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BOOK REVIEWS

DOUGLAS OF THE SUPREME COURT. By Vern Countryman. Doubleday & Co., Garden City: 1959. Pp. 401. $5.95.

Vern Countryman's selection of Douglas' opinions commemorates the Justice's twentieth year on the Supreme Court. William O. Douglas came to the bench from a two year tenure as Chairman of the Securities and Exchange Commission and, prior to that, a professorship at Yale University School of Law and a short swing as a part-time member of the Columbia Law School faculty—the youngest appointee (41 years of age) in 125 years. As a member of the Court, we are told here, Mr. Justice Douglas "has earned an international reputation as one of America's outstanding liberal jurists."[1]

What is a "liberal"? What are the attributes of a "liberal jurist"? Certainly, by today's standards, the legislator who proposes more generous workmen's compensation, more stringent securities regulation or who decries the advent of the Taft-Hartley Act[2] is not ipso facto a liberal. Nor is one necessarily a liberal because he advocates complete racial equality and would add that *Brown v. Board of Educ.*[3] will eventually dispatch state anti-miscegenation laws. "Liberal" is a chameleon word. It is, in fact, more than a word or a characterization. It is a chapter of history.

Munn v. Illinois[4] would, I suppose, be called a liberal decision. Surely it was such in its day. It put a prerogative in the state to regulate industries "affected with a public interest" and placed Chicago's grain warehouses in the category of those enterprises affected with a public interest. And by the same measure, *Lochner v. New York*[5] may be damned as ultraconservative or, in today's dialect, reactionary. *Lochner*, with an oblique and forlorn look at *Munn*, informed us that among the liberties which the due process clause made immune to state inoculation was "liberty to contract," that a state statute forbidding bakeries to work their employees more than ten hours a day had no substantial relation to the state's right to protect "the morals, the health or the safety of the people . . ."[6] and that, therefore, the law was an arbitrary interference with the "right of free contract" on the part of the individual, either employer or employee. "Arbitrary" or "unreasonable" conduct became the criterion of due process derelictions, and the Court was prepared to sit as a superparliament to determine the wisdom of economic legislation. The majority in *Lochner* did not hear or, hearing, did not heed Justice Holmes' protest that, "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[7] Holmes' cavilling against the judicial superlegislature was unremitting.[8] After 1916 he had, in dissent, the almost constant companionship of Louis Brandeis and, in subsequent years, that of Harlan Fiske Stone.

Thus, when in 1933 Franklin D. Roosevelt laid plans for the New Deal and told us we had "nothing to fear but fear itself," he most certainly sensed that *he* had

1. Inside front cover.
2. Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).
3. 347 U.S. 483 (1954).
4. 94 U.S. 113 (1876).
5. 198 U.S. 45 (1905).
6. Id. at 56.
7. Id. at 75.
8. Perhaps Holmes' most effective dissent came in Hammer v. Dagenhart, 247 U.S. 251 (1918), which was eventually overruled by United States v. Darby, 312 U.S. 100 (1941).

something to fear—the Supreme Court. Roosevelt's eruptions against the Court were only slightly less dispirited than his upraiding of "Martin, Barton and Fish." F.D.R. did not, however, look carefully at the Court's immediate past nor had he, his more intense admirers to the contrary, oracular powers.

In the immediate past there was *Tagg Bros. & Moorhead v. United States.*[9] *Tagg Bros.* upheld the power vested in the Secretary of Agriculture to determine the fair and reasonable charges of dealers who in interstate commerce sold livestock at a stockyard on a commission basis. The Packers and Stockyards Act was found to be constitutional. And in 1931 the Court could find no fault with a New Jersey statute which limited the commissions of agents of fire insurance companies.[10] The Holmes dissents were being reread and the Court was ready to listen to Stone, Brandeis and Cardozo. But more important still, in 1934, in *Nebbia v. New York,*[11] Mr. Justice Roberts, for the majority of the Court, was ready to accept a New York statute authorizing the fixing of minimum and maximum retail prices for milk. In *Nebbia,* Roberts went back to *Munn v. Illinois* and added that there was no closed category of industries "affected with a public interest."[12] What is more critical, more expositive and more significant, he made it clear that "affected with a public interest" can mean "no more than that an industry, for adequate reason, is subject to control for the public good."[13]

After *Nebbia,* due process, as a restraint on economic legislation or legislative experimentation in economic matters, was dead, dead " 'ere its prime." And if, as for Lycidas, there was no one to weep, there was also no one to complain.

