JUSTICE DOUGLAS AFTER FIFTY YEARS: THE FIRST AMENDMENT, McCARTHYISM AND RIGHTS

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Fifty years ago, when Franklin Roosevelt elevated William O. Douglas to the Supreme Court, the Court was rapidly dismantling the constitutional protection of all economic rights. The battle over *Lochner* was coming to an end because the one thing that united all New Deal Justices was the belief that legislatures had to be free to seek a better and fairer economic environment. Douglas fully concurred; indeed, the majority of the major cases withdrawing judicial scrutiny from economic transactions bear his name.[1]

The end of one jurisprudential battle typically marks the beginning of the next. With New Dealers firmly in control of the judicial power, the Justices split over how to use it. Just as modern politicians have tried to apply the lessons of Vietnam, the New Deal Justices were determined to apply the lessons of *Lochner*. But, again as with Vietnam, different people drew different lessons. One faction, rallying behind Felix Frankfurter, found the lesson to be the evils of judicial activism. The lesson translated into a jurisprudence emphasizing procedural regularity on one hand and deference to legislative action on the other. For another faction, the lesson of *Lochner* was the error of protecting economic rights. This simple lesson had an equally simple solution: cease protecting the wrong rights. Thereafter the Court could protect its own special constituency groups—blacks, labor, urbanites—as it thought fit.[2]

During the 1950s and early 1960s a new jurisprudence emerged at Harvard largely tracking the Frankfurter position. Although ultimately unsuccessful in holding back the Warren Court, the

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1. 313 U.S. 236 (1941); 336 U.S. 106 (1949); 342 U.S. 421 (1952); 348 U.S. 483 (1955).

2. Shapiro, *The Supreme Court: From Warren to Burger* in THE NEW AMERICAN POLITICAL SYSTEM 179, 188-94 (A. King ed. 1978); Shapiro, *Fathers and Sons: The Court, the Commentators and the Search for Values* in THE BURGER COURT 218, 218-20 (V. Blasi ed. 1983); Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1989).

Harvard jurisprudence had an important impact on legal elites and therefore on the legitimacy of the judicial product.

Today, in the continuing debate about the Warren Court legacy, the battle over rights has reemerged again. The Federalist Society looks to undoing the Warren Court initiatives by adopting a Frankfurterian-like view and freeing legislative bodies from most, if not all, restraints. On the left, the dominant elite strain of the Critical Legal Studies movement rejects the rights-based jurisprudence associated with Douglas and the Warren Court.[3] In between, liberal scholars search from moral philosophy to civic republicanism to define the appropriate scope of constitutional rights.[4]

By longevity and behavior, Douglas's career uniquely spans these battles. He progressed from a mainstream New Deal liberal to anti-establishment hero, and in the process he spoke to each of the rights' debates. Although his opinions in *Skinner*, *Griswold*, and *Roe v. Wade* assist significantly those who would create constitutional rights on the basis of moral philosophy, it is the first amendment where Douglas contributed most to the idea of judicial protection of rights. Writing in the New York Times on Douglas's retirement, Anthony Lewis aptly observed: "Freedom of thought and expression was his best known theme as a judge."[5] It is also a theme that, set in the context of the debate over rights, illustrates Douglas's significance as a Justice.

I

Years ago, on the occasion of his thirty-fifth anniversary of appointment to the Supreme Court, I wrote an article entitled *Evolution to Absolutism: Justice Douglas and the First Amendment*[6] in an attempt to correct the then-prevailing view (promoted by Douglas himself) that Douglas had always been at the frontiers of first amendment protection. Douglas joined the Court as a mainstream New Deal liberal quite content to work within Holmes's clear and present danger test. But with the beginning of McCarthyism,

3. Tushnet, *An Essay on Rights*, 63 TEX. L. REV. 1363 (1982); Levinson, Book Review, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1468-69 (1983) (reviewing THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982)).

4. Frank Michelman, the only person who has written a pair of Supreme Court Forewords, has devoted one to each of the theories: Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

5. Lewis, *Mr. Douglas: 36 Years Out on the Frontier*, N.Y. Times, Sun. Nov. 16, 1975 (Week in Review), at 2, col. 4.

6. 74 COLUM. L. REV. 371 (1974).

Douglas began a progression that eventually led to his mislabeled liberal absolutism.

Because such progressions do not "just" happen, my other goal was to identify the causes of his leftward evolution. I suggested that one was the passing from the scene of his patron FDR; another was his summer travels in the third world; and a final one was experience *simpliciter* which by the mid-1950s caused him to believe that restrictions on speech were invariably motivated by fear, or worse, and were virtually *per se* unconstitutional. I omitted one other factor: Understandably, if not entirely commendably, I pulled my punches and failed to attribute part of the evolution to the waning of Douglas's presidential ambitions. Without that shift, Douglas's place in the history of the Court would be more open to doubt.

On the same occasion, Thomas Emerson concluded that Douglas made a major theoretical contribution—indeed a "totally new dimension"[7]—to freedom of expression with his emphasis on individual fulfillment as one of the cornerstone values protected. In like vein Vincent Blasi was able to find the single best example of his checking value theory in a Douglas opinion.[8] Nevertheless, it was for others—the Emersons, the Blasis, the Meiklejohns—to piece together the theoretical structures of the first amendment. Douglas's opinions would naturally be helpful, but as William Cohen so accurately notes, Douglas was a pragmatist; he left theory building to others.[9]

Stated bluntly, Douglas's doctrinal contributions are not impressive. Nor is it a matter of passage of time, the normal fading of an ex-Justice. Douglas's many critics, both while he was sitting and afterwards, were right. His opinions were not models; they appear to be hastily written; and they are easy to ignore. For those of us who think Douglas was correct in his results and instincts, this is too bad.

