blood. The Justice thus insisted that the first amendment prohibited local communities from forbidding or otherwise restricting the sale of obscene materials. What the first amendment says is that Congress shall make no law prohibiting freedom of speech. Justice Douglas applied the prohibition literally because that construction fit with his general libertarian beliefs,

5. *Id.* at 52-53.
6. M. PUSEY, CHARLES EVANS HUGHES 204 (1951).
7. W. DOUGLAS, *supra* note 1, at 53.

not because any evidence suggested that the framers favored a free market in smut.

Although he claims to have parted company with Justice Frankfurter when his once hero and later nemesis suggested that they join forces to rewrite the Constitution, he admits joining forces with his ideological bedfellows Black, Murphy, and Rutledge in the hope of imposing a libertarian gloss on the document.[8] Indeed, one of his great regrets is that what the Justice calls "the libertarian bloc" failed to prevail. The "bloc" did not fail for want of Douglas' scheming although he naturally denies conniving like "Felix the fixer." Swelling with pride he declares: "I was probably the one Justice in the long history of the Court never to proselytize."[9] The statement is astonishing, first, because he could not have known how most of his predecessors on the early Courts behaved and, second, because his own descriptions of his relationships with his colleagues belie the statement. His vain posturing, as in the *Rosenberg* case,[10] may have compromised his politicking; but he worked as hard as any of his result-oriented colleagues to put together a five person coalition.

Even those who dismiss resort to the lawgiver's intent as hopelessly naive or inevitably futile must have reservations about result-oriented adjudication as Justice Douglas practiced it. A court which believes that the social utility of its decision alone legitimates it must still articulate a rationale for the result. A legal system cannot function efficiently or justly unless the rationale of the law is coherent and intelligible. Writing that kind of opinion is hard work, and Justice Douglas refused to do it. Indeed, what he came to prize most about his job was that it demanded so little of his time that he could devote himself to his "many other interests."[11] His cavalier attitude toward opinion writing is best revealed in his own account of Justice Brennan's travail in *Baker v. Carr*:

> The Conference vote on whether the question of reapportionment was "political" rather than "justiciable" was five to four. Justice Stewart was one of the five, though his vote was tentative, dependent on whether

8. *Id.* at 28, 95.
9. *Id.* at 88.
10. *See, e.g.*, Rosenberg v. United States, 345 U.S. 989 (1953).
11. W. DOUGLAS, *supra* note 1, at 4.

> thorough research and a close analysis of the cases would disclose that the question was not foreclosed by prior decisions. If it had been previously decided that the question was "political," he was inclined to follow precedent and not change course in such turbulent times and on such a controversial issue.
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> Chief Justice Warren assigned the opinion to Justice Brennan on the theory that if anyone could convince Stewart, Brennan was the one. Brennan worked long and hard on the opinion, its length being due to the exhaustive and detailed examination of precedents which he undertook. When he finished the first draft he showed it to Stewart, who approved; and there was a broad Irish grin on his face when he told me that the fifth vote was secure. He then circulated the opinion and quickly obtained the concurrence of the Chief, Black and myself. The dissents were circulated; and just before the Conference at which *Baker v. Carr* was to be cleared for Monday release, Tom Clark circulated a concurring opinion. Without talking to anyone, he had changed his mind and written a short concurrence, which, if it had happened earlier, would have made Brennan's long, scholarly but tedious opinion unnecessary.[12]

If Justice Douglas' sole ambition was to avoid the stigma of writing tedious opinions, he achieved it. He was no more tedious than he was conscientious. Justice Douglas' harsh description of Justice Jackson's opinions in fact describes his own opinions far more accurately.

> He loved to write essays and publish them as opinions, not necessarily to illuminate a problem, but to embarass or harass a colleague. In that sense he was petty, but some of his opinions are enduring and contain ringing declarations of the democratic ideal.[13]

Justice Douglas seemed not to understand that the rule of law inevitably depends at some point on the rule of men, and that in our system that point occurs when the Court exercises its power of judicial review. We have staked our faith on the ability of life-tenured judges to exercise that power fairly, honestly, and responsibly. Justices like Black and Frankfurter struggled manfully to articulate a theory of judging that would reconcile the Court's power of judicial review with democratic theory. Long after succeeding generatons have stopped debating the substantive merits of *Baker v. Carr*[14] (reapportionment) or *Griswold v. Connecticut*[15] (privacy),

12. *Id.* at 135-36.
13. *Id.* at 32.
14. 369 U.S. 186 (1962).
15. 381 U.S. 479 (1965).

they will still study Frankfurter's and Black's respective dissents in those cases because those Justices addressed not only the merits but the only enduring question in American constitutional law: the proper role of the judiciary in a free society. Justice Douglas' sole contribution to that question was to say in effect that it didn't make any difference. And that is why, in the end, he didn't make any difference.