Mr. Roberts, it is true, was not a constant hero. He, in *Nebbia,* guaranteed, in economic affairs, the decline and fall of due process. But the Court (including Justice Roberts) either did not read *Nebbia,* as Roberts wrote it, or did not believe that Roberts meant what he wrote. There was a long year of vacillation during which the majority of Roberts, Van Devanter, McReynolds, Sutherland and Butler retreated from *Nebbia* and dealt hard blows to some of the major features of the New Deal program. In retrospect now, however long it may have seemed at the time, it was but a final gasp of the Court's "conservative" bloc. In 1937, *West Coast Hotel Co. v. Parrish*[14] upheld a State of Washington statute fixing minimum wages for women, and in 1941 *United States v. Darby*[15] overruled *Hammer v. Dagenhart.*[16] *Darby* was unanimous in sustaining the regulation of hours and wages under the Fair Labor Standards Act of 1938.

Now all this took place before William O. Douglas wore judicial robes. When *Tagg Bros.*[17] was being argued before the Supreme Court, Mr. Douglas was back in Yakima in the private practice of law. He came to the Court after the unanimous decision in *United States v. Darby.* By that time, Holmes' dissent in *Hammer v. Dagenhart* and *Lochner v. New York* had become accepted law. Anyone—judicially or legislatively connected—who disagreed with *Nebbia* and *Darby* would have earned only a red badge of courage.

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9. 280 U.S. 420 (1930).
10. O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251 (1931).
11. Nebbia v. New York, 291 U.S. 502 (1934).
12. Id. at 536.
13. Ibid.
14. 300 U.S. 379 (1937).
15. 312 U.S. 100 (1941).
16. 247 U.S. 251 (1918) (child labor case).
17. 280 U.S. 420 (1930).

That is why I question Professor Countryman's Chapter II on two scores.[18] And for that matter also Chapter III.[19] Professor Countryman would, I conclude, have us believe that Justice Douglas consolidated the "liberal" thinking with respect to the interplay of the due process and commerce clause on governmental regulation of business. Douglas is (again an impression, and not in Countryman's words) a Daniel come to judgment. But Douglas came too late. Judgment was already rendered. Douglas added nothing to the Holmes liberalism expounded by the minority position in such cases as *Lochner, Dagenhart* and *Adkins v. Children's Hospital*.[20]

Douglas, in espousing the right of the federal and state governments to be quasi-dictatorial in economic matters, is a dull echo of Holmes. To suggest that he was the catalyst which brought substance to the diverse views of the Hughes Court[21] is simply to state an untruth. Judicial "liberalism" in economic regulation had already become the fashion of the times, and the reasoning of *Lochner v. New York* had already evaporated with bathtub gin. If the judicial interpretation of economic legislation be the reason for prefixing the label of liberal to the name of Justice Douglas then the meaning of "liberal" escapes me. Who is more liberal than Owen Roberts in *Nebbia v. New York?* Yet, as the word is bandied about today, we would not characterize Roberts as a liberal.

Judicial liberalism—or a "liberal jurist," to take the terminology first used—is today related to the personal liberties embodied or claimed to be embodied in the Bill of Rights. There, it seems to me, is where Douglas earns the characterization of "liberal," and on that chart, it also seems, Douglas must find his mark in history. In other words, the Douglas brand of liberalism is not at all notable or noteworthy in matters of governmental economics. If it means anything or has any merit, it must find its laurels in the first eight amendments to the United States Constitution.

In a sense, there has been an analogous development in the political branches of government. In the mid-New Deal days there were the bright young men whose Phi Beta Kappa Keys would open the vaults of the United States Treasury to aid the farmer, the laborer, the depressed and devil-take-the hindmost. Liberalism then meant liberal spending. The bright young men of the thirties and their liberal successors are the "liberal" sober men of today who are willing to take a second look. The liberal Democrats as well as liberal Republicans, it seems, sense a popular and earthy appeal for a balanced budget. And the political protagonists seem anxious to keep their cleats in the earth. The farm subsidies and the veterans' giveaways may well be entombed with *Lochner*. But whether the political branches

18. I have paid no attention, until now, to Professor Countryman's arrangement of the Douglas opinions because (though I am sure Professor Countryman might disagree) I find the symmetry and arrangement of the opinions terribly unimportant. The virtues of the book are confined to chapters I, IV, and V, and to the excellent comments of Professor Countryman which preface each Douglas opinion. The chapters are as follows: I. The Man and the Court (a biographical sketch); II. The Powers of Government; III. The Economy; IV. Fair Governmental Procedures; V. Liberty.

19. See chapter headings, supra note 18. There is no clear cleavage between chapters II and III.

20. 261 U.S. 525 (1923). See Carter v. Carter Coal Co., 298 U.S. 238 (1936).