The reasons for his doctrinal insignificance are not news to anyone: one was legal realism and the other, by no means unrelated, was his contempt for what he saw as the legal establishment—the Harvard Law School and its law review alumni association functioning as the American Law Institute. So long as he perceived that the criticisms of his opinions came from a conservative legal establishment, he did not care. His pejorative refer-

7. Emerson, *Justice Douglas' Contribution to the Law: The First Amendment*, 74 COLUM. L. REV. 353, 356 (1974).

8. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 621.

9. Cohen, *William O. Douglas*, 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 579, 580 (L. Levy ed. 1986).

ence to doctrinal argument in Supreme Court opinions as "Harvard fly paper" expresses the contempt he felt for his critics.[10]

Douglas drank at the well of legal realism too long and too thoroughly. With the other founders of the movement he stripped away the silly doctrinal shrouds that marked legal activities. In the process he concluded that doctrine was irrelevant, the explanatory cloak for decisions reached on more significant grounds. Whether the subject was business law (his academic specialty at Yale) or the rapid dismantling of the constitutional superstructure of the *Lochner* Era, Douglas did not—indeed he could not—take doctrine seriously.

Perhaps he was right not to take doctrine seriously, but as G. Edward White notes, this may have been an insight too fundamental and vastly too unsettling for others to accept.[11] Thus he failed to appreciate that others, including those not wedded to the judicial conservatism of Harvard, did take doctrine seriously.[12] With his acknowledged abilities he could have played the doctrinal game superbly, but he saw doctrine as a waste of time and he had non-legal activities that were more pressing than authoring rationalizations for those silly enough to believe them.

Douglas, the legal realist, turns out not to have been much of a judicial realist. He had to know that almost everyone else believed doctrine to have a part in the legal system. By wholly eschewing doctrine, he not only suffered a loss of professional esteem, he suffered a loss of influence. It is not easy to explain why a man of such remarkable abilities would voluntarily do this, and nothing he has said offers help.

My own view is that he was the quintessential executive. He believed in and exemplified efficiency; he knew how to make decisions, even tough ones. As Chairman of the Securities and Exchange Commission he once remarked: "It's goddamn lonely in the front-line trenches these days."[13] One of his most hostile critics, former Harvard Dean Erwin Griswold, recognized Douglas as a "great and active [New Deal] administrator."[14] The problem was, as White notes, that the executive strengths that propelled his mete-

10. *Id.* at 580.

11. White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 84 (1988).

12. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 UCLA L. REV. 716, 749 (1969): "As one who has previously expressed mild dismay at the way Justice Douglas writes his opinions, let me say that I understand better now. Having said that I confess that I still yearn for a little more explanation . . . you can take the boy out of Harvard Law School, but . . . ."

13. Rodell, *Bill Douglas, American*, 61 AM. MERCURY 656, 665 (1945).

14. Griswold, *Foreword* to B. WOLFMAN, DISSENT WITHOUT OPINION xii (1975).

oric rise, were not judicial strengths, with a single exception, to be discussed at length in the next section: the willingness to stand up and be counted when doing so had obvious costs and seemingly few benefits.

Douglas was a man of action, not reflection. He wrote his dissents before the author of the majority had put pen to paper; he chafed while waiting for the Chief Justices to assign majorities; he began writing his own instantly—I mean that literally not figuratively—on receipt of an assignment.[15] In a large, unfortunate sense, Douglas was miscast in the judiciary. Although elevation to the Supreme Court seems the appropriate reward for a president to bestow on an outstanding lawyer, in Douglas's case higher executive office would have better suited his abilities. He was temperamentally incapable of functioning within the contemplative world of the mid-twentieth century judiciary.

If legal realism was Douglas's undoing when it came to doctrine, it turned out to be his strength in casting his vote. The sine qua non of legal realism was the belief that doctrine obscured more than it explained about why a court decided as it did. Thereafter, legal realists split into a variety of approaches to the law.

Douglas was a functionalist. While at Yale he remade the teaching of corporate law by focusing on how corporations behaved. He believed, in what now seems an obvious point, that if you did not understand what corporations were doing and why they were doing it, you had no chance of successfully regulating their behavior. He studied political, economic, and social institutions in which law and business intersected to better understand contemporary problems. As part of his study he turned to the fledgling empirical social sciences for whatever assistance they would yield. The same held true when he went to the New Deal and from there to the Court.

Any Justice who successfully searches out the underlying facts of litigation will be rewarded. But as important as facts are generally, nowhere are they as crucial as in the first amendment area. Difficult cases often turn on determinations of dangerousness, and any mistake made by miscalculating or overemphasizing the danger turns what should be constitutionally protected activity into criminal conduct. Furthermore, as Douglas recognized, speech is often fragile; self-censorship comes too easily. A mistaken conviction of a dissenter may not only silence him but many others as well, who now have reason to fear similar police action against themselves.

15. Powe, *Mr. Justice Douglas*, 55 WASH. L. REV. 285, 286 (1980).

Douglas saw no inherent limits on where he could look for facts. First came the record—what happened and why. But this would hardly set him apart from either a Brennan or a Harlan. Vastly more important in the first amendment was Douglas's sensitive antennae for the preconditions for freedom of speech. Emerson aptly singled out Douglas's "remarkable ability to grasp the realities of the system of freedom of expression . . . understand[ing] the apparatus of repression."[16]

Consider Douglas's separate opinion in *Keith*. At issue was the constitutionality of the Nixon Administration's domestic national security wiretapping. While the Court agreed with Douglas, he went far beyond his brethren in describing the domestic climate:

> [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, and 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.[17]

What is striking, even at this distance, is that this wholly unjudicial and seemingly injudicious blast is so accurate in describing the Nixon administration. Yet Douglas's opinion was delivered a month *before* the Watergate break-in and therefore before any public revelation of Nixon's encroachment on civil liberties. Douglas's *Keith* opinion demonstrated his comprehension of what was really happening in America.

II

Keith, of course, harkens back to *Dennis* and the McCarthy Era when Douglas made his major jurisprudential contribution: demonstrating for all to see—and many to condemn—that a Justice could defend civil liberties during crisis times. Such action had neither a long nor distinguished lineage. It last had been seriously attempted by a discredited Roger Taney acting as a visible fifth column on behalf of the Southern cause during the Civil War.

Furthermore, as I will soon discuss, the prevailing legal theory was that it could not and should not be done; judges should intervene only when government actions were manifestly unreasonable. The Japanese exclusion cases[18] (the principal case written by Black,

16. Emerson, *supra* note 7, at 354.
17. 407 U.S. 297, 329-31 (1972).
18. Korematsu v. United States, 323 U.S. 214 (1944); Hirayabashi v. United States, 320 U.S. 81 (1943).

joined by Douglas) demonstrate how circumscribed a class "unreasonable" can be, especially in times of great national stress. By going against the grain during the McCarthy Era, Douglas (and for this part of the article everything said about Douglas applies virtually equally to Black) suffered a professional loss of reputation, but also helped discredit the prevailing ideology, although realistically in the first amendment area the ideology self-destructed in a series of cases beginning in 1959.

Dennis, charging the Communist Party leadership as a seditious conspiracy, is the key case of the McCarthy Era. If hysteria were ever justified by unanticipated events, it was justified by the events between the *Dennis* indictment in July, 1948, through trial and conviction, which took almost all of 1949, to the two appellate affirmances in 1950 and 1951: the Berlin blockade (1948); Chiang Kai-shek fleeing from Mainland China (1949); the first Soviet atom bomb (1949); Klaus Fuchs' confession (1950); Chinese intervention as MacArthur approached the Yalu (1950); and the indictment (1950) and conviction of the Rosenbergs (1951). Frankfurter put the case into this perspective in his concurring opinion when reflecting on the appropriate judicial function: "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day. . . ."[19] One way or another all but Black and Douglas agreed with Frankfurter that the Smith Act could be validly applied to the leaders of the Communist Party in the circumstances of post-War America.

Douglas summarized the majority vote acidly. "Only those held by fear and panic could think" that the Communist Party was an internal menace.[20] As he and Black would be called upon to note with unfortunate regularity, the methods of a communist state were used to fight internal communism. Thus Douglas quoted Vishinsky's *The Law of the Soviet State* for the proposition that there could be no freedom of speech for foes to socialism and added that "[o]ur concern should be that we accept no such standard for the United States."[21]

With *Dennis* the decapitation of the Communist Party leadership was complete, as was the constitutional validation of the government program. Unions were purged with the assistance of § 9(h) of Taft-Hartley,[22] and government employees fell victim to the Federal Loyalty-Security Program (sustained in *Bailey v. Rich-*

19. *Dennis*, 341 U.S. 494, 525 (1951).
20. *Id.* at 589.
21. *Id.* at 591.
22. American Communication Assn. v. Douds, 339 U.S. 382 (1950).

ardson)[23] which relied heavily on the Attorney General's List basically sustained a few weeks prior to *Dennis* in *Joint Anti-Fascist Refugee Committee v. McGrath*.[24] The issues that remained to be decided were: (1) did the first amendment place any limits on the new type of legislative investigation that HUAC was pioneering; (2) was it relevant that a person joined the Communist Party for political rather than revolutionary reasons; and (3) would the parallel state loyalty-security program receive a like imprimatur to that of *Bailey v. Richardson*? The first of these questions would wait until the end of the decade and the settling of the constitutionality of Southern segregation. The latter two were ready for resolution almost immediately, the membership problem being presented in the context of exiling long-term resident aliens.

In 1939 the Court had held on statutory grounds that an alien who had resigned from the Communist Party could not be deported based on past discontinued membership *simpliciter*.[25] Congress responded with the Alien Registration Act of 1940 by making it clear that membership in an organization committed to the overthrow of the government was sufficient ground for deportation. The Act was unmistakably retroactive: membership may have been legal; it may have been innocent; it may even have been terminated prior to the Act; none of that was relevant. In *Harisiades v. Shaughnessy*[26] the Court sustained the Act on facts showing (in at least one case) that membership was innocent, triggered by a specific injustice the Party was protesting at the time.

When Congress passed the infamous McCarran Act in 1950, one provision relieved the Government of even the necessity of proving the Communist Party believed in the overthrow of the government; the Act made past membership in the Party grounds for deportation. Intentionally or not, the Act reached membership during World War II when the Party actively supported Roosevelt's wartime policies and was urging cooperation. In *Galvan v. Press*[27] the Court sustained deportation of an alien who, having lived and worked (and married) in the United States for thirty years, had the misfortune of joining the Party during the War, even though he ceased membership in 1946, some four years before the McCarran Act was passed. Douglas and Black were able to use the retroactive harshness of the statutes as well as the appalling facts to dissent effectively, even in the face of a long-standing rule of com-

23. 341 U.S. 918 (1951).
24. 341 U.S. 123 (1950).
25. Kessler v. Strecker, 307 U.S. 22 (1939).
26. 342 U.S. 580 (1952).
27. 347 U.S. 522 (1954).

plete congressional power. The majority's sole response to the hardship and injustice was to note that others had suffered hardships; after all, the Japanese exclusion cases showed we could treat citizens badly too.[28] And the fact is that Douglas and Black dissented alone; aliens remained an easy target for majoritarian wrath and xenophobia.

Two cases sustaining facets of New York's loyalty-security program showed nuanced distinctions were not of great interest to the majority of the Court. *Adler*[29] brought to the Court the Feinberg Law with its prima facie presumption that membership in a listed organization was grounds for taking a teacher out of a classroom. Resting on the right-privilege distinction—it is after all a privilege not a right, to teach our young—and embracing guilt by association as no other case ever did, *Adler* sustained the law in its preenforcement stage. Frankfurter, in dissent, wished to wait and see how listing and then allowing a teacher to explain membership would operate in practice. The other eight knew, although only Douglas and Black thought that important first amendment rights—not to mention careers—would be sacrificed.

More than a hint of how the Feinberg Law would operate came when New York stripped Dr. Edward Barsky of his right to practice medicine for six months because he had been convicted of failing to turn over to the HUAC the subpoenaed papers of the Joint Anti-Fascist Refugee Committee, an organization he had joined after he returned from treating the Loyalists wounded during the Spanish Civil War. Everyone agreed Barsky was fully competent to practice medicine. But of course that was not the point: fully competent Communists and fellow travellers were being denied employment across the nation; that was the whole point of the loyalty-security programs. Douglas closed with another plea: "When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us."[30]

And in fact, largely on technical, nonconstitutional grounds the Court began to do so for several years beginning in 1955, thereby alleviating in individual cases the hardships inflicted. Not until the end of the decade would the major constitutional issues return. But before looking at how later cases affected perceptions of the judicial role, it is necessary to discuss the legal ideology that came to the fore in the 1950s.

28. *Harisiades*, 342 U.S. at 591.
29. 342 U.S. 485 (1952).
30. Barsky v. Board of Regents, 347 U.S. 442, 474 (1954).

III

The creative energy of the realist movement made Yale the dominant intellectual force in American law. But faculty losses to government service and private practice and the desire for a Rule of Law—not to mention the more immediate problem of distinguishing the American judicial system from European totalitarianism—placed such strains on realism that the intellectual mantle of American law returned to Harvard. Just as Yale had been the place to be in the 1930s, Harvard became the place in the 1950s.[31] There, a generation of scholars firmly committed to the legitimacy of both the New Deal and the Rule of Law struggled to create a new jurisprudence recognizing realist insights but nevertheless striving to cabin judicial discretion in ways consistent with democratic governance.

The new process jurisprudence[32]—as announced in a series of articles throughout the decade in the *Harvard Law Review*, as well as two seminal casebooks coauthored by Henry Hart, had an intriguing process formulation.[33] First and foremost it stressed the reasoning process used by judges to reach and explain results. By 1959, separate articles by Hart and one of his co-authors, Herbert Weschler, had sharpened this demand. They saw the Supreme Court as engaged in a collective reasoning process, achieving the correct result by a mature judgment that would then be explained in an opinion written so that all readers could see that the relevant considerations had been vented fully.[34] Because judges were necessarily *not* the predominant lawgivers when significant, rather than interstitial, choices were to be made, it was essential that they give due deference to what had gone before. Respect for doctrine became primary.

Beyond, but a necessary part of, its doctrinal emphasis, the new jurisprudence would further limit discretion by institutional allocation. That is, on issues where other institutions have superior knowledge or fact-finding abilities, judges should defer. The judici-

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31. So much so, that much to Douglas's dismay Yale appeared to play catch up by appointing a Harvard graduate as dean and hiring Harvard-trained Frankfurter clerks for the faculty. J. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 337-38 (1980).

32. I have taken the term from G.E. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976); White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 827 (1986).

33. H. HART & H. WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); H. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

34. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ary did not have to "roll over and die," but simply recognize as Stone had said in 1936 that judges are not the only actors who have the capacity to govern. Much of the judicial function would be process oriented: insuring that institutions maintain procedural regularity and choosing the institution best suited for deciding the question at hand. The central allocational fact in constitutional adjudication was that the judiciary was the inappropriate institution when the issues were political, that is, when the outcome "depended on a choice to interpret the social world in one way rather than another."[35] Thus a deference to the outcomes of the democratic process was an inherent facet of the new jurisprudence.

Because the new jurisprudence was the creation of New Dealers, there was no necessary reason why Black and Douglas should have fallen outside its pale. But its demands pushed in directions Black and Douglas could not go even if they had wished. A demand for deference to various decision-makers, be they the president, Congress, state legislators, HUAC, or the Board of Regents in New York, could not be squared with what Black and Douglas felt was their duty to defer to the Constitution. Recognizing the superior competence of HUAC to ascertain the needs to invade political associations did not seem to them to be particularly apt.