21. Professor Countryman has made a rough alignment of the "Hughes Court" (Douglas vintage, or post-1939) as follows: Chief Justice Hughes (to July 1941); McReynolds (to Feb. 1941); Butler (to Nov. 1939); Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy (from Feb. 1940).

vote farm subsidies or not, whether they increase social security taxes or not, whether they amend the Labor Management Act or not, the judiciary—conservative and liberal alike—will, we can be almost certain, recognize the constitutional right of the legislature to do so. Today the line between the so-called liberals and so-called conservatives is drawn not on an economic blackboard but on the issues of religious liberties, personal liberties, civil liberties, social liberties or, in the constitutional phrase, the issues newly raised respecting the Bill of Rights.

It is interesting to note that the Douglas opinions in Chapters II and III of Professor Countryman's collection are predominantly those in which Douglas speaks for the majority of the Court. I believe that bears out what I say. The "liberal" Douglas—on economic issues—speaks for the overwhelming majority. With respect to personal liberties or the rights accorded by the Bill of Rights, the line of demarcation between liberal and conservative is more clearly described. Douglas espouses an unfettered license motivated, it seems, by what he said in his dissent in *United States v. Wunderlich*:[22] "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."[23]

This judicial rebellion against autonomy characterizes Justice Douglas. There is no doubt that the present Court presents a Douglas-Warren-Black-Brennan bloc. Though it has not said so, nor had the courage to say so, it is against this bloc that the American Bar Association fired its criticism.[24] But to suggest that Justice Douglas is thereby frustrating the effective enforcement of our security laws is to cast upon him an opprobrium which is unfair, unreasonable, and unfounded. The American Bar Association diatribe implies that Douglas and his colleagues are overly sympathetic toward our enemies and toward their sympathizers. The criticism is presumptive. Douglas may be sympathetic toward *alleged* communists[25] but he is

22. 342 U.S. 98 (1951).

23. Id. at 101.

24. See in this connection, Cohn & Bolan, The Supreme Court and the A.B.A. Report and Resolutions, supra at 233.

25. See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (concurring opinion) wherein Douglas wrote:

"The resolution of the constitutional question presents one of the gravest issues of this generation. There is no doubt in my mind of the need for the Chief Executive and the Congress to take strong measures against any Fifth Column worming its way into government—a Fifth Column that has access to vital information and the purpose to paralyze and confuse. The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two.

"In days of great tension when feelings run high, it is a temptation to take short-cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within.

"The present cases . . . are simple illustrations of that trend. . . .

"The requirements for fair trials under our system of government need no elaboration. A party is entitled to know the charge against him; he is also entitled to notice and opportunity to be heard. Those principles were, in my opinion, violated here.

"The charge that these organizations are 'subversive' could be clearly defined. But how

equally sympathetic toward the businessman deprived of fair procedures,[26] toward the negro mistreated because he is a negro,[27] toward the *alleged* second or third offender[28] and toward the criminal whom the state would sterilize simply because he was thrice convicted of crime.[29] It is evident enough that Douglas dispenses justice with an even hand. To insinuate that Douglas, by his vigorous and perhaps overzealous adherence to the constitutional guarantees of personal liberty, is therefore some kind of a communist sympathizer is only to prove what he himself wrote extra-judicially:

"The American people are too quick to identify anyone who support equal rights for negroes as a Communist because that happens to be a part of the Communist line."[30]

In Chapter IV (Fair Governmental Procedures) and Chapter V (Liberty) of Professor Countryman's collection, the opinions of Douglas are predominantly dissenting opinions. The paramount issue before the Court on which Holmes sat was one of governmental economic freedom. Holmes championed this governmental freedom and the Holmes reasoning eventually prevailed. Since Douglas joined the Court the paramount issue has been individual freedom. On this issue, Douglas—as did his tutors, Holmes and Brandeis, on governmental economic freedom—has become the spokesman of a minority cause. One wonders whether the dissents of Douglas will also one day become the law. If they do, God grant that the American Bar Association is—as it must be—wrong.

One final note: Professor Countryman's introductory biographical sketch, though it has at times a ring of undue adulation, is excellent. His comments which preface each of the Douglas opinions are clean, clear, concise and penetrating. Both his substance and his style are comparable to that of Douglas'. That is no small measure of praise.

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can anyone in the context of the Executive Order say what it means? It apparently does not necessarily mean 'totalitarian,' 'fascist' or 'communist' because they are separately listed. Does it mean an organization with socialist ideas? There are some who lump Socialists and Communists together. Does it mean an organization that thinks the lot of some peasants has been improved under Soviet auspices? Does it include an organization that is against the action of the United Nations in Korea? Does it embrace a group which on some issues of international policy aligns itself with the Soviet viewpoint? Does it mean a group which has unwittingly become the tool for Soviet propaganda? Does it mean one into whose membership some Communists have infiltrated? Or does it describe only an organization which under the guise of honorable activities serves as a front for Communist activities?" Id. at 174-76.