Surprisingly, the Harvard scholarship of the 1950s did not touch the communist cases.[36] For example, consider the monumental attempt of Hart and Sacks "to describe American law comprehensively, including all of its major institutional settings and accounting for the various permutations of interrelationships between institutions."[37] Their casebook about public law and private ordering avoided issues of constitutional law. Its table of contents reflects areas where constitutional law might intrude, but these are undeveloped. Thus its table of contents has a section on legislative investigations. But when the reader gets to that section in the tenta-

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35. Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561, 594-605 (1988).

36. An important exception was Harvard Dean Erwin Griswold's timely publication of three speeches defending the right to claim the privilege against self-incrimination before legislative committees. E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). The speeches had two principal points: (1) that an innocent person could feel the need to claim the fifth; and (2) that the legislature had the responsibility to more actively supervise and regularize the investigating committee behavior, especially when a sub-committee consisted of a single member sitting. The volume called for no judicial changes in settled law and reflected strongly the process emphasis of the new jurisprudence. Interestingly, Griswold recognized that the fifth was often being taken because of the first, *id.* at 60-61, but did not try to discuss the issue in first amendment terms, an important, and correct, tactical choice given the currency then of the pejorative "Fifth Amendment Communists." When it did come time to consider the first, however, Griswold was nowhere near so solicitous. *See* Griswold, *Absolutes in the Dark*, 8 UTAH L. REV. 167 (1963), and text at notes 49-53.

37. Peller, *supra* note 35, at 591-92.

tive edition, the authors note it "will not be developed in this edition."[38]

The scholarly focus, and not only that of Hart and Sacks, was on other areas where Black and Douglas were not as far apart from their brethren. But that did not help the reputations of either Douglas or Black for several reasons.[39] One was Frankfurter, who helped create process jurisprudence and in turn for whom process jurisprudence was made. He had been a friend and colleague and teacher of some of its creators; others had served apprenticeships as his law clerks. His energy and magnetic personality made him the role model that all should follow.[40] At Harvard Law School he was perceived as precisely what a judge should be: intelligent, undogmatic, disinterested, but passionate. He excelled in those areas where judicial creativity was called for, but understood fully the necessity of deference to democratic institutions when value-laden decisions were at issue. A belief flourished that Frankfurter—"Our Felix" as he was known at Harvard Law School—was a shining light of Western jurisprudence. It did not take a Harvard education to see that he was voting differently in the first amendment McCarthy Era cases than Black and Douglas.[41]

Process jurisprudence spread less through scholarship—no one could accuse the Harvard constitutional law faculty of that era of being prolific—than by word of mouth. Process jurisprudence also took time, at least fifteen years, to mature. Thus not everyone at Harvard adhered to it and the accretion of its tenets was uneven. But a basic rallying point was that Black and especially Douglas were not of the caliber to be taken seriously as judges. One law professor who was a Harvard Law School 1950s LL.B. and an early 1960s teaching fellow, described an overwhelming ambience of real hostility to Douglas and Black; conversely, a president of the

38. H. HART & A. SACKS, *supra* note 33, at 1037.

39. Obviously I was not at Harvard during the period under discussion. In putting this together I have relied on what was written and an oral tradition. As to the latter, as a former Douglas clerk, during my early years in teaching, I was regaled by stories of the way Harvard professors would take pot shots at Douglas. I could remember the attitude, if not the story or the story teller. In writing this I have talked to a number of law professors who were at Harvard during the period and then given each of them my draft with the express injunction to correct me in any ways necessary. Those I have consulted include Vern Countryman, Norman Dorsen, Jack Getman, George Schatzki, Ernest Smith, and Russell Weintraub. What appears in text is the outgrowth of this process although the final choice of language and emphasis was, of course, mine. *See also*, Dorsen, Book Review, 95 HARV. L. REV. 367, 385 & n.101 (1981).

40. "To Felix Frankfurter who first opened our minds to these problems" is the Dedication in H. HART & H. WECHSLER, *supra* note 33, at ix.

41. It was well known, of course, what Frankfurter thought of Black and Douglas. *See* Urofsky, *Conflict Among the Brethern*, 1988 DUKE L.J. 71.

Harvard Law Review described it as a generally accepted dogma that Frankfurter was right on issues of constitutional law. Wherever Harvard graduates taught or practiced law, Frankfurter was praised while Black and Douglas were treated with scorn and contempt. Their votes, their analyses, were simply not the workings of "first-rate lawyers."[42]

In his forthcoming book about American legal education, my colleague Jack Getman (Harvard Law School '58) writes of going to Harvard after City College of New York and a two-year military enlistment, with Douglas and Black as his legal heroes. But he soon discovered that they "turned out to be woefully deficient in all . . . technical professional ways."[43] Getman wryly summed it up: "One of the things that makes you proudest of a Harvard legal education is that you can explain why Douglas is wrong."[44]

I have been told of one *Harvard Law Review* officer who was selected as one of Black's law clerks, an incredible honor given both the limited number of slots and the stark unevenness of the sitting Justices. Yet faculty members ridiculed him for being willing to waste a year of his life working for Black. (There is no comparable Douglas story because Douglas, to my good fortune, always went West for law clerks.)

In 1963, the *Harvard Law Review* commissioned an article by Yale Professor, and former Black clerk, Charles Reich, to commemorate Black's twenty-fifth anniversary. The resulting article, *Mr. Justice Black and the Living Constitution*,[45] is magnificent in scope and substance, demonstrating Black's commitment and ability to make the eighteenth-century Constitution work in mid-twentieth century America. Yet the 1963 president of the *Review* reports that there was "faculty disgruntlement (which we thought narrowly conceived) about both the subject and the reasoning."[46] From the faculty perspective, what Black (and Douglas) thought and did was not fit for discussion in the *Harvard Law Review*, except perhaps as a subject of ridicule.

IV

The Court, however, was about to reenter the debate and would do so in a way that would profoundly change perceptions.

42. The phrase is Hart's. *See* P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 53 (1982).

43. J. GETMAN, NOTES OF AN ACADEMIC DISSIDENT (forthcoming).

44. Getman to author in conversation, October 4, 1988.

45. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

46. Kester, *Faculty Participation in Student Edited Law Reviews*, 36 J. LEGAL ED. 14 (1986).

As the 1960s were about to begin, the Supreme Court had returned to constitutional issues in communist cases. The major opinions were written by Harlan (who was perceived to be a weaker, junior version of Frankfurter), joined by Frankfurter since the analysis followed his *Dennis* opinion, with Black and Douglas (and now Warren and Brennan) dissenting. These cases resulted in an academic debate where it became apparent, as Duncan Kennedy's student note would subsequently point out, that "a number of enthusiastic 'balancers' have also been strong advocates of 'principled' decision-making [the process jurisprudence school]."[47] Once again, however, the adherents of process jurisprudence concluded that Black and Douglas had been bested.

In dissent, Black and Douglas had argued that the first amendment was an absolute. The majority, by contrast, viewed that claim as preposterous and held that balancing all the various interests at stake was the appropriate way of solving the issue. The academic community accepted the debate on the terms set by the Justices. On those terms Black and Douglas "had" to be wrong. It was simply inconceivable that "all" speech was "absolutely" protected under the Constitution. Numerous counter-examples were possible—and Harlan supplied them in a single devastating and unanswered footnote[48]—and if Black and Douglas believed, for example, that perjury was the exercise of first amendment rights, then they were not merely wrong; their position was not worthy of discussion. Harvard's dean, Erwin Griswold, made the point wonderfully when he recalled a large illuminated sign outside a New Orleans church which read: "God said it. We believe it. That's all there is to it." The absolutism of Black and Douglas, he added, "seems a similar approach."[49]

With Black and Douglas confirming the Harvard view that they were brain-dead, it was easy to conclude that ad hoc balancing "had" to be right; law is an exercise of balancing and it ought not come as a shock to find that that applies to the first amendment as much as the fourth or fifth. What was not considered was that Black and Douglas were using "absolutism" as a summation of how the balance worked out after a decade of deciding cases growing out of the hysteria.

47. Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 852 n.39 (1969).

48. 366 U.S. 36, 49 n.10: "That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms."

49. Griswold, *Absolutes in the Dark*, 8 UTAH L. REV. 167, 172 (1963).

Nor would process jurisprudence allow absolutism to be used as a rhetorical device to express an attitude about how first amendment adjudication should be approached,[50] because if absolutism was rhetorical, it would "gravely . . . deprecate and damage the process" of decision-making which must be "as deliberate and conscious as men can make it."[51] Both possibilities, rhetorical or sub silentio summation of experience, were incompatible with the premises of process jurisprudence; furthermore Black and Douglas, by their willingness to reassess the need for action, were invading the legislative province. Thus they were taken literally, which, not surprisingly, confirmed existing prejudices.

Nor did process jurisprudence adherents ask whether, in operation, balancing was also a rhetorical cover. In a sense, the majority opinions seemed far more absolutist than Black and Douglas. The majority was absolutely convinced that no matter what was placed in the scales to be balanced, when the government was on the prowl for communists, the balance was always to favor the government. Black and Douglas pointed that out in their dissents, and Black's dissents powerfully showed how a serious "balancer" would attempt to deal with the factors. The opinions in *Barenblatt*,[52] *Wilkinson*,[53] *Konigsberg*,[54] and *Anastaplo*[55] make clear for any who would read that Black and Douglas were not only right in their criticism of the balancers' technique, but in the process were validating their positions taken in the earlier cases. These cases, coming when and as they did, would make Douglas and Black heroes to law students as the decade progressed.

Lloyd Barenblatt had been called before HUAC in 1954 and was questioned about whether he had been a Party member as a graduate student at Michigan after World War II. Barenblatt eschewed the fifth and took the first instead. Harlan's majority embraced the competency point of process neutrality by stating that the Court would not pass judgment on either the wisdom or efficacy of the activities of HUAC. Instead the Court announced it must decide the case by "balancing" the "competing private and public interests at stake in the particular circumstances shown." For the next seven pages the Court discussed the "public interests," i.e., those favoring disclosure and then, without mentioning a single pri-

50. Charles L. Black, *Mr. Justice Black, the Supreme Court and the Bill of Rights*, HARPER'S, Feb. 1961, at 63.

51. A. BICKEL, THE LEAST DANGEROUS BRANCH 96 (1962).

52. 360 U.S. 109 (1959).

53. 365 U.S. 399 (1961). The opinion of the Court was written by Stewart.

54. 366 U.S. 36 (1961).

55. 366 U.S. 82 (1961).

vate interest—or ever considering that the first amendment might be a "public interest"—it bluntly announced in the penultimate paragraph: "We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."[56]

Black and Douglas demolished the majority, first by demonstrating that balancing was inappropriate and then by showing that if the Court really believed balancing was valid, a proper balance would have resulted in reversal of Barenblatt's conviction. Had the balancing debate ended here, *Barenblatt* might have passed as a somewhat belated validation of HUAC, years after the issue was relevant. But in several 1961 cases the same majority made clear that when it said "balance" in the context of any mention of the "c"-word, it meant that the government was to win no matter what the facts.

Wilkinson had been a long-time anti-HUAC activist. When HUAC went to Georgia in the summer of 1958, Wilkinson arrived a week earlier to assist those protesting the hearings. Within an hour of his registering at a hotel, he was served with a subpoena to appear. The essential distinguishing factor from *Barenblatt* was that Wilkinson was in Atlanta to protest HUAC and would not have been forced to appear had he been elsewhere; his "crime" was protesting HUAC in the late 1950s. Was this relevant? The majority, adhering to its balancing, said no: "the First Amendment claims pressed here are indistinguishable from those considered in *Barenblatt*. . . ."[57]

"Indistinguishable" would appear again in *Konigsberg* and *Anastaplo*, decided two months later. In both cases the majority held that a refusal to answer a Bar committee's question about membership was grounds for refusing to certify good moral character to become a member of the Bar. In *Konigsberg*'s case there was some weak evidence of past membership in the party; in *Anastaplo*'s there was none. He had triggered the inquiry when, in responding to a request to state the principles underlying the Constitution, he concluded that "whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or abolish it and thereupon to establish a new government." The Illinois Bar was apparently worried that belief in the principles of the Declaration of Independence might indicate communist tendencies. For the majority, the reason that the state asked about mem-

56. 360 U.S. 109, 126, 134 (1958).
57. 365 U.S. 399, 415 (1960) (Black, J., dissenting).

bership was irrelevant. The state's need to know about any past party membership so that it could have a Bar dedicated to the highest principles of the law "outweighs any deterrent effect upon" first amendment rights.[58]

Anastaplo's facts are so appealing—his mistake was, as Black and Douglas accurately noted, that "he took too much of the responsibility of preserving that freedom upon himself"[59]—that the injustice was enshrined for everyone to see. Black made it even clearer with possibly the most moving and powerful opinion in the pages of the *United States Reports*. The balancing test "proves pitifully and pathetically inadequate to cope with an invasion of individual liberty so plainly unjustified that even the majority apparently feels compelled expressly to disclaim 'any view upon the wisdom of the State's action.' "[60]

It is not the result so much as the reasoning, process jurisprudence held, that matters; but maybe the result does matter, especially when it is flagrantly wrong. Deference to other institutions; refusal to square the premise of those being judged with constitutional norms; logic and doctrine: if these components of process jurisprudence led to such profound injustices in 1961, seven years after McCarthy's fall, maybe they sustained earlier injustices. If Black and Douglas were right in 1961, saying the same things that they had always said, maybe they were right earlier. Maybe protected first amendment rights against government would not have brought either the nation or the judiciary to its knees.[61] Maybe it makes sense to stand up for constitutional rights and stand against injustice even when democratic institutions and the legal establishment argue to the contrary.

A generation of law students coming into law schools in the

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58. 366 U.S. at 89.

59. *Id.* at 114.

60. *Id.* at 111.

61. Contrast Alexander Bickel's point that the Court should husband its resources so if there is a "coup" the Court can intervene and restore democracy. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94, 178 (1970). There is something staggering about the judiciary intervening—an injunction perhaps?—to prevent a coup, so here is the full quote:

> If we should encounter, not malapportionment, not inequality and social injustice but a coup, an attempt by an inflamed majority or by a powerful elite, broken loose from other restraints, to proscribe and outlaw one or another group, or to mount a fundamental assault against broadly-responsive government, might not this unique American institution just save us?

Reading this quote from the perspective of two decades it might be seen to justify the actions of Black and Douglas during the McCarthy Era because an "inflamed majority" had "broken loose" and functionally was "outlawing" a group. This would be more than a bit ironic since Bickel had nothing but contempt for Black and Douglas and revered Frankfurter, for whom he had clerked.

1960s would find those "maybes" unnecessary. When Southern governments attempted to wrap themselves in the cloak of the Court's red hunting doctrines to fight civil rights groups, it was impossible to argue plausibly—although Harlan for one sometimes tried—that neutrality required blacks to lose because reds had lost earlier. The civil rights litigation provided timely and powerful reinforcement for the positions of Black and Douglas. Moreover, Black's advancing age and inability to reconcile civil rights demonstrations with first amendment rights, separated the two, to Douglas's overwhelming advantage.

In a remarkable transformation in law schools (decidedly less so —initially—at Harvard), taking less than a decade, Black and Douglas went from being objects of scorn to prescient judges who had understood the hysteria and acted to counter it. Process jurisprudence was not, however, an immediate casualty in this switch. Just as it took time to develop, so, too, its parts disintegrated over time. Frankfurter's mythical status was an early victim. So was the idea of deference; if Douglas and Black had not done enough to inter it, in the 1960s it became obvious that Southern governments would be the beneficiaries of any deference.

Although the results sought by Black and Douglas were accepted and validated, their styles, especially Douglas's, were not. As White demonstrates, there are incredible institutional pressures for judges to eschew Douglas's realist stance and subsequent Justices have had little trouble doing so.[62] Furthermore, process jurisprudence in operation, although not intent, had turned out to be a conservative doctrine in the sense that its application tended to reinforce the status quo. As the status quo became a liberal one, liberals could more easily embrace its tenets while conservatives would wonder why liberal doctrine was entitled to respect simply because it was there. In the years following their respective departures from the Court it was not necessary to embrace either Douglas's style or Black's jurisprudence to justify liberalism. Douglas and Black were right, and they showed that by being willing to stand for what was right; men, lawyers, yes, maybe even the Law, can do what is right.

V

With Frankfurter off the Court, thereby saving himself and the NAACP from his disgraceful fifth vote to allow Florida to save the NAACP from internal communism in *Gibson*,[63] a firm majority ex-

62. White, *supra* note 11, at 77-86.

63. B. SCHWARTZ, SUPER CHIEF 452-53 (1983) recounts the five-four vote against the

isted to implement most positions that Black and Douglas voted for. No longer was it an open question whether the Constitution would be actively enforced to protect individual liberties. At issue was only to what lengths the majority was willing to go. Although both Black and Douglas lived to see majorities holding to their views, Douglas again moved to dissenter and began to stake out positions for the next generation of liberal judges—a generation that never came because the era of liberal dominance of the presidency had ended.

Unlike Black in his twilight, Douglas found a new constituency, the nation's youth. At a time when "never trust anyone over thirty" was a popular motto, Douglas achieved the status of a folk hero. His positions on the environment and civil liberties resonated with the views of youth. In *Points of Rebellion* he explicitly embraced their anti-establishment views and tweaked his contemporaries by referring to the Establishment as the new George III, implicitly suggesting that revolutionary change would be a good idea.

The battles that Douglas and Black fought in the McCarthy Era were formally "won": a new consensus emerged recognizing the importance of an independent judiciary willing to sustain political dissent and essential personal liberties. By the Constitution's Bicentennial, a superbly credentialed federal judge, Robert Bork, who had tantalizing if unexplored jurisprudential affinities with both Holmes and Black, but definitely not Douglas, was denied confirmation to the Supreme Court in large part because he appeared to reject the idea of judicial enforcement of civil liberties.

Yet even as the new consensus that Black and Douglas helped pioneer has achieved amazing breadth, it has splintered and been attacked. Within the academic community, Bork would be identified with The Federalist Society and the conservative reaction to the Warren Court jurisprudence. To the left, the emergence of CLS represents a view of the Warren Court as part of an outmoded conservative status quo, and thus CLS largely rejects the rights-based liberalism that Douglas championed—although I suspect that many CLS members counted Douglas as one of their heroes when they were younger and would identify even today with his stands during the McCarthy Era.

Douglas's choices during the McCarthy Era were fundamentally different in kind from the Warren Court's dismantling of segregation, rural domination of legislatures, and an antiquated

NAACP at Conference. Whittaker's retirement and Frankfurter's stroke resulted in the case being reset for oral argument and coming out as it did.

criminal justice system. In those areas, where the modern debate about judicial activism began, there was a powerful constituency on the sidelines applauding the Court and encouraging it to do more to create a better society. As Martin Shapiro importantly notes, the Court was protecting the Democratic Party coalition and therefore its own supporters.[64] That was not the case when the issue was protecting reds and pinks in the early 1950s. Those who saw the necessity of protecting civil liberties were, sadly, few and far between. Had other members of the Warren Court majority been on the Court during the early 1950s they might have performed as Black and Douglas did. Or they might not have. Warren, for instance, had the opportunity to show how he would vote as late as 1954, and he voted with the majority, not Black and Douglas, in both *Barsky* and *Galvan v. Press.*

What I have suggested provides some basis for a reevaluation of Douglas's legacy and his importance. No one can erase his cavalier attitude towards doctrine. But, as time passes, any given Justice's contribution to doctrine and judicial craft recedes. To use the most obvious example, John Marshall has been acclaimed as the greatest Justice of all time, and yet even first year students are able to rip gaping holes in the logic of his opinions. His greatness is entirely divorced from the reasoning of his opinions (*Marbury*'s absurd reasoning being the most blatant) and rests instead on the fact that he turned the Court into a major and unique institution of American government.

It may be that only a "founder" is entitled to such an evaluation. Moreover, unlike Douglas, Marshall enjoyed the solid support of the leaders of the Bar. Nevertheless, Douglas, too, was a "founder" albeit a different one, a "founder" of a school that holds that even in the worst of times judges can actually stand up and demand we adhere to our ideals. Douglas received little credit at the time from the elites of the profession, but he had a unique credibility with American youth when almost no other politically prominent American had any. There, indeed, his eschewing legalisms and resting on a blunt moral basis may have proven no small part of his charm.

When in the future we evaluate Justices, more recognition ought to be placed on their external influences, for those tend to be the more lasting. We cannot freeze the law or any given perception of it. It may well be that a new concept of the function of courts

64. Shapiro, *The Supreme Court: From Warren to Burger* in THE NEW AMERICAN POLITICAL SYSTEM (A. King ed. 1978); Shapiro, *Fathers and Sons: The Court, the Commentators and the Search for Values* in THE BURGER COURT (V. Blasi ed. 1983).

will form and replace the liberal consensus that finds individual liberties worthy of judicial protection in the worst of times no less than in the best of times. Attitudes, like reputations, are not static. But for over a quarter of a century, thanks in no small part to the courageous stands of Black and Douglas, an ideology of judicial protection of individual liberties has dominated our legal culture as thoroughly as the Harvard ideology dominated the previous era. Each generation must decide how it wishes to choose, and Douglas would have been the last to suggest the dead should govern the living. Yet by one precept, being right on the major issue of his times when so many others were wrong, he may have assisted future generations in choosing wisely.