26. See the Douglas dissent in United States v. Wunderlich, supra note 22, at 101.
27. See, e.g., Sweeney v. Woodall, 344 U.S. 86, 91 (1952).
28. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942).
29. Ibid.
30. Douglas, The Right of the People 93 (1958).

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BEHIND THE JUDICIAL CURTAIN. By Clarence G. Galston. Barrington House, Chicago: 1959. Pp. 159. $3.50.

"An upright judge, a learned judge." [1]

We have recently been sprayed by the sometimes illuminating tide of sub-judicial writings flowing from the lofty mountain trails leading to the Supreme Court,[2] and from the competent hand[3] of a learned intermediate court judge. It is at once a change of direction and purpose to meander along the side of an elder statesman of the district court bench[4] as he quietly comments—sometimes with and sometimes without modesty—upon a variety of matters which have formed part of his eighty-three years of experience.

The life thus autobiographically relived in fragment is that of a gentleman of the law, appointed to the bench by President Hoover in 1929 (he retired January 1, 1957) following careers, which preceded his successful practice of law, as a teacher of mathematics, English, philosophy and (to intrude for some a jarring note into this fine enumeration), patent law.

It is refreshing to those of us dedicated to the lecture halls that Judge Galston considers his years of teaching to have been of significant value to his future contributions. The late Chief Judge Loughran of the New York Court of Appeals commented to similar effect, and noted too that his days upon the lecture bench at Fordham were among his happiest.

Usual minor typographical errors aside, this small book is admirably printed in a most comfortable 12 point Linotype Granjon, and is bound unobtrusively and neatly. It also differs from law tomes recently received in that it is not of material use in assisting the metropolitan telephone directory in its task of elevating youngsters to table level at dinner time.

Judge Galston speaks with much conviction about patent cases,[5] wherein he is an undoubted expert. As to social jurisprudence, the judge's opinion is that "We have reached a stage of head-on collision between the conservative and liberal minds," but he seems to find some solace in that in the settlement of this controversy "those who make the laws, those who administer them, those who interpret them, those who seek to conform them, and those who violate them are all human beings."[6]

On the subject of settlements, it is pleasant for the practitioners of law to read today of a judge, retired though he may be, who is so old-fashioned as to believe that "to press litigants into trials or settlements when they are not ready is another way of denying them justice."[7]

The reactions of this judge to some of the cases, and their *dramatis personae* which have passed before him in the fields of patents, crimes, admiralty and naturalization

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1. Shakespeare, The Merchant of Venice, Act IV, scene 1.

2. See, e.g., Douglas, The Right of the People (1958); cf. Christman, The Public Papers of Chief Justice Earl Warren (1959).

3. Hand, L., The Bill of Rights (1958).

4. Judge Galston was appointed to the bench of the Eastern District of New York, but in conformity with federal practice, he has at various times been designated to sit in the Southern District of New York and upon the bench of the Court of Appeals for the Second Circuit.

5. See, e.g., p. 102.

6. P. 128.

7. P. 29.

should be of interest to lawyer and law student alike, especially those of the latter who believe cases are decided only by Mr. Shepard, and those of the former who believe that Mr. Shepard and his red books have absolutely nothing to do with the agony of decision.

Whether or no we agree with such thoughts as that one who ponders the decisions of the Supreme Court "must reach the conclusion that prevalent conflicts in judicial decisions seem to be the order rather than the exception,"[8] this book offers a brief fare of digestable comment which should not pass unnoticed by those interested in the lives of such who, in this world, are responsible for the administration of justice.

Judge Galston's pleasant recollections of the lively discussions around the judges' luncheon table in the southern district[9] recall the story of the young lad who often wondered what it was that the great judges of the New York Court of Appeals spoke about as they took dinner together at the Fort Orange Club in Albany. As the lad observed in later years, when he had become one of those great judges, and after he had assumed his place at the same dinner table, "I still wonder what they are talking about."

This book is a quick, fresh glimpse into the professional and non-professional recollections of a man devoted to his family, country and profession, who has elected to record the thoughts of his lifetime for those of the bench and bar who may be interested.

In piercing here and there the judicial curtain which Judge Galston, by his title, seems to believe has concealed part of himself from public view, the judge furnishes another strand in the mesh through which we may sift the arguments for[10] and against[11] the value of the judgment of men of four score years.

MARTIN FOGELMAN†

8. P. 127.

9. Pp. 138-39.

10. "Intelligence, and reflection, and judgment reside in old men, and if there had been none of them, no states could exist at all." Cicero, De Senectute XI.

11. "That judges of important causes should hold office for life is not a good thing, for the mind grows old as well as the body." Aristotle, Politics, Book II.